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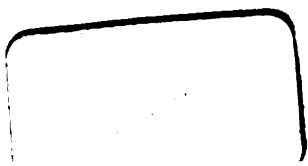
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THE
PACIFIC REPORTER,
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CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON, WASHINGTON,
COLORADO, MONTANA, ARIZONA, NEVADA, IDAHO, WYOMING,
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BECK v. THOMPSON. (No. 1,428.)

(Supreme Court of Nevada. Aug. 16, 1895.)

APPEAL—REHEARING—MATTERS CONSIDERED.

On rehearing, the supreme court will not consider points not raised on the original argument.

On petition for rehearing. Denied.
For former report, see 40 Pac. 516.

BONNIFIELD, J. The appellant has filed a petition for rehearing. On this appeal, the counsel for appellant presented and argued the following points, to wit: (1) The \$30,000 transaction, including the \$10,000 note; (2) the question of rental; (3) the question of wages. In the petition for rehearing, the second point above named (the question of rent) is again presented, as follows: "We respectfully submit, also, that this court erred, upon this appeal, in holding that there was no error in the rent account, as settled by the lower court. Nowhere in the evidence can an agreement be found that no rent was to be paid in case of destruction of the mill by fire." The evidence shows that rent was paid to Lake by Bole up to the date of the destruction of the mill, on the 10th day of October, 1881; that, on June 1, 1882, Lake and Beck received a credit for rent in the sum of \$1,466.66, and that from then forward they received a credit of \$400 per month, including the month of June. From October 10, 1881, to June 1, 1882, there are 7½ months. The \$1,466.66 paid the rent for 3¾ months, leaving 4 months for which no rent was charged on the books by Lake & Beck to H. H. Beck & Co., and none was paid. Evidently this period of four months was the period during which the new mill was being built by Lake & Beck. It appears from the evidence that Lake did not die till more than two years after the expiration of these four months. And there is no evidence that Lake made any complaint about there being no charge made for rent for the four months, or that he claimed that rent should be paid therefor. These facts tend to show that it was agreed and understood by the parties that no rent was to be paid for the four months the new mill was being con-

structed. We see no reason to change the conclusion we arrived at heretofore on the question of rent.

All the points raised in the petition, except as to the rent, are new matters, and, under the decisions of a long line of authorities, they should not be considered, on petition for rehearing. "A rehearing in the supreme court will not be granted in order to consider points not made in the argument upon which the case was originally submitted." *Kellogg v. Cochran*, 87 Cal. 192, 25 Pac. 677. "The supreme court will not consider a petition for rehearing that attempts to discuss the case upon grounds which were not presented in the original argument or discussed in its opinion." *San Francisco v. Pacific Bank*, 89 Cal. 23, 26 Pac. 615, 835. "New questions cannot be raised for the first time on motion for rehearing." 2 Enc. Pl. & Prac. 386, and authorities cited in note 1. "Counsel are presumed to have presented on the original argument all the grounds upon which they rely for the affirmance or reversal of the judgment appealed from." *Id.*, and note 2. We fully concur with the above-named authorities. A rehearing is denied.

BIGELOW, C. J., and BELKNAP, J., concur.

BALFOUR et al. v. BURNETT et al.

(Supreme Court of Oregon. Aug. 5, 1895.)

FORECLOSURE PROCEEDING—SEPARATE SALE OF PART—DEMAND BY CLAIMANT.

Hill's Code, § 292, providing that where a portion of the land to be sold under execution is claimed by a third person such portion shall, on his request, be sold separately, does not include defendants in a foreclosure suit under a judgment in which land is sold, but refers to one not a party to the suit who acquired title to a portion of the land subject to the judgment.

Appeal from circuit court, Douglas county; J. C. Fullerton, Judge.

Action by Robert Balfour and others against James D. Burnett and others to foreclose a mortgage. From an order confirming the foreclosure sale, defendants Thomas B. Burnett and others appeal Affirmed.

W. R. Willis, for appellants. J. W. Hamilton, for respondents.

MOORE, J. This is an appeal from an order confirming a sale of real property. The facts are that the plaintiffs, having obtained a decree foreclosing a mortgage on certain tracts of contiguous land in Douglas county, caused an execution to be issued against the property adjudged to be sold, directed to the sheriff of said county, who advertised the sale to take place on February 24, 1894, at which time the defendants Thomas B. Burnett, Jasper Waite, and Shirley Waite, claiming a portion of said premises, requested the officer to sell the same separately, but, after offering for sale a part of the lands so claimed by them, and failing to receive any bid therefor, the sheriff sold the mortgaged premises en masse to the plaintiffs, who, upon the return of the officer, moved the court for an order confirming the sale, to which the said defendants filed objections, which having been overruled, the court made an order confirming the sale, from which the said defendants appeal, and contend that they claimed a portion of the mortgaged premises as "third persons," and, having requested the sheriff to sell the same separately, his failure to do so was an irregularity which should avoid the sale.

The statute prescribing the manner of sale, so far as applicable to the case at bar, is as follows: "When the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately or otherwise, as is likely to bring the highest price, or when a portion of such real property is claimed by a third person, and he requests it to be sold separately, such portion shall be sold separately." Hill's Code, § 292. A proper definition of the term "third person" is important in the determination of the defendants' right to insist upon a separate sale of that portion of the mortgaged premises so claimed by them. Bouvier, in his Law Dictionary, in defining the term, says: "But it is difficult to give a very definite idea of 'third persons'; for sometimes those who are not parties to the contract, but who represent the rights of the original parties, as executors, are not to be considered third persons,"—while Anderson, in his more recent work, referring to the term, says: "Strangers are 'third persons' generally,—all persons in the world except parties and privies. For example, those who are in no way parties to a covenant, nor bound by it, are said to be strangers to the covenant." The latter definition would seem to make the term synonymous with "strangers"; but, since a person claiming a portion of the premises subject to the lien of a judgment must be in privity with the judgment debtor, and bound by the judgment, he could not be a stranger to it, and hence the definition as given by Anderson

is not applicable to the term as used in the statute; for, if the person claiming a portion of the premises offered for sale were a stranger to the judgment, his property would not be bound by it, and there would be no necessity to request a separate sale, and any attempt to sell it as the property of the judgment debtor would be restrained upon invoking the equitable powers of the court. In *Leese v. Clark*, 20 Cal. 425, the court, interpreting an act of congress which, *inter alia*, provided: "And be it further enacted, that the final decrees rendered by the said commissioners or by the district or supreme court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the claimants only, and shall not affect the interest of third persons,"—said: "The term 'third persons' refers not to all persons other than the United States and the claimants, but to those who hold independent titles arising previous to the acquisition of the country. The latter class are not barred by the decree and patent, for they do not hold it in subordination to the action of the government, nor by any title subsequent, but by title arising anterior to the conquest." It will be seen that the court in this case limits the term to a particular class, and does not extend it to all persons other than the United States and claimants thereunder, thus conclusively showing that it is not in all cases synonymous with "stranger." The term "third person," as used in the statute under consideration, evidently means one who was not a party to the judgment or decree, but who has acquired a title to a portion of the judgment debtor's real property subsequent to the rendition of the judgment or decree, and is privy to and bound by it, but, having obtained his title subsequent to the lien of the judgment, he is entitled, upon request, to have that portion of the debtor's estate claimed by him sold separately, in order that he may redeem it from the sale; but, if he has secured a title to all the real property which the judgment debtor had, or all that was subject to the lien of the judgment, he has put himself in the place of his grantor, so far as the property is concerned, and cannot insist upon a separate sale of any portion of it. In the case at bar, the record discloses that the appellants were parties to the decree, and are bound by it, and, applying the interpretation above given, they are not "third persons," within the meaning of the statute. Had they desired a separate sale of that portion of the mortgaged premises so claimed by them, they had the right to invoke the aid of the court to adjust their equities, and by a decree prescribe the manner of sale (2 Jones, Mortg. § 1616); but, failing to apply for this relief when they were before the court, they cannot now claim to be "third persons" to the decree, and hence had no right to insist upon a separate sale.

The statute invests the officer making a sale of real property in such cases with a discretion, which will not be reviewed except for abuse (*Griswold v. Stoughton*, 2 Or. 64; *Dolph v. Barney*, 5 Or. 211; *Bank v. Page*, 7 Or. 455; *Leinenweber v. Brown*, 24 Or. 548, 34 Pac. 475, and 38 Pac. 4; *Bays v. Trulson*, 25 Or. 109, 35 Pac. 26); and, the sheriff having sold the premises en masse, it must be presumed that the method adopted was the one best calculated to realize the greatest amount for the property sold. There being no error in the order confirming the sale, it follows that it must be affirmed, and it is so ordered.

(28 Or. 77)

VEDDER v. MARION COUNTY.

(Supreme Court of Oregon. Aug. 5, 1895.)

VACATION OF ROAD.

Application was made to establish a road to run 116 rods to a certain point in the W. road, the new road running perpendicular to the W. road, and also to vacate a road which commenced at the same point and intersected the W. road at a point three-eighths of a mile from the point of intersection of the new road with the W. road; the new and the old road thereby making with each other an angle of about 45 degrees. *Held*, that the petition was properly treated as two proceedings, the one to establish and the other to vacate a road, and not as one proceeding to alter a road; and therefore the establishment of the new road did not vacate the old road. *Bean, C. J., dissenting.*

On rehearing. Original opinion (38 Pac. 535) adhered to.

WOLVERTON, J. The county court has supervision of all county roads. There are three distinct instances in which the jurisdiction of the court may be exercised: First, to establish; second, to alter; and, third, to vacate. These would seem to be the natural subdivisions for the exercise of its powers as touching the establishment and discontinuance of county roads from a survey of the statutes bearing upon the subject. The language of section 4061, *Hill's Code*, is: "No county road shall be hereafter established, nor shall any such road be altered or vacated in any county in this state except by the authority of the county court of the proper county;" and of section 4063: "When any petition shall be presented for the action of the county court for laying out, alteration, or vacation of any county road, it shall be accompanied by satisfactory proof," etc. The jurisdiction of the county court is obtained by petition signed by at least 12 householders of the county residing in the vicinity where said road is to be laid out, altered, or vacated. It is believed that it is not good practice to combine two of these causes for calling into requisition the functions of the court. *Strahan, J.*, in a former appeal of this cause, intimated that in a case where the location of the new road would virtually supersede the

old, or render it useless or unnecessary, there could be no objection to combining an application for the location with one for vacation in the same proceeding, but if there should appear to be no connection or relation whatever between the two no doubt then existed but the better practice would be to prosecute them by separate proceedings. 22 Or. 270, 29 Pac. 619. The reasons for this are substantial. Suppose a petition be filed for the establishment of two distinct and detached pieces of road, separated one from the other by two miles at the nearest point. The householders residing within the vicinity of one may not all reside in the vicinity of the other, and hence those residing without the vicinity of one and within the vicinity of the other could not be legal petitioners for both roads. The same may be said of a petition to establish one road and to vacate another where relatively situated as in the supposed case of a petition for two distinct and detached roads. The application of this principle promotes a construction of the statute which would seem to be more in consonance with its spirit, as it tends to prevent the combination of different localities to the injury of some other. It might be possible to vacate a road or a portion thereof by combining it with the location of another, whereas a petition to vacate singly would fail, and vice versa. The power to make alterations in county roads is simply the power to make changes therein. Where an alteration is made, if the route of a road is deflected, the new road takes the place of the old. Whenever it in effect supersedes the latter, and renders it useless or unnecessary, the old road is thereby discontinued as a necessary consequence of the establishment of a different route. *Brook v. Horton*, 68 Cal. 554, 10 Pac. 204; *Hobart v. Plymouth Co.*, 100 Mass. 159; *Helple v. Clackamas Co.*, 20 Or. 149, 25 Pac. 291; *Bliss v. Deerfield*, 18 Pick. 107; *Goodwin v. Inhabitants of Marblehead*, 1 Allen, 37; *Com. v. Inhabitants of Westborough*, 3 Mass. 406; *Bowley v. Walker*, 8 Allen, 21.

The petition, which is the foundation for the proceedings in the county court is as follows: "The undersigned, your petitioners, respectfully ask for the location and establishment of a county road commencing at the northwest corner of the donation land claim of W. Eastham, in section 25, Tp. 5 S., R. 1 W., in said county of Marion, thence north about 180 rods to the center of the old county road leading from Shuck's Mill, in said Marion county, to the town of Woodburn, in said county. Application will also be made at the same time to said court to vacate all that portion of the present county road from Shuck's Mill to said town of Woodburn which is situated between the termini of said proposed road, and which runs diagonally across the land claims at present owned by G. W. Vedder and Joseph Schafer, respectively." Since this cause was remanded upon the former appeal the county court has treated the appli-

cation as if two petitions were presented, one for the establishment of a county road and the other for the vacation of a portion of a county road already established. The counsel for both petitioners and remonstrators have likewise so treated the petition, and the whole cause has been tried out in said court upon the theory that two petitions were before it distinct and disconnected one from the other. It was evidently the intention of the petitioners to institute but one proceeding, and to maintain it as such; but since the decision of this court upon the former appeal the parties and the court below, as well as the county court, have treated it otherwise. The report of the viewers and survey show that the road proposed to be established begins at the northwest corner of W. Eastham's donation land claim, and runs thence north 28.53 chains, to its intersection with the Shuck's Mill and Woodburn road, and the portion of the road proposed to be vacated begins at a point 30.09 chains east of the northwest corner of said Eastham's land claim, in the center of the Shuck's Mill and Gervais road, and runs in a northwesterly course to the northern terminus of the proposed new road. There is a county road now opened and established between the termini of the road to be vacated and the one to be established.

It is now contended upon the rehearing that the petition was in effect for an alteration in a county road, and that it should be so considered and treated; that, while it prays for the location of one road, and the vacation of another, by reason of the proximity of the two roads, and the relation they sustain to each other, it is in effect a prayer for an alteration only. If this contention is sound, the cause ought to go back to the court below for another hearing; if otherwise, not.

It may be observed that the south terminus of the road to be vacated and the road to be established are three-eighths of a mile apart, and each intersects what is known as the "Shuck's Mill and Gervais Road," this latter road forming the base of a right-angle triangle, of which the new road would be the perpendicular and the one to be vacated the hypotenuse. It is also apparent that householders residing to the east and just within the vicinity of the southern terminus of the road sought to be vacated would not be within the vicinity of the road sought to be established, and the same would be true, on the other hand, of householders residing to the west and just within the vicinity of the southern terminus of the road to be established. They would not be within the vicinity of the road to be vacated. Thus it will be seen that all the parties to the petition and remonstrance herein might not have the statutory qualifications to prosecute or contest the establishment of one or the vacation of the other road, taken singly. This is a strong circumstance showing why it would be better to prosecute such pro-

ceedings singly, but it is, perhaps, not conclusive. Neither is the circumstance that the termini of the two ways are not the same conclusive that the proceeding is not for an alteration. In *Hobart v. Plymouth Co.*, supra, a petition was filed representing that the highway was narrow and crooked, praying that it may be widened, straightened, and newly located, and such parts discontinued as may be rendered unnecessary by such location. The county commissioners voted to widen the highway to a certain point, thence to locate a new highway to a point on the line of the old one, and from thence to widen it further along in the same general direction. Another public way entered the old way between the said points. It was held that the change in the way between said points was, in legal effect, only an alteration of the old location, and that a discontinuance of so much of the old way as was not included in the new location, nor necessary for the travel of the connecting way, resulted from such alteration. In *Com. v. Boston & A. R. Co. (Mass.)* 22 N. E. 913, a county road entering another at right angles was deflected at a point some 28 rods from the point of intersection, and entered the old road about the same distance north of the old intersection; and it was held by the court that the portion of the road between the point of deflection and its first terminus was thereby vacated. The new road was 40 rods and 8 links in length. In determining the matter the court said: "There is nothing in the language of the petition or of the adjudication to suggest that anything else was contemplated than a substitution of a new piece of road for an old one in the same general line of travel." It was further observed that the distance to be traveled to a certain point was slightly increased, but that the commissioners had provided for such a use by making the road six rods wide at its junction, thus cutting off the corner towards such point. From this, and the obligations the town would be under to maintain both roads if allowed to stand, the court concluded that the commissioners intended to and did actually discontinue that portion of the old road between the point of deflection and the old intersection. The sides of the triangle formed by the new and the old ways are about one-fourth the length of those formed by the roads in the case at bar. *Com. v. Cambridge*, 7 Mass. 157, is a case wherein the petition prayed for an alteration, and stated that the existing road may with greater convenience be turned or altered in two places, in the direction therein described. The lower court adjudged that one of the alterations be made, but that the existing road should not be discontinued. The court on appeal say: "The jurisdiction given to the court is to lay out new county roads, or to turn or alter old roads, on application made to the court. * * * The matter in dispute was whether an existing road should be par-

tially altered, or not. The adjudication was against the alteration prayed for, but in favor of a new road where the alteration was requested; a new road then not being prayed for. In form, therefore, it appears that the adjudication was not of the matter in dispute. Whether it was or was not substantially, deserves consideration. So far as an alteration is a charge upon the town, it is reasonable they should prefer the alteration to a new road; because in this last case the old road remains a subject of repair, while the new road requires also to be made and repaired. But where there is an alteration, the part of the old road that is discontinued ceases to be a charge upon the inhabitants. It may, therefore, be well supposed that, when an alteration is prayed for, it may not be opposed by a town, but their agents may unite with the petitioners in requesting it, while they would earnestly oppose a new road. With respect to individuals whose interest may be affected, they may not oppose a new road, because the old road remains for them to pass, while they might resist an alteration, as discontinuing an old road convenient to them. * * * We are obliged to conclude that the alteration of an old way, and the establishment of a new one, are substantially different, and differently affect the opposing parties."

These considerations have cogent application to the case in hand. The petition here is in form for the establishment of a new road and the vacation of an old one; but is it in substance a petition for an alteration, and can it be treated in that light in consideration of the relation which the old road bears to the new, their respective lengths, and their connections with other public roads of the county? The proposed new road is 28.83 chains in length, and the road required to be vacated 41.95. They diverge one from the other at an angle of more than 45 degrees, and intersect the same public road on the south 30.09 chains apart. The road to be vacated constitutes a part of what is known as the "Shuck's Mill and Woodburn Road," the base of the triangle serving as a part of the Shuck's Mill and Gervais road. The new way increases the distance to Shuck's Mill from Woodburn almost 19 chains. Under these conditions, it cannot be said that the new supersedes the old, and renders it unnecessary. The respective lengths of the two roads are so great, and their divergence so marked, as to dispel the idea that the one is to supersede the other, or that the location of the one will render the other unnecessary. These conditions being wanting, the petition cannot be considered as substantially one for an alteration only. The county court properly considered the petition as the commencement of two proceedings, the one for a location and the other for a vacation of a county road. The former opinion of the court is therefore adhered to.

BEAN, C. J. (dissenting). I am unable to agree with my brethren in this case. In my opinion the petition in question is in effect an application for the alteration of an existing county road and should have been so treated by the county court.

GROSSMAN v. CITY OF OAKLAND.

(Supreme Court of Oregon. Aug. 5, 1895.)

ORDINANCES—FENCING RAILROAD RIGHT OF WAY
—WRIT OF REVIEW.

1. An ordinance prohibiting as a nuisance the fencing by a railroad of its right of way within the platted portion of a city is void.

2. Defendant, by pleading guilty in a prosecution under a city ordinance, does not waive his right to attack the validity of the ordinance on writ of review.

Appeal from circuit court, Douglas county; J. C. Fullerton, Judge.

S. Grossman was convicted of the violation of a city ordinance, and from a judgment of the circuit court dismissing his writ of review he appeals. Reversed.

W. D. Fenton, for appellant. J. W. Hamilton, for respondent.

BEAN, C. J. On June 12, 1894, the petitioner was arrested on a warrant of the municipal court of the city of Oakland, issued upon a complaint charging him with having "committed a public nuisance within the platted portion of said city by driving stakes as a part of the fence which he was then and there building along the side of the O. & C. Railroad, otherwise known as the Southern Pacific Railroad, contrary to Ordinance No. 58 of the city," and on a plea of guilty was fined \$25. He thereupon sued out a writ of review to have the judgment of the recorder's court annulled and set aside on the ground that the ordinance was void. The writ being dismissed by the circuit court, he brings this appeal.

The ordinance in question was passed by the Oakland council June 11, 1894, for the declared purpose, as shown by the minutes of the meeting, of "prohibiting the Southern Pacific Railroad Company from building a fence along their railroad within the corporate limits of the city," and provides: "That it shall be unlawful for any person, association or corporation owning, operating or controlling any railroad within the corporate limits of the city of Oakland, Oregon, or any person or persons in the employment of any such person, association or corporation, or any other person whatever, to build, construct or maintain any fence or other obstruction whatever along the side of any such railroad within the portion of the corporate limits of said city of Oakland that is laid out in lots and blocks, and every such fence and obstruction is hereby declared a nuisance within and against the ordinance of said city of Oak-

land." In our opinion, this ordinance cannot be sustained as a legitimate exercise of municipal power. The charter of the city confers upon it the power to prevent and restrain nuisances, and to "declare what shall constitute a nuisance"; but this does not authorize it to declare a particular use of property a nuisance, unless such use comes within the common-law or statutory idea of a nuisance. 2 Wood, Nuis. (3d Ed.) 977; *Yates v. Milwaukee*, 10 Wall. 497; *Village of Des Plaines v. Poyer* (Ill. Sup.) 14 N. E. 677; *Quintini v. City of Bay St. Louis*, 64 Miss. 483, 1 South. 625; *Chicago, R. I. & P. R. Co. v. City of Joliet*, 79 Ill. 44; *Hutton v. City of Camden*, 39 N. J. Law, 122. By this provision of the charter the city is clothed with authority to declare by general ordinance under what circumstances and conditions certain specified acts or things injurious to the health or dangerous to the public are to constitute and be deemed nuisances, leaving the question of fact open for judicial determination as to whether the particular act or thing complained of comes within the prohibited class; but it cannot, by ordinance, arbitrarily declare any particular thing a nuisance which has not heretofore been so declared by law, or judicially determined to be such. *City of Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693. An ordinance of the city cannot transform into a nuisance an act or thing not treated as such by statutory or common law, nor can it prohibit the free use of property by the owner so long as such use does not interfere with the rights of others. Every proprietor has a constitutional right to erect upon his property such buildings or other structures as he may deem necessary for its enjoyment, having due regard for the rights of others, and this is a vested right, guaranteed by the constitution, and cannot be arbitrarily interfered with. It is true one cannot lawfully use his property in such a manner as to injure another, but a particular use, which may or may not result in creating a nuisance, according to circumstances, cannot be declared such in advance. The question when it may or may not become a nuisance within some provision of law must be settled as one of fact, and not of law. Now, the fencing of a railway track in the platted portion of a city can ordinarily work no more harm or injury to others than the fencing of private property, and it would not for a moment be contended that an ordinance prohibiting a private citizen from fencing his property regardless of the character of the fence would be valid. The fencing or enclosing of property is a lawful and harmless use in itself, and does not become a nuisance because the municipal authorities have so declared, unless it is so in fact by reason of the character of the structure or the place of its erection; and in such case the ordinance should be directed against the unlawful, and not the lawful, act, leaving it to be judicially determined whether the particular structure is in

fact a nuisance, either by reason of its character or the place of its erection. But the ordinance in question is not directed to the prohibition of such fences or structures as may, by reason of their character or location, be a nuisance, but it absolutely prohibits a railroad company from in any manner fencing or inclosing its track in the platted portions of the city, although the fence may be upon its own property, acquired by purchase or condemnation, and although it may be necessary to do so as a protection to its servants or the traveling public; and, in our opinion, is manifestly void. *Tied. Lim. § 122a*. It is contended, however, that by his plea of guilty the petitioner has waived the right to insist in this proceeding that the ordinance is void. But the plea of guilty is only an admission that the defendant committed the acts charged in the complaint, and, unless such acts constitute an offense, or are in violation of some valid ordinance of the city, his admission was not material, and he waived nothing thereby. *Fletcher v. State*, 7 Eng. (Ark.) 169. It follows that the judgment of the court below must be reversed.

ELDER v. ROURKE.

(Supreme Court of Oregon. July 20, 1895.)

ACTION FOR SERVICES—HARVESTING GRAIN—CONDITIONS OF PAYMENT—PLEADING AND PROOF—QUESTIONS FOR JURY.

1. In an action for services in cutting grain, plaintiff alleged that the work was done for the agreed price of \$1.25 per acre, and that the same was reasonably worth \$1.25 per acre. The defendant denied the material allegations of the complaint, and for a defense alleged that the work was performed at the instance and request of a third person; that the defendant, as cashier of a bank, guaranteed the payment for plaintiff's services to the extent of the proceeds of the grain harvested, when the same should be sold, and not before. The reply put in issue all the allegations of the answer. *Held*, that evidence by the plaintiff that the work performed by him was reasonably worth \$1.25 per acre was within the issues made by the pleadings.

2. Where, in an action for services in cutting grain, it is admitted throughout the trial that the agreed compensation for the work was \$1.25 per acre, and this question is not made an issue of the case, admission of evidence of the reasonable value of the work, if error, is harmless.

3. Where, in an action for harvesting grain, the answer contains no allegation that payment for the services would not become due until the grain was threshed, or that the grain had not been threshed before the commencement of the action, an instruction based on such issues is properly refused.

4. In an action for services in harvesting grain, defendant claimed that the money was not due for such services till the grain was threshed. There was evidence that plaintiff commenced the work September 1st, and had the grain stacked ready for threshing the last of October, 1893, and that the action was commenced in May, 1894. *Held*, that the question whether a reasonable time had been allowed defendant for threshing the grain was a question for the jury.

5. The setting aside of a verdict for insufficiency of the evidence is not assignable error.

6. In an action for services for harvesting grain, defendant claimed that payment for the work was not to be made until the grain was threshed. Plaintiff testified that nothing was said about the time for payment, while one of plaintiff's witnesses who was present when the contract was made testified that the defendant told plaintiff he would pay him when the wheat was threshed. *Held*, that a motion for a nonsuit was properly overruled.

Appeal from circuit court, Umatilla county; Morton D. Clifford, Judge.

Action by S. B. Elder against T. F. Rourke for services in cutting and harvesting grain. From a judgment for plaintiff, defendant appeals. Affirmed.

J. J. Balleray, for appellant. A. D. Stillman, for respondent.

BEAN, C. J. This is an action to recover \$986.25, alleged to be due the plaintiff from the defendant for cutting and harvesting grain. The complaint alleges, in substance, that between August 1, and October 1, 1893, the plaintiff performed work and labor for defendant, at his special instance and request, in cutting, heading, and harvesting the wheat then growing on 965 acres of land, at the agreed and stipulated price of \$1.25 per acre, amounting in the aggregate to the sum of \$1,206.25. That said work and labor was and is reasonably worth the sum of \$1.25 per acre, and of the reasonable aggregate value above stated, and that no part thereof has been paid except \$218. The defendant answered, denying all the material allegations of the complaint, and alleging, as a separate and affirmative defense, that the labor and services of plaintiff as alleged in the complaint were performed for and at the special instance and request of one J. M. Elgin, and that before the performance thereof the defendant, acting for and in behalf of the Pendleton National Bank, of which he was cashier, guaranteed payment for plaintiff's services in cutting and heading the grain mentioned, to the extent of the proceeds of the wheat so headed and harvested when the same should be sold, and not otherwise; that \$113.05 is the entire amount received from the sale of said wheat, which sum was paid to plaintiff prior to the commencement of this action. The reply put in issue all the allegations of the answer. A trial by jury was had upon the issues so made, which resulted in favor of the plaintiff, and defendant appeals.

The first, second, and third assignments of error relate to the ruling of the trial court in permitting plaintiff to testify that the work performed by him was reasonably worth \$1.25 per acre. This evidence was within the issues made by the pleadings; but, if it had not been, its admission, if error, was harmless. There was no dispute as to what plaintiff was to receive for his work, but as a matter of fact it was admitted all through the

trial that he was to have the agreed and stipulated price of \$1.25 an acre, and proof that such sum was reasonable could in no way prejudice the defendant. The gist of the controversy was whether the defendant had become personally liable to the plaintiff for the value of said work and labor, or whether the Pendleton National Bank, through defendant as agent, had agreed to become surety for Elgin to the extent of the proceeds of the wheat harvested by plaintiff, after the same should be threshed and disposed of. This was the contested question in the case, and the one submitted to the jury by the court, and hence evidence of the reasonable value of the work was immaterial, and its admission affected no substantial right of the defendant.

The next assignment of error is in overruling defendant's motion for a nonsuit. It is admitted, as we understand it, that the evidence of plaintiff tended to show that a contract for cutting the wheat was made by him with the defendant individually at an agreed price of \$1.25 per acre, but the contention is that it appears from plaintiff's own case that the work was not to be paid for until the wheat was threshed, and it is claimed there is no evidence showing that the wheat had been threshed, or that a reasonable time for threshing it had elapsed before the commencement of the action. The only witnesses in chief for the plaintiff were the plaintiff himself and one Foster. The plaintiff testified that nothing was said about the time of payment, but Foster, who was present when the contract was made, says the defendant told the plaintiff he would pay him when the wheat was threshed. Under this state of the evidence the fact as to when the payment was to be made, if material, was clearly a question for the jury. If the plaintiff's version of the contract was correct, the money became due and payable when the services were rendered and the work completed, and it was the province of the jury to sift out the truth of the matter from the conflicting evidence of plaintiff and Foster. There was, therefore, no error in overruling the motion for a nonsuit.

The next assignment of error is in refusing to give the following proposed instruction to the jury: "If the jury believe that it was a part of the contract that the plaintiff should not be paid for said work until the wheat was threshed, then I instruct you that, in the light of insufficient evidence, a reasonable time has expired for threshing the same, and on any allegation to that effect you are bound to find for the defendant." This instruction was, in our opinion, properly refused, because the defense that the action was prematurely brought was not set up in the answer, and was therefore not an issue in the case. If the defendant intended to rely upon such a defense, he should have pleaded it, so that the plaintiff would have been advised thereof and been prepared to contest it on the

trial, if he so desired. Bliss, Code Pl. § 352; Pom. Rem. §§ 691, 711; Hagan v. Surch, 8 Iowa, 309; Smith v. Holmes, 19 N. Y. 271. The answer contains no allegation that plaintiff's compensation for cutting the grain should not become due and payable until the grain should be threshed, nor does it aver that the grain had not in fact been threshed before the commencement of the action. No issue was tendered upon either of these questions. By his answer the defendant denied his liability entire, and alleged that the work was performed for Elgin, and that as cashier of the Pendleton National Bank he had agreed to pay for such work if a sum sufficient for that purpose should be realized from the sale of the grain, and that the bank had complied with this contract. These were the real issues in the case and were properly submitted to and passed upon by the jury.

And again, we do not think the court could have declared as a matter of law that there was no evidence tending to show that a reasonable time had not elapsed in which to thresh the grain, even if the question had been an issue in the case. The evidence shows that the plaintiff commenced work about the 1st of September, and had the grain stacked ready for threshing the last of October, 1893, and this action was not commenced until May 29, 1894, about seven months thereafter. Whether this was a reasonable time, under all the circumstances, in which to have threshed the grain was a question for the jury and not the court.

It is also claimed the court erred in overruling defendant's motion to set aside the verdict, and for a new trial, but it is well settled in this state that the action of a trial court in refusing to set aside a verdict for insufficiency of the evidence is not assignable error, and therefore the question requires no further consideration at this time.

It follows that the judgment of the court below must be affirmed.

VEASEY v. HUMPHREYS.

(Supreme Court of Oregon. July 20, 1895.)

PLEADING—CONFESSION AND AVOIDANCE.

In an action for possession of property under a chattel mortgage executed by a partnership, defendant denied its execution by the alleged partnership, and then alleged, as a separate defense, that plaintiff, with one of the alleged partners, conspired to place property of the other partner beyond reach of his creditors by pretending to execute the alleged chattel mortgage, and that the plaintiff received the alleged chattel mortgage knowing that it was attempted to be executed by his co-conspirator without consideration. *Held*, that the execution of the mortgage was admitted by the pleadings, and it was therefore properly admitted in evidence without further proof.

Appeal from circuit court, Wallowa county; M. D. Clifford, Judge.

Action by T. H. Veasey against Thomas Humphreys for possession of cattle. From a

judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover 37 head of cattle. The complaint alleges, among other things, that, during all the time from March 1 to August 23, 1893, R. M. Douney and D. C. Nicholson were partners, doing business under the firm name of Douney & Nicholson. That, on or about March 10, 1893, plaintiff sold and delivered to said firm a certain lot or drove of cattle, taking for the purchase price thereof three joint and several notes, signed in their individual capacity, for the sum of \$420 each, payable respectively 18, 30, and 42 months after date. That, to secure the payment thereof, "the said Douney & Nicholson did, on August 21, 1893, execute and deliver to plaintiff their certain chattel mortgage in writing upon all the cattle so sold," except two head thereof. The complaint then proceeds with appropriate allegations of the filing of the mortgage, its conditions, and the breach thereof, of plaintiff's ownership and right to possession by virtue of such conditions, and of the wrongful taking and detention of the 37 head of cattle by defendant. Another action was commenced December 5, 1893, by plaintiff against defendant, to recover 38 head more. The allegations of the complaint are substantially the same as the first. The defendant filed an answer to each of these complaints, denying specifically each and every allegation thereof, including the allegation of the execution and delivery of the mortgage by Douney & Nicholson to plaintiff. By each of said answers, defendant justifies his taking and detention, as sheriff of Wallowa county, Or.,—the first under a writ of attachment, and the second under an execution duly issued out of the circuit court in and for said county, in an action by A. Levy v. R. M. Douney, for the purpose of subjecting Douney's undivided one-half interest to the payment of Levy's claim against him. In the further and separate defense to the first complaint, it is alleged: "That, on or about the 21st day of August, 1893, * * * the plaintiff and said D. C. Nicholson, conspiring together, and without any consideration, and in bad faith, attempted to place all the property herein described beyond the reach of the creditors of the said R. M. Douney, by then and there pretending to execute said alleged chattel mortgage mentioned in plaintiff's complaint, and that any and all claims of plaintiff in and to said property, or any part thereof, are fraudulent and void, as against the rights of said creditors of the said R. M. Douney, and especially fraudulent and void as against the rights of said A. Levy, and said plaintiff received said alleged chattel mortgage with full knowledge that the same was attempted to be executed by the said D. C. Nicholson without any consideration at all, and for the sole purpose of hindering, delaying, and defrauding the creditors of the said R. M. Douney." The answer to the second complaint being substantially the

same, the two cases were consolidated, and tried as one. At the trial, the chattel mortgage, which was signed "Douney & Nicholson" and witnessed by one W. W. White, was offered in evidence, and admitted by the court, over objections by the defendant, based upon the ground that, the execution of said instrument having been witnessed by W. W. White, he should have been called, or his absence accounted for, before other proof of its execution was admissible. The verdict and judgment being for plaintiff, the defendant appeals.

Ivanhoe & Sheahan, for appellant. J. Nat. Hudson and T. G. Halley, for respondent.

WOLVERTON, J. (after stating the facts). It is claimed by the plaintiff that the execution of the chattel mortgage in question was admitted by the pleadings (and that he was entitled to have it admitted in evidence without other proof of its execution. This contention involves to some extent a consideration of the rules of pleadings touching the allegation of new matter constituting a defense. The statute provides (Hill's Ann. Laws Or. § 73, subd. 2): "The defendant may set forth by answer as many defenses and counterclaims as he may have. They shall each be separately stated, and refer to the cause of action which they are intended to answer in such manner that they may be intelligibly distinguished." New matter pleaded under this statute, which goes to defeat the plaintiff's cause of action, logically speaking, if not expressly, it impliedly admits a real or apparent right in plaintiff to be thus avoided. Such a plea at common law was by way of confession and avoidance, in which the defendant had to give color to the plaintiff. By this is meant he was required to give plaintiff credit for having an apparent or prima facie right of action, independently of the matter disclosed in the plea, to destroy it. A special defense of new matter in avoidance may, however, go with a traverse,—at least, when not inconsistent. The confession should in such case be qualified, says Bliss, as under the old precedents. Thus, as found in Chitty, the contract to be avoided should be alluded to as "the said supposed contract," or "the said several supposed debts and causes of action," or "the supposed escape." There is no confession in terms, and it is only implied from the nature of the defense. Bliss, Code Pl. §§ 340, 341. Woodruff, J., in Ketcham v. Zerega, 1 E. D. Smith, 560, 561, cites other precedents from Chitty. Thus, a plea of nonjoinder of another defendant was made as follows: "Because they say that the said several supposed promises," etc.; "if any such were made by them, were made by them and A. B. jointly," etc.; or, as in a plea of bankruptcy, "that, after the making of the said several supposed promises and undertakings, if any such were made, he, the said C. D.,

became a bankrupt," etc. It often happens that new matter directly alleged would be inconsistent with an absolute traverse, so that both could not be verified; and, in such case, if the pleader desires to avail himself of both defenses,—that is, to put the opposing party to the proof of his plea, and at the same time save to himself an affirmative defense,—it is essential that the allegations of new matter should be qualified, or else they should be preceded by a qualified traverse. These observations apply to such defenses as are only apparently inconsistent; but, when clearly so, it is doubtful whether they can be pleaded in the same answer. In further illustration, Thayer, C. J., in McDonald v. Mortgage Co., 17 Or. 633, 21 Pac. 883, says: "The two defenses set up in the answer,—that the respondent never employed the law firm of McDougall & Bower, and that they were guilty of gross negligence in the management of the business,—were not necessarily inconsistent, as they both may have been true. If the respondent had denied the rendition of the services, and then alleged that they were negligently and unskillfully performed, the case would have been different. In the latter case, the defenses, unless the denials were with an 'absque hoc,' as it was termed, would be inconsistent, as both could not be true." In the case at bar, the defendant had a perfect right, by his denials, unless he knew them to be false, to put the plaintiff to the proof of the execution of the chattel mortgage, and by a proper plea show that, if said alleged mortgage was in fact executed by, or bears the signature of, said alleged or supposed firm of Douney & Nicholson, it is the result of a conspiracy entered into by D. C. Nicholson and the plaintiff, for the purpose of defrauding the creditors of Douney, and was without consideration and void. Such denials and plea of fraud and want of consideration have been held not to be inconsistent, and are properly pleadable in the same answer. Bank v. Closson, 29 Ohio St. 78; Pavay v. Pavay, 30 Ohio St. 600; Nelson v. Brodback, 44 Mo. 596; Mott v. Burnett, 2 E. D. Smith, 50; Bell v. Brown, 22 Cal. 672; Ketcham v. Zerega, supra. But, as between a denial of a fact alleged in the complaint and a direct admission of the same fact in a further and separate or special defense, the admission, and not the denial, will be taken to be true. Derby v. Gallup, 5 Minn. 119 (Gil. 85), and 1 Thomp. Trials, § 197. There can be no denial of a statement absolutely admitted upon the record. Bliss, Code Pl. § 341. Now, in this case, the defendant denied the execution of the chattel mortgage in question by Douney & Nicholson; but, in the further and separate defense set forth in his answer, he alleged, in effect, that the plaintiff and Nicholson conspired together and in bad faith attempted to place the property beyond the reach of Douney's creditors by then and there pretending to execute said alleged

chattel mortgage mentioned in plaintiff's complaint, * * * and that the plaintiff received said alleged chattel mortgage with full knowledge that the same was attempted to be executed by the said D. C. Nicholson without any consideration. This is an admission of the execution of the mortgage by D. C. Nicholson. When the mortgage was produced, it was found to be subscribed "Douney & Nicholson." If Douney & Nicholson were partners, a question which was left to the determination of the jury, the physical signing of the firm name, from the nature of things, would be done by one of its members or by an authorized agent, as a copartnership acts through its members or an agent, so that an admission that D. C. Nicholson executed the mortgage by signing the firm name was an admission of its execution. The reasonable interpretation of the answer is that the firm of Douney & Nicholson did not execute the mortgage, as there was no such firm in existence; that D. C. Nicholson did execute it, but without right or authority from the supposed firm or from Douney. The answer thus construed enabled the plaintiff to dispense with the preliminary proof by the subscribing witness before offering the mortgage in evidence, and the court committed no error in admitting it. There are some other assignments of error in the record, but they are not deemed prejudicial. The judgment of the court below is therefore affirmed.

GARRETT v. BISHOP et al.

(Supreme Court of Oregon. July 20, 1895.)

LICENSE—REVOCATION—ENJOINING USE.

1. A parol license to construct a ditch across land to conduct water to land of the licensee cannot be revoked after the licensee relying thereon has made valuable improvements on his land and the agent of the licensor located the course of the ditch.

2. On suit by a licensor to enjoin a licensee from continuing a ditch to conduct water across the licensor's land to a mine of defendant, it appeared that the licensee, relying on his license, had made valuable improvements on his land; that the banks of the ditch, constructed on the side of a hill, under the licensor's direction, was of soft earth, and liable, until hardened by water, to allow the water to overflow the licensor's land; that defendant had agreed to keep the ditch in repair, and was able to pay damages. *Held*, that an injunction restraining defendant from using the ditch was improperly issued.

Appeal from circuit court, Baker county; Morton D. Clifford, Judge.

Bill by Louisa Garrett against Bishop & Stuller for an injunction. From a decree for plaintiff, defendants appeal. Reversed.

This is a suit to enjoin the defendants from continuing an alleged trespass on plaintiff's premises. The facts are that plaintiff is the owner of 160 acres of land, situated in Baker county, Or., through which the waters of Styce's gulch flow in a northerly direction, emptying into Powder river, which also flows through said land in an easterly di-

rection; that, by means of ditches connected with Styce's gulch in 1869 and 1875, about 75 acres of said land had been irrigated and put in cultivation, and in 1890 the plaintiff, desiring more water for irrigation, commenced a ditch from Powder river, and in April of the following year entered into an agreement with the defendants, by the terms of which they undertook to enlarge said ditch and construct it across the plaintiff's land and supply it with water sufficient for the irrigation of said land, in consideration of the use of the surplus, after her appropriation had been made, to operate a placer mine owned by them; that the defendants, in pursuance of the terms of said agreement, commenced the ditch at a point on the river about one-quarter of a mile above plaintiff's point of diversion, and, at an expense of \$1,200, constructed it, on a line marked out and agreed upon by the parties, across the plaintiff's land to their mining claim; that the ditch was dug in light soil on the side of a hill for a part of the way, and, by reason of cattle being driven across it, and squirrels burrowing in its banks, the water escaped from such places, flowed on the plaintiff's meadow, and injured about 20 acres of grass. The plaintiff brings this suit to prevent a recurrence of the injury, and alleges that the defendants unlawfully broke and entered her close, cut down and destroyed the banks of her irrigating ditch, rendering it unsafe and useless, and, having turned a large quantity of water therein, the banks of the ditch gave way at different times and places, and her meadow was covered with gravel, rocks, and debris, and 25 acres of hay land kept flooded with water, and that, by reason of the ditch being dug too deep in places, 12 acres of her grain land could not be irrigated; that, in April, 1892, the defendants unlawfully drained all the waters of Styce's gulch away from her ditches, and diverted the flow thereof, and threaten to deprive her of the use of the waters of said stream; and prays that they may be perpetually enjoined from diverting the same. The defendants, after denying the material allegations of the complaint, allege that the ditch was constructed under a license from the plaintiff, upon the faith of which they had relied and expended about \$6,000 in improving their mining property, valued at \$20,000, and that, if they were deprived of the use of the water from Powder river by the ditch so constructed by them, their mine would be rendered valueless; and claimed that the plaintiff, by reason of her conduct, was estopped to enjoin them from appropriating the water to the operation of their said mine. A reply having put in issue the allegations of new matter contained in the answer, the cause was referred to D. D. Williams, Esq., who took the evidence, and from it found that the equities were with the defendants, and that the suit should be dismissed. The court, however, set aside these

findings, and rendered a decree perpetually enjoining the defendants from conducting water across plaintiff's premises, from which decree the defendants appeal.

M. L. Olmstead, for appellants. J. L. Rand, for respondent.

MOORE, J. (after stating the facts). It is contended that a parol license cannot be revoked after it has been executed by the licensee who, relying upon the faith of the privilege conferred, has expended money in making valuable permanent improvements. The principle contended for assumes that the outlay of money in making such improvements is equivalent to the payment of a valuable consideration for the license, which, having been executed, becomes irrevocable, and is converted into an agreement which equity will enforce, upon the theory that the licensor, having encouraged the improvements which have been made upon the faith of the license, is estopped by his conduct from asserting his strict legal rights. The leading case in support of this principle is *Rerick v. Kern*, 14 Serg. & R. 267, in which it appears that Kern, being about to erect a sawmill on a branch known as the right-hand stream, found a better location on the left-hand stream, and, having obtained Rerick's permission, he built his mill on the latter stream, which, without the aid of water from the right-hand stream, would have been wholly insufficient to operate the mill. No deed was executed or any consideration paid for the privilege; but, after Kern, in consequence of the permission, had put his mill in successful operation, Rerick revoked the license, by removing the dam which was built to divert the water. It was there held that the license, in consequence of the improvement, became irrevocable. Gibson, J., in delivering the opinion of the court, said: "But a license may become an agreement on valuable consideration, as where the enjoyment of it must necessarily be preceded by the expenditure of money; and, when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it as soon as the benefit expected from the expenditure is beginning to be perceived." The editors of the *American Decisions*, in their notes to this case (16 Am. Dec. 497), after an exhaustive citation of decisions upon this question, say: "From the foregoing review of case law it will be seen that the doctrine of the principal case, though not recognized in some of our state courts, is nevertheless expressive of the law as administered in the majority of them, and that the preponderance of recent judicial opinion is in harmony with the views of Judge Gibson." The rule announced in the *Pennsylvania* case was adopted by this court in the case of

Curtis v. Water Co., 20 Or. 34, 23 Pac. 808, and 25 Pac. 378, in which Lord, J., in commenting on the principle contended for, said: "An executed license is treated like a parol agreement in equity. It will not allow the statute to be used as a cover for fraud. It will not permit advantage to be taken of the form of the consent, although not within the statute of frauds, after large expenditures of money or labor have been invested in permanent improvements upon the land, in good faith, upon the reliance reposed in such consent. To allow one to revoke his consent, when it was given, or had the effect, to influence the conduct of another, and cause him to make large investments, would operate as a fraud, and warrant the interference of equity to prevent it." The execution of a parol license, while relying on the faith of it, supplies the place of a writing, and takes the case out of the statute of frauds (*Lee v. McLeod*, 12 Nev. 280); but, while the agreement under which the licensee has acted may be proved by parol (*Le Fevre v. Le Fevre*, 8 Am. Dec. 696), the evidence of it should be clear and convincing, and show a permission to do the particular act which has been accomplished or some participation in its execution by the owner of the estate or easement affected thereby (*McBroom v. Thompson*, 25 Or. 559, 37 Pac. 57). The evidence shows an agreement between the parties in relation to the construction of the ditch; that the plaintiff's husband, as her agent, assisted in locating its course across her land; that she furnished a team and plow with which to do a part of the work; and that the completion of the ditch for the purpose of irrigating her lands, and the defendants' reliance upon the faith of the agreement, while making permanent improvements on their mining claim, constitute the consideration for the license which, having been executed, cannot now be revoked.

The next question to be considered is whether equity will enjoin the use of the defendants' ditch when its banks are liable to break, thereby causing the water to overflow the plaintiff's meadow. The defendants allege in their answer that their agreement to keep the ditch in repair formed a part of the consideration for the permission to construct it, and hence they are bound to exercise due care in the management of the ditch, and for any neglect in that respect they will be liable for any injury in excess of the ordinary consequences that might result therefrom. The rule is well settled that, where one, in the execution of judicial process, abuses the license conferred upon an officer by law, he becomes a trespasser ab initio; but where one, under express authority of the licensor, exceeds or abuses the privilege conferred, he is only liable for the excess. *Jewell v. Mahood*, 84 Am. Dec. 90. The defendants, having entered the plaintiff's premises by her express agreement, cannot be trespassers, but would be liable in an action at

law for any neglect of duty or abuse of their privilege. When the nature of the trespass is such as to lead to a multiplicity of actions, or the injury goes to the destruction of the estate in the manner in which it is enjoyed, or the trespass cannot be adequately compensated in damages, and the remedy at law is plainly inadequate, equity will grant relief by injunction. *Smith v. Gardiner*, 12 Or. 221, 6 Pac. 771; *Mendenhall v. Water-Power Co. (Or.)* 39 Pac. 399. The plaintiff knew the character of the soil along the side of the hill where the ditch was dug, and must have known its banks were, for a time, at least, liable to break. The evidence shows that such soil soon becomes compact by means of water flowing in ditches, and that recurrences of the injury complained of are not to be apprehended. The injury does not, in our judgment, tend to the destruction of the estate, and only amounts to a mere trespass when the banks of the ditch break; and the damage sustained in consequence of the occasional overflow cannot be irreparable, and must be susceptible of pecuniary compensation in an action at law. If it appeared that plaintiff's land was liable to constant overflow from this source, necessitating a multiplicity of actions to compensate the injury, or that the water, for any length of time, stood upon the meadow, thus tending to a destruction of the estate, in the manner in which it was used, equity would, by injunction, restrain the further use of the ditch; but, there being no evidence of the defendants' inability to respond in damages, for which the law side of the court furnishes an adequate remedy, it follows that the decree must be reversed, the injunction dissolved, and the suit dismissed; and it is so ordered.

FRATT v. HUNT et al. (No. 18,442.)

(Supreme Court of California. July 31, 1895.)

LEASE—COVENANT—BREACH—ACTION AGAINST
EXECUTOR—PRESENTATION OF CLAIM.

1. During the life of a lease covenanting that the lessee at the termination thereof shall return certain furniture in as good condition as when the lease was made, action for injury thereto cannot be maintained, as it may be repaired so as to be in as good condition before the termination of the lease.

2. The presentation against the estate of decedent of a contingent claim for any damages claimant may sustain by reason of any injury to furniture, which a subsisting lease, on which deceased was guarantor, provided should be returned in good condition at the termination of the lease, will not support an action for damages for actual destruction of the furniture, there being no allegation in the complaint that this occurred subsequent to the presentation and rejection of the contingent claim.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Francis W. Fratt against Emma L. Hunt, executrix of H. B. Hunt, deceased. Judgment for defendant. Plaintiff appeals. Affirmed.

Holl & Dunn, for appellant. Mastick, Belcher & Mastick, for respondent.

GAROUTTE, J. Francis W. Fratt, as the owner of certain hotel property situated in the city of Sacramento, leased the same, including furniture, etc., to one Sherwood, for the term of five years, at a stipulated rental per month. This contract of lease contains the following provision: "And it is agreed by the party of the second part that, at the expiration of said term, or the sooner termination thereof, he will return to the party of the first part all the furniture, fixtures, bedding, gas fixtures, and all other articles described in said inventory A, according to the inventory therein mentioned, in as good condition as said articles now are. Any window glass that may be broken must be replaced by said second party with glass of equal quality, at his expense, and, at the expiration of said term, the said party of the second part will quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted." Inventory A contained a statement in detail of the personal property aforesaid. Hunt, the defendant's testator, in writing guaranteed the faithful performance of the covenants of the lease upon the part of Sherwood. Prior to the expiration of the five-year term, Hunt, the guarantor, died, and thereupon Fratt presented a claim to the defendant, as executrix of his estate, for: (1) Balance due for rent already accrued; (2) amount of rent hereafter to become due prior to the expiration of the lease; (3) a contingent liability, to wit, "for any damage claimant may sustain by reason of any injury which may be done to any of the personal property described in said inventory or schedule B, hereto attached, and also for any damage which claimant may sustain by reason of the non-delivery or return to him of any of the property described in said schedule B; but the amount of such damage this claimant is at this time unable to state." The aforesaid claim set out the guaranty of Hunt and the facts in detail concerning the transaction. Both the absolute and contingent claims for rent were allowed by the executrix; but the contingent claim for damages for loss and injury to furniture, etc., was rejected. Thereupon this action was brought upon the claim as presented, and a general demurrer to the complaint was interposed and sustained by the trial court. The sole purpose of this appeal appears to be to test the ruling of the court in sustaining that demurrer.

In so far as the claim was for rent due and to become due, it was approved by the executrix. Hence, no cause of action could be based upon it in those particulars; and that portion of the complaint wherein it is sought to recover a judgment for rents was clearly susceptible to a general demurrer. Plaintiff also sued to recover a sum of money as

damages for broken panes of glass; but, inasmuch as Sherwood agreed to replace all such glass upon the expiration of the lease, an action for such damage prior to that time is clearly premature. The complaint contains the following allegation: "Plaintiff alleges that, before the filing of the complaint to which this is amendatory, the said T. J. Sherwood had carelessly and negligently permitted a large amount of personal property, furniture, and fixtures leased with said hotel, and described in Exhibit B, attached to said complaint, to become utterly lost and destroyed; that said personal property, furniture, and fixtures, so lost and destroyed, was, at the time of said loss and destruction, of the value of \$1,000, as this plaintiff is informed and believes; that, by reason of said loss and destruction of said personal property, this plaintiff was damaged in the sum of \$1,000, as he is informed and believes. The plaintiff further alleges that the personal property, furniture, and fixtures described in said Exhibit B, which was, at the date of filing said complaint, and still is, in the said Union Hotel, and which consists of all of said personal property, furniture, and fixtures in said exhibit described, except such as has been lost and destroyed, as aforesaid, was, during the continuance of said lease, and while the same was in the possession of said T. J. Sherwood, by his carelessness and negligence, greatly injured and damaged; that is to say, the same was damaged and injured to the extent of \$2,174.45." It is upon this allegation of the complaint that plaintiff must rest his cause of action, if the pleading states one, and our consideration will now be addressed to its sufficiency.

The claim presented to the executrix, upon which the allegation of the complaint just quoted is based, is in its nature essentially a contingent claim. Section 1498 of the Code of Civil Procedure declares when actions must be brought upon claims due and claims not due at the date of rejection. The claim here presented cannot be classed in either category; and the declaration of this principle finds full support in the case of *Verdier v. Roach*, 96 Cal. 474, 31 Pac. 554. We find no other provision in the statute prescribing the time within which suit must be brought upon rejected claims; hence, as to rejected contingent claims, the matter may be said to be enveloped in some doubt. As is said in *Verdier v. Roach*, supra: "The allowance of such a claim would have admitted and established the validity of the obligation, and would have entitled it to be filed in court, etc." And, while it is possible that an action upon a rejected contingent claim may be brought to secure a judgment, giving the claim the same status as would come to it by its allowance, still, we find, upon examination of the complaint in this case, and especially of the allegation previously quoted, that no such judgment is

here sought; but a money judgment for damages pure and simple is asked for. This allegation of the complaint has a twofold character. It lays a claim for damages in the sum of \$1,000 for furniture, etc., lost and destroyed by the lessee, and also a claim of \$2,174.45 for furniture, etc., injured and damaged. As to the damage for injury to the personal property leased by plaintiff, we are clear that any action for such damages will be premature until the expiration of the lease term. The lessor, under his contract, agreed to return this personal property "in as good condition as said articles now are," and no cause of action for a breach of that covenant could arise until the time came for a return of the property. The mere fact that it was injured and damaged at some time during the life of the lease would not show that it could not be returned subsequently in substantially its original condition. It would not show but that repairs would place it in the same condition as when leased. As to the claim of \$1,000 for property destroyed and lost, it must be assumed that such property not only was placed beyond repair, but could not be returned; and, such being the fact, it may be conceded, for present purposes, at least, that a cause of action in damages for its loss would arise at the date of its destruction, regardless of the time of the expiration of the lease; for, even though the lessee's stated time for performance had not yet arrived, if he voluntarily placed it out of his power to perform, he committed a breach of the contract, and was liable at once. It may also be conceded that the covenants of his contract as to returning this property could not be satisfied by a return of other property of a similar kind and character. But, for other reasons, we think this claim of \$1,000 for damages does not state a cause of action; and those reasons also furnish additional grounds for defeating the plaintiff's claim of damages for property injured and damaged. The allegation of the complaint in this regard is that, "before the filing of the complaint to which this is amendatory, the said T. J. Sherwood had carelessly and negligently permitted a large amount of personal property," etc. It will be observed that the claim presented and rejected was a contingent claim. No damages were alleged, and no allowance for damages asked. The complaint, as we see, asks for damages. Upon such a state of facts, it is necessary to the statement of a cause of action that an allegation be found therein that such damages arose from a breach of the contract occurring since the presentation and rejection of the contingent claim. No claim for damages was presented to the executrix of the estate. She had no opportunity to allow such a claim, and necessarily rejected no such claim. No such claim ever being presented and rejected, no action for damages upon a claim of that character will lie; for its

presentation and rejection were conditions precedent to the bringing of an action. An allegation of the character suggested would seem to be as necessary to a complaint in this class of actions as an allegation showing that the breach of the contract occurred during the life of the guaranty. The complaint upon its face must show a present liability of the guarantor. It must show a presentation and rejection of the claim upon which the action is brought, or a legal reason excusing such presentation and rejection. This the complaint does not do. If a complaint showed an action against an administrator or executor upon a claim against a decedent, without alleging its presentation and rejection, no cause of action would be stated, and in this case there is no cause of action stated against defendant, inasmuch as there is no allegation that this breach of contract was made subsequent to the presentation and rejection of the contingent claim. An allegation in the one case is no more important than in the other. For the foregoing reasons the judgment is affirmed.

We concur: McFARLAND, J.; HARRISON, J.

5 Cal. Unrep. 101

BIGELOW v. BALLERINO. (No 19,480.)¹
(Supreme Court of California. July 31, 1895.)

VACATION OF ALLEY—RIGHTS OF ABUTTING OWNER.

Where a public alley is vacated, the right of an abutting owner to the portion adjoining his land is not, as against an abutting owner on the opposite side of the alley, affected by the fact that the vacation was unlawful.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by L. M. Bigelow against Bartolo Ballerino to quiet title. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Horace Bell, for appellant. A. W. Hutton, for respondent.

BRITT, C. There was a street in the city of Los Angeles called "Negro Alley." Plaintiff owned land which, as she claimed, abutted on the westerly side of such alley, and defendant owned land adjacent to the easterly side thereof, opposite to plaintiff's land. In April, 1889, the city council of Los Angeles vacated said alley as a street, and about the same time laid out a new street, called "Los Angeles Street," a little to the west of said alley. Such new street included nearly all of plaintiff's land, the city paying her for the portion taken. The court found that there was left, however, of her property, a wedge-shaped piece, varying in width from a few inches at the north end to a few feet at the south end, contiguous to said Negro alley, and lying between the west-

erly line of the alley and the easterly line of the new street. Defendant, claiming the right, upon the vacation of the alley, to extend his frontage to the new street, constructed a small building adjacent to the east line thereof, covering a section about 16 feet in length of the said narrow strip of plaintiff's land, and extending eastward into what had been Negro alley. Plaintiff brought this action to quiet her title against defendant to the land between her north and south lines lying east of the new street and extending to the middle line of such former alley, and to recover possession of the parcel so built upon by him. She had judgment, and the defendant appeals from the same, and from an order denying his motion for new trial. The only question of any consequence in the case is whether the evidence sustains the finding that plaintiff is the owner of that portion of the narrow strip between Los Angeles street and the line of the former Negro alley, where defendant constructed his building. If she is, then of course she is entitled to resist the encroachments of the defendant on her side of the alley, whether it was lawfully vacated or not, and whether he consented to its vacation or not. Civ. Code, 831. On this question the record is not very clear; but, upon examining the evidence set out, we think the court was justified in its conclusion that plaintiff is the owner of the disputed ground,—by long continued possession of herself and her predecessors, if not by paper title. We see no useful purpose to be served by detailing the testimony here. The judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

5 Cal. Unrep. 83

JENSEN v. HUNTER et al. (No. 19,321.)
(Supreme Court of California. July 11, 1895.)

DIVERSION OF WATER—CONTRACT—CONSIDERATION—LICENSE—ADVERSE POSSESSION.

1. Where suit was brought by an upper riparian owner to compel defendant to desist from taking water from a stream, such compulsory abandonment cannot constitute a consideration for an agreement by another owner to allow defendant to divert the water from a point lower on the stream.

2. Title to a ditch diverting water from a stream on the land of plaintiff's decedent cannot be claimed by adverse possession by one who, after using the water for three years, acknowledged decedent's title by offering to pay for a grant thereof.

3. An oral permission given to divert and use water from a stream is a mere license, which is revocable, and does not vest any estate in the land.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

¹ Reversed in banc. See 44 Pac. 307, 111 Cal. 359.

Action by Mercedes Jensen, as executrix, against R. B. Hunter and others, to quiet title. Defendants had judgment, and plaintiff appeals. Reversed.

Paris & Allison and H. W. Nesbit, for appellant. Goodcell & Leonard and W. A. Purrlington, for respondents.

HAYNES, C. Cornelius Jensen died December 12, 1886, seised of the lands described in the complaint, and plaintiff brings this action, as his executrix, to quiet the title of the estate thereto. The only controversy between the parties relates to an alleged water right and right of way for a ditch claimed by defendants over said lands. The court found in favor of defendants, establishing their right to the water and ditch, and plaintiff appeals from the judgment entered thereon, and from an order denying her motion for a new trial.

The water in question rises above plaintiff's land, and flows through it in a natural stream or water course. About four years prior to 1882, the water was diverted by one Kelting at a point above plaintiff's land, and conducted by a ditch to his land, which is now owned by the principal defendant, Margaret Scott, who was formerly the wife of said Kelting. The point of diversion was then upon the land of one Evans, who, in 1882, refused to permit Kelting to longer take the water out upon his land. Whether any part of the ditch, as it then existed, was upon plaintiff's land does not clearly appear. Jose Jensen testified that "it might have crossed a corner of our land." Phillippe Martinez and one Quintana were interested in the ditch with Kelting, but they were not made defendants. Whether they have or claim any present interest does not appear. The defendants, other than Mrs. Scott, are tenants and incumbrancers of Mrs. Scott's land, which was formerly owned by Kelting, and neither her land nor that of Martinez or Quintana touch the stream from which the water was taken at any point.

Mrs. Scott's answer alleged ownership of the right to divert the water for use on her land, and the right to maintain and use the dam and ditch, by the adverse use and possession thereof for more than five years; and for a second defense alleged a parol agreement between her grantor, Kelting, and said Cornelius Jensen, whereby said Kelting agreed to abandon his right to divert the water "at said higher point," and to abandon the use of the ditch at that point, and that Jensen, in consideration thereof, promised and agreed that Kelting should have the perpetual right to divert the water at said lower point, and the like right to use and maintain a dam, and a ditch extending therefrom across Jensen's land to a point where it would connect with the ditch before that used to convey the water diverted at said higher point; that the new ditch was completed in the spring of 1882, and was used

thereafter until 1886, when the dam was washed away, and that Jensen then orally agreed with Mrs. Scott that she should have the perpetual right to maintain a dam at a point about 200 yards above the site of the one washed out, and to construct a ditch from the new dam to connect with the ditch then existing; that the new dam and ditch were used by Mrs. Scott until June, 1888, when plaintiff prevented the further use of the dam and ditch. The court found all the averments of the answer to be true, except that the court was unable to find or determine the quantity of water to which the defendant was entitled, but found that she was entitled to the flow of the water to the full capacity of the ditch, not to exceed, however, 300 inches measured under a 4-inch pressure, that being the quantity she alleged she was entitled to.

Appellant contends that the findings are not justified by the evidence. The answer, as we have seen, alleged a consideration for the parol agreement alleged to have been made by Jensen with Kelting for the right to construct the dam and ditch on the land of the former. That consideration is alleged to have been the abandonment by Kelting of the right to divert the water at a point above Jensen's land. The evidence, however, shows that about four years before the construction of the dam and ditch on Jensen's land Kelting diverted the water upon the land of one Evans, and that Evans brought suit against Kelting, and compelled him to desist from taking the water, and it was this enforced abandonment of the diversion of the water and use of the former ditch that is referred to as the consideration of Jensen's alleged parol agreement with Kelting. Such enforced abandonment could not constitute a consideration for the alleged agreement. There was, however, no evidence that any promise or agreement was made by Jensen, whether by parol or otherwise, at or before the construction of the dam, conferring upon Kelting a right to the water, or to construct the dam or ditch; nor was there any evidence in support of the allegation that when the dam was washed away in 1886 Jensen orally agreed with Mrs. Scott that she should have the perpetual or any right to maintain a dam or ditch at any place upon his land; but the evidence shows that the first dam and ditch constructed upon Jensen's land was by his license or permission, and that after that dam was washed away another dam was constructed at a different place, and a new ditch taken out and connected with the old one, also with Jensen's permission. That the construction of the dam and ditch was not based upon any assertion of right in Kelting or his associates, Martinez and Quintana, who assisted in their construction and participated in the use of the water, is clear. Neither of them were riparian proprietors, and the place of diversion which they had been com-

pelled to abandon, as well as the water diverted, was the private property of Evans. The particulars of the litigation with Evans do not appear in the record, but it must be assumed from the result that they had no right. If they had purchased the water right from Evans, the right to the ditch across his land would have been sustained; and a right acquired by adverse possession would have been equally efficacious to sustain their right to both the water and the ditch. If, therefore, they had no right to the water as against Evans, they could have no right to it as against Jensen, and defendants cannot now assert any title to either the water or the ditch, unless it has been acquired by adverse possession, there being not only no evidence of any grant, but both the answer and the evidence on the part of the defendants concede that no conveyance of the right was ever made.

In *Pitzman v. Boyce*, 111 Mo. 387, 19 S. W. 1104, a case involving a similar question, it was said: "The question to be first determined in this case is whether the use was really adverse to the owner, or was it merely permissive in its character? If permissive in its inception, then such permissive character, being stamped on the use at the outset, will continue of the same nature, and no adverse user can arise until a distinct and positive assertion of a right hostile to the owner, and brought home to him, can transform a subordinate and friendly holding into one of an opposite nature, and exclusive and independent in its character." In *Thomas v. England*, 71 Cal. 456, 460, 12 Pac. 491, it was said: "To perfect an easement by occupancy for five years, the enjoyment must be adverse, continuous, open, peaceable. It must be adverse, and under claim of legal right so to do, and not by the consent, permission, or indulgence merely of the owner of the alleged servient estate." That the use of the dam, ditch, and water by the defendants was not under a claim of "legal right" is apparent from the testimony of Mrs. Scott, the principal defendant, as well as from the testimony of other witnesses. Mrs. Scott, it is true, testified that she used the water peaceably until about two years before the trial, and during that time claimed it as her own property. She further testified, however, as follows: "I went to Mr. Cornelius Jensen to get him to give me a writing for the right of way, and took money along to pay him for it. He said it was not necessary, the water was mine, and he could not take it, and nobody else, and offered to defend me if I had any trouble with it. This conversation was two or three years before Jensen died." She further testified that she had three or four conversations with him about the water, and that he always said it was hers; that she never had any writing from Mr. Jensen for the right of way; that he said it wasn't necessary, that he gave it to her husband,

and she had had it so long it was hers without any writing. Mrs. Berkmore, a sister of Mrs. Scott, testified that she went with Mrs. Scott to see Mr. Jensen; that they went because they heard other parties were talking of buying the water from Jensen. "We thought we would go to Mr. Jensen, and pay him something to secure this water,—not the water, the right of way." Mr. Ferris, a witness called by the defendants, testified to the changes in the location of the dam and ditch; that the dam was put on Jensen's place because Evans had sued them and stopped them; that Jensen said she could take it across his land, so that she would not lose her garden or use of the place. Upon cross-examination he was asked: "Q. Did he say he would simply give permission to run the water through his land? A. Yes, sir; he had let them have a chance to have some water there. I took it from what he said that he should let her have a right of way. I asked him one time why he did not deed it to her if he wanted her to have it, and he said it would be all right. He said Mrs. Kelting had a big family, and he wanted her to have the use of the water, and that he might not want the water for some time. He told me that he would not sell any of that water,—that he wanted Mrs. Kelting to have it;" and, in reply to a question whether Jensen did not say that he might need the water himself some time, answered, "No, sir; he told me he could never use that water on his land, and it was thought so at that time." These conversations testified to by Mr. Ferris took place about 1884. Frank Wilkinson, for defendant, testified that he was with John Berkmore when he tried to get some writings from Jensen giving Mrs. Kelting (now Mrs. Scott) a right of way. That also was in 1884. Philippe Martinez, called by the plaintiff, testified, in substance, that he was interested in the ditch with Kelting and Quintana; that they went to Jensen and got permission to take out the ditch; that Jensen said he was willing that his neighbors should have the use of the water; that the dam would often break, and he would go and get permission to build another, and to take out a new piece of ditch, but that Jensen never sold or gave the right of way; that in 1886, shortly before Mr. Jensen died, he went to him on behalf of Kelting, Quintana, and himself to purchase the right of way for the ditch, and the water right, and offered to give him \$1,000 for it; that "Jensen said he did not care about it, as he was about to die, and his heirs would be left so they could fix his matters." Jose Jensen testified that they had been using the water on the Jensen land about two years.

It is a significant fact that the evidence nowhere discloses any effort to secure from Jensen a grant or conveyance of this valuable water right, and the right to construct and maintain upon his land the dam and ditch necessary to its use and enjoyment, until Mrs. Scott learned that others were talking of buy-

ing the water from Jensen, two years or more after the dam and ditch were constructed. It is urged by respondent that she had a right to buy in a title to secure herself, and that by doing so she did not waive any right or title she had. But she did not approach Jensen with any assertion of right, but offered to pay him for the conveyance of a right she did not have. It is true she testified that Jensen told her she did not need any writing, that he had given it to her husband, and used other expressions of like character, but the fact remains that the use had continued but two or three years, that unless she could obtain a conveyance of the right she could have no title otherwise than by adverse possession for five years, and her application at that time was a confession of Jensen's title, and that the only source from which she could obtain title was from him. She asserted no right as against him, and, whatever he may have said to her, the fact remains that he refused to convey the right to her. The testimony of Mr. Ferrie, already quoted, shows that he only intended her to have the use of the water temporarily, and that that was the reason he did not convey to her the right by deed. His verbal declarations testified to by Mrs. Scott could not vest in her the title to the water, nor the easement of the ditch. In *Lovell v. Frost*, 44 Cal. 471, it was held "that the offer to purchase or rent the property, and not merely to purchase an outstanding or adverse claim or title to quiet his possession or protect himself from litigation, as in *Cannon v. Stockmon*, 36 Cal. 538, amounted to a clear and unequivocal recognition of the defendant's title. Such recognition proves that the plaintiff's intestate did not, at that time, claim the title as against the defendant, and, the recognition having been given before the full period of the statute had run, the plaintiff is precluded from relying on the statute as vesting in his intestate the title as against the defendant; for in order to secure that position his possession must not only have been adverse to the defendant, but he must also have claimed the title as against the defendant during the entire statutory period." See, also, *Railroad Co. v. Mead*, 63 Cal. 112, and *Insurance Co. v. Stroup*, Id. 150, 154. The elements of adverse possession are very clearly stated in *Unger v. Mooney*, 63 Cal. 586, and need not be repeated here; and in *De Frieze v. Quint*, 94 Cal. 653, 663, 30 Pac. 1, it was said: "The burden of proving all the essential elements of an adverse possession, including its hostile character, is upon the party relying upon it," but here the use by Kelting and those interested with him, being by the permission and license of Jensen, was in subordination to his title and possession. *Brumagim v. Bradshaw*, 39 Cal. 24, 37. The facts disclosed by the evidence constituted simply a parol license, founded in personal confidence or favor, and is defined to be an authority to do some act, or a series of acts, on the land of another, without passing any in-

terest in the land. *Cook v. Stearns*, 11 Mass. 533; *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Houston v. Laffee*, 46 N. H. 505; *Iron Co. v. Wright*, 32 N. J. Eq. 248. Kent thus distinguishes it from an easement: "A claim for an easement must be founded upon grant, or by deed, or writing, or upon prescription which presupposes one, for it is a permanent interest in another's land, with a right at all times to enter and enjoy it; but a license is an authority to do a particular act, or a series of acts, upon another's land, without possessing an estate therein. It is founded in personal confidence, and is not assignable." 3 Comm. 452. It is essentially revocable, and its continuance depends on the will of the person by whom it is given (*Bartlett v. Prescott*, 41 N. H. 493; *Tanner v. Volentine*, 75 Ill. 624; *Hill v. Hill*, 113 Mass. 103); and it is terminated at the death of the party conferring it (*Carter v. Page*, 4 Ired. 424; *De Haro v. U. S.*, 5 Wall. 599). In the case last cited the court (at page 627) said: "There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it. A sale of the land by the owner instantly works its revocation, and in no sense is it property descendible to heirs."

The evidence, showing as it does that the original entry upon Jensen's land in 1882, and the construction of the dam and ditch, and the diversion of the water, were not under a grant, nor upon a claim of right asserted by Kelting and his associates, but under a parol license given by Cornelius Jensen, and that Jensen died in 1886; and, as the license was then terminated, the possession and use by Mrs. Scott may have been adverse from that time; but I see nothing in the evidence justifying the conclusion that prior to that time she had asserted any right or title as against Jensen, who is conclusively shown to have been the owner of the land and water; but, on the contrary, she expressly acknowledged his title in 1884, less than five years before her use of the water and ditch was interrupted by the plaintiff in June, 1888. Where, as here, the evidence clearly shows that the entry and use was under a license merely, convincing evidence of the repudiation of the license, and an unequivocal assertion of a right hostile to the licensor, brought

home to him, should be required to set the statute in motion. In the absence of such evidence, a license is a complete answer and defense to a claim of adverse possession or use, set up by the licensee, and some authorities hold that one who enters under a license cannot afterwards set up an adverse possession. *Luce v. Carley*, 24 Wend. 451; *Blaisdell v. Railroad Co.*, 51 N. H. 483. A man's title to his land should count for something in controversies of this character.

The judgment and order appealed from should be reversed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

108 Cal. 72

HARGRAVE et al. v. COOK et al. (No. 19-453.)

(Supreme Court of California. July 11, 1895.)

WATERS—RIPARIAN RIGHTS—LIMITATION—DIVERSION.

1. None of the rights of a riparian proprietor to put water of a stream flowing through or along his land to a legitimate use is lost by mere nonuser.

2. As a riparian proprietor's right to the use of water ceases when it has flowed past his land, his acquiescence does not give a person diverting such water to a useful purpose a prescriptive right therein against him by operation of the statute of limitation.

3. Under Civ. Code, § 1422, providing that the rights of riparian proprietors are not affected by the provisions of the Code as to appropriation of water, one who bases his right on appropriation of water over land then part of the public domain acquires no right superior to those attaching to riparian lands which at the time of the appropriation were private.

4. Under Civ. Code, § 1412, providing that the person entitled to the use of water may change the point of diversion if others are not injured thereby, applies only to a change of diversion made on land subject to his easement.

Department 2. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by E. T. Hargrave and others against D. C. Cook and others. From an order granting a new trial, plaintiffs appeal. Affirmed.

Blackstock & Ewing, for appellants. Chapman & Hendrick, Barnes & Selby, and Del Valle & Munday, for respondents.

HENSHAW, J. Appeal from the order granting a new trial. Plaintiffs claim ownership in common with some of the named defendants in a certain described ditch, flume, water right, and right of way, by means of which they diverted the waters of Piru river to their nonriparian lands. The ditch was known as the "Hargrave & Comfort Ditch." They averred the adverse claims of defendants, and asked for a decree settling their rights and enjoining defend-

ants from further assertion of such or any claims. The defendants answered in accordance with their various claims; some asserting ownership in the ditch and water rights, others declaring upon superior rights by prescription. But in particular the defendant Cook claimed the rights of a riparian owner to the water of the creek, which rights are pleaded as superior to those of the ditch owners.

Stripped of matters unnecessary to this consideration, the following are the essential facts: Defendant Cook is the owner of the Temescal rancho under United States patent issued in 1871. Piru river flows through this ranch, and thence across the northwest quarter of section 20. About the year 1875, section 20 being public land of the United States, plaintiffs' predecessors in interest constructed the ditch, and diverted part of the waters of the river, with the acquiescence of the then occupant of the land; and, as the court found, plaintiffs and their grantors, "for more than fourteen years next preceding the commencement of this suit, have been in the quiet, peaceable, open, adverse, notorious, uninterrupted, and exclusive possession, claiming right and title of said water ditch, with the right to divert and use the waters of said Piru river to the extent of 271 inches, measured under four-inch pressure." The court further found that the predecessors in interest of the defendant Cook in the Temescal rancho did not use any of the waters of said stream except at rare and irregular intervals, and in small quantities; and that they at all times knew that the said Hargrave & Comfort ditch was being continuously used, and that the waters of the stream were being diverted and conducted to lands not riparian to the stream; and that such use, "with their full knowledge and acquiescence," had been continuous for a period exceeding 10 years before Cook acquired title to the Temescal rancho and the northwest quarter of section 20. Also it is found that when Cook acquired title he knew of the use of the water by defendants, and "did not object to such use, but fully acquiesced therein, until about the commencement of this suit; and that the rights of plaintiffs were not disputed until long after they had fully acquired a prescriptive right with their co-owners to a part of the waters of the said stream." The waters of Piru river had in the past been little used by the owners of the Temescal rancho, but upon Cook's acquisition of it he began the planting of extensive orchards of fruit-bearing trees, until, as he pleads, there were at the commencement of the suit over two millions of orchard and nursery trees dependent upon the waters of the Piru river for irrigation. This use of the water by Cook naturally lessened the flow of the stream to plaintiffs' ditch, decreased the supply available for their purposes, and led to this action. The Piru Water Company, an-

other of the defendants, took water from the Piru river by means of a ditch higher up the stream than the ditch of plaintiffs. Its ditch, at the time of the action, tapped the stream upon the land of the Temescal rancho, and carried the water over and across it to other nonriparian lands. Its right by prescription was claimed to be prior and superior to the right of the owners of the Hargrave & Comfort ditch, and this seems to have been conceded; though the precise extent of the right is a matter of controversy which will be considered hereafter.

The court, by its judgment and decree, awarded: (1) The right to Cook to use the waters flowing over the Temescal rancho for domestic uses and purposes and the watering of stock; (2) the right to Cook to 100 inches of water, under 4-inch pressure, drawn off in the Esperanza ditch; (3) the right to the Piru Water Company to an amount not in excess of 285 inches, or so much thereof as may be necessary for the uses accustomed to be made upon certain nonriparian lands; (4) the right to the owners of the Hargrave & Comfort ditch to an amount not in excess of 271 inches, or so much thereof as may be necessary for the uses accustomed to be made, and in accordance with the amounts by the owners respectively accustomed to be used, upon certain described nonriparian lands; and (5) the right to Cook, "after the wants and necessities of the above prior owners have been fully and reasonably supplied," to use the surplus waters for irrigation on the lands of this ranch. By this decree the right of an upper riparian owner to the use of the water for irrigating purposes is made subordinate to the right of a lower appropriator, because at the time the right of appropriation vested the riparian owner was not actually using the water for the designated purpose. This view, appellants contend, is sound. It is the view taken by the court upon trial and expressed by the judge in the following language: "I think the law is well settled in this state that a person diverting and appropriating to a useful purpose the waters of a running stream may acquire an ownership in the right to the use of such waters to the amount he has appropriated to such useful purpose, by operation of the statute of limitation, even against an upper riparian owner, although the point of diversion is without the limits of the lands of such riparian owner, except as against any lawful use to which the riparian owner had or was making of the waters during the time of the creation of the right in the appropriator by operation of statute of limitation." Upon the hearing of the motion for a new trial the court receded from this position, after the consideration of authorities not before called to its attention, and ordered a new trial. Other grounds were urged in support of the motion. Such of them as are deemed necessary will receive

attention, but the principal point inviting consideration is the one above set forth.

The right of a riparian proprietor in or to the waters of a stream flowing through or along his land is not the right of ownership in or to those waters, but is a usufructuary right,—a right, among others, to make a reasonable use of a reasonable quantity for irrigation, returning the surplus to the natural channel, that it may flow on in the accustomed mode to lands below. If his needs do not prompt him to make any use of them, he still has the right to have them flow onto and along and over his land in their usual way, excepting as the accustomed flow may be changed by the act of God, or as the amount of it may be decreased by the reasonable use of upper owners and riparian proprietors. But none of his rights to put the water to legitimate uses is lost by mere nonuser. His rights are not easements, nor appurtenances to his holding. They are not the rights acquired by appropriation or by prescriptive use. They are attached to the soil, and pass with it (*Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674), and may be lost only by grant, condemnation, or prescription. With any use or diversion of the water after it has passed his land the upper riparian proprietor, having no ownership in, and no longer any rights to, it, would have no concern. (The right to forbid the lower owner from backing the water and flooding his land not being here under consideration.) None of his rights would or could be impaired thereby, and without such an impairment he would be without injury, and, consequently, without cause for complaint or redress. "His right extends no further than the boundary of his own estate. He cannot complain of the mere facts of the diversion of the water course either above or below him, if, within the limits of his own property, it is allowed to follow its accustomed channel." *Lux v. Haggin*, supra. The Rancho Temescal was never public land, within the meaning of the United States statutes affecting appropriations of water. The riparian rights of the owners of private land are fully protected by section 1422 of the Civil Code. One who bases his right solely upon appropriation made of waters over land which at the time of the appropriation was part of the public domain acquires thereby no right superior to or in derogation of those attaching to lands riparian to the same stream, which, at the time of the appropriation, were held in private ownership.

The "acquiescence" of Cook and his predecessors in interest in the acts of the owners of the Hargrave & Comfort ditch, as declared by the findings, receives this support from the evidence, and no more: With knowledge of these acts, they never attempted to interfere with them. But before one can acquire a right to the doing of an act in which another so acquiesces, the act itself must amount to an invasion of that other's rights.

and the doing must either have been so long continued as that a prescriptive claim can be supported upon the theory that the acquiescence presupposes a grant, or under such circumstances as will raise an estoppel against the objecting party. But, as the upper riparian proprietor's right to object to any use or diversion of the water below ceased when it had flowed past his boundary, any such use could not work an invasion of his rights, and he was not called upon to protest against it. Thus, in *Hansen v. McCue*, 42 Cal. 303, the waters of a spring had been appropriated below by plaintiff. The time arrived when defendant, upon whose land the spring was situated, desired to make use of the waters which fed it. A prescriptive right in plaintiff was urged by reason of defendant's long acquiescence in the use, but this court said: "It will be seen at once that McCue, or those from whom he purchased, could, in the nature of things, have no right to complain that the water in the artificial channel, after leaving the spring, was appropriated below by the owners of the Hansen lot. If they had no right to complain in the first instance, we are not driven to the presumption of the grant of an easement to account for why they did not complain." The same principle is announced in *Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76, where a lower appropriator claimed a right to a certain amount of water against an appropriator whose ditch was higher up the stream. The finding was that plaintiff diverted his ditch full of water "whenever there was water in the stream to fill it," and a right superior and adverse to that of defendant was predicated upon this. But the court said: "If the plaintiff's ditch was simply diverting water which defendants allowed to pass down the stream while the headgate of their ditch was closed, the act of plaintiff in diverting the water thus permitted to pass down could not, in the nature of things, be adverse to the defendants. The latter could not complain, and title by prescription cannot be acquired unless the acts constituting the adverse use are of such a nature as to give a cause of action in favor of the person against whom the acts are performed." To like effect are the cases of *Anahelm Water Co. v. Semi-Tropic Water Co.*, 61 Cal. 192, 30 Pac. 623, and *Water Co. v. Hancock*, 85 Cal. 219, 24 Pac. 645. No estoppel is pleaded or found, nor would the facts warrant such a finding. The motion for a new trial was properly granted upon the ground considered.

In contemplation of the new trial it is proper to say that the rights of defendant Cook, and of defendant the Piru Water Company, of which Cook is a stockholder, are in issue in this action only to the extent that their rights affect or are affected by the rights of the plaintiffs. As between themselves, their rights are not subject here to determination, excepting so far as may be

necessary to do complete justice to plaintiffs, and excepting so far, as between themselves, they have tendered and joined hostile issues. The limitation upon the use of the water appropriated by the Piru Water Company is not warranted by the evidence. So far as plaintiffs are concerned, the Piru Water Company is prior in time and superior in location, and had acquired the ownership of a given amount of water while that water was used for proper objects, with the right to change the place and purpose of use so long as the change did not injuriously affect the rights of the subsequent appropriators and claimants. *Ramelli v. Irish*, 98 Cal. 214, 31 Pac. 41; *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. 119; *Davis v. Gale*, 82 Cal. 26; *Pom. Water Rights*, § 69.

Upon the question of the right of the owners of the Hargrave & Comfort ditch to extend it five or six hundred feet over the northwest quarter of section 20, now the land of Cook, the better to facilitate the obtaining of their water, we do not deem it proper, upon this appeal, to do more than point out that, while an appropriator of water upon government land retains his rights when the land passes into private ownership, by virtue of the confirmatory statutes of the United States (14 Stat. 253; 16 Stat. 218), and while in the exercise of these rights he may change the point of diversion to another place upon the servient tenement, he is nevertheless limited in so doing to the exigencies of the situation, and has no right to make such change arbitrarily and at will. He may do so when, under certain circumstances, it is required to enable him to make the amount of water to which he has ownership, but then only when "others are not injured by the change." Civ. Code, § 1412. His rights are the rights of the grantee of an easement, and extend, in the matter of changing the point of diversion, no further than the boundaries of the servient tenant; and even when entering upon this he is bound only to make reasonable changes with reasonable care, and also to repair, so far as possible, whatever damage his labors may have occasioned. *Gale & W. Easem.* 235. As to lands other than those subject to his easement, and as to other claimants and owners, he can make no change at all which injuriously affects them or their rights. The order appealed from is affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(108 Cal. 68)
MESNAGER v. ENGELHARDT et ux. (No. 19,455.)

(Supreme Court of California. July 11, 1895.)

INJUNCTION—INCONSISTENCY OF FINDINGS.

In an action to restrain defendant from interfering with plaintiff in laying pipes over defendant's land, and in construction of a dam, the court found that plaintiff had a right of way for conducting water across defendant's land,

but not for the construction of a dam; that defendant had interfered with plaintiff in the enjoyment of his easement, and unless restrained from interfering with him in laying water pipes along the right of way, and "rebuilding his dam at the point of diversion," great injury will be done plaintiff's crops. The decree restrained defendant from interfering with plaintiff in laying the pipes, but adjudged that plaintiff had no right to build a dam. *Held*, that the decree could not be reversed on the ground of inconsistency in the findings.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by George L. Mesnager against George Engelhardt and wife for an injunction to restrain defendants from interfering with plaintiff's construction of a dam, and laying of pipe on a right of way over defendants' land. From the judgment on the merits, and an order denying a new trial, plaintiff appeals. Affirmed.

Horace Bell, for appellant. Will D. Gould, for respondents.

HENSHAW, J. The action was for an injunction. Plaintiff alleged that he was "the owner of a right of way, and in particular for the purpose of laying a pipe line and the erection of a dam, and the construction of ditches, and for the doing of any work necessary for the diversion of the water flowing in the Verdugo creek, over the following described land." The land is then described. Next follows a description of the "particular right of way" claimed, which commenced at "the point where the dam constructed by the plaintiff in 1892 was situated," and extends over and across the land of defendants to the point where "said pipe line constructed by plaintiff in 1892 crossed the northeasterly line of defendants' land." Plaintiff then avers the interference of defendants, their preventing him "from entering upon said land, and from using his right of way for the purposes aforesaid," and his damage, and prays "that his right of way over the land described in his complaint, and in particular for ditches, dams, and pipe lines, for the purpose of diverting the water from the said Verdugo creek, be declared good and valid forever," and for a perpetual injunction. The defendants, for answer, made denial, and the facts as disclosed by the evidence or found by the court proved to be that the land upon which the dam was to be constructed and the ditches dug, and over which the pipes were to be laid, was the separate property of the wife of defendant George Engelhardt. In 1891 the husband, without authority from his wife, attempted to convey by instrument in writing to plaintiff the right "to build a dam and make a ditch in the Verdugo creek, and on my north line, as near as possible from the northeast corner, about two hundred feet, more or less, providing said dam and ditch will not interfere with any private entrance." In April, 1892, the Engelhardts, husband and wife, granted to plaintiff "the right of way over their land

for all purposes, and also the right to use a certain water ditch, now existing on the place, to run his own water along with theirs, or to build new ditches, and so forth." Under these instruments plaintiff assumed the right to construct a dam upon defendants' land, obstructing the natural flow of the creek waters, and to lay a pipe line to conduct these waters to his lands; and in 1892 entered upon the lands, and, with the assistance of George Engelhardt, built a dam and laid his pipe line at an expense of \$2,000. The dam was injured by the floods of the following winter, and in 1893 plaintiff again attempted to enter upon defendants' land to relay his pipes and rebuild the dam, when he was forcibly prevented by defendants.

Mrs. Englehardt testified that her husband had no authority to execute the first attempted grant to plaintiff, and that she did not know of the dam until after it was constructed. She declared that she did not object to plaintiff's digging a ditch or laying pipes across her land to take his own water from the creek, but did object to his building a dam and taking her own water from her property. Under this evidence plaintiff would not be entitled either to build such a dam on defendants' land or to appropriate any of the waters of the creek rightfully belonging to defendant Jesus de Engelhardt, and the court so concluded. The husband was not shown to be the agent of the wife, nor was she bound to allow the maintenance of a dam against the construction of which she protested, nor the appropriation of her water by means of it. The difficulty arises solely in construing the findings, which it is contended are inconsistent with themselves, do not support the conclusions and decree, and do entitle plaintiff to the relief sought. It will be noticed that the complaint does not in terms aver a right in plaintiff by grant, appropriation, or prescription, to divert the waters of the creek upon defendants' land, but somewhat curiously pleads a right of way for the doing of any work necessary for such diversion. Plaintiff is the owner of a tract of land bordering upon the creek above the lands of the Engelhardts. He diverted the water upon this upper land, and carried it by ditch across defendants' land onto his lower tract. The easement granted gave him the right to construct new ditches or pipe lines for this purpose, but under it he wrongfully asserted the right, as has been seen, to dam the creek upon defendants' land, and make there a new point of diversion. By the decree he was given all to which he was justly entitled.

The alleged ambiguity or inconsistency in the findings is not sufficient to justify a reversal of the case. The court first finds, with much particularity, the right of way and the nature and extent of the easement to which plaintiff is entitled. It is a right of way for the purpose of transporting plaintiff's water across defendants' land, and

not a right of way for the construction of a dam. The defendants are found to have interfered with plaintiff in the enjoyment of his easement. And it is then found that plaintiff's crops will suffer great damage "unless defendants are restrained from further interfering with and obstructing plaintiff, as aforesaid, in relaying his said water pipes along his said right of way, and rebuilding his dam at the point of diversion aforesaid." By the decree defendants are enjoined from interfering with the plaintiff's right of way for the laying of pipes and construction of ditches, and plaintiff is adjudged to have no right to build any dam or do any work for the purpose of diverting the water of the creek upon defendants' land. The inconsistency, it is charged, is found in the italicized portion of the finding above quoted. But while plaintiff and his crops suffered from the interference of defendants with his acts, some of which were legal and others illegal, and while these acts are all grouped and collectively declared against, it plainly appears that, so far as concerns the construction of the dam, the interference caused *damnum absque injuria*, since plaintiff had no just cause of complaint against it.

The judgment and order are affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(108 Cal. 129)

GIER v. LOS ANGELES CONSOLIDATED ELECTRIC RY. CO. (No. 19,577.)

(Supreme Court of California. July 3, 1895.)

INJURY TO STREET-CAR EMPLOYE—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

1. An employé of a street railroad company, who was crushed between cars passing on the switch and main tracks while standing there to change the switch, is not guilty of contributory negligence where it appears that this position is the one usually taken, and not in itself a place of peril.

2. Under Civ. Code, § 1970, providing that an employer shall not be liable for injuries to an employé through the negligence of a coemployé unless he has neglected to use ordinary care in the selection of such coemployé; and section 1971, providing that an employer must in all cases indemnify his employé for loss caused by the former's want of ordinary care, —in an action by an employé for injuries resulting from the negligence of plaintiff's coemployé, where it was shown that defendant used due care in selecting the coemployé, plaintiff cannot recover without showing that such coemployé was in fact incompetent, and that defendant had knowledge thereof, or that his reputation was such that defendant should be presumed to have had knowledge of his incompetency.

3. In an action against an employer for injury resulting from the incompetency of a fellow servant, where it is shown that defendant exercised ordinary care in the selection of such servant, plaintiff cannot recover merely on proof of his reputation for recklessness and carelessness, without also proving that he was in fact reckless and careless.

Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by W. H. Gier against the Los An-

geles Consolidated Electric Railway Company for personal injuries. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

John D. Pope, for appellant. Murphey & Gottschalk, for respondent.

HENSHAW, J. Plaintiff, a conductor upon one of defendant's electric cars, was injured under the following circumstances: He had stopped his car and gone ahead to turn a switch to permit the passage of his car from one track to the other. He turned the switch, standing, while doing so, in the V-shaped space made by the switch track and the main line. Another car, coming up, had stopped on the main line, just behind him. At this moment his own car was moved forward by its motorman. The plaintiff was caught between the cars in the wedge-shaped space, crushed, and injured. This action is for a recovery on account of his injuries, and to maintain it he pleads the negligent and careless act of the motorman, —admittedly a fellow servant,—and a lack of ordinary care upon the part of defendant in selecting and hiring the culpable employé. Some charge is also made of defective and inadequate switching apparatus, but this contention seems to have been abandoned. In any event, the record does not disclose any evidence in support of it, nor is argument addressed to maintain it. Some evidence was introduced tending to prove that the plaintiff might with safety have stood in another place and turned the switch point, and that he voluntarily selected a dangerous spot from which to perform the act; but his position, it is shown, was the usual one, and not in itself a place of peril. No contributory negligence can be predicated upon that fact. *Taylor v. Railroad Co. (Tenn.)* 27 S. W. 663.

There is likewise conflicting evidence upon the question whether or not plaintiff ordered his motorman to move forward, but the verdict of the jury upon this disputed fact will not be disturbed. The evidence, however, does abundantly establish that plaintiff suffered through the carelessness of the motorman in sending his car ahead under such circumstances as must inevitably bring death or serious injury to the plaintiff, and upon this proposition not the least convincing testimony comes from the motorman himself. But herein it is to be noted that the act was not one evincing incompetency, employing the word strictly to denote a lack of skill or ability to use appliances or perform a duty in a workmanlike way, but was a single and signal exhibition of carelessness or recklessness,—such, however, as the most competent man might at some time be guilty of. Nor does the evidence of plaintiff's witnesses establish, or seek to establish, incompetency, as the word is here used. It is addressed to establishing the propositions that

the motorman was in fact habitually reckless or careless, or both, and that his general reputation was in accord with this fact. If these propositions are satisfactorily demonstrated, it follows from them that the defendant, being presumed to know this reputation, was negligent in not pursuing inquiries which would have shown that it was well founded, and that the man was an unfit employé.

Coming thus to the consideration of the employer's liability, the evidence shows that in the selection and at the time of the selection of the culpable motorman the company did not fail to exercise ordinary care. The undisputed and supported testimony is that the defendant first employed the motorman as a driver of one of its horse cars, and, upon changing the power to electricity, he was trained as a motorman, and had served continuously as such for a considerable period of time. The motorman had, previous to his employment by defendant, been the driver of a horse car upon a line afterwards acquired by defendant, and continued in the same occupation under the new management. At the time of the change inquiry was made by defendant of the former employers of the motorman as to his fitness and competency, and he was declared to be the best and most careful of the men. During all the time he was in defendant's employ, previous to the occurrence charged upon, no accident is proved to have happened to his car, or to any person or property, the responsibility for which attached to him. Indeed, the court instructed the jury that there was no evidence "of any special acts of carelessness on the part of the motorman, Defrain, prior to the time when Gier was hurt, from which the jury would be authorized to find that said Defrain was either careless or incompetent as a motorman." Respondent criticizes the omission of defendant to question Defrain himself (the motorman) as to his competency, skill, and carefulness at the time of his employment. Such inquiry would be natural and prudent were no better source of information at hand; but defendant was not in fault, since it took pains to avail itself of evidence upon the matter at once disinterested and superior,—that of his former employer. It appears, however, that in the original selection of the employé the defendant was not remiss, did not fail to exercise ordinary care. The determination of this fact in its favor, defendant contends, entitles it to a reversal of the order and judgment. "An employer," says section 1970, Civ. Code, "is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé." The strict construction of

this section for which appellant contends would support his contention, and at the same time relieve the employer from all liability to an employé for the acts of such a culpable servant, even though afterwards the employer had received knowledge that such servant had become grossly incompetent, reckless or unfit, provided only that at the time of his selection ordinary care was exercised. Thus an employé, skillful and competent and careful at the time of his employment, might, through drunkenness or other vice, become wholly unfit and untrustworthy, yet, though knowledge of this were brought home to the employer, and he refused to act upon it, the helpless fellow servant, himself perhaps in ignorance, would have no redress. A court would be strenuous against such a construction, and, if forced to adopt it, would regard it only as an inevitable and unfortunate miscarriage of justice. But no such result need here arise. If necessary, we should not hesitate to construe the acts of the employer, under such circumstances, as constituting a new selection of the culpable employé. This, however, we do not deem requisite, for the section following the one quoted provides generally that an employer must in all cases indemnify his employé for losses caused by the former's want of ordinary care. Civ. Code, § 1971. Such lack of ordinary care may as well be shown by the retention of an unfit employé after knowledge of the fact as by a failure to use due diligence at the time of his selection, and in either case the liability of the employer attaches.

The defendant, then, having exercised due care in the selection of Defrain, to render it liable for the injury complained of, it was necessary for the plaintiff to establish the following facts: First, that the accident happened by reason of the carelessness or incapacity of Defrain; second, that Defrain had become and was actually unfit or incompetent through negligence or incapacity; third, that defendant knew this, or that Defrain's general reputation was so in accord with the fact that the presumption is that defendant knew it, and was therefore negligent in not acting upon the knowledge. And this is so because the burden of proving the employer's negligence is on plaintiff. He attempts to do this by showing that his fellow employé was, in fact, unfit and reckless, and that the employer knew this, or is presumed to have known it. It is therefore the character of the employé which is the object of ultimate determination, not his reputation. Where the plaintiff has established that the employé was, in fact, unfit and incompetent, and has been able to show by direct proof that the employer knew this fact, the case so far is made out, and there is no need or utility in evidence of reputation. But, as such proof is difficult, and frequently impossible, to make, the law permits the employer to be charged after proof of the fact of unfitness,

If it can be shown that the culpable servant's reputation for the particular matter in question was so generally and notoriously bad that it ought to have been, and therefore presumably was, known to him; for then, with knowledge of this reputation imputed to him, if the employer had acted with reasonable prudence upon this information, he would have discovered that the reputation was well founded, that the facts justified and supported it; in short, that he had in his employ an unreliable man. It becomes apparent, therefore, that as evidence of reputation becomes necessary only where there is an inability to furnish direct proof of the employer's knowledge, so it is proper only after the establishment of the fact that the employé is in truth an unfit person. And reputation is not proof of that fact. A man's reputation may be at variance with his character or in accord with it. He may be reputed reckless, and in fact, be careful. An employer is not bound to discharge an employé merely because of his ill repute, but he is culpable if he retains in his employ a servant with a bad reputation, well founded. So it is that evidence of individual acts evincing negligence or incompetency is admissible. It is admitted, not to show reputation, but to establish the second requisite specified, namely, that the employé was veritably unfit or incompetent. Such is the rule. It will be found suggested or laid down with more or less particularity in the cases of *Cosgrove v. Pitman*, 103 Cal. 274, 37 Pac. 232; *Baulec v. Railroad Co.*, 59 N. Y. 356; *Davis v. Railroad Co.*, 20 Mich. 112; and *Railroad Co. v. Hoover* (Md.) 29 Atl. 994; *Davis v. Railroad Co.*, 20 Mich. 105; *Monahan v. City of Worcester*, 150 Mass. 439, 23 N. E. 228; *Railway Co. v. Stupak*, 123 Ind. 210, 229, 23 N. E. 246. Applying it to the case at bar, the first fact, as has been said, was clearly proved, and it may be conceded (though not decided) that the bad reputation of Defrain was sufficiently established. But upon the other essential—the fact that Defrain was reckless or careless—there is not only a failure, but such an entire absence, of proof that the court was justified in its instruction to the jury to that effect. Plaintiff's case, as to this, then rests merely upon proof of reputation, but, as has been shown, proof of a reputation for unfitness is not proof of the fact of unfitness. The judgment and order are reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

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ALEXANDER v. McDOW. (No. 18,405.)
(Supreme Court of California. July 8, 1895.)
ACTION ON NOTE—COMPLAINT—AIDED BY JUDGMENT—DEFAULT JUDGMENT—ATTORNEYS' FEES.

1. A superfluous terminal letter added to the name of defendant will not invalidate a

sheriff's return of service which also recited that defendant was duly served, and there was only one defendant.

2. Civ. Code, § 1459, provides that a nonnegotiable note may be assigned by indorsement. *Held*, that a complaint which, after setting out the note, added, "Indorsed: 'Pay to [plaintiff],'"—and alleged that the whole amount was due from defendant to plaintiff, sufficiently alleged the assignment, as against a motion to vacate a judgment entered on default.

3. Where a complaint set out the note sued on, in which there was a stipulation to pay attorneys' fees incurred in the collection thereof, and the suit was brought by an attorney, the complaint was sufficient to support an allowance therefor, the sum asked being fairly deducible from the face of the note.

4. Under Code Civ. Proc. § 585, subd. 1, providing for the entry of judgment by default in actions on contract for the recovery of money only, the clerk has authority to add to the amount due on a note the sum therein stipulated to be paid for attorneys' fees, if within the amount demanded in the summons.

Department 2. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by Jules Alexander against L. D. McDow on a note. Plaintiff had judgment by default, and defendant appeals. Affirmed.

Spencer & Raker and F. C. Spencer, for appellant. Shinn & Shinn, for respondent.

HENSHAW, J. There are two appeals. The first is from an order refusing to recall and quash the execution and to vacate the judgment; the second from the judgment rendered against defendant after his default. The grounds of the motion are that the judgment is void upon its face in showing no service of summons and complaint upon defendant, and that it is void for that the complaint states no cause of action.

1. Upon the summons the sheriff made the following return: "I hereby certify that I received the within summons on the 14th day of —, A. D. 189—, and personally served the same on the 16th day of October, A. D. 1893, on L. D. McDow, defendant therein named, by delivering to each of said defendant personally, in the town of Susanville, county of Lassen, a copy of said summons, and upon defendant L. D. McDow, personally, in the town of Susanville, county of Lassen, a copy of said summons attached to a copy of the complaint in the action therein named." The irregularity which it is contended renders the return a nullity is the addition of the terminal letter "n" to the name of the defendant, L. D. McDow. The court, in its order holding the return sufficient, said: "There is no question but that the summons was regularly served. There is but one defendant, viz. L. D. McDow, and the return shows that 'the defendant' was served with copy of complaint, although, by what is evidently a clerical error, a slip of the pen, the letter 'n' is affixed to the last letter of the name 'McDow.'" We think the ruling and the reasons upon which it is based are both sound.

2. The complaint is in form as follows:

"Plaintiff complains of defendant, and for cause of action alleges: That on the 28th day of November, 1888, the defendant made and delivered to Levy & Alexander his promissory note in the words and figures as follows, to wit:

"\$848.14. Susanville, Cal., Nov. 28, '88. On or before the 29th day of November, 1888, without grace, for value received, I, or either of us, promise to pay Levy & Alexander, or order, eight hundred and forty-eight ¹⁴/₁₀₀ dollars, with interest thereon from November 28, 1888, at one per cent. per month, interest to be added to principal and compounded every six months, and ten per cent. of total amount due for attorneys' fees incurred in the collection of this note, when collection is made by attorney or other officer. Demand, notice of nonpayment, and protest of this note is hereby waived by each and every signer and indorser. Principal and interest both payable in United States gold coin, and the same collectible in any part of the United States.

"P. O. address: —, L. D. McDow.

"Indorsed: 'Pay to Jules Alexander. Levy & Alexander.'

—"That no part of the principal or interest of said note has ever been paid, and the same and the whole thereof is now due and owing from defendant to plaintiff. Wherefore, plaintiff demands judgment against the defendant for the sum of \$848.14, and interest thereon from the 28th day of November, 1888, according to the terms of said note, and for ten per cent. on the amount which may be found due for principal and interest for attorneys' fees incurred in the collection of this note, and for costs of suit." The test of the sufficiency of this complaint will be found in the answer to the question: Is it or is it not obnoxious to a general demurrer? "When this question arises," to quote the language of Mr. Justice Temple, "courts have always discriminated between insufficient facts, and an insufficient statement of facts; and where the necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication, the judgment will be sustained." *Amestoy v. Rapid Transit Co.*, 95 Cal. 311, 30 Pac. 550; *Garner v. Marshall*, 9 Cal. 268; *Hentsch v. Porter*, 10 Cal. 555; *People v. Rains*, 23 Cal. 128. Thus, while a judgment will not relieve from the entire absence of a necessary averment, it will cure defects in all such averments as may by fair and reasonable intentment be found to have been pleaded, although defectively. The gravamen of the charge against this complaint is that it fails to make the necessary averment of assignment to plaintiff. The note, by containing a provision for the payment of attorneys' fees, was stripped of that essential characteristic of a negotiable instrument by which it could pass by simple indorsement, and all the attaching liabilities to the indorser. As-

signment of it, therefore, became necessary to convey title. But such an instrument may be assigned by indorsement as fully as may a negotiable instrument. Civ. Code, § 1459. The assignment is pleaded in the complaint, with *Cæsar*ian brevity, by the single word "indorsed," followed by the quotation. This, however, is aided by the subsequent statement that the principal and interest are due from defendant to plaintiff. By fair, if not by necessary implication, we learn from this that Levy & Alexander assigned the instrument by indorsement, and delivered it to plaintiff, and that plaintiff then became and now is the owner and holder of it. So construed, the complaint will support the judgment, although it must be added that the weight is quite all it is capable of sustaining.

3. We think, also, that there is sufficient in the complaint to support the allowance of attorneys' fees. The note, which is set forth in full, provides for them, and the prayer of the complaint asks for them, and the action is brought by an attorney at law. The sum asked as attorneys' fees is susceptible of exact determination by simple mathematical calculation. It is fairly deducible from the complaint, therefore, that plaintiff asks an allowance of a specific sum as being reasonable and due for attorneys' fees under the contract. It is true that this demand is in the nature of special damages, the allowance of which might have been contested by defendant. *Prescott v. Grady*, 91 Cal. 518, 27 Pac. 755. But his default admits the truth of the matters pleaded, and must, therefore, be construed to admit that the amount claimed is both reasonable and due. Thus no evidence was required to be taken for the purpose of fixing that amount.

4. The judgment attacked was entered by the clerk under section 585, subd. 1, of the Code of Civil Procedure, which provides: "That in an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk, * * * the clerk * * * must enter the default of the defendant, and immediately thereafter enter judgment * * *." The action of the clerk in estimating and adding the amount of the attorneys' fees to the judgment, under the above circumstances, was as purely ministerial as was his calculation of interest upon the principal sum of the note in accordance with the terms and the averments of the complaint. The clerk was acting within the scope of his authority in entering judgment.

5. It is finally contended that the judgment should be reversed because the clerk entered it for an amount in excess of that specified in the summons. Against this contention it is urged that the court below modified the judgment before the appeal was perfected. Nothing in the record, however, gives evidence of such modification, and the judgment must here be considered to be the one set

forth in the transcript. The entry of judgment for an amount in excess of that called for by the summons was indisputably error. Code Civ. Proc. § 585, subd. 1.

The order appealed from is affirmed, and the superior court of Lassen county is directed to order the clerk to modify the judgment by entering therein, in lieu of the amount named, the amount specified in the summons; and it is further ordered that appellant have his costs upon appeal.

We concur: McFARLAND, J.; TEMPLE, J.

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COOPER v. WILDER. (No. 19,566.)¹
(Supreme Court of California. July 9, 1895.)
PUBLIC LANDS—TIMBER-CULTURE ENTRY—EQUITABLE INTEREST.

1. 20 Stat. 113, relating to patents to timber-culture claims, provides that no final certificate or patent shall be issued unless, at the expiration of eight years from the date of entry, the person making such entry, or, if he be dead, his heirs or representatives, shall prove that for not less than eight years they have cultivated such trees as aforesaid. *Held*, that one who died within two years after entry had an equitable interest in the land, capable of devise, and the title, when perfected, inured to him in whom the equitable title vested at the date of the issue of the patent.

2. Where a land patent is issued to the heirs of a person who made the entry, the courts should decide to whose benefit it should inure.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action to quiet title by Charles Edward Cooper, by guardian, against H. G. Wilder. Defendant had judgment, and plaintiff appeals. Affirmed.

W. H. C. Ecker and Haines & Ward, for appellant. James E. Wadham and F. W. Stearns, for respondent.

SEARLS, C. This is an action to quiet the title of the infant plaintiff to a 40-acre tract of land, described as the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 12, in township No. 14 S., of range No. 2 W., San Bernardino M., situate in the county of San Diego, state of California. The cause was tried by the court without a jury, and judgment entered in favor of defendant, from which judgment, and from an order denying his motion for a new trial, plaintiff appeals.

There is no material conflict in the evidence. The tract of land in question was duly entered as a timber-culture claim, under the laws of the United States (it being public land of the United States), in November, 1879, by David Cooper, who occupied the same until his death, which occurred in 1881. By his last will he bequeathed and devised all his property, real, personal, and mixed,

to his wife, Narcissa T. Cooper, to the exclusion of his son, Charles Edward Cooper, the plaintiff and appellant herein. Administration was had upon the estate of said David Cooper, and the property, including the land here in dispute, was regularly distributed to the widow and devisee, Narcissa T. Cooper. In 1892 a patent issued to the land in question, which recites, among other things, that the claim of the heirs of David Cooper, deceased, has been established and duly consummated in conformity to law, etc., and then proceeds to grant the land as follows: "Now, know ye that there is, therefore, granted by the United States unto the said heirs of David Cooper, deceased, the tract of land above described, to have and to hold the said tract of land, with the appurtenances thereof, unto the said heirs of David Cooper, deceased, and to their heirs and assigns forever." In October, 1891, Narcissa T. Cooper (having previously intermarried with one Dodson) executed a mortgage on the land to H. G. Wilder, the defendant, who subsequently foreclosed, purchased the property at a sale, and, no redemption being made, received a sheriff's deed therefor in due time, and holds the title which Narcissa T. Dodson had or could convey therein.

Objection was made at the trial to the introduction in evidence of the probate proceedings upon the will and estate of David Cooper, upon the ground that such proceedings were wholly irrelevant and immaterial to the question of the title to said land, or to any title therein or thereto, of Narcissa T. Dodson, as grantor of defendant. The branch of the case which turns upon this exception is this: Had David Cooper an estate in the land at the time of his death which he could devise by last will to his wife, the grantor of defendant? The solution of the question depends upon the construction to be given to the timber-culture act, as amended June 14, 1878. 20 Stat. 113. The clause directly involved is contained in the latter portion of section 2, which is as follows: "And provided further that no final certificate shall be given or patent issued for the land so entered until the expiration of eight years from the date of such entry; and if at the expiration of such time, or at any time within five years thereafter, the person making such entry, or if he or she be dead, his or her heirs or legal representatives, shall prove by two credible witnesses that he or she or they have planted, and for not less than eight years have cultivated and protected such quantity and character of trees as aforesaid, * * * they shall receive a patent for such tract of land." The contention of appellant is: (1) That David Cooper, having died within two years after making his entry, could not have complied with the law which required him to "have planted, and for not less than eight years have cultivated

¹ Reversed in banc. See 43 Pac. 591, 111 Cal. 191.

and protected, such quantity and character of trees" as was required by the statute as a condition precedent to his receiving a patent to the land; (2) that the recitals in the patent and the granting clause thereof show that it was "the claim of the heirs of David Cooper, deceased," that was established, etc., according to law, and that it was "unto the said heirs of David Cooper, deceased," etc., that the grant was made.

We do not attach much importance to the fact that the patent issued to the "heirs of David Cooper." It was held at a comparatively early day that where a patent was issued to a man's "legal representatives," or to his "heirs," it was the intention of the land department to leave the question open to inquiry in the proper court as to the party to whom the patent should inure. The land department is not usually in a position to inquire into and settle the rights and equities of claimants under the patent, and cannot properly adjust such rights. *Page v. Hogan*, 2 Wall. 605; *Weeks v. Railroad Co.*, 78 Wis. 501, 47 N. W. 737; *Meador v. Norton*, 11 Wall. 442; *Simmons v. Wagner*, 101 U. S. 260; *Cornellius v. Kessel*, 53 Wis. 395, 10 N. W. 520, and affirmed by the supreme court of the United States in 128 U. S. 456, 9 Sup. Ct. 122. It may be stated as a general proposition that the patent inures to the benefit of him who has the title, though it issued to another. *Urket v. Coryell*, 5 Watts & S. 60. These cases only go to the rights of those who have title, legal or equitable, to land patented to others, and do not solve the very question in issue, viz. did David Cooper have such a title as he could devise? Appellant likens the case of one in under a timber-culture claim to that of a pre-emptioner, who is universally held to have, as against the United States, no title or right which may not be abrogated by the government at any time before final entry and payment. *Hutton v. Frisbie*, 37 Cal. 475; *Hemphill v. Davis*, 38 Cal. 577; *Montgomery v. Whiting*, 40 Cal. 208; *Kenyon v. Quinn*, 41 Cal. 325; *Rutledge v. Murphy*, 51 Cal. 388; *Buxton v. Traver*, 67 Cal. 171, 7 Pac. 450; *Frisbie v. Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77. When a pre-emptor who has filed his declaratory statement dies before making his final entry and making payment, he has no title which can descend to his heirs, except that the pre-emption law provides that in such cases his executor or administrator, or one of his heirs, may complete the pre-emption, "but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned." Rev. St. U. S. § 2269; *Elliott v. Figg*, 59 Cal. 117. In the case last cited it was said: "Were it not for this provision, the pre-emption claim would not survive the pre-emptor. By this provision it survives only for the benefit of his

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heirs." It is not subject to the claims of his creditors, and the heirs take the title as purchasers from the government, and not by inheritance. *Rogers v. Clemmans*, 26 Kan. 522. So, too, under the Oregon donation act, the same principle has been asserted. *Hall v. Russell*, 101 U. S. 503. In this last case the court, speaking of the heirs, said: "Their title to the land was to come, not from their deceased ancestors, but from the United States. The title, it is true, was granted to them by reason of the possessory rights of their ancestor, but these were rights which he could not transfer, and which passed to them under the statute without any act of his. On his death his heirs became qualified grantees." And again: "It follows from this that Loring, at the time of his death, had no devisable estate in the land, and that the heirs of his devisees cannot maintain this suit."

This much has been said in reference to pre-emptors and claimants under the Oregon donation act for the reason that appellant, on the one hand, holds that like considerations apply to claimants under the homestead and timber-culture acts, while the respondent's claim is that there is a clear line of demarkation between the latter and the former; that homestead and timber-culture claimants occupy, from the inception of their claims, such contractual relations to the government as gives to them an equitable right to the lands they occupy as such claimants, subject to be defeated only by a failure to perform the conditions subsequent prescribed by the statutes. There seems a substantial basis for this distinction in the adjudged cases. In *Railroad Co. v. Sture*, 32 Minn. 95, 20 N. W. 229, the court, speaking through Mitchell, J., said: "We are aware that it has been authoritatively decided in *Frisbie v. Whitney*, 9 Wall. 187, and the *Yosemite Valley Case*, 15 Wall. 77, that occupation and improvement on public lands with a view to pre-emption do not confer any vested right in the land as against the United States; that this is only obtained when the purchase money has been paid, and the receipt of the land office given to the purchaser. This is put upon the ground that until such time the proposed pre-emptor has merely a right to be preferred in the purchase over others, provided a sale is made by the United States. But a homesteader after entry occupies an entirely different position. He has in effect purchased. His entry, which is made by making and filing an affidavit, and paying the sum required by law, is a contract of purchase, which gives him an inchoate title to the land, which is property. This is a substantial and vested right, which can only be defeated by his failure to perform the conditions annexed. It is true, no certificate or patent can be issued until the expiration of five years from the date of entry, the United States retaining the legal title to insure the

performance of these conditions. But the vested right of the settler attaches to the land at the time of his entry, and is liable to be defeated only by his own failure to comply with the requirements of the law. * * * Until forfeited by his own failure to perform the conditions of his purchase, this right of property acquired by his entry must prevail, not only against individuals, but against the government itself." In *Carner v. Railroad Co.*, 43 Minn. 375, 45 N. W. 713, which was an action by a claimant under the timber-culture act, the court, in referring to what had been said in the *Red River v. Sture Case*, supra, added: "The rights under the homestead acts, though differently acquired, are no greater than those under the timber-culture act. * * * His rights are analogous to those of one in under a contract to purchase." In *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350, Fuller, C. J., in discussing the rights of a homestead claimant, quotes with apparent approval the opinion of Attorney General MacVeagh, in an opinion to the secretary of war, July 15, 1881, in which the learned attorney general held in substance the same as in the case of *Railroad Co. v. Sutre*, supra. See, also, *Railroad Co. v. Whitney*, 132 U. S. 357, 368, 10 Sup. Ct. 112; *U. S. v. Ball*, 31 Fed. 667; *U. S. v. Turner*, 54 Fed. 228. The consensus of these opinions is to the effect that the homestead entry operates as an appropriation and reservation of the lands embraced within the same, segregates the tract from the public domain, and vests in the claimant an equitable interest therein which is good as against all the world, the government included, until forfeited by failure to perform the conditions of the act of congress.

The similarity of the provisions of the timber-culture act places claimants thereunder in the same category with homesteads; and, while the comparatively recent period of its adoption prevents the existence of but a limited number of cases thereunder, it is not doubted but that the rule as to an equitable interest in lands taken thereunder should be held the same as in cases of homestead. And as the act of congress of June 14, 1878 (20 Stat. 113), which provides for the issue of patents to the applicant, or, in case of his death, to his representatives or heirs, does not declare to whom the title shall inure, such title, when perfected, inures to him in whom the equitable title vested at the date of the issue of the patent. The equitable interest which David Cooper had in the homestead he could pass by devise. 1 Pom. Eq. Jur. § 105.

It follows that the evidence as to the probate of the last will of David Cooper, the probate proceedings, including the decree of distribution of the land in question to defendant's grantor as the devisee of said David Cooper, as well as the evidence of the mortgage by the widow of said Cooper, the

foreclosure and sale thereunder, etc., was properly admitted; and the judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

108 Cal. 49

LOCKE v. MOULTON et al. (No. 18,260.)
(Supreme Court of California. July 11, 1895.)
JURY TRIAL.—DEFENSE IN EJECTMENT.

In ejectment, wherein defendant alleged that the instrument under which plaintiff claims was in fact intended as a mortgage, the fact that the answer closed with a prayer that it be "adjudged that plaintiff is not the owner of the property described," does not render the defense an equitable one, so as to deprive defendant of his right to trial by jury.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action of ejectment by George S. Locke against C. S. Moulton and A. M. McCloud. There was a judgment for plaintiff, and from an order denying a new trial defendants appeal. Reversed.

Carter & Smith and Frank H. Smith, for appellants. L. W. Elliott and W. L. Dudley, for respondent.

VANCLIEF, C. Action of ejectment to recover possession of a half section of land. The complaint is in the most general form, alleging, in substance, that plaintiff owns, and is entitled to the possession of, the demanded premises, and that the defendants are in possession, and wrongfully withhold it from the plaintiff. In their answer the defendants deny that plaintiff ever owned the land, or that he was entitled to the possession thereof at the time of the commencement of the action; and, as a further answer, allege that on October 2, 1885, the defendant Moulton, who was then the owner and in possession of the land, executed to plaintiff a bargain and sale deed thereof, absolute in form, but which was intended by the parties thereto to operate only as a mortgage to secure payment to plaintiff of a debt of \$6,127.50, with interest; and that it was understood and expressly agreed by the parties, at the time the deed was executed, that upon payment of the said debt the plaintiff would reconvey the land to Moulton. As a further answer, the defendants alleged adverse possession for a period of five years, etc. The answer closed with the following prayer: "Wherefore defendants pray that plaintiff take nothing by reason of this action; that it be adjudged that plaintiff is not the owner of, or entitled to the possession of the real property described in the complaint; that it be decreed that the instrument in writing herein described was and is

a mortgage, and that the defendants have judgment for their costs." A former judgment in favor of plaintiff in this case was reversed by this court, and a new trial granted. 96 Cal. 33, 30 Pac. 957. After the remittitur was filed in the court below, to wit, on the first Monday in October, 1892, the case was called by the lower court for the purpose of setting a day for the new trial thereof, when the attorneys for defendants demanded a trial by jury, whereupon the court stated "that the defendants could have a jury on the common-law part of the action, but the court itself would try the equity part of the case," to wit, the issue as to whether the deed was intended to operate merely as a security for a debt. On December 1, 1892, the case was called for trial, when the defendants again demanded a jury trial upon all the issues in the case. The court again refused a jury trial on the issue as to whether the deed was intended to be a mortgage, and proceeded to try that issue alone. The result of such trial was a finding by the court that the deed "was not executed or delivered as a mortgage, and was not a mortgage of any kind, and was not to secure the payment of any money whatever"; and as a conclusion of law found "that said deed was not a mortgage, but that it was a conveyance and grant of the title to said real estate from defendant Moulton to plaintiff." These findings were filed on December 27, 1892, and disposed of the only material issue except that as to adverse possession, upon which, it appears from evidence given on the issue tried, the defendants could not hope for a verdict in their favor. Defendants moved for a new trial on all the grounds allowable under section 657, Code Civ. Proc., presented by a bill of exceptions. This motion was denied, and the defendants appeal from the order denying it.

The only grounds upon which appellants claim a reversal are (1) insufficiency of the evidence to justify the decision, and (2) that the court erred in refusing a trial of all the issues by a jury. As to the first of these grounds, I think the evidence was substantially conflicting to a degree which precludes a review of it by this court. But I think the court erred in denying a jury trial of the whole case. The affirmative allegations in the answer to the effect that the deed was intended as mere security for a debt do not constitute an equitable defense in the proper sense of those terms, since they could have been proved under the general denials. *Smith v. Smith*, 80 Cal. 329, 21 Pac. 4, and 22 Pac. 186, 549; *Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957. They added nothing to the denials of plaintiff's alleged title. The defendants unnecessarily anticipated that plaintiff would rely upon the deed as evidence of his title, and improperly alleged the evidence by which they proposed to show that the deed did not convey the title. Of themselves, these affirmative allegations constituted neither a legal nor equitable defense to the action, and

might have been stricken from the answer without impairing its legal effect. But counsel for respondent contend that the character of the defenses is to be determined only by the prayer of the answer; and since defendants, in addition to their prayer "that plaintiff take nothing by the action," asked the court to adjudge that plaintiff is not the owner of the land, and that the deed is a mortgage, this affirmative relief could be administered only by a court of equity, and therefore it was within the discretionary power of the court to refuse to submit to a jury that part of the case upon which such equitable relief was to be based. In the first place, it is manifest that there is no basis in the answer for any affirmative relief of any kind; and, in the second place, even if the court should affirmatively adjudge, on the pleadings in this case, that the deed is a mortgage, and that plaintiff has no title, such judgment would add nothing in effect to the simple judgment "that plaintiff take nothing by the action." The only authorities cited to this point by counsel for respondent are *People v. Mier*, 24 Cal. 71; *Arrington v. Lascom*, 34 Cal. 375; and *Canal Co. v. Kidd*, 37 Cal. 304; but that none of these is in point for respondent seems so obvious that I think it needless to point out the distinctions. I think the order should be reversed, and a new trial granted.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed, and a new trial granted.

108 Cal. 81

SABICHI et al. v. CHASE. (No. 19,575.)

(Supreme Court of California. July 11, 1895.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—OBJECTIONS BY CREDITORS.

1. Under Civ. Code, § 3449, regulating assignments by insolvents in trust for benefit of creditors, a conveyance by partners in failing circumstances of all their individual and partnership property, in trust to be collected, sold, and disposed of and converted into money, to be divided equally among certain designated creditors, the surplus, if any, to be returned to them in consideration of their release from all liabilities to such creditors, is an assignment.

2. Under Civ. Code, § 3457, making an assignment for benefit of creditors void as against any creditor not assenting thereto in certain cases, a creditor whose demand secured by mortgage is not due at the time of the assignment, and cannot be enforced till foreclosure of the mortgage, can object to the assignment.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Frank Sabichi and others against Delia W. Chase to set aside a sale of land under an execution. From a judgment for defendant, plaintiffs appeal. Affirmed.

E. E. Powers and Brewton A. Hayne, for appellants. C. W. Chase, for respondent.

BRITT, C. From the agreed statements of facts on which this case was submitted in the court below it appears that G. A. Clark and C. H. Humphreys, partners engaged in business at the city of Los Angeles under the firm name of Clark & Humphreys, being in failing circumstances, both as individuals and as a partnership, entered into a written contract of date December 15, 1892, with the plaintiffs, Sabichl, Minor, and Holt, as trustees, and 10 named creditors of Clark & Humphreys, by the terms of which contract Clark & Humphreys agreed to convey all their property, partnership and individual, to said trustees, "in trust to be collected, sold, and disposed of and converted into money and divided ratably" among said designated creditors; the surplus, if any, to be returned to Clark & Humphreys. By the terms of this agreement it was also stipulated that upon the execution of such conveyance Clark & Humphreys should be released from all liability to said creditors; that the trustees might borrow money on certain of the property; purchase outstanding claims against the partnership; carry on the business of the firm, and employ assistants for that purpose; sell real and personal property on such terms as they might deem best, call a meeting of creditors named every six months during the continuance of the trust, and report their proceedings to such meeting; and receive a reasonable compensation for their services. Such agreement was signed by all the said parties thereto, and by a number of other persons not named as parties therein, but who were also creditors of said partnership, and the trustees were chosen by Clark & Humphreys in conjunction with all the said creditors. Accordingly, on December 17, 1892, Clark & Humphreys, individually and as copartners, executed a conveyance (styled on its face a "deed of trust") of all their property, real and personal, to said trustees, the plaintiffs here. Such conveyance recited the said contract of December 15th, and purported to be made in consideration thereof, and to transfer the property described "in trust in accordance with" such contract. The deed was recorded in the recorder's office of Los Angeles county December 19, 1892. The plaintiffs accepted the trust, and took possession of all, or the greater part, of the property conveyed. Defendant, Chase, held the promissory note of Clark & Humphreys, secured by mortgage on land in Los Angeles county,—a parcel of that conveyed to said trustees,—which mortgage was of record in said recorder's office at the time of the transactions above stated. The note fell due August 15, 1893, and was not paid. The holder instituted an action to enforce payment and for the foreclosure of the mortgage. She obtained judgment and caused the mortgaged land to be sold for the satisfaction thereof. The proceeds of sale were insufficient for that purpose, and on January 15, 1894, judgment against Clark

& Humphreys was docketed in said action for the deficiency, amounting to \$1,532.51. Execution issued thereon, and under that writ the sheriff levied on and sold to said Della W. Chase a portion of the other lands previously conveyed to said trustees by the deed of December 17, 1892. Defendant, Chase, never assented to such transfer in trust. The parties agree that the said instruments of December 15 and December 17, 1892, respectively, were executed upon valuable and adequate consideration, and without actual fraud. The consideration moving to Clark & Humphreys seems to have been the release of their debts owed to the preferred creditors. The dispute here relates to the land sold under said execution. The superior court declared by its judgment that the defendant has the better right to such land; that as to her the said agreement of December 15, 1892, and the deed made to plaintiffs in pursuance thereof, are of no effect. Plaintiffs appeal.

By the settled rule of the common law, now expressed in our Code, "a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another" (Civ. Code, § 3432); but parallel with this principle, and to be construed with it, is the rule of more recent legislative policy, that "an assignment for the benefit of creditors is void against any creditor of the assignor not consenting thereto, in the following cases: (1) If it give a preference of one debt or class of debts over another"; etc. Civ. Code, § 3457. The law virtually says to the embarrassed debtor, "You may pay or secure any creditor, and thus give him a preference; but your preferential payment or security must not be cast in the form of an assignment for his benefit." The question for decision, therefore, is whether the said instruments of December, 1892, constituted an assignment for the benefit of creditors within the meaning which the law attaches to those terms. If so, then plaintiffs concede that it was invalid, because violative of the statutory regulations of such transfers. Civ. Code, §§ 3449-3473. The statute attempts no definition of such assignments; but there are qualities (not so well ascertained, perhaps, as is desirable) which, when appearing in an instrument of transfer, characterize it as among those required to conform to the statute on the subject of those assignments or else be treated as void. It is the theory of the appellants that the trust deed here "was in the nature of a mortgage to secure the debts of the named creditors." The distinction between such an instrument and an assignment for the benefit of creditors has been thus stated: "If the conveyance is to a trustee, and the debtor intends to divest himself, not only of the title to the property, but of all control over it; if it is intended as an absolute conveyance of all of his property, and is made for the purpose

of securing a distribution of its proceeds among his creditors, or a portion of them,—in legal effect it is an assignment for the benefit of creditors, no matter what name or designation the parties may have given it. On the other hand, if the intention of the debtor is merely to secure his debt to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance will be treated as a mortgage, even though the debtor is insolvent at the time, and it covers all his property, and but a portion of his debts are secured by it." *Bank v. Crittenden*, 66 Iowa, 240, 241, 23 N. W. 646. And this seems to be a fair statement of the result of the authorities upon this much-vexed question, though great diversity is found in the adjudged cases, due largely to the differences which obtain in the statutes of the several states which have sought to regulate or suppress the evils supposed to arise from the unrestricted right to make preferential assignments allowed by the common law. See *May v. Tenney*, 148 U. S. 64, 13 Sup. Ct. 491. "The material and essential characteristic of a general assignment is the presence of a trust" (*Brown v. Guthrie*, 110 N. Y. 441, 18 N. E. 256; *Burrill*, Assignm. § 8); and while it cannot be said that every transfer of property to trustees for the benefit of creditors is an assignment within the statute (*Lawrence v. Neff*, 41 Cal. 566; *Handley v. Pfister*, 39 Cal. 283; cf. *Priest v. Brown*, 100 Cal. 626, 35 Pac. 323), yet, when a continuing trust is created, presenting the features prominent in this case, we think it must be held that the transfer is such an assignment as the legislature designed to regulate by the provisions of the Code (Civ. Code, §§ 3449-3473). If not, then those provisions would as well be repealed. It has been several times assumed in this court that such a trust indicates an assignment of that nature. *Dana v. Stanfords*, 10 Cal. 269; *Wellington v. Sedgwick*, 12 Cal. 469; *Saunderson v. Broadwell*, 82 Cal. 132, 133, 23 Pac. 36. The provision that a surplus of proceeds remaining after satisfaction of the claims of the creditors named should be returned to the grantors does not, as supposed by appellants, distinguish the contract as one of security only. *Hall v. Denison*, 17 Vt. 318; *Lochte v. Blum* (Tex. Civ. App.) 30 S. W. 925. The reservation of an interest in the possible surplus—not in the property itself—marks the transaction more clearly as an assignment for the benefit of creditors. *Kenefick v. Perry*, 61 N. H. 364.

Appellants argue that the defendant ought not to be considered a creditor having the right to object to the assignment, for the reason that at the date thereof her demand against the assignors was not yet susceptible of enforcement against them personally; she being required to first foreclose the mortgage. But the statute renders void such transfers

"against any creditor of the assignor not assenting thereto." Civ. Code, § 3457. No exception of creditors secured by mortgage is expressed, nor does the reason assigned warrant the implication of one. The judgment should be affirmed.

We concur: VANOLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

106 Cal. 95

WHOLEY v. CALDWELL et al. (No. 18,407.)
(Supreme Court of California. July 12, 1895.)

RIPIARIAN RIGHTS.

A lower riparian proprietor has no right, independent of contract, to go on the land of an upper proprietor to return the stream to its original channel, when it has been diverted therefrom by natural causes.

Department 2. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by James Wholey against Leona J. Caldwell and others for an injunction. From a judgment denying the injunction, but granting plaintiff relief in other form, defendants appeal. Reversed.

James F. Farragher, for appellants. L. F. Coburn, for respondent.

HENSHAW, J. Plaintiff is a lower, defendants are upper, riparian proprietors. Parks creek for many years had flowed over the land of defendants to a point on that land known as "Batterton Crossing," where it divided into two branches, called the "North Channel" and the "South Channel." About one-third of the waters of the creek passed on the plaintiff's land through the North Channel, while the remaining two-thirds flowed down the South Channel. A third waterway, seemingly an ancient course of Parks creek, left the main stream about one-half a mile above Batterton crossing, and entered upon and extended over the land of plaintiff in a direction parallel with that of the North Channel. This last waterway was known as the "Spring Branch Channel." There was no direct surface flow from Parks creek into it, the point of separation being dammed by gravel, boulders, and debris, but its bed was lower than the bed of the North Channel, and from North Channel by percolation and by small but defined surface streams water rose in this Spring Branch Channel and flowed over plaintiff's lands. The amount of water so rising bore direct relation to the amount of water flowing through the North Channel. Plaintiff relied upon the waters of the Spring Branch and North Channels for all beneficial purposes. Such were the conditions until the winter of 1890-91, when an extraordinary freshet deposited a bar of boulders, gravel, and debris at the head of the North Channel, and thus

prevented the waters from flowing into it as had been their wont. At the same time the waters cut a new bed for themselves. This "New Channel" (so named) left the original stream from the south about a mile above Batterton crossing, extended in a general course parallel with it, and joined the South Channel, still on the lands of defendants, above the point where South Channel entered plaintiff's property, and thence flowed on by the accustomed South Channel. During the first year after this change some of the water passed down the old way to Batterton crossing. The rains of the following year deposited a bar in the original stream at the point where the New Channel had been cut, and thereafter all the waters of the creek flowed down this New Channel into the South Channel, and so on to defendants' lands, leaving dry the original water course down to Batterton crossing, and, consequently, also the North Channel and the Spring Branch Channel. Plaintiff then commenced this action, averring that these changes were occasioned wholly by natural causes, and asserting the right to enter upon defendants' land, and to take such necessary and proper steps as might be required to return the water to the channels wherein it flowed prior to 1889, and asking that defendants be enjoined from preventing him from entering upon their land and doing such proper and necessary acts. He also pleaded a grant to himself, from defendants' predecessor, of his land and of "the waters accustomed to flow in the Spring Branch Channel." Defendants denied the asserted rights, and by cross complaint pleaded the construction and maintenance for 30 years last past of a dam across the head of the North Channel sufficient to divert all the water thereof, during ordinary low stages from the North to the South Channel, and also their prescriptive right to divert two-thirds of the water of the creek by ditches. He pleaded defendants' interference with these rights, and asked damages accordingly. Plaintiff was denied an injunction, but, as riparian proprietor and as grantee under the deed above mentioned, was decreed the right of "restoring and restraining the waters of Parks creek to the following channels: First, from the point where the New Channel cut from and left the former channel (original bed of the stream) down said former channel in a single body to the Batterton crossing; second, from the Batterton crossing in two channels in the following proportions, to wit: One-third through the said North Channel, and the remainder through said South Channel."

We cannot see that the rights of the parties in this action are in any way affected by the grant to plaintiff "of the waters accustomed to flow in the Spring Branch Channel." *Aqua cedit solo*. This grant accompanied the grant of the land bordering upon that channel. Whether the waters which flowed in it came from the North Channel

by percolation and seepage, or by well-defined subterranean or surface channels, can here make no difference. For, in either case, the utmost that could be claimed for the grant would be that it gave plaintiff full right to the waters against any asserted right of the defendants to them, and protected him from any use which defendants might make of the waters of the creek after the grant to the injury of their right in these waters. But the complaint of plaintiff does not declare upon any such invasion or infringement by defendants. It asserts the right to go upon the land of an upper riparian proprietor, and return a stream to its original channel which has been diverted therefrom suddenly and sensibly by natural causes. And plaintiff's warrant in doing this rests not upon any contractual relations with defendants, but upon his prerogatives as a lower riparian proprietor. We do not attach importance to the contention of appellants that the right of the lower riparian proprietor is merely to have the water enter his land by its accustomed channels, without regard to the quantity which these channels are wont to carry. The lower proprietor, as against the unwarranted acts of the upper, is entitled not only to have the water enter his land by its accustomed channels, but to have each channel carry its due amount of water. Any other rule would lead to untold hardship and oppression.

But we are here concerned only with the rights of the lower proprietor where the change in the channel has been caused, not by the act of man, but by the act of God. Does the right of the riparian proprietor to have the water enter his land by its accustomed channels stand superior to changes wrought in the flow of a stream by the act of Providence? Has such a proprietor a paramount right over the forces of nature, as well as over the acts of man, to insist that water which has once flowed upon his land shall always flow upon it? A somewhat extended examination leads to the conclusion that the assertion of such a right is new to jurisprudence. The right finds no recognition by the commentators of either the civil or common law, and no case has come under our observation in which the question is considered. Even Sir Mathew Hale, whose *De Jure Maris* is declared by Chancellor Kent to have exhausted the learning on the subject, makes no mention of so important a topic. This silence is itself significant; for it is not easily to be believed that if this important right exists it would not have been asserted and announced in numerous instances. While thus lacking in authority, it is certain that the contention cannot find better support from principle or reason. The foundation of the riparian proprietor's rights rests upon the universally accepted maxim, "*Aqua currit, et debet currere ut currere solebat ex jure naturæ*." These rights thus draw their support from the laws of nature, but they do

not arise superior to those laws. When, by their operation, the flow is lost the right is lost with it. The New Channel itself becomes the natural channel. Otherwise a riparian proprietor would hold all lands above him in extraordinary and perpetual servitude. If, by the forces of nature, the stream should change its course at a point miles above him, he would still be empowered to subject any and all of the intermediate territory to operations requisite to enable him to turn the water back upon his own premises, and this power would be his to the very fountain head of the stream. Such a doctrine could not be tolerated. If it be needed, however, the reasoning of the foregoing finds abundant support in analogous principles of the law which are firmly established. Says Sir Mathew Hale (*De Jure Maris*, c. 1): "A watercourse running between the lands of A. and B., which leaves its course and suddenly and sensibly makes its channel wholly upon the land of A. belongs wholly to A. This rule has been reannounced by all the later text writers, and has been adopted by the courts without suggestion of dissent. 3 Kent, Comm. 428; 2 Bl. Comm. 262; Ang. Water Courses, § 57; Gould, Waters, § 160, and cases thereunder. True, it has usually been invoked in cases of boundaries and of the accretion and reliction of land, but nevertheless, by necessary implication, it defines the riparian proprietor's right in the matter under consideration. Because, if the stream belongs wholly to A., thus depriving B. of all his riparian rights, this can only result because B. has no right to go upon another's land and restore to the old channel the water which has thus been diverted therefrom *ex jure naturæ*."

For the foregoing reasons the judgment is reversed, and the case remanded.

We concur: McFARLAND, J.; TEMPLE, J.

103 Cal. 124

In re BLYTHE'S ESTATE. (S. F. No. 30.)
(Supreme Court of California. July 12, 1895.)

WHO MAY APPEAL.

In proceedings for the distribution of a decedent's estate, appellant set up a claim as widow, and a judgment against her claim of widowhood was affirmed, on appeal, and also an order denying her a new trial. *Held*, that she thereby lost all interest in the proceeding, and could not subsequently appeal from an order directing distribution of the property.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Appeal by Alice Edith Blythe in the matter of the estate of Thomas H. Blythe, deceased. Dismissed.

Henry E. Highton, for appellant. T. I. Bergin, W. W. Foote, Garber, Boalt & Bishop, and W. H. H. Hart, for respondent.

v.41p.no.1—3

HENSHAW, J. This is a motion to dismiss the appeal of Alice Edith Blythe, prosecuted from the order and decree of the court in probate, distributing certain property of the estate of Thomas H. Blythe to Florence Blythe Hinckley. The petition for distribution of Florence Blythe Hinckley was filed on the 18th day of June, 1894. Alice Edith Blythe appeared, and opposed the petition by demurrer and answer, and then appealed from the decree, which was rendered October 26, 1894. Notice of appeal was given upon November 3, 1894. The bill of exceptions was settled upon January 15, 1895, and upon February 25, 1895, appellant's transcript upon appeal was filed with the clerk of this court. At the time of the filing of the petition, the appeal of Alice Edith Blythe from the judgment made and given in the case, entitled "Florence Blythe v. Abbie Ayres and others," had been decided adversely to her contention, upon April 24, 1894 (*Blythe v. Ayres*, 102 Cal. 254, 36 Pac. 522); but her appeal from the order denying her a new trial in the same matter was pending and undetermined. Upon January 2, 1895, the last-named order was affirmed, upon appeal. In re Blythe's Estate (Cal.) 38 Pac. 1108. The action of Blythe v. Ayres was a proceeding under section 1664, Code Civ. Proc., to determine heirship and the right of succession and distribution in the matter of the estate of Thomas H. Blythe. Alice Edith Blythe asserted her rights as the widow of the deceased. The findings and judgment of the court were against her claim of widowhood. This judgment and the order refusing a new trial of the issues having both been affirmed by this court, it is contended by respondent that appellant herein has ceased to be a party in interest, or to stand in a position to be in any wise affected by the questions involved upon this appeal, and that, therefore, it should be dismissed. The decision affirming the order denying the new trial was handed down after the commencement of the proceeding sought to be reviewed upon this appeal; but it will be considered by the court in deciding this motion. It is not only a matter of which we take judicial notice, being a part of the record proceedings in one and the same estate (*Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872), but it is formally brought to our attention by suggestion and proof under affidavit (*Bank v. Henderson*, 101 Cal. 309, 35 Pac. 899). The affirmation of this judgment and order leaves this appellant a stranger in interest to the proceedings upon distribution. The judgment declared the rights of all persons to the estate, and to whom distribution should be made. It having been finally determined that appellant here is not one of those interested in or affected by the distribution, she cannot be beneficially or injuriously affected by any decree which the court might make in the matter; and, as was said by the supreme court of the United

States: "The court is not empowered to decide moot questions or abstract propositions, or to declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *California v. San Pablo & T. R. Co.*, 149 U. S. 308, 13 Sup. Ct. 876.

It is the theory of the law that a litigant seeks the aid of a court, not to succeed in a claim, whether it be well or ill founded, but to have the court determine whether in truth he have any right at all, and, if so, then to define its scope and limit. The present situation of the parties to this appeal differs but in one respect, hereafter considered, from that which would have existed had the appellant, coming before the court, formally disclaimed and renounced all pretensions to heirship or succession in the matter of the estate of Blythe. All interest in that estate, under such circumstances, and so far as this matter is concerned, would have been vested in respondent; there would have been no adversary rights awaiting determination; and it cannot be doubted but that the appeal would no longer be entertained. *Arnold v. Woolsey*, 4 C. C. A. 319, 54 Fed. 268. But, in principle, it matters not whether the relinquishment of the claim be voluntary, as by purchase, abandonment, or compromise, or involuntary, as by final judicial decree. In both cases, the interest of the appellant in the controversy has come definitively to an end, and the decision on the appeal "cannot affect the result as to the thing in issue in the case before it." The affirmance of the judgment and order has, as between these parties, terminated this controversy. There is a marked distinction between the case thus presented and that of *Ricketson v. Compton*, 23 Cal. 649. In the latter case plaintiff (respondent) moved to dismiss the appeal of Compton, whom he had made a defendant, upon the ground, with others, that the appeal was frivolous and groundless. Such rights as Compton had in the matter in controversy were upon the appeal precisely as they had been upon the trial of the cause. To determine, under these circumstances, that the appeal was frivolous and groundless, itself involved a consideration of the merits of the appeal. This court said, after setting forth the facts, that it was no proper ground to dismiss an appeal that it was sham and frivolous; and, as to the contention that defendant was not interested in the controversy, if this were true he should not have been made a party, and it was defendant's fault that he was. Under such circumstances, plaintiff could not hold a judgment against defendant and deny him the right to appeal from it. So, in *Foscalina v. Doyle*, 48 Cal. 151, upon a motion to dismiss an appeal as frivolous, the court simply decided that it would not examine the transcript and the merits of the appeal on such a motion, adding, obiter, that, if it

could and should do so, still it would not dismiss such an appeal "if well taken in point of procedure,"—in other words, if it appear that appellant is still in the exercise of an existing right.

In one respect only, as above suggested, does the enforced relinquishment by judicial decree differ from the voluntary abjuration of a claim; that is, in the matter of costs upon this appeal. Appellant contends that her right to costs following a successful appeal, even if her right is found to be no greater than this, gives her such a substantial interest in the controversy as must compel the retention and determination of the questions presented by her appeal. But to this we cannot accede. Were an appellant, for example, to declare that he had surrendered his claim to respondent, and finally adjusted and disposed of the matter in controversy, saying that it had been agreed between them that the appeal should be pressed to a decision, solely to determine which of the two should bear the costs, it would present a case not different in principle from the present; and the costs being incidental to the judgment, the appeal would be dismissed as no longer being a contest involving the determination of adversary rights. So here, while at the time appellant joined issue with respondent in the matter of distribution she had a standing by reason of the fact that there was then no final adjudication of her status as Blythe's widow, which status alone warranted her appearance in the proceeding, yet, upon the other hand, she was bound to know that her standing was uncertain; that it would be lost by an adverse determination of her then pending appeal; and that, being lost, the right to further prosecute her litigation in the matter of the estate would be at an end. With this knowledge, she litigated in peril of the result, which having been adverse, leaves upon her the burden of costs. The motion to dismiss is granted.

We concur: GAROUTTE, J.; TEMPLE, J.; MCFARLAND, J.; VAN FLEET, J.

108 Cal. 123
GREGORY et al. v. DIGGS et al. (Sac. No. 20.)

(Supreme Court of California. July 12, 1895.)

APPEAL—SUFFICIENCY OF BRIEF.

1. Where a brief is such that it can only be determined from an examination of its merits, whether it sufficiently presents its points and authorities, as required by rule 2, the sufficiency of the brief will not be examined on motion to dismiss for failure to file a proper brief.

2. Where an injunction is a part of the relief sought in a complaint, on appeal from an order denying the injunction and from a judgment for defendant on a demurrer to the complaint being sustained, a brief in support of plaintiff's right to an injunction is applicable to the appeal from the judgment.

Department 1. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by one Gregory and others against one Diggs and others. From an order refusing an injunction, and a judgment for defendants, plaintiffs appeal. Heard on motion to dismiss. Denied.

Armstrong & Bruner, for appellants. R. B. Mering and C. W. Thomas, for respondents.

PER CURIAM. The respondents have moved to dismiss the appeals herein, for failure on the part of the appellants to file their points and authorities within the time limited by rule 2. The notice of appeal shows that the appeal is taken from an order refusing an injunction, and also from a judgment in favor of the defendants. Although the plaintiffs have included three defendants in their action, they seek from them different relief,—an injunction against Diggs alone, and damages against them all. The order refusing the injunction, and the judgment in favor of the defendants, were made at the same time and in the same entry, upon the records of the court, with the order sustaining the defendants' demurrer to the complaint; and the appeals therefrom have been brought here upon a single record. A document entitled "Opening Brief for Appellants" was filed within due time after the transcript was filed; but it is now claimed by the respondents that this brief applies to only the appeal from the order refusing the injunction, and that it has no reference to the appeal from the judgment. We cannot, however, determine whether the brief is so limited without an examination of its merits; and it can be readily seen that, if we should countenance this practice, a respondent would be able to obtain a decision of the court upon the sufficiency of the appeal without being required to file his brief, unless such decision should be adverse.

As one of the grounds of relief sought by the complaint herein was an injunction against Diggs, if the complaint is sufficient to show that the plaintiff is entitled to this relief, an argument in support thereof would be applicable to the appeal from the judgment, as well as from the order. The motion is denied.

(108 Cal. 135)

GAROUTTE v. WILLIAMSON et al¹ (No. 15,955.)

(Supreme Court of California. July 15, 1895.)

CONVERSION BY BAILEE—INSTRUCTIONS.

1. To prevent a recovery by a bailee for the conversion of wheat in a warehouse, on the ground that, at the time of the alleged conversion, plaintiff had transferred the receipt, which is by statute negotiable, defendant must show that plaintiff indorsed the certificate, and that money was advanced thereon which remained unpaid. Evidence that the receipt was placed in a bank to secure advances at a time prior to the conversion, and that it remained until after the conversion, is insufficient.

2. Error in an instruction is not ground for

reversal where exception was not taken thereto until the jury returned, after deliberation for some time, for further instructions.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco, Charles W. Slack, Judge.

Action by C. H. Garoutte against Stephen Williamson and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

W. S. Goodfellow, Page & Bella, and Edward R. Taylor, for appellants. John T. Greany, Dunne & McPike, and Robert Y. Hayne, for respondent.

BELOHER, C. This is an action to recover damages for the conversion of 2,168 sacks of wheat. The complaint is in the usual form, alleging the conversion by defendants on the 13th day of October, 1892; and the answer denies all of its material averments. The case was tried before a jury, and the verdict and judgment were in favor of the plaintiff. Defendants moved for a new trial, and their motion was granted, on condition that they pay to the plaintiff, within a time named, his costs of suit, amounting to \$226. They refused to comply with the condition imposed, and as a consequence their motion "must be regarded as having been denied." *Garoutte v. Haley* (Cal.) 83 Pac. 194. In due time they appealed from the judgment and the order.

The facts proved on behalf of the plaintiff were in substance as follows: The wheat in controversy was a portion of a crop of 13,460 sacks of wheat which, during the year 1892, was raised on a farm in Yolo county by a firm known as Hays & Garoutte, of which the plaintiff was a member. All of the wheat was taken to and stored in the Phoenix Warehouse at Knight's Landing, then owned and controlled by one W. P. Merrill. On September 5, 1892, a warehouse receipt for said wheat, in the statutory negotiable form, signed by Merrill, the warehouseman, was issued to Hays & Garoutte; and from that time up to and including October 6, 1892, there was no wheat in the warehouse except that so placed there by Hays & Garoutte. At some time after Merrill gave the said warehouse receipt to Hays & Garoutte, he issued another negotiable warehouse receipt, in the ordinary form, for 2,168 sacks of wheat, to one Nelson, as the depositor thereof, but in fact Nelson had not then and never had any wheat in the warehouse. Subsequently Nelson indorsed and delivered the receipt so received by him to one McGlaulin, and on the 6th of October, 1892, by direction of McGlaulin, and under the superintendence of Merrill, the 2,168 sacks of wheat in controversy were taken from the warehouse and loaded on a barge, and thence shipped to Port Costa. "The said wheat was thereafter, and while in transit to Port Costa, in this state, sold by the said McGlaulin to the defendants in this action, and the said wheat was there-

after delivered to the defendants, and received by them into their warehouse at Port Costa on the 13th day of October, 1892." This wheat was taken without the knowledge or consent of Hays & Garoutte, and immediately after its shipment Nelson and Merrill left Yolo county and disappeared. On the 24th of February, 1893, Hays & Garoutte assigned and transferred to the plaintiff all their right, title, and interest in and to the wheat in controversy, and in and to any cause of action which they then had against the defendants for the conversion thereof; and thereafter, on the 24th of March, 1893, the plaintiff commenced this action.

It was proved by defendants that in the latter part of September, 1892, Hays & Garoutte placed their warehouse receipt in the Bank of Woodland as security for advances, or for a loan, and that it remained there until January 4, 1893, when it was returned to them. The court instructed the jury that if, at the time the wheat was taken by defendants, if it was taken as claimed by plaintiff, a warehouse receipt for the same had been indorsed and delivered to the Bank of Woodland by Hays & Garoutte, and at that time was held by the bank, under said indorsement, as security for an indebtedness not then paid, then plaintiff could not recover. "If, however, the indebtedness to the Bank of Woodland was paid at the time the wheat in controversy came into the possession of the defendants, if you find it did so come, then Hays & Garoutte were entitled to the possession of the same, and they, or their assignee, have a right to maintain this action." Appellants contend that the verdict was not justified by the evidence, and was contrary to the instructions of the court, because there was no evidence showing that, at the time of the alleged conversion, their indebtedness to the bank had been paid by Hays & Garoutte. We do not think the judgment can be reversed on this ground. It is true that on the back of the warehouse receipt, as presented in evidence, there was written the name "Hays & Garoutte"; but the record entirely fails to show when it was written, or that it was written by, or by authority of, any member of the said firm. And the record also entirely fails to show that there were any advances or that there was any loan made by the bank to Hays & Garoutte, or that there was any existing indebtedness from them to the bank on the 6th of October, or from that time to and including the 13th day of the same month. But if there was such indebtedness, secured by a pledge of the wheat, the burden was upon the defendants to show it. The ownership of the wheat by Hays & Garoutte was clearly established, and from that ownership the presumption that they had a right to its present possession followed as a necessary sequence. That presumption was not overcome by the showing made by defendants. To sustain their theory, they should have gone fur-

ther, and should have shown that the receipt was indorsed by Hays & Garoutte, or by their authority, and that under and on the security of it money was advanced or loaned to them by the bank, which had not been repaid at the time of the conversion. Counsel for appellants suggest that it is immaterial whether the receipt was indorsed or not, but this cannot be so. The receipt was negotiable, and, under the statute in relation to warehouse receipts (St. 1877-78, p. 949), the property was transferable by the indorsement of the party to whose order it was issued. In solving questions on appeal only the record presented can be looked at; and, in view of the record here presented, the appellants' contention that the verdict was not justified by the evidence, and was contrary to the instructions of the court, cannot be sustained.

The point is made that the court erred in refusing to give to the jury several instructions requested by defendants, and in modifying some of their instructions and giving them as modified. This point cannot, in our opinion, be considered. It is well settled that errors in the giving or refusing instructions are "errors in law occurring at the trial," which must be excepted to, or they cannot be reviewed on appeal. And "the exception must be taken at the time the decision is made." Code Civ. Proc. § 646. In *Collier v. Corbett*, 15 Cal. 183, it was held that where instructions to the jury are not excepted to at the time they are given or refused, and a motion for new trial is made for error in giving or refusing such instructions, they cannot be considered on appeal from the order denying the motion. And in *Mallett v. Swain*, 56 Cal. 171, it was held that an exception to the instructions of the court, taken after the retirement of the jury, is too late. Here the bill of exceptions does not show any attempt to take an exception to the action of the court in regard to the instructions until after the jury had retired and deliberated for some time on their verdict. Subsequently, it is said, the jury twice returned into court for further information; and after that is found the statement that "the defendants then and there excepted to the refusal of the court to give to the jury the instructions requested by them, and excepted, also, to the action of the court in modifying the instructions requested by the defendants." The record, in our opinion, cannot be construed as showing that the exceptions were taken before the jury retired. They were therefore too late, and must be disregarded.

There was no error in admitting in evidence the statements of the warehouseman, Merrill, as to the ownership of the wheat loaded on the barge. The statements served simply to identify the wheat removed, and, being made at the time of the removal, they were a part of the *res gestæ*. Besides, if it was error to admit the statements, it was harmless, as it was otherwise shown beyond controversy that the wheat removed was the wheat of

Hays & Garoutte. The judgment and order should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

HENSHAW and MCFARLAND, JJ. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

TEMPLE, J. I concur in the judgment. Even if it be admitted that there was evidence that the warehouse receipt was indorsed by Hays & Garoutte, and deposited with the bank as collateral security for a loan, still the loan—if there was one—had been paid and the warehouse receipt redelivered before this action was commenced. The forms of action having been abolished there is little to be gained now by a discussion of the distinction between trespass, trover, and case. So far as our system can be assimilated to the common-law forms, every action for damages under the Code has more resemblance to an action on the case than to any other. "It is not true, however, that in any proper sense an action for a conversion is for a tort to the possession." In trover, the plaintiff sues in respect to his property, while in trespass he sues in respect of his possession. *Balme v. Hutton*, 9 Bing. 471. It was owing to this distinction that a title acquired by relation was deemed sufficient to support an action of trover, though not of trespass. 26 Am. & Eng. Enc. Law, 765. It is true the plaintiff must have the right of possession, because the tort consisted in the refusal to deliver to the plaintiff property to which he was entitled, but which the defendant acquired lawfully. The whole thing depended upon a fiction which is no longer kept up. Conversion is an act which deprives the owner of the property, and whether he can maintain an action for it should logically depend upon the question as to whether he is entitled to get the damages which may be recovered in lieu of it. If the property was hypothecated, naturally the creditor would be first considered, but, if the owner pay the debt, no reason exists why he may not then sue for the conversion. He is the real party in interest. At best it is in this case a barren technicality. Had Garoutte demanded the wheat, if defendants had failed to deliver it, he would have had an undoubted right of action. After judgment, when it appears that a demand would have been unavailing, and that no injury has been done, a judgment should not be reversed for that reason. In regard to the instruction, I think the presumption is that the jury obeyed it, and found the facts to be such that plaintiff should recover upon that view of the law. The objection really is that the verdict is against the evidence. In this view the learned judge of the trial court agrees, but still seems to think plaintiff ought to have recovered, and would have done so upon proper instructions. It is a correct verdict

and a proper and just judgment, although the case was tried upon a wrong theory. Ordinarily,—in fact, always, where there is any chance to doubt whether proper relief has been obtained,—a new trial should be granted. But here the facts are few and undisputed. There is really no issue except in regard to the question of law first alluded to. I do not think a new trial necessary to determine that. If plaintiff could maintain the action without a new demand and refusal, a new trial would be unavailing. I therefore concur in the conclusion reached.

108 Cal. 143

BRENOT v. ROBINSON. (No. 19,528.)

(Supreme Court of California. July 16, 1895.)

CLAIM AND DELIVERY—PLEADING—DEMAND—JUDGMENT.

1. In an action of claim and delivery, an allegation in the complaint that plaintiff has, prior to the beginning of the action, made demand upon the defendant for the property, although it is not alleged that such demand was in the form prescribed by Code Civ. Proc. § 689, as amended in 1891, is good against general demurrer.

2. Where the claimant's demand for property, prior to bringing an action of claim and delivery, was not in the form prescribed by Code Civ. Proc. § 689, as amended in 1891, for such cases, the defendant may set up such fact in his answer, or object to the admission of evidence of demand.

3. Where, in an action of claim and delivery for the recovery of several specific articles, the defendant, in his answer, did not set forth the value of the articles separately, but took issue as to the total value, and no evidence of the value of any of such articles was offered on the trial, failure of the court to find the value of several of the articles did not invalidate the judgment in favor of the plaintiff.

Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by one Brenot against one Robinson for the recovery of specific personal property. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. S. McKelvey, for appellant. R. Melrose and Jas. G. Scarborough, for respondent.

HARRISON, J. Action of claim and delivery. The complaint alleges: That the plaintiff is the owner and entitled to the possession of four mules, of the value of \$400; two double sets of harness, of the value of \$75; one farm wagon, of the value of \$60; and one pair of lead bars, of the value of \$5; all of said property being of the aggregate value of \$540. That on October 9, 1893, the defendant, as constable of Santa Ana township, in Orange county, without the plaintiff's consent, and against his will, took said articles of personal property from the possession of the plaintiff. That before the commencement of this action the plaintiff demanded of the defendant the possession of said articles of personal property, but the defendant refused to deliver the same. Upon the trial of the action the court found that the plaintiff was the owner of the property,

and that the aggregate value of said property at the time it was taken was \$425; but did not find the particular value of each article. Judgment was rendered in favor of the plaintiff for the possession of the property, and, in case delivery thereof could not be had, that he have and recover from the defendant the sum of \$425.

1. The defendant filed a general demurrer to the complaint, and now urges that the demurrer should have been sustained on account of the absence of an averment that the plaintiff had made a claim for the property in the form prescribed by section 689, Code Civ. Proc., as amended in 1891 (St. 1891, p. 20). It is unnecessary to determine whether the owner of property from whose possession it is taken by the officer under a writ against another is a "third person," within the meaning of this section, or whether in such case any demand is essential to maintaining the action. See *Wellman v. English*, 38 Cal. 583; *Sharon v. Nunan*, 63 Cal. 234. The provisions of the section prescribe only the form in which the claimant is to make a demand in those cases in which the demand is requisite; and the allegation in the present case, that before commencing the action the plaintiff made a demand upon the officer for the property, is, as a matter of pleading, a statement of the fact of demand. If the form of the demand did not comply with the section of the Code, the defendant could traverse the allegation in his answer, and could also object to the proof when offered at the trial. In *Paden v. Goldbaum* (Cal.) 37 Pac. 759, it was held that, even in the absence of an averment in the complaint that any demand had been made upon the officer, evidence of the demand might be given at the trial, upon the ground that the provisions of the section are intended for the benefit of the officer, and that a failure to comply with the section is a matter of defense to be pleaded by him.

2. The failure of the court to find the specific value of the several articles did not render the judgment invalid. In *Whetmore v. Rupe*, 65 Cal. 237, 3 Pac. 851, it was held that this omission did not authorize a reversal of the judgment, the court saying: "By section 627, Code Civ. Proc., the jury are to find the value of any specific portion of the property only 'if so instructed.' Error can, therefore, only arise in a case where such instruction would be pertinent and proper, and the instruction was asked and refused." The defendant herein did not, in his answer, set forth the value of the several articles, and took issue with the plaintiff only upon the aggregate value of all of the articles, and it does not appear that any evidence was offered at the trial regarding the value of any of the property. The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

108 Cal. 148

CALIFORNIA NAT. BANK OF SAN DIEGO
v. GINTY et al. (No. 19,353.)

(Supreme Court of California. July 16, 1895.)

SURETIES ON NOTES—LIABILITIES—APPLICATION
OF COLLATERAL—NATIONAL BANKS—
RATE OF INTEREST.

1. One signing a note as principal with a debtor will be such as to the payee, though the payee knew that as to the debtor such signer was only a surety.

2. Rev. St. U. S. § 5197, prohibits a national bank from charging a higher rate of interest than that fixed by the law of the state in which it is located. Civ. Code, § 1918, makes a rate of interest greater than the rate fixed by law as the legal rate, viz. 7 per cent., valid when agreed on by the parties. *Held*, that a national bank may contract for any rate of interest.

3. A debtor pledged certain logs to secure a note signed by himself and his sureties, as principals. On payment of part of the note, two new notes were executed, one by the original parties and the other by the debtor alone, but no new contract was made as to the purpose of the pledge. The logs were pledged to secure both the creditor and the sureties. *Held*, that the creditor was entitled to have the security first applied to payment of the renewal note executed by the debtor alone.

4. A motion for a new trial is not necessary to entitle a party to a review of an error arising on the face of the findings.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the California National Bank of San Diego against John Ginty and others on two promissory notes, and to foreclose a lien on logs securing them. From a judgment for plaintiff, and an order denying a new trial, defendants Ginty and Luce appeal. Plaintiff appeals from the application made by the judgment of the security. On defendants' appeal, affirmed. On plaintiff's appeal, reversed.

C. H. Rippey and Luce & McDonald, for appellants. Hunsaker, Britt & Goodrich, for respondents.

VAN FLEET, J. Action to recover on two promissory notes,—one for \$7,350, dated December 20, 1890, due in six months, with interest at 10 per centum, per annum, signed by Livingston, Clarke & Co., John Ginty, and M. A. Luce; and the second for \$5,000, of even date with the first, and like rate of interest, due three months from date, signed by Livingston, Clarke & Co. only,—and to subject certain primavera logs, pledged as security for the payment of said notes, to sale, and the application of the proceeds to the satisfaction of the indebtedness. Judgment went for plaintiff for the amount of the notes and interest, as stipulated, and directing a sale of the logs. There are cross appeals, the defendants Ginty and Luce appealing from the judgment and an order denying them a new trial, and the plaintiff appealing from that part of the judgment which directs the manner in which the proceeds of the pledged property shall be applied.

The appeal of Ginty and Luce involves but two questions: First, whether they were correctly held to be principals upon the note

signed by them; and, second, whether the court below ruled properly in allowing interest on said note. The defense relied upon by them was that they signed the note for \$7,350, as sureties for Livingston, Clarke & Co., with the knowledge of that fact by plaintiff, and with the understanding that plaintiff was to hold them as sureties only; that plaintiff had released Livingston, one of the principals on said note, and that they, as sureties, were thereby discharged of any liability. The court found that, as to plaintiff, Ginty and Luce executed the note as principals thereon, and that plaintiff dealt with them as principals, and not as sureties; that as between Livingston, Clarke & Co. and Ginty and Luce, the latter were sureties, and that this fact was known to plaintiff at the time of the execution of the note. The court also found that the release of Livingston was with the consent of Ginty and Luce. It is contended by these appellants that the evidence is insufficient to support the finding that they executed the note as principals, and that the plaintiff dealt with them as such. An examination of the evidence satisfies us that this contention cannot obtain. Indeed, taking all the circumstances attending upon the transaction from its origin into consideration, and it is doubtful if an opposite conclusion by the trial court could find substantial sanction in the evidence. However that may be, there is at least a substantial conflict on the point, and under the well-settled rule of this court the finding cannot be disturbed. It is further urged, however, that the fact that plaintiff was aware, at the execution of the note, that these defendants were merely sureties for Livingston, Clarke & Co. was sufficient of itself, independently of any agreement by plaintiff to that effect, to make said defendants sureties as to the plaintiff. We do not understand such to be the law. To the contrary, we understand the rule to be that where one signs as principal he will be held as such, notwithstanding the creditor knew that, as between the one thus signing and the principal debtor, the former was in fact only a surety. This principle is well settled. *Harlan v. Ely*, 55 Cal. 340; *Aud v. Magruder*, 10 Cal. 282; *Damon v. Pardow*, 34 Cal. 278; *Shriver v. Lovejoy*, 32 Cal. 575. Ginty and Luce having signed as makers, and being such, as between themselves and the plaintiff, it becomes immaterial to discuss the question as to what effect the release of Livingston by plaintiff would have had upon their rights as sureties.

The objection that the court erred in allowing plaintiff interest upon its notes is based upon the contention that, under section 5197 of the Revised Statutes of the United States, it is not competent for a national bank to charge or reserve a higher rate of interest upon its loans than that fixed by the law of the state as the legal rate,—7 per cent.; and that by contracting for a higher rate the plaintiff forfeited its right to the en-

tire interest provided for. This question depends upon whether a national bank can lawfully charge a rate of interest in excess of that allowed by the federal statute, when such excess can be lawfully contracted for under the statute of the state in which the bank is situated and doing business. The question has been expressly decided in the affirmative by this court. *Hinds v. Marmolego*, 60 Cal. 229; *Bank v. Stover*, Id. 387. In *Hinds v. Marmolego* it is said "that the true interpretation of the act of congress is that, in those states and territories having no statute upon the subject of interest, the national banks are allowed a rate not exceeding 7 per centum; while in those states and territories having a statute on the subject, they are authorized to charge and receive interest at the rate allowed other banks and individuals." And it is held that in view of section 1918 of our Civil Code, giving parties the right to contract for a higher rate, national banks are also at liberty to receive such rate as may be agreed upon. This doctrine was affirmed in *Bank v. Stover*, supra, and is in accord with decisions elsewhere. *Tiffany v. Bank*, 18 Wall. 406; *Wiley v. Starbuck*, 44 Ind. 298; *Rockwell v. Bank* (Colo. App.) 36 Pac. 905. The cases cited by defendants do not sustain a contrary view.

The appeal by plaintiff involves the question of the proper application of the proceeds of the pledged property. The prayer of the complaint was that such proceeds be applied first to the payment of the principal and interest of the \$5,000 note executed by Livingston, Clarke & Co., and secondly to the satisfaction of the \$7,350 note and interest executed by Livingston, Clarke & Co. and Ginty and Luce. The judgment directed the application of such proceeds to be made first to the liquidation of the latter note, and of this plaintiff complains as error. The logs were the property of Livingston, Clarke & Co., and were originally pledged as security for a debt of \$16,640, owing to plaintiff from said Livingston, Clarke & Co., evidenced by a note for that amount signed by Livingston, Clarke & Co. and Ginty and Luce. This note was subsequently renewed by the same makers, but thereafter, on the 20th day of December, 1890, by an arrangement between the parties thereto, the last-mentioned note was retired by the payment thereon of \$5,000 in cash, and the making of the two notes in suit. After the first delivery of the logs in pledge, no new arrangement or contract was made by the parties, as to the purposes or conditions upon which they were to be held, but they continued to be held in the same manner as when first delivered. Upon these facts plaintiff contends that it was entitled, under the law, to have the proceeds of the pledged property applied first to the liquidation of the unsecured \$5,000 note signed only by Livingston, Clarke & Co., and in this we think plaintiff must be sustained. The logs were originally hypothecated as security for the

whole debt due from Livingston, Clarke & Co. to the bank. This security was not affected by the giving of the new notes in renewal or extension of the indebtedness. As urged by plaintiff, there being no new contract between the parties as to the purposes of the pledge, it remained as security for the debt, which was the same debt, although evidenced by new notes. *Collins v. Dawley*, 4 Colo. 138; *Shrewsbury Appeal*, 94 Pa. St. 309; *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 Ohio St. 208. The pledge stood, therefore, as security for both notes, and the case falls within the doctrine invoked by plaintiff,—that where a creditor holds two notes or obligations, one better secured than the other, and has collateral security for both alike, he has a right, in the absence of any modifying agreement, to have the collateral applied upon the obligation which is most precarious by reason of being least secured. *Murdock v. Clarke*, 88 Cal. 384, 26 Pac. 601; *Fieid v. Holland*, 6 Cranch, 8; *Wood v. Callaghan*, 61 Mich. 412, 28 N. W. 162; *Morrison v. Bank*, 65 N. H. 253, 20 Atl. 300. The fact that by the terms of the pledge the logs were intended to be security for the protection of Ginty and Luce, as sureties for Livingston, Clarke & Co., as well as for the plaintiff, cannot affect the rights of the latter in the premises. As between plaintiff and Ginty and Luce, the latter being makers of the note, the plaintiff is entitled to the same protection in all respects as against Livingston, Clarke & Co.

It was not essential for plaintiff, in order to avail itself of the objection made to the judgment, to move for a new trial. The error arises upon the face of the findings.

The superior court is directed to modify its judgment so as to direct the proceeds to be derived from a sale of the logs to be first applied to the satisfaction of the amount found due for principal and interest on the \$5,000 note, and, as thus modified, the judgment will stand affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(108 Cal. 146)

RIVERSIDE LAND & IRRIGATING CO.
v. JENSEN. (No. 19,496.)

(Supreme Court of California. July 16, 1895.)

QUIETING TITLE—PLEADING—RES JUDICATA.

1. It is not necessary for plaintiff in an action against an executrix to quiet title to land to plead a former judgment against defendant's testator for possession of the land in order to entitle him to put it in evidence.

2. The successor in interest of one against whom a judgment for possession of land has been made is estopped by such judgment from asserting adverse possession of such land anterior to the date of entry of the judgment.

Department 1. Appeal from superior court, San Bernardino county; John Campbell, Judge.

Action by the Riverside Land & Irrigating Company against Mercedes Alvarado Jensen, executrix, to quiet title. From a judgment for plaintiff, defendant appeals. Affirmed.

Paris & Allison and Rolfe & Rolfe, for appellant. Frank F. Oster, J. W. Curtis, and R. E. Houghton, for respondent.

VAN FLEET, J. Action to quiet title. Plaintiff had judgment, from which, and an order denying her motion for a new trial, defendant appeals.

1. The objection of defendant to the introduction in evidence of the judgment roll in the action of *Riverside Land & Irrigating Company v. Cornelius Jensen* was properly overruled. That was an action brought by the plaintiff here against the testator and predecessor in interest of this defendant to quiet plaintiff's title to certain lands, including the premises in controversy in this action, and in which final judgment was entered quieting plaintiff's title to the land in suit. It was not required of plaintiff to plead said judgment in order to be entitled to prove it. The complaint was in the usual form, and was sufficient (*Rough v. Simmons*, 65 Cal. 227, 3 Pac. 804; *Heeser v. Miller*, 77 Cal. 192, 19 Pac. 375; *Castro v. Barry*, 79 Cal. 447, 21 Pac. 946); and such an allegation would have been improper, as it is never necessary in such an action to plead deratignment of title. That is matter of evidence purely. While, as a general rule, it may be necessary to plead estoppel by former judgment, that rule does not apply when, as under our system, no opportunity is afforded the plaintiff to plead it. It had no proper place in the complaint, but plaintiff could not be precluded from the benefit of it as matter of evidence on that ground. He was entitled to give it in evidence with the same effect as if given an opportunity to plead it specially. *Clink v. Thurston*, 47 Cal. 27; *Wixson v. Devine*, 67 Cal. 345, 7 Pac. 776.

2. The evidence in the case entirely failed to establish the defense of the statute of limitations, and the court below correctly found against defendant upon that issue. The effect of the judgment against *Cornelius Jensen*, defendant's predecessor, was to estop the latter, and the defendant, who claims under him, from asserting title adverse to plaintiff anterior to the entry of that judgment (*Freem. Judgm.* §§ 300, 309; *Marshall v. Shafter*, 32 Cal. 195; *People v. Center*, 66 Cal. 559, 562, 5 Pac. 263, and 6 Pac. 481); and the period that elapsed intermediate the final judgment in the action of *Riverside Land & Irrigating Company v. Cornelius Jensen* and the commencement of the present action was not sufficient to ripen the adverse holding of this defendant into title by limitation. It follows also that the court below did not err in its rulings upon questions of evidence affecting this plea.

3. Nor did the court err in refusing defendant leave to amend her answer by set-

ing up that the premises in dispute were included in the former judgment by mistake. Assuming that such defense could have availed defendant in avoiding the otherwise conclusive effect of that judgment, there was an entire want of any such showing as would have justified the court in granting such leave. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(108 Cal. 211)

GRADY v. DONAHOO et al. (No. 18,455.)

(Supreme Court of California. July 22, 1895.)

JUDGMENT BY DEFAULT—VACATION—SURPRISE AND EXCUSABLE NEGLIGENCE.

Immediately before removing from town, defendant's attorney left the papers in the case with defendant's bookkeeper, tied in a bundle, with instructions to tell defendant that he would have to get another attorney on account of the intended departure. The bookkeeper, being busy, supposed the papers were certain other papers which the attorney had been asked to return, and failed to give defendant the attorney's message. The case was set for trial, and judgment rendered therein, without either defendant or the attorney knowing of it. *Held*, that the judgment should be set aside, on the ground of surprise and excusable neglect, under Code Civ. Proc. § 473.

Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by W. D. Grady against M. J. Donahoo and others. From a judgment for plaintiff, and an order denying a motion to vacate the same, defendants appeal. Reversed.

Sayle & Caldwell, for appellants. W. A. Grady, for respondent.

VAN FLEET, J. Defendants failed to appear at the trial, and judgment was taken against them in their absence. They moved to vacate and set it aside, immediately upon learning of the fact, upon the ground of surprise and excusable neglect. The motion was denied, and defendants appeal from the judgment and the order refusing to vacate it.

It appeared that one D. M. Seaton had been retained by defendants as their attorney in the case, and he had put in an answer; but thereafter, and before the case was set for trial, Seaton removed from Fresno, where the parties reside, and the case was pending, to San Francisco. Before leaving Fresno, Seaton took his office copies of pleadings and papers in the case, and the papers in several other matters in which he was acting as attorney for the defendants, to the place of business of the latter, and, none of the defendants happening to be in at the time, he delivered all the papers, which were in one large bundle, to the bookkeeper of defendants, with the statement, among other things, that he was about removing to San Francisco, and that defendants would have to get another attorney to attend to this case

and the other matters. The bookkeeper, being busy at the time, did not pay particular attention to what was said by Seaton, but, knowing that the latter had a short time before been requested to return some papers called the "Donahoo Papers," he assumed that the bundle handed him was the papers in the Donahoo estate which had been wanted, and later, when Mr. Emmons, a member of the firm, and one of the defendants, came in, handed the bundle to the latter with the remark that they were the Donahoo papers left by Mr. Seaton, but did not deliver Seaton's message about the case or the latter's intention to leave Fresno. Mr. Emmons, not having immediate use for the Donahoo papers, did not open the bundle, but laid it away and paid no further attention to it. Subsequently, after the removal of Seaton, and in his absence, and without his knowledge or that of defendants, the case was set down for trial, and was thereafter tried, and a judgment rendered against defendants, before the latter knew that the case had been set or that Seaton had ceased to attend to it. Upon these facts, we think the lower court should have set aside the judgment. It is not a case disclosing neglect or omission on the part of either counsel or party, nor any one connected with the case. The attorney had taken at least reasonable precaution to bring notice to his client of the fact of his removal and the necessity of procuring other counsel, but, through the inadvertence or neglect of an employé of defendants, for which we think they were, under the circumstances, in no way chargeable, knowledge of the fact never reached them. It does not appear that the case had ever been neglected by defendants in any way; but they were proceeding to defend it in good faith and upon the merits, and had done all that they were called upon to do, so far as knowledge of the necessities had been conveyed to them. Under such circumstances, and where, as here, the application is made so immediately after the default as that no considerable delay or injury is to be occasioned to plaintiff, we think defendants should be given an opportunity to defend upon the merits. "The exercise of the mere discretion of the court ought to tend, in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and, where the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application." *Watson v. Railroad Co.*, 41 Cal. 17. In *Dodge v. Ridenour*, 62 Cal. 263, the facts fell very far short of making as strong a showing for relief as is made here, but the order refusing it was reversed, the court holding that the case was within section 473 of the Code of Civil Procedure. We think this such a case. The facts clearly establish an instance of "sur-

prise and excusable neglect." The judgment and order are reversed.

We concur: GAROUTTE, J.; HARRISON, J.

108 Cal. 224

COWAN et al. v. GRIFFITH et al. (No. 18, 438.)

(Supreme Court of California. July 22, 1895.)

MECHANIC'S LIEN—DWELLING HOUSE—LAND SUBJECT TO LIEN.

Under Code Civ. Proc. § 1185, declaring subject to mechanics' liens on a building the land on which it is situated, together with so much of the land about it as may be required for the convenient use and occupation thereof, the whole 40-acre tract on which a dwelling is located is not subject to liens, it not being meant that sufficient land about the dwelling to support the owner while living there shall be subject to the lien.

Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by D. A. Cowan and others against Annie T. Griffith and others. Judgment for plaintiffs. Defendant the Fresno Loan & Savings Bank appeals. Reversed.

Horace Hawes, for appellants. Frank H. Short, L. L. Cory, Sayle & Coldwell, and Tupper & Welsh, for respondents.

GAROUTTE, J. This is an action to foreclose certain mechanics' and material men's liens. Plaintiffs recovered judgment, and the Fresno Loan & Savings Bank, a mortgagee and defendant, has appealed. The building upon which the liens were foreclosed was a dwelling house, situated some five miles from the city of Fresno, and the only question of any importance involved in this appeal relates to the amount of land necessary for the convenient use and occupation of this dwelling. It is situated upon a tract of land described as lots 21 and 22 of the Easterby Rancho, the entire tract containing 40 acres, and each lot 20 acres. After hearing evidence, the court made a finding of fact to the effect that all the land was necessary for the convenient use and occupation of the dwelling house, and ordered the same to be sold. The land was planted to fig trees and vines. For the convenient use and occupation of this dwelling house it is very evident that 40 acres of land is not necessary. The statute does not contemplate anything of that kind. It means exactly what it says,—a sufficient space around the dwelling for its convenient use and occupation. It does not contemplate that sufficient land around the dwelling house to support the owner while living there be set apart. Very possibly 40 acres would not be sufficient for such a purpose; and, if the dwelling house was situated upon a section of farming land, upon

the same line of reasoning as has been here adopted, the entire section should be set apart. Neither the productiveness or non-productiveness of the soil, nor the profit derived from the cultivation of the land, is a material element to be considered in determining the amount of land to be set apart with the dwelling house, under this section (1185) of the Code of Civil Procedure. If this dwelling house was situated upon a 5-acre lot, and the remaining 35 acres of this tract was situated near, but upon the opposite side of, a public highway, it could hardly be contended that the entire 40 acres were necessary for the convenient use and occupation of the building; yet it is wholly immaterial upon the question here presented that the tract is in one body, rather than divided, as suggested, by a public highway. In *Tunis v. Association*, 98 Cal. 285, 33 Pac. 63, a mechanic's lien was foreclosed upon a hotel and saloon, and a tract of land containing about 60 acres was declared by the court necessary for the convenient use and occupation of these buildings, and ordered sold. The tract was known as the "Fair Grounds Tract," and had upon it a race track, racing stables, and other improvements. This court held that the trial court erred in setting aside the entire tract, and reversed the judgment, saying: "In the present case it is easy to see that the race track, with its training stables, grand stand, corrals, and other improvements, may be necessary to create business for the hotel, club house, and saloon, for which the building in question was constructed; but it is not at all apparent that they are necessary to the convenient use and occupation of the building for the purposes indicated. Their uses are foreign to its purposes, except as they may tend to bring custom to its doors." And here it may be said the use of this land is foreign to the owner's purposes, except that it may furnish him an income by which he may sustain himself in the dwelling. The statute simply allows him the dwelling house and a quantity of land around it sufficient for its convenient use. As to his income or source of support, the statute does not concern itself. It is not our purpose to indicate to the trial court the quantity of land necessary for the convenient use and occupation of this dwelling-house, but it is entirely evident that 40 acres is too much, and we think it equally evident that an entire 20-acre tract is too much. We see no objections to the complaint of sufficient merit to demand a reversal of the judgment. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

(12 Wash. 35)

WATSON v. SAWYER et al.

(Supreme Court of Washington. July 30, 1895.)

APPEAL—SUPPLEMENTAL TRANSCRIPT.

A supplemental transcript is not admissible to show want of jurisdiction in the appellate court.

On rehearing. Denied.

For former opinion, see 40 Pac. 413.

HOYT, O. J. In the petition for rehearing it is claimed that a mistake was made as to the facts shown by the record and relied upon by respondents in their motion to dismiss the appeal. The motion to dismiss was founded upon the fact that certain of the defendants had not been served with notice of appeal, and was denied on the ground that such defendants were not necessary parties, for the reason that they had never appeared in the action except for the purpose of disclaiming any interest in the subject-matter of the suit. It is claimed in the petition that this assumption on the part of the court was not supported by the record made in the lower court, and to show that fact certain papers have been brought here, and filed with the petition for rehearing, by which it is sought to make it appear by way of supplemental record that such defendants had in fact appeared in the superior court. It is an almost universal practice with appellate courts to exercise their discretion to the fullest extent by way of allowing supplemental transcripts to be filed in furtherance of an appeal, or to support their jurisdiction in a case in which action has been taken; but it is an equally universal practice not to allow this to be done for the purpose of disclosing a want of jurisdiction. Under these rules it is clear that this supplemental transcript must be entirely disregarded, and the petition decided upon the record as it existed at the time the motion to dismiss the appeal was heard. We have carefully re-examined such record, and are of the opinion that it justified the denial of the motion to dismiss. Nowhere in such record is there any other appearance by the defendants not served with notice of appeal than the special one above suggested, except that there is a recital in the findings of fact that an attorney appeared for one of them, and it does not appear from such recital for what purpose he was there, nor in what capacity he had entered his appearance; and, in our opinion, it was not sufficient to authorize us to assume, in the face of the transcript of the record, which failed to show that any pleading or other paper had ever been filed by said defendant, that he had appeared generally in the action. Besides, the force of such recital was entirely destroyed by one in another order made in the cause at a later date. In this last order it was recited that the plaintiff and certain defendants who had joined in the stipulation were all the parties interested in the decree, and the defendants who were not served with notice of the ap-

peal were not mentioned therein. Not only did it thus appear that these defendants had never appeared in the action, but there was an affirmative certificate by the clerk to that effect. The petition will be denied.

ANDERS, GORDON, and SCOTT JJ., concur.

(12 Wash. 310)

BUDDRESS v. SCHAFER et al.

(Supreme Court of Washington. July 15, 1895.)

ACTION FOR SERVICES—PLEADING AND PROOF—RES JUDICATA.

1. In an action for services rendered, defendant cannot, under a denial that the services were of the value alleged, or of any value, show that the services were not rendered.

2. A judgment in an action on an express contract for services rendered is not a bar to a quantum meruit action therefor.

Hoyt, O. J., dissenting.

Appeal from superior court, King county; R. Osborn, Judge.

Action by A. W. Buddress against John Schafer and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

J. C. Whitlock and Million & Houser, for appellants. A. W. Buddress, Metcalf & Jurey, and Geo. H. Jones, for respondent.

GORDON, J. This action was brought by respondent to recover the sum of \$500 for services as an attorney and counselor at law in "prosecuting and conducting certain causes in the superior court of the state of Washington for the county of Island, in which said causes said defendants (appellants) were plaintiffs and Henry Alexander and Kitty Alexander were respondents." Respondent also claims the sum of \$50 by way of expenses, costs, and disbursements necessarily incurred in the prosecution of said suit. In his complaint it is alleged "that said services were reasonably worth the sum of \$500, and that said defendants (appellants) promised and agreed to pay what the same were reasonably worth." The answer of the appellants merely denied that the "services were worth the sum of \$500, or any sum whatever," and for an affirmative defense set up that the matter had been adjudicated in a trial between the same parties on the same subject-matter. There was a verdict for respondent in the sum of \$225, and from judgment entered thereupon, and an order denying a new trial, this appeal has been taken.

Upon the trial appellants offered to show that they had employed other attorneys to prepare the pleadings and try the identical causes referred to in respondent's complaint. The proof was excluded, and this ruling is assigned as error. The apparent object of this testimony was to dispute the amount and extent of plaintiff's services. The respondent contended, and the court below

held, that appellants could not, under their answer, deny that the services were rendered by respondent, and that appellants should be confined to the question of the value of the services so rendered; and we think the ruling was correct. It was the right of appellants to have demanded a bill of particulars, or to have required a more definite statement, if the character and extent of the services were indefinitely set forth in the complaint; but under a mere denial of the value of the services they were not entitled to show that the services were not rendered. *Van Dyke v. Maguire*, 57 N. Y. 429. The court committed no error in allowing respondent to testify as to the amount expended by him for hotel and traveling expenses, nor in limiting the cross-examination of the witnesses Scott and Coleman, nor in the instruction given the jury concerning the effect to be given the testimony upon the subject of the value of professional services. We do not think that the language of the instruction was calculated to mislead the jury, and it is manifest from the verdict that such could not have been its effect.

Coming now to the question of former adjudication of the matters involved in this controversy, it appears from the record that respondent had instituted a prior suit to recover the sum of \$500 as attorney's fees. That action was founded upon an express contract to pay said sum for said services. No other question was litigated therein. The question of the reasonable value of respondent's services, or of respondent's right to recover such reasonable value, was withheld from the consideration of the jury in the trial of that case. Referring to this prior suit, which was relied upon as a bar to respondent's right to recover in this action, the learned counsel for appellants upon the trial of this cause below admitted that no evidence was offered in the former trial to prove what the services were worth, but that the only question submitted for determination was upon respondent's theory of an express contract. We think the law is well settled that a judgment in a former suit on an express contract is not a bar to the second suit on a quantum meruit for the same services, and to determine whether a former judgment is a bar to a subsequent action it is necessary to inquire whether the same evidence would have maintained both of such actions. 1 *Freem. Judgm.* § 259; *Kirkpatrick v. McElroy* (N. J. Err. & App.) 7 Atl. 647. In *Taylor v. Castle*, 42 Cal. 372, the court say: "The cause of action is said to be the same where the same evidence will support both actions; or, rather, the judgment in the former action will be a bar, provided the evidence necessary to sustain a judgment for the plaintiff in the present action would have authorized a judgment for the plaintiff in the former." In 2 *Black Judgm.* § 720, the learned author says: "For the purpose of ascertaining the identity of

the causes of action, the authorities generally agree in accepting the following test as sufficient: Would the same evidence support and establish both the present and the former cause of action? If so, the former recovery is a bar; if otherwise, it does not stand in the way of the second action." We have examined the error assigned by appellants in permitting respondent to explain the record of the former trial, but think that no error was committed. If, however, we were constrained to the opposite view, the same result would follow, in view of the admissions made by appellants' counsel upon the trial of this case in the court below as to the proceedings occurring upon the trial of the former action, which resulted in a judgment for defendants. No substantial error appearing in the record, the judgment will be affirmed.

ANDERS' and DUNBAR, JJ., concur.
HOYT, C. J., dissents.

OWEN et al. v. ST. PAUL, M. & M. RY. CO.
(Supreme Court of Washington. July 16, 1895.)

CONDEMNATION PROCEEDINGS—NECESSITY OF NOTICE TO LANDOWNER—ESTOPPEL TO CLAIM LAND—AMENDMENT OF COMPLAINT.

1. Ejectment will lie against a railroad company for land, obtained by it under condemnation proceedings, at the suit of one not a party to the proceedings, who claims title under an unrecorded deed executed before the filing of his pendens in such proceedings, when it appears that such person had possession of the land under a contract of sale, and the railroad company offered to buy the land before commencing the proceedings.

2. Where, in condemnation proceedings by a railroad company, counsel for defendant states that defendant does not claim the land sought to be condemned, the fact that the real owner, not a party to the proceedings, testifies to the value of the land, will not estop him from subsequently maintaining ejectment against the railroad company for the land.

3. An amendment of a complaint in an action of ejectment so as to show that the property sued for is community property is properly allowed.

Appeal from superior court, Snohomish county; Henry McBride, Judge.

Action by Maria Owen and Nels Owen, her husband, against the St. Paul, Minneapolis & Manitoba Railway Company for possession of land. From a judgment for plaintiffs, defendant appeals. Affirmed.

Burke, Shepard & Woods, for appellant.
A. W. Frater, for respondents.

DUNBAR, J. This is an action in ejectment brought by Maria Owen and her husband, Nels Owen, against the St. Paul, Minneapolis & Manitoba Railway Company. It is alleged that the plaintiffs had the right to immediate possession of the land, and that the defendant was in possession, and wrongfully withheld the same from plaintiffs. The prayer of the complaint was that the plain-

tiffs recover from the defendant the possession of said land, and all thereof, with the appurtenances, and their costs and disbursements. The answer of the defendant denied the material allegations of the complaint, except that the defendant was in possession of the land in dispute, which was lot 11 in block 3 of Highland Park Addition to Sultan City; and for an affirmative defense pleaded that on or about April 23, 1892, proceedings were begun in the superior court of Snohomish county by the defendant against one Almarion W. Graves and the American Mortgage Company to condemn and appropriate to the use of the company a strip of land across Highland Park Addition which included said lot 11 in question in this suit, and alleged that a notice of the pendency of this condemnation proceeding was duly filed in the office of the county auditor of Snohomish county on the 23d day of April, 1892, by which due notice was given to the said Almarion W. Graves and the American Mortgage Company, and to all other persons whatsoever, that said suit had been begun; set up the paragraphs and determination of said condemnation proceedings at length; that a jury was summoned, a trial had, and that the jury returned a verdict for the sum of \$1,342, awarding the same to the said Graves, for the taking of the said strip of land described in the petition, including said lot 11 in question in this suit; alleging that a decree of appropriation followed, and that by said decree of appropriation the defendant acquired title to said lot; and also alleged fraud and collusion between the plaintiffs and Graves by which they sought to compel the defendant to pay a greater price for the right of way than it was fairly worth, and that the plaintiffs never had acquired any title or interest whatsoever in said lot, and that whatever interest they did have was subordinate to the title acquired by the railroad company in said condemnation proceedings; and prayed that the action might be dismissed at the cost of the complainants. The reply of the plaintiffs denied each and every allegation contained in the separate and affirmative answer of the defendant. A jury was waived and the case was tried before the presiding judge, and judgment rendered in favor of respondents in accordance with the prayer of the complaint.

Many points are discussed by appellant in this case which it seems to us are not pertinent to the case; but there are one or two main propositions upon which the cause must depend. First, were the respondents in any way bound by the decree of the court in the condemnation proceedings pleaded by appellant? If the court in that case had jurisdiction of the subject-matter and jurisdiction of these respondents, it cannot be denied that they are estopped from bringing this action. If it did not, then the respondents had a legal right to bring this action in ejectment, and under the testimony in this case they should

prevail. It is conceded that no notice was directly given to respondents in the condemnation proceedings, and that they are not made parties to the action. The lis pendens in the proceedings was filed April 23, 1892, and the condemnation suit was tried May 26, 1892. The testimony in this case shows that the respondents made a verbal agreement with Graves to purchase this lot in question in the month of April, 1891; that they at that time paid \$5 in money,—the agreed price of the lot being \$100,—entered upon possession of the lot, and made valuable improvements thereon, to wit, a livery stable, the possession of which they maintained until they were ousted by the railroad as a result of the order of the court in the condemnation proceedings above referred to. February 19, 1892, another payment of \$20 was made, and on April 22d following a payment of \$80, which completed the payment for the lot; and on that day a deed was executed in due form of law from Graves to the respondents for said lot, which deed was recorded on May 2, 1892. The contention of appellant is that by reason of the filing of its notice of pendency of action in the condemnation proceedings it acquired a right in lot 11 prior to the claim of respondents upon an unrecorded deed, and that the decree of appropriation subsequently obtained on June 4, 1892, related back to the time of the filing of the notice of the pendency of the action on April 23, 1892, so as to complete its title and give it priority over the unrecorded deed of respondents. We do not think this contention can be sustained under the facts in this case, for, whatever may have been their rights under the statute in the case where no actual notice of the respondents' interests existed, the record in this case overwhelmingly shows that appellant, the railroad company, through its authorized agents, had actual notice of the title and claim of these respondents; and, that being the case, appellant cannot rely upon the lack of constructive notice provided for by the statute, for, where actual occupancy and visible possession are proven, notice is presumed, and the parties in a case of this kind would require to be brought into court by a due process of law. This outside of all questions of the constitutional power of the legislature to authorize property to be taken by eminent domain without notice and an opportunity to be heard. Not only were circumstances proven in this case such as would put a prudent man on his guard, and from which actual notice might be inferred, but the testimony shows that actual notice was given, and that the right of way agents of the railroad company sought these respondents out and made propositions to them, looking towards buying the right of way through this lot, prior to the time the condemnation proceedings were instituted. Respondent Owen testified that Col. Crook, the main right of way agent of the company, agreed to settle with him for this lot. It seems that at the time

he had some conversation with him with reference to purchasing another house and lot on the east side of the river, but the witness positively states that he also said that he would settle for the lot which the barn was on (the lot in dispute). And Mr. Sherwood, a disinterested witness, testifies that George James, a right of way agent of appellant, asked him to make Mr. Owen an offer of another lot in place of the one in dispute; and on cross-examination, in answer to the question of appellant's counsel whether or not the lot he talked about was the lot where respondents' house was, on the east side of the river, he replied: "No. The lot across the river, where the barn is;" and again, in answer to a question of the same import, namely, "Was not that what you had your conversation with Mr. James about?" he replied: "No. The conversation was with regard to the barn property." And the witness testified that this conversation and this offer occurred prior to the commencement of the condemnation proceedings. Mrs. Owen also testified substantially to the same effect as to the offer made by the right of way agent. There is a feeble attempt on the part of the witness Crook to contradict these proofs on the part of the respondents, though he says that he thinks that the respondents made claim to this lot about the time the proceedings were commenced. In answer to the question, "The first you heard, then, that they claimed any title to the land, was in the condemnation proceedings?" he said: "Yes, sir. When we talked of commencing the proceedings, and I think about the time when they were first commenced, as near as I can recollect." In answer to another question, he says: "The first talk that I remember having with him was about the time the condemnation proceedings were commenced. He told me that he owned a barn, and, I think, that he owned a lot at that time; and I asked him what he considered them worth, and made a proposition to buy the barn." So that it seems, even from the appellant's own witnesses, that, really before the commencement of proceedings,—namely, at the time they talked of commencing them,—they were notified of respondents' ownership, and really made a proposition to respondent Owen to buy the property from him. Conceding that the testimony of witness Crook is absolutely true, it was the duty, then, of appellant, by supplemental proceedings, to have made these respondents parties to the action; but under the testimony in this case the court had a right to conclude that appellant had notice of the ownership of respondents prior to the commencement of the condemnation proceedings. It is urged by appellant that respondents ought to be now estopped from the fact that respondent Nels Owen was in attendance at court at the trial of the railroad company with Graves, and

that he gave testimony with regard to the value of the strip of land sought to be condemned. It appears from the evidence, however, and is conceded by the statement made to the court below by the counsel for appellant, that Graves' attorney in that case announced that Graves was not the owner of this particular lot, and that he made no demands for damages for its condemnation. Under such an announcement, we do not think that the respondent Nels Owen was under any obligation to intervene in the case, but he was justified in resting upon his constitutional right to be notified and have his day in court before his property should be taken from him. It is also claimed that respondents should be estopped from the fact that they knew of the location of this right of way, and permitted the railroad company to take possession. We do not think the evidence justifies this conclusion. It was no doubt known in the fall of 1891 that the railroad company would build its road through the city of Sultan, but there is nothing to show that the definite location of the line of the road was located or known to the citizens of that city.

We do not think that the court abused its discretion in allowing respondents to modify their complaint so as to show that the property was community property. This, under the circumstances of the case, was in furtherance of justice, and appellant was in no way injured by the change allowed. There was no attempt on the trial of the cause to prove the allegations of fraud and collusion made in the complaint, so that it appears to us, upon an examination of the whole record, that respondents entered into this agreement to purchase this lot in good faith; that they entered into possession of the same, and made valuable improvements upon it, and received title to the same, before the commencement of the condemnation proceedings; that they had no notice of such proceedings, were not in any way made parties thereto, had no opportunities to litigate their rights, and that appellant had actual notice of the title and ownership of respondents, and that therefore the respondents were in no way bound by the judgment rendered in the condemnation proceedings; that, as to them, such proceedings were actually void, and without effect, and that such judgment, therefore, was no defense to their action in ejectment. The judgment will therefore be affirmed, and the appellant will be allowed 30 days from the entering of this judgment to carry into effect the condemnation proceedings provided for in the judgment below; or, in other words, the conditions of said judgment will commence to run from the date of this judgment.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

BLUMENTHAL et al. v. PACIFIC MEAT CO.

(Supreme Court of Washington. July 17, 1895.)

COMPLAINT—AIDED BY ANSWER—APPEAL—ASSIGNMENT OF ERROR—JUDICIAL NOTICE.

1. A complaint which shows a breach of contract, and damage to plaintiff by the breach, is sufficient when attacked for the first time after answer.

2. Witnesses will be held competent in the absence of an assignment of error raising the question of their competency.

3. Where, on suit for breach of contract of sale of cattle, the evidence shows the market price of cattle at another place than that named in the contract for delivery, judicial notice will be taken of the nearness of the two places to each other, so as to render evidence of the market price in the former evidence of what it was in the latter.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by I. Blumenthal and another against the Pacific Meat Company for breach of a contract of sale. From a judgment for plaintiffs, defendant appeals. Affirmed.

F. Campbell, for appellant. Burt J. Humphrey, Ellis De Bruler, and W. H. Jackson, for respondents.

HOYT, C. J. Respondents brought this action to recover damages for the alleged breach of a contract for the sale of neat cattle. The answer of appellant contained certain denials, and set up certain facts by way of affirmative defense, which were denied by the reply. The trial resulted in a judgment for the plaintiffs, to reverse which this appeal has been prosecuted.

The appellant objected to the introduction of any evidence, for the alleged reason that the complaint did not state facts sufficient to constitute a cause of action. This objection was overruled, and such ruling furnishes the first ground upon which a reversal of the judgment is sought. A reversal is also sought upon the ground that the evidence was not sufficient to support the verdict. If the sufficiency of the complaint is to be determined by the same rules under the circumstances of this case as it would have been had it been seasonably attacked by a motion or demurrer, there would be some grounds for the contention that it was insufficient. But this is not the rule. A complaint seasonably attacked by motion or demurrer will be held to be insufficient if the facts are not so stated as to clearly show the right of the plaintiff to recover, and upon what particular theory or reason such right is founded. But, if tested after answer, it will be held to be sufficient if the facts stated will justify a recovery upon any theory upon which a right can be founded. Tested by the latter rule, the complaint was sufficient. Such facts were set out as to show that there had

been a violation of a contract made by the appellant with the respondents, and that on account of such violation the respondents had been damaged.

As to the other question, after the introduction of proofs by the respective parties, the court instructed the jury as to the rules which should govern in its determination of the questions submitted to them. To these instructions no exceptions were taken, and it must follow that if the evidence was sufficient upon any theory which might be suggested, such verdict must stand. If exceptions had been taken to the instructions of the court, it might have been our duty to have gone into the evidence somewhat in detail to determine whether or not the theory upon which the cause was submitted to the jury found support therein. But, no fault having been found with the theory under which the cause was submitted to the jury, the only thing which we have to do is to see whether there was evidence which warranted the jury, upon the theory on which the cause was submitted, in finding for the plaintiffs. That the evidence was sufficient to warrant a verdict for the plaintiffs under the instructions given, upon the theory that the market price of the cattle had been shown, is conceded by the appellant, except that it is claimed by it that the witnesses who testified to such market price were not competent to so testify, and that the proof in relation thereto was as to the market value in Seattle, instead of in Puyallup, where the cattle were to be delivered. The witnesses must be held to have been competent, for the reason that the errors assigned do not raise the question of their competency. The court will take judicial notice of the distance between Seattle and Puyallup, and their relation to each other, from which it will be apparent that the market price for neat cattle would not be so different in the two places that evidence as to what it was in one would not be sufficient to show substantially what it was in the other.

Several other questions have been suggested in the brief of the appellant, but under the two alleged errors above stated, which are all that are contained in its brief, we are not called upon to say anything in reference thereto. That the cause was submitted to the jury upon proper issues and upon a theory warranted by the proofs must be conclusively presumed, for the reason that no exceptions were taken to the instructions; and we are of the opinion that the pleadings and proofs were sufficient to sustain the verdict rendered upon the issues and theory presented to the jury by such instructions. The judgment must be affirmed.

SCOTT, J., concurs. ANDERS, DUNBAR, and GORDON, JJ., concur in the result.

ROBERTSON v. WOOLLEY et al.

(Supreme Court of Washington. July 17, 1895.)

ASSUMPSIT—PLEADING—VENDOR AND PURCHASER—RECOVERY OF PRICE PAID.

1. The complaint, in an action to recover the balance due for work performed, need not allege a demand.

2. Where the vendor refuses to execute a bond for a conveyance, as required by the contract of sale, the vendor does not, by failure to rescind the contract within a reasonable time, waive his right to recover the purchase price paid.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by W. D. Robertson against P. A. Woolley and others, partners as the Skagit River Lumber & Shingle Company. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Metcalfe & Jurey, for appellants. Sinclair & Smith, for respondent.

DUNBAR, J. The respondent, Robertson, brought his action below against the appellants on two counts. The first was for the sum of \$315.25, with interest from the 6th day of March, 1892, at the rate of 10 per cent. per annum, for work performed for and at the special instance and request of the appellants. The second cause of action alleges that the respondent's wife, Sarah J. Robertson, entered into a contract with the appellants to buy certain lots in the town of Woolley, Skagit county, Wash. The contract was that the said Sarah J. Robertson was to pay to the appellants \$500 for said lots, \$100 to be paid down and the other \$400 to be paid at the end of a year; that a deed was to be made for said lots; and that the appellants agreed, upon the payment of \$100, to execute a bond for the making of said deed; that the appellants had refused to comply with their contract, and refused to execute the bond; and that the demand had been made for the return of the \$100; and an assignment of said claim had been made to the respondent. The defendant P. L. Woolley separately answered, denying that he was a member of the partnership sued. The other defendants answered, denying that the labor performed by the plaintiff was performed as alleged in the complaint; and for an affirmative answer, in substance, claimed that, under the agreement which they made, the appellants were to furnish, sell, and deliver to respondent, on account of a reasonable value, certain goods, wares, and merchandise, provisions, and supplies, as should be requested by the respondent, necessary for the support of himself and family while in the employ of the appellants, and also to furnish him certain lumber and materials, such as should be requested, for the improvement of said real property; and, under and by which said agreement, the respondent agreed to perform

work and labor, at the usual and reasonable sum per day, in payment of the balance of the purchase price of the said real property, and also in payment of such goods, wares, and merchandise to be furnished under and by said agreement; that, on or about the 10th day of July, 1890, in pursuance of said agreement, and at the special instance and request of the respondent, they caused to be executed and delivered to the said Sarah J. Robertson, wife of the respondent, a good and sufficient bond for a deed to said real property; that the bond for a deed was executed and delivered to said Sarah J. Robertson, and taken by her in her name for the convenience of the respondent, and in trust for him, and for no other purpose. They alleged the furnishing of the goods and lumber to the amount of \$761.89; admitted the reasonable value of the work to be \$914.75; and alleged the nonpayment of the sum of \$500, excepting the cash payment; and demanded a balance in the sum of \$226 on the general account, with interest from the 5th day of March, 1892, at the legal rate; alleged that they caused a good and sufficient deed of conveyance to be duly executed on the 2d day of April, 1892, which they filed with their answer to the original complaint (the cause being tried under an amended complaint). Upon the issues made by the pleadings the case went to trial, and a verdict was rendered in favor of the respondent for \$512.80.

The first contention of the appellants is that the statement of the first cause of action does not state facts sufficient to constitute a cause of action, for the reason that the allegations thereof show the first cause of action is to recover an alleged balance due upon their mutual current account, and it is not alleged that any demand for the payment of the balance was ever made. We do not think the complaint is properly subject to this criticism, as it does not show a mutual current account for which any demand was necessary. It alleges in terms an amount of money due.

The other contention, that the purchase money was waived by the failure to claim the rescission within a reasonable time, we do not think can be sustained. According to the testimony of the respondent, which the jury from their verdict evidently believed, the payment of \$100 was made, and the appellants came into possession of that amount of money of the respondent, upon a contract to do certain things, which they refused to do. They refused to proceed any further or make the contract, according to the agreement; and there was nothing to rescind, and, upon such refusal, respondent was entitled to the money advanced.

Many questions which are raised by the appellants in this case are settled by the verdict of the jury. According to the testimony of the respondent, the appellants in-

sisted upon changing the agreement. He testifies that, under the agreement, he was to have a year within which to pay the \$400, and that, when the appellants proffered the bond, the condition incorporated was that it was to be paid within six months, and that the respondent thereupon refused to enter into such contract, and the appellants refused to comply with the agreement. This testimony is contradicted by the appellants, and flatly contradicted. But it was the province of the jury to determine the truth of the matter in issue by the testimony of the witnesses, and they have determined that question in favor of the contention of the respondent.

The other proposition, viz. that P. L. Woolley was not a member of the corporation, has also been determined by the same tribunal. We do not agree with the appellants that there was no testimony tending to show that he was a partner. The fact that he was a bookkeeper for several years in the concern; that he admits that he was a partner in the store business; that the business of the store and the business of the partnership were intimately connected; that they had the same bookkeeper and secretary; that their business was transacted in the same office, and that the same books were used; the further fact that the billheads which were used, and upon which the respondent's account was made, had described P. L. Woolley as one of the members of the corporation, and the secretary of the same; that these billheads were used for about three years; the statements of members of the corporation, which were sworn to by the respondent, and other circumstances testified to,—were tangible testimony tending to show that P. L. Woolley was a member of this corporation; and, while the testimony may not be sufficient to convince this court that such was the case, there was sufficient testimony before the jury to sustain their verdict.

Several instructions are discussed in appellants' brief; but the record shows that there was no exception to any instruction except the instruction that there was no evidence that would entitle the defendants to recover any amount under the pleadings. The others were the general exceptions, which this court has so often held did not amount to an exception under the law. This instruction, we think, under the testimony, was correct.

The appellants insist that whether or not they should recover was a question of fact, which should have been submitted to the jury; but, under the pleadings in this case, there was no question of fact submitted to the jury, and no proof offered, upon which a judgment for defendants could have been sustained. The answer alleged that the agreement was that the plaintiff was to pay for the lots in work and labor, and no proof at all was introduced to show that the plaintiff refused to continue to perform work and

labor in payment of these lots. We think the jury were not misled by the instructions of the court, and the judgment will therefore be affirmed.

ANDERS, SCOTT, and GORDON, JJ., concur. HOYT, C. J., dissents.

'12 Wash. 342)

FLINT et al. v. LONG et al.

(Supreme Court of Washington. July 17, 1895.)

ADVERSE POSSESSION—COLOR OF TITLE.

1. One who purchases land under a deed of certain lots as platted obtains color of title to lots staked off as such lots, though in fact they are not the lots called for by the plat.

2. A purchaser of a city lot built a fence around three sides of it, the lot being inaccessible from the fourth side, due to the roughness of the ground; cleared it of brush and timber, a considerable quantity of which was on it and the surrounding lots, and planted shrubbery thereon. *Held*, that his possession was sufficiently open to constitute adverse possession.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Thomas Flint and another against Franklin P. Long and another. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

Preston & Albertson, for appellants. Greene & Turner, for respondents.

DUNBAR, J. The plaintiffs and defendants in this case derive their respective claims of title from a common source, namely, one D. T. Wheeler and his wife. The land in controversy is a part of the tract of "thirty acres off from the south side of the east 120 acres of what is known as the 'C. D. Boren Donation Claim'" in the city of Seattle, of which D. T. Wheeler and wife were on the 7th day of December, 1870, seised and possessed in fee simple. Wheeler and wife, on the 10th day of December, 1870, being still the owners of a certain 5 acres of said 30 acres, in which tract of 5 acres is included the parcel now in dispute, conveyed said 5 acres to one Benjamin Flint, which Flint afterwards duly conveyed to appellants. The record shows that said Wheeler and wife, on December 7, 1870, conveyed 10 acres out of the 30 acres above mentioned to one John Lawler and Margaret Kollock in undivided interests, and that this 10 acres was, on April 10, 1882, partitioned in severalty between these grantees. This 10 acres abuts on the west boundary of the 5 acres deeded to appellants, and does not overlap any part of the latter according to the description in the respective deeds. Lawler, however, in platting his part of the said 10 acres, staked it out on the ground, not according to the description of his deeds, but so as to include the west 102 feet of the 5 acres owned by appellants. The land in controversy is a part of this strip of 102 feet, and

corresponds with lots 5 and 6 of block 4 of Lawler's addition, as the same were actually staked out on the ground. The description in the paper plat, however, follows the description of the Lawler deeds, and does not purport to cover any part of said strip of 102 feet. The respondent Long became the purchaser of lots 5 and 6 of block 4 of Lawler's addition, so that the question is, who is entitled to the parcel in dispute by reason of these conveyances? At least that would be the question if there was not any question of the statute of limitations in the case. Mary Monasmith is the tenant of respondent Franklin P. Long herein, and was made a party to this action, which is an action in ejectment. The defense of adverse possession for 10 years prior to the commencement of the suit under said alleged color of title was set up by the respondents, and the view we take of this issue renders unnecessary the discussion of any other propositions. Conceding the necessity, under the provisions of our statute, to show color of title on the part of the respondent in this case,—a question upon which we do not now pass,—it seems to us that such color of title was fairly shown. All that is necessary to be shown is that there was a proof or colorable title under which the entry or claim has been made in good faith. The land in question was purchased by the respondents, and the platting on file merely represented the lots as staked out upon the ground; and a deed to certain lots purporting to convey land actually staked out upon the face of the earth to correspond with the deed would certainly be a purchase, and an entry thereunder, if such entry was made in good faith. It is but a prudent practice, and certainly a common one, when people are buying lots, to view the lots as actually staked out upon the face of the earth. Devlin, Deeds, § 1022, p. 336, says: "The words on the face of a map of a town 'as laid out' by a certain person, are equivalent to 'as surveyed' by him, and embrace a reference to the monuments placed on the land by the surveyor." So that the pertinent question in this case is: Has there been an open, notorious, undisputed, and adverse possession of the land in controversy by the respondent and his grantors for 10 years immediately preceding the commencement of this action? The court who tried the cause found as a fact that the defendant Franklin P. Long and his grantors have been in actual, open, notorious, and exclusive possession adverse to the plaintiffs, and each of them, of every part and parcel of the land in question from and ever since the 23d day of May, 1883, until the day of the hearing and trial, under color and claim of title adverse to the plaintiffs. This action was commenced August 10, 1893. A careful investigation of all the testimony in this case leads us to the conclusion that the court was warranted in such finding. The testimony is too long and too much diversified to specially refer to it, but we do not think that

we shall have to go to the extent that we did in *Land Co. v. Dibble*, 4 Wash. 767, 31 Pac. 30, to sustain this finding. It is true, there is some conflict in the testimony, and parties were introduced to testify that they had been upon these lands at the time testified to by the defendants' witnesses, and that such improvements as they testified to did not exist; but the parties who had procured these improvements made, and had paid for them, and witnesses who made some of the improvements, testified in regard to the making of them, and to the time of the making of them. It appears from the testimony that during the winter of 1882 and the early spring of 1883,—shortly after the purchase of these lots by Mrs. Malson,—that she employed a man to clear the same; that he went upon the lots, cut down the timber that yet remained standing upon them, cut down the brush,—of which it seems there was an abundance on the lots,—and cleared the lots off, planting in the month of February a considerable portion of it to shrubbery; and that he built a rude fence around three sides of the land in dispute (testimony showing that the other side was inaccessible to stock on account of its roughness); and from the character of work which was shown by these witnesses to have been done upon this land the face and appearance of the ground must have been completely changed, so that notice would have been given to any one who saw the land that possession had been taken of the same, and improvements made thereon, which improvements would be inconsistent with any other theory than the theory of possession and ownership. Shortly after this, and, according to the testimony, about the 1st of September, 1883, a house was built upon this land, which house has been occupied by the respondent and his grantor or their tenants practically ever since it was built. It is true that this house was not a very pretentious one, being a board house, with the boards running up and down, and a shingle roof, and, as the man testified who built it, from 20 to 24 feet long; but, unpretentious as it was, it has been occupied all this time by families consisting of women and children, and the testimony is undisputed that since the fall of 1886 it has been occupied continuously by Mrs. Monasmith and her family, and that she has paid the rent, which, from the testimony, appears to have been from two to four dollars per month, to the respondent, or his agent, Mrs. Ross. If the testimony of the witnesses for the defense be true, the possession in this case has not been of a doubtful character, but has been open and notorious, and the improvements made substantial; and while, as we before said, there is some conflict as to when the first improvements were made,—namely, the clearing and the setting out of the shrubbery,—yet, from a perusal of this testimony, we are not prepared to say that the judge, who saw the witnesses and heard them testify, was not

justified in reaching the conclusion which he did. The judgment will therefore be affirmed.

SCOTT, ANDERS, and GORDON, JJ., concur.

(12 Wash. 349)

STATE v. ROBINSON.¹

(Supreme Court of Washington. July 17, 1895.)

MURDER—ACCESSORY—CONVICTION OF MANSLAUGHTER.

One charged with murder as an accessory before the fact cannot be convicted of manslaughter, he not having been present at the time of the killing.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

William Robinson was convicted of manslaughter, and appeals. Reversed.

Geo. A. Allen and Alex. Akerman, for appellant. J. W. Heffner (A. W. Hawks, of counsel), for the State.

GORDON, J. Appellant was tried in the superior court of Snohomish county, upon an information charging him with the crime of murder in the first degree, for the killing of George Schultz on the 22d day of December, 1892. A verdict of manslaughter was returned by the jury, and, a motion for a new trial having been overruled, appellant was sentenced to imprisonment in the penitentiary for the term of 18 years. The case comes to this court upon his appeal from the judgment of conviction.

The record discloses that upon the trial below no attempt was made by the state to show that appellant was present at the time and place of the killing. On the contrary, it is conceded that at the time the homicide was committed appellant was serving as a juror in the superior court of the county, at the city of Snohomish, distant some 10 or 11 miles from the place where the homicide was committed. And the proof upon the part of the state was confined to an attempt to show that appellant had conspired with James Robinson, George Robinson, John White, and John Livingstone to commit the crime, and that the killing was done by George Robinson and John Livingstone in pursuance of such conspiracy; the theory of the state being that the appellant was an accessory before the fact. 2 Hill's Code, § 1180, provides: "No distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degree, and all persons concerned in the commission of an offense, whether they directly counsel the act constituting the offense, or counsel, aid, and abet in its commission, though not present, shall hereafter be indicted, tried and punished as principals." It is conceded by appellant's counsel that the evidence was insufficient to justify the conviction of manslaughter; and we

think this contention must be upheld. It was conceded by the learned counsel for the state, upon the argument of the cause in this court, that, if the information charged no higher offense than manslaughter, the evidence introduced would be incompetent to establish such crime. But he earnestly contends that inasmuch as the crime of murder in the first degree is charged in the information in which the lesser offense of manslaughter is necessarily included, and inasmuch as the evidence was competent in support of the charge of murder, it was within the province of the jury, under section 1319, 2 Hill's Code, to find the defendant not guilty of the degree charged in the information, and guilty of any degree inferior thereto. But with this contention we cannot agree. We think that section 1319, supra, contains but the usual provisions in force in all or nearly all of the states, and we have been cited to no case, nor have we found one, in which a conviction for manslaughter has been sustained under circumstances similar to those disclosed by the record here. "The offense of manslaughter, from its legal character, excludes the possibility of an accessory before the fact as an element in its composition." *Jones v. State*, 13 Tex. 168; *Bowman v. State* (Tex. Cr. App.) 20 S. W. 558; *Boyd v. State*, 17 Ga. 194. Conspiring with another to kill a human being necessarily involves malice, whereas manslaughter is the "unlawful killing without malice," and does not admit of preconcerted design. The only offense which the evidence in this case tended to establish was murder in either the first or second degree, and the verdict which found appellant guilty of manslaughter was farcical and "contrary to law and the evidence." It was the duty of the jury, if they entertained a reasonable doubt of the appellant's guilt of the only crime which the evidence tended to prove, to acquit, and "not compromise with that doubt by finding him guilty of a lower grade of offense." *State v. Mahly*, 68 Mo. 315. The theory of manslaughter is unsupported by any evidence whatever; and, such being the case, it was improper to instruct the jury that they might find the appellant guilty of manslaughter. *State v. Cole* (Iowa) 17 N. W. 183; *Dickerson v. State* (Wis.) 4 N. W. 321; *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458; *Foster v. People*, 50 N. Y. 598. In *Boyd v. State*, supra, the court say: "Here the pleadings, it is true, put in issue the crime of manslaughter; for the indictment, being for murder, put in issue, not only that offense, but every lower grade of homicide also, just as though there were a separate count for each. But, the evidence introduced going to the crime of murder only, all the minor grades of homicide, although contained in the true bill, were nevertheless withdrawn, or dropped for want of proof, in the issue finally submitted to the jury." Such we think is the present case. The evidence, while prop-

¹ For dissenting opinion of Hoyt, C. J., see 41 Pac. 902.

er to be passed upon by a jury in connection with the charge of murder in the first degree, became legally incompetent when considered with reference to the charge of manslaughter,—a charge which admits of no accessories before the fact. The case of *State v. Grier*, 39 Pac. 874, decided by this court on February 20, 1895, does not support the position of counsel for the state. The question presented here was not involved in the decision of that case, and there is a marked distinction between the cases. The indictment in the case of *State v. Grier* was for murder in the first degree, in administering poison to the deceased. The conviction was for a lesser degree. None of the evidence upon the trial was brought to this court by bill of exceptions or statement of facts, the contention being that under the indictment a conviction could only be had of murder in the first degree. In the absence of the evidence or any sufficient statement of the circumstances relied upon for a conviction in that case, this court was unable to say that circumstances might not exist which would justify a conviction under the indictment for homicide in one of the lesser degrees. For instance, if the poison had been administered under circumstances amounting to criminal negligence, a conviction might properly follow for manslaughter. Here, however, the facts and circumstances relied upon for a conviction are not in dispute, and we think that the distinction between the cases is apparent. The legal effect of the verdict in this case acquits the defendant of the higher degrees of homicide, and, having concluded that the evidence is insufficient to justify a conviction for manslaughter, the judgment will be reversed, and the cause remanded, with instructions to discharge the appellant.

ANDERS and DUNBAR, JJ., concur.

STATE v. FEAMSTER.

(Supreme Court of Washington. July 27, 1895.)

ASSAULT WITH INTENT TO KILL—SUFFICIENCY OF
INDICTMENT—MOTION IN ARREST OF
JUDGMENT—TIME TO MAKE.

1. The objection that a motion in arrest of judgment was made too late cannot be raised for the first time on appeal.

2. A motion in arrest of judgment on the ground that the information does not charge a crime may be made after two trials, in one of which the jury disagreed.

3. An information for assault with intent to kill, which alleges that defendant attempted to kill one T. with a pistol, sufficiently shows that defendant committed an assault on T.

Appeal from superior court, Yakima county; Carroll B. Graves, Judge.

William Feamster was convicted of an assault with intent to murder. A motion in

arrest of judgment was granted, and the state appeals. Reversed.

Ira P. Englehart, Pros. Atty., J. A. Rochford, and Jones & Newman, for the State. H. J. Sniveley, Fred Miller, and W. F. Butcher, for respondent.

ANDERS, J. The respondent was twice tried for an assault with intent to commit murder, on an information the body of which is as follows: "Comes now J. A. Rochford, prosecuting attorney of Yakima county, state of Washington, and by this information accuses William Feamster of the crime of assault with intent to commit murder, committed as follows: He, the said William Feamster, on the 24th day of November, 1894, A. D., in the county of Yakima, state of Washington, then and there being, did then and there attempt in a rude, insolent, and angry manner, coupled with the presentability to carry into execution such attempt, unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, to kill one H. L. Tucker with a deadly weapon, to wit, with a pistol (revolver), which he, the said William Feamster, then and there had and held in his hand, with intent then and there and thereby to unlawfully, feloniously, purposely, and of his deliberate and premeditated malice to kill and murder the said H. L. Tucker." On the first trial the jury failed to agree, but upon the second a verdict of guilty as charged was returned. A motion for a new trial having been overruled, the defendant moved in arrest of judgment on the ground that the information did not state facts sufficient to constitute a crime. This motion was sustained by the court, and, the prosecuting attorney having elected to stand upon the information, the defendant was discharged, whereupon the state, by its counsel, appealed.

The first point made by appellant is that the motion in arrest of judgment was not seasonably made. It is insisted that after the defendant had gone into two trials on the merits without objection it was too late to object to the information on the ground of insufficiency. But there are two insuperable objections to this proposition. The first is that the question was not called to the attention of the court below, and cannot be presented for the first time here; and the second is that, as a matter of fact, the motion was timely made. No motion in arrest of judgment can properly be interposed until after a verdict, for the reason that the only judgment which can be arrested upon such motion is a judgment on the verdict of the jury. The motion could not have been made at an earlier stage of the proceedings, and it necessarily follows that it was made in time.

We now come to the consideration of the vital and decisive question in the case, which is, does the information state facts sufficient to constitute a crime? If it does not, the

judgment of the court below was right; but, if it does, it was wrong, and must be reversed. The information was drawn under section 22 of the Penal Code, which provides that "an assault with an intent to commit murder * * * shall subject the offender to imprisonment in the penitentiary for a term of not less than one year nor more than fourteen years." It will be seen that this offense consists of two constituent elements or essentials. To constitute it, there must coexist a consummated assault, as contradistinguished from a mere attempt, and a specific intent to commit murder; and an indictment or information which does not, in proper terms, allege both the commission of an assault and the specific intent, fails to state facts sufficient to constitute the offense under consideration. That the intent is sufficiently averred in this instance can hardly be doubted, and it follows that, if sufficient facts are stated to constitute an assault, the information must be held good. The words employed in the statute defining an assault (section 20, Pen. Code) are not used, but that is not material, provided those used convey the same meaning (Code Cr. Proc. § 1243), or are words of more extensive signification, and include the words of the statute. 1 Bish. Cr. Proc. § 612; 10 Am. & Eng. Enc. Law, p. 573; *Whitman v. State* (Neb.) 22 N. W. 459; *Tully v. People*, 67 N. Y. 15. In the case last cited the word "destroy" was substituted for the word "disable" in the statute, in an indictment for mayhem, and the court held that the indictment was not defective by reason of the substitution, because the word "destroy" was more comprehensive than the word "disable," and included what was signified by it. And in *Whitman v. State*, supra, the court held that an indictment for shooting with intent to kill, in which it was alleged that the act was "unlawfully, willfully, purposely, and feloniously" done, would not be quashed as not stating an offense, because the word "maliciously," employed in the statute, was omitted, for the reason that the words used included the full signification of the word "maliciously," and were more than equivalents of that word. And so, in this case, we think the words "to kill with a pistol" are of more extensive signification than either of the words "touch," "strike," "beat," or "wound," used in the statute, and include all that is signified by either or all of them. For the foregoing reasons, we are of the opinion that this information, though somewhat inartificially drawn, states facts sufficient to constitute the crime of which the respondent was convicted, and that the motion in arrest of judgment should have been denied. The judgment will therefore be reversed, and the cause remanded for further proceedings in accordance with law and this opinion.

HOYT, C. J., and DUNBAR, SCOTT, and GORDON, JJ., concur.

WEIGLE v. CASCADE FIRE & MARINE INS. CO. et al.

(Supreme Court of Washington. July 27, 1895.)

AMOUNT OF FIRE INSURANCE POLICY—MISREPRESENTATIONS—INTENT—APPEAL.

1. The objection that plaintiff had a jury trial, to which he was not entitled, cannot be raised for the first time on appeal.

2. On an issue as to whether an insured misinformed the company as to the purpose for which he occupied the insured premises, it was error to charge that any concealment by insured, in order to affect the policy, must have been willful and intentional.

Appeal from superior court, King county; Alfred Battle, Judge pro tem.

Action by George M. Weigle against Cascade Fire & Marine Insurance Company and others on a fire insurance policy. Judgment was rendered for plaintiff, and defendant company appeals. Reversed.

C. A. Riddle, for appellant. A. E. Isham, for respondent.

DUNBAR, J. This action was instituted by the respondent, George M. Weigle, assignee of Jennie V. Willets, against the appellant, the Cascade Fire & Marine Insurance Company, and various persons alleged to be stockholders in said company, to recover upon a policy of insurance damages for loss of property destroyed. The defendant insurance company answered, admitting the issuance of the policy sued upon, and that the property therein described was destroyed by fire, but alleged that the policy of insurance insured the property while the same was contained in the building occupied as a dwelling and lodging house; that it was stipulated in said policy that it would be entirely void, unless otherwise provided by agreement indorsed on said policy, if the hazard should be increased by any means within the control or knowledge of the insured; alleged that the building and rooms wherein said property was situated were used as a house of prostitution, wherein lewd, boisterous, and riotous persons congregated; that riotous conduct occurred; that thereby the hazard became greatly increased; that such use was in violation of the terms of said policy, and that the policy thereby became null and void. It was further pleaded affirmatively by the appellant that it was stipulated in said policy that the same should be void if the insured had concealed or misrepresented in writing or otherwise any material fact or circumstance concerning the insurance, or the subject thereof; that at the time of making said policy of insurance said Jennie V. Willets, the person named in said policy as the insured, stated and represented to the defendant that the premises wherein the property described in the said policy of insurance was situated were used as a dwelling and a lodging house; that in truth and in fact the said premises were used and occupied by the said Jennie V. Willets as a house

of prostitution, and as a place of assignation, and as a resort for lewd and riotous people, who indulged in drinking and carousals, and that said persons became drunk and disorderly, and thereby rendered said premises uninsurable under and by virtue of the by-laws and regulations of the defendant corporation; alleged that the said Jennie V. Willets concealed the aforesaid facts from the defendant, misrepresented the character of the risk and the occupancy of the building, and that the defendant had no knowledge or information regarding the same; and alleged, what was really a conclusion of law, that the policy of insurance, by reason of such misrepresentation and concealment, was void at the time of the fire. The case was tried before a jury, and a verdict rendered for the respondent, from which an appeal is taken to this court by the appellant.

It is urged by the appellant that the amended complaint in this case was a bill in equity; that the action thereby became a case in equity; that equity, having assumed jurisdiction, could retain it for all purposes; and that respondent was not, therefore, entitled to a jury trial of the issues involved. As this question was not raised below, however, by the appellant, as it tacitly consented to a trial by jury by entering into a trial of the cause without objection, it is too late to raise the question here. We have carefully examined this record, and from such examination conclude that with one exception the contention of the appellant that errors were committed by the lower court cannot be sustained. We do not think (without particularly specifying) that the court erred in admitting the testimony of Mrs. Willets, nor should we reverse this case on the ground that the testimony would not sustain the verdict, neither do we think the court abused its discretion in not allowing appellant to amend its answer as prayed for. The court, we think, rightfully instructed the jury concerning the question of additional risk, and that under the testimony they were justified in concluding that no additional risk had been proven, even conceding that the testimony showed that the house had been used as a house of prostitution. Among other things, however, the court instructed the jury as follows: "You are instructed that it is stated in the policy introduced in evidence that the second story building was occupied as a dwelling and lodging house. You are furthermore instructed that the policy introduced in evidence in this case provides that said policy shall be void if the insured should conceal or misrepresent, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof." Then the court proceeded to instruct the jury as follows: "In order for there to be a concealment upon the part of Jennie V. Willets in this particular, you are instructed that such concealment must have been willful

and intentional." This instruction was properly excepted to by the counsel for the appellant, and we think it is palpably erroneous, under all the authorities. 1 May, Ins. (3d Ed.) § 181, states the rule as follows: "The general doctrine undoubtedly is that a misrepresentation, whether made intentionally or through mistake and in good faith, avoids the policy on the ground that in either case the injury to the insurer is the same. It is the fact that the insurer relies upon the truth of the representation, and not upon the intention which misleads, whether fraudulent or otherwise, that gives him the right to complain." The author states that this doctrine is held with reference to concealment, but perhaps with less reason; but we are unable to see why any distinction should exist, if it is based upon the right of the insurer to know the conditions of the property which he insures. 1 Wood, Ins. p. 555, states the rule to be that: "Where the conduct of the assured, either by acts of omission or commission, is such as to influence the insurer in either or any of these respects, it in law is fraudulent, even though the insured did not know that his conduct was of that character, or did not intend to mislead the insurer. It is not essential that the conduct of the assured in these regards should be such as indicates bad faith on his part. The matter does not depend so much upon the question as to whether the act is fraudulent as whether it is a violation of an implied contract on his part to reveal everything material to the risk, or to state everything truly that he undertakes to state, that influences the underwriter in taking or rejecting it, or in fixing a higher or lower premium." The only exception to this rule is where the assured does not undertake to state the matter charged to be false as a matter of positive knowledge on his part, as if he states it as his opinion or belief. In such case the insurer is thereby put upon his inquiry. But in this case it is alleged that a material concealment was made, and that by reason of that concealment a policy was issued upon property which would not have been issued at all at any rate; and, if this were true, then certainly the concealment here would be very material, and it might well be that the jury would find in favor of the appellant on the question of the occupancy of the house as a house of prostitution, upon the question of increase of risk by reason of such occupancy; and yet, under this instruction, if it did not appear that this particular use of the house was concealed from the company willfully and intentionally by Mrs. Willets, they would be compelled to find in favor of the respondent. The cases cited by the respondent to sustain the instruction of the court in this particular are not in point. The first citation is 1 Wood, Ins. p. 557, § 229. This is the same section referred to above and the only exception to the rule which that author gives is, as we have above indicated,

where the representation was not of a positive nature. The author also makes a distinction between statements made in answer to inquiries put by the insurer and those stated by the insured voluntarily, and not in response to inquiries by the insurer, and asserts that the latter are not efficacious as warranties unless material in fact; and section 230 announces that: "The effect of a concealment and of a misrepresentation of facts relating to the risk is the same, and their effect upon the rights of the parties is tested by the same rules, to wit, whether they relate to matters material to the risk, or influence the insurer either in taking or declining the risk or in fixing a less rate of premium than he would otherwise have charged therefor; that the concealment or representation of untrue matters that are not material to the risk does not avoid the policy, because they do not influence the insurer in the respects previously named." But propositions of this kind, and cases that are cited under the text, do not bear upon the case in point; for, if the allegations of the answer are true, the concealment of the fact alleged did influence the insurer in taking the risk. One of the cases relied upon by respondent is *Hall v. Insurance Co.*, 6 Gray, 185. There it was held that a policy of insurance upon a hotel described in the application as occupied as such by a tenant, and which is in fact leased and apparently used as a hotel at the time of obtaining the insurance, is not avoided by its being then used by the tenant, without the knowledge or consent of the assured, as a house of ill fame. The court, in its opinion, says: "The evidence is not stated; but the court instructed the jury that if they found the house was occupied as a house of ill fame, and that this fact was known to the plaintiff, or his agent, who made the representation, the plaintiff could not recover; but that, if the building was leased as a hotel, and apparently used as such, but was in fact used by the tenant as a house of ill fame, without the knowledge or consent of the plaintiff, such use would not prevent a recovery." The court held that that instruction was sufficiently favorable to the defendant; that the inquiry naturally was as to the then description of the building; that it was truly described as a hotel, occupied by Mr. Holmes as a hotel, and that there was no suppression of a material fact if such fact was not known to the assured, which could be deemed false; that, if it was a hotel, and used as a hotel at the time, there would be no false representation if it was used otherwise by the tenant without the lessor's knowledge or consent. This is altogether a different proposition from the one stated by the answer in this case. In *Insurance Co. v. Wilkinson*, 13 Wall. 222, the assured in a life policy, in reply to a question, "Had she ever had a serious personal injury?" answered, "No." It eventuated that she had, 10 years before, fallen from a tree,

and injured herself more or less. It was insisted by the defense in that case that if the injury was considered serious at the time it was one which must be mentioned in reply to the interrogatory, and the court held that the accidents resulting in personal injuries, which at the moment are considered by the parties serious, are so very numerous that it would be almost impossible for a person engaged in active life to recall them at the age of 40 or 50 years, and in substance decided that, if the lack of answering or of reciting all such personal injuries worked a forfeiture of policies, very few could be sustained, where thorough inquiry is made into the history of the party whose life is the subject of insurance. This case decides some points in favor of respondent's contention on the question of agency, but, as we have before remarked, the jury may have found for the appellant on the question of agency and all other questions at issue in the case, and still would have been justified in finding for respondent under the instruction just criticised, and for that reason we cannot determine that this instruction is not injurious to the appellant. For this error the judgment will be reversed, and the cause remanded, with instructions to proceed in accordance with this opinion.

SCOTT and ANDERS, JJ., concur. HOYT, C. J., concurs in the result.

CURRY et al. v. CATLIN.

(Supreme Court of Washington. July 17, 1895.)

WRONGFUL ATTACHMENT — DAMAGES — INSTRUCTIONS.

1. In an action for the wrongful attachment of property which the owner had sold, the value of the property, in estimating the measure of damages, is the price contracted for, though it is in excess of its market value.

2. It is proper to refuse an instruction already substantially given.

3. Where the jury is properly instructed, a verdict based on conflicting evidence will not be disturbed.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Lizzie M. Curry and another against Jerome Catlin. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

Relfe & McCutcheon, for appellant. Will H. Thompson, Edward P. Edsen, John E. Humphries, J. T. Ronald, and Samuel H. Piles, for respondents.

DUNBAR, J. The respondents brought suit against the appellant for attaching the property of the respondents, which attachment suit was dissolved by the superior court of King county. The jury in this action found that the respondents had been damaged, by reason of the proceedings in the attachment suit, in the sum of \$1,200. On the

overruling of the motion for a new trial, and the entry of judgment on the verdict, the appellant appealed to this court.

The first argument of the appellant is that the court erred in giving the jury the sixth instruction asked by the plaintiffs, and in not giving certain instructions asked by the defendant. It is claimed by the respondents that the record in this case does not show that there was any instruction marked "No. 6," the exception of the appellant being: "I desire to save an exception to the refusal of the court to give the third and fourth instructions asked for by the defendant; also, to the instructions given by the court, marked number 6 and 7, given by the court." The record fails to show any numbering of the instructions, by paragraph or otherwise, and in the record proper there are no instructions whatever asked for by the defendant. After the filing of the original record, however, a supplemental record was brought up by the appellant, certified to by the clerk, showing that the instructions had actually been numbered, and in the supplemental record the instructions asked for by the defendant are incorporated. Under section 15, p. 117, of the Laws of 1893, we think it becomes the duty of this court to take cognizance of this supplemental record; but, considering the exception properly taken, we think the instruction No. 6 complained of states the law. The instruction was as follows: "I instruct you that if you find from a preponderance of the evidence that the plaintiffs had sold their hops to a purchaser before they were attached, and such purchaser was to pay twenty cents per pound for said hops, or for a portion of them, and would have so purchased and paid for them if they had not been so attached, and that, by reason of such attachment, the plaintiffs lost the benefit of such sale, and were afterwards unable by diligence to sell said hops for as much as such purchaser would have paid, then it does not matter what the actual market value of such hops were at the time of such attachment. The plaintiffs were entitled to the benefit of the sale they had made." It is contended that this instruction misled the jury as to the true measure of damages, and that it was inconsistent with the other instructions given. It certainly stated the true measure of damages, for, while the market value is the value which is to be determined, in the absence of a sale, yet the value is the fundamental rule, and the market price is only one of the evidences of this value; and the value as between plaintiffs and defendant may, according to circumstances, be higher or lower than the market. 2 Sedg. Dam. § 433. It is the duty of the party taking the property of another to make reparation to the party who turns out ultimately to be injured, by placing him, as to the property, in the same situation in which he was before the trespass was committed. As was said by the court in *Conard v. Nicoll*, 4 Pet. 291,

the jury should give the plaintiff such damages as he had proved himself to be justly entitled to on account of any actual injury he had proved, to their satisfaction, he had sustained by the seizure and detention of the property levied on. We do not think there is any controversy in the law on this subject, and it is evident that in this case, if the plaintiffs had sold their hops for 20 cents a pound, that, as to them, was the actual value of the hops; and it made no difference to them what the market value might be. This instruction, of course, was based on the supposition that the jury should find that the hops had actually been sold for that price. We are not able to see that it conflicts with any other instruction given.

The third and fourth instructions asked by the defendant were rightly refused by the court. The court had already, in substance, instructed the jury that in this action the burden of proof was upon the plaintiffs to show by a preponderance of the evidence that at the time the writ of attachment was sued out by Catlin there was no just or reasonable cause for the same, and that Catlin had no reasonable or probable cause at the time to believe that Curry was about to dispose of his property with intent to defraud his creditors, and that, unless the jury found from the evidence that no such reasonable or probable cause existed, they should find for the defendant. This is as far as the instruction should have gone, and substantially states what was asked for in defendant's request No. 4.

This case is principally a case of facts, rather than of law. The facts were bitterly contested, and the evidence is painfully conflicting; but, the issues, so far as the facts were concerned, having been determined by the jury, under proper instructions by the court, such determinations will not be disturbed by this court. The judgment will therefore be affirmed.

HOYT, C. J., and ANDERS, GORDON, and SCOTT, JJ., concur.

(12 Wash. 335)

McQUESTEN v. MORRILL et al.

(Supreme Court of Washington. July 17, 1895.)

APPEAL—STATEMENT—EXTENSION OF TIME TO SERVE—FORECLOSURE OF LOGGING LIEN—SUFFICIENCY OF COMPLAINT—TIME TO COMMENCE SUIT.

1. One who takes steps to appeal from a judgment cannot claim, that, because of respondent's failure to serve notice of the entering of the judgment, the time to appeal had not commenced to run, within Laws 1893, p. 116, § 13, providing that a statement on appeal must be filed within 30 days after the time begins to run within which an appeal may be taken.

2. Laws 1893, p. 116, § 13, provides that a statement on appeal must be filed within 30 days after the time begins to run within which an appeal may be taken; and that the time may be enlarged, but not for more than 60 days additional, by an order on notice to the adverse

party. *Held* that, where appellant's motion for an extension of time to file a statement could not be heard because of the absence of the judge, and, on the judge's return, a month remained of the 60 days for which the court could grant an extension, it was error to grant an extension on an *ex parte* application.

3. A complaint to foreclose liens on logs, which alleges that defendant has an interest in the logs, without specifying it, is good on general demurrer.

4. Laws 1893, p. 428, provides that a suit to enforce a logging lien must be brought within 8 months after the lien is filed, and repeals all acts inconsistent with it. Under the former law, a lienor had 12 months after filing his lien within which to sue. *Held* that, where a lien was filed before the new act went into effect, and, when the act took effect, the lienor had 6 of the 8 months provided in the act left to commence suit, the time within which he could sue was governed by the new act.

5. A party cannot tax costs for fees for the preparation and service of pleadings by a private individual.

Appeal from superior court, Snohomish county; John O. Denney, Judge.

Action by W. F. McQuesten against George Morrill and others to foreclose logging liens and two chattel mortgages. Judgment was rendered for plaintiff, and defendant Morrill appeals. Judgment modified.

James Klefer, for appellant. Coleman & Hart and Bell & Austin, for respondent.

SCOTT, J. Preceding the argument upon the merits, a motion was made to strike the statement of facts on the ground that the law had not been complied with as to the time of its filing. The decree was rendered on the 31st of May, 1894. Appellant served notice on respondent that he would apply on June 27th for an extension of time within which to file and serve the statement of facts, but the matter was not heard at this time, on account of the absence of the judge before whom the case was tried. Thereafter, on July 30th, upon the application of appellant, the court made an order extending the time for the filing and service of the statement of facts to the 15th day of August. No notice of this application had been served upon respondent, and he was not present at the hearing. The statute (section 13, p. 116, Laws 1893) provides that the statement must be filed within 30 days after the time begins to run within which an appeal may be taken, and it contains the following provision: "Provided, that the time herein prescribed may be enlarged either before or after its expiration, once or more, but not for more than sixty days additional in all, by stipulation of the parties, or, for good cause shown and on such terms as may be just, by an order of the court or judge wherein or before whom the cause is pending or was tried, made on notice to the adverse party. And the certifying of a bill of exceptions or statement of facts provided for by this act, and the filing and service of the proposed bill or statement, the notice of application for the settlement thereof, and all other steps and proceedings leading up to the making of the certificate, shall be

deemed steps and proceedings in the cause itself, resting upon the jurisdiction originally acquired by the court in the cause, and no irregularity or failure to pursue the steps prescribed by this act on the part of any party, or the judge, shall affect the jurisdiction of the judge to settle or certify a proper bill of exceptions or statement of facts." It is first contended by appellant that his time within which to serve and file the statement had not commenced to run, in consequence of the failure upon the part of respondent to serve notice upon him of the entering of the judgment; but we do not think that this objection is tenable, because appellant took notice of the rendition and entering of the judgment when he sought to appeal therefrom, and instituted proceedings to that end. Appellant further contends that the specific requirements of the first part of the section, relating to the time within which the statement must be filed, and to the time and manner of its extension upon notice to the adverse party, etc., must be held to be directory only, in view of the remainder of the section. The language of the section in these particulars is contradictory. The first requirements, with reference to the manner of the extension of the time, and service of notice upon the respondent of the application therefor, are specific and certain, and no stronger language could well be employed were it the intention of the legislature to make these provisions mandatory. The remainder of the section, however, expressly provides that no failure to pursue any of the steps pointed out with reference to the filing, service, and settlement of the statement of facts shall prevent the court from settling and certifying a proper statement; and the question to be determined is, what was the real intention of the legislature in enacting this law? It seems to us that it lies between the two provisions, or, in other words, that the appellant must serve upon the respondent notice of the application for an extension of time for filing and serving a statement of facts, unless he can show good and valid reasons for not having done so; but if, upon the other hand, the appellant should be prevented, through no fault of his own, from serving such notice, and had diligently and in good faith sought to prosecute his appeal, and to comply with the requirements of the law, he should not be deprived of the benefit of a fair and proper statement of the facts, in consequence of a want of authority on the part of the judge to settle the same within the time specified for which an extension could have been granted upon notice to the adverse party, because the appellant was prevented, by some circumstance over which he had no control, from giving such notice. It is certainly in accord with the best system of practice that important steps in a litigated cause should not be taken *ex parte*, and a statement of the material facts upon which a cause was tried, to be used upon an appeal, is a most important matter. Incidentally, it

may be well to notice, in this connection, that the legislature, in enacting this section, seems to have provided that there cannot be an extension of this time for more than 60 days, either by a stipulation of the parties or by an order of the court. This provision might not preclude an extension of the time beyond such period of 60 days upon the joint action or consent of the parties and the court, but it seems to vest the right in both the adverse party and the court to prevent an extension beyond said period. It is desirable that the facts should be settled as speedily as possible, while they are fresh in the minds of the judge and the parties, and this is a good reason for fixing an arbitrary time beyond which either the adverse party or the court can prevent an extension. In this instance, we do not think a sufficient excuse was shown by appellant for not having served a notice on the respondent of the time when the application for the extension was heard. It appears that, on the return of the judge, a month remained of the 60 days for which an extension could have been granted by the court. The statute expressly provides that the time may be extended after the expiration of the original 30 days provided by the statute. Certainly the appellant had ample time within this month to serve notice on the respondent that he would apply within said period for an extension of the time for filing a statement, and the respondent had a right to be heard upon this proposition. The intention of the law is evidently, under this statute, that parties shall diligently prosecute their appeals, and there should be no extension of the time for a settlement of the facts upon which the appeal is to be based, in whole or in part, unless good cause is shown therefor; and this showing should not be made upon an ex parte application or hearing if notice can reasonably be given. In view of the foregoing, the motion to strike the statement of facts must be granted.

Certain questions, based upon the pleadings and record, remaining, are, however, to be determined. The action was brought to foreclose a number of liens upon several lots or quantities of logs for labor performed by various persons, which claims had been assigned to the plaintiff, and also to foreclose two chattel mortgages upon the logs in question. It did not appear that each lien covered all of the logs, and it was contended by appellant that there was a misjoinder of the causes of action. Without going into the details of the argument urged in this particular, it is sufficient to say the complaint alleged that appellant had some interest in the logs upon which the various liens were claimed. Although his interest was not specifically set forth, we are of the opinion that this allegation was sufficient as against appellant's general demurrer. The fair import of it was that appellant claimed some interest in all the logs in controversy. It transpired upon the trial that he was the purchaser of

said logs, and, while this of itself did not appear by the complaint, we are of the opinion that it was fairly included therein; and, if appellant sought to raise any question as to the sufficiency of the complaint in this particular, he should have moved to make the same more definite and certain. If appellant had an interest in all the logs against which the various liens and the mortgages were sought to be foreclosed, and all the causes of action so joined affected him, he will not be heard to raise the question of a misjoinder, if there was any, as against the other defendants.

Another question raised by appellant relates to the causes of action pleaded in the complaint, commencing with the seventh and ending with the fourteenth. It is insisted that, as to these causes of action, the suit was not commenced in time, and appellant demurred thereto upon that ground. These causes of action relate to the lien claims of Fred Shoenfeldt, Philip McDonald, Robert Logan, J. W. Atkinson, William Sanders, William Dorey, and John O'Neill, and were for the foreclosure of liens, notices of which were filed prior to the passage of the act of March 15, 1893 (Laws 1893, p. 428), which went into effect June 7, 1893, and was a general law covering the entire subject, and expressly repealed all prior inconsistent laws. This action was commenced in December, 1893, and more than 8 months had elapsed since the filing of these lien notices, and more than 8 months since the passage and approval of the act in question. Under the law in force at the time the lien notices were filed, the lien claimants had 12 months within which to commence suit to enforce the same. Under the new law, the period within which actions could be commenced was limited to 8 months. Respondent claims that the provision of the old law as to the time of the commencement of actions to foreclose should govern as to notices filed prior to the taking effect of the new law, which had no emergency clause. Appellant contends that the later act should govern. There has been no determination of this particular question in this state, and the material inquiry is whether the provision as to the time of commencing suit relates to the remedy or to the right. *Garneau v. Mill Co.*, 8 Wash. 467, 36 Pac. 463. Any matter relating to the right of such liens could not be abridged by the legislature; but anything relating to the manner of enforcing such right or the remedy might be abridged. In this case the lien claimants had the full period of 8 months—the time prescribed in the new act after its passage—within which to commence their actions, and more than 6 months from the time it took effect within which to begin them. We are constrained to hold, under the weight of the authorities cited, that the time provided for the commencement of actions related to the remedy only, and, consequently, might be abridged by subsequent legislation; and the

question is not whether the parties had the full time within which to commence their actions, as prescribed by the subsequent act, after it took effect, but whether they had a reasonable time within which to commence them. Of course, there can be no question as to there having been a reasonable time after the passage of the new law in this instance; and, as to these causes of action, suit was not commenced in time, and they were barred. *Forcht v. Short*, 45 Mo. 377; *Smith v. Packard*, 12 Wis. 371; *Gibbs v. Peck*, 77 Pa. St. 86; *McCrea v. Craig*, 23 Cal. 522; *Acker v. Acker*, 81 N. Y. 143; *Slocum v. Fayette Co.*, 61 Iowa, 169, 16 N. W. 61; *Phil. Mech. Liens* (3d Ed.) § 24; *End. Interp. St.* § 284, etc.

A further question relates to the costs allowed below. The court permitted the taxation of certain fees for preparing and serving copies of the pleadings by a private individual. Appellant objected thereto. The allowance of these items was conceded to be erroneous upon the oral argument of the cause here, under a decision of this court which was not published at the time of the trial. *Creighton v. Cole*, 10 Wash. 472, 33 Pac. 1007.

The judgment will be reversed as to the causes of action aforesaid from the seventh to the fourteenth, inclusive. It will be affirmed as to the other causes of action set forth, but modified, as to the costs taxed, by striking the items of \$15 and \$40.60, allowed the plaintiff for preparing and serving copies of the pleadings. Remanded accordingly.

DUNBAR, ANDERS, and GORDON, JJ., concur. HOYT, C. J., not sitting.

(12 Wash. 358)

NEIS v. O'BRIEN.¹

(Supreme Court of Washington. July 20, 1895.)

SALE—REFUSAL OF PURCHASER TO ACCEPT—RIGHTS OF PARTIES.

Plaintiff contracted to purchase a certain quantity of hops, to be grown by defendant, and made two payments before the time of delivery, as required by the contract, but, without excuse, refused to accept the hops and pay the balance, as agreed, whereupon defendant sold them, receiving therefor more than was due from plaintiff on the contract. *Held*, that the plaintiff could not recover any of the excess received by defendant over the balance due by plaintiff on his contract. Hoyt, C. J., dissenting.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Philip Neis, trading under the firm name of Phil Neis & Co., against Morgan O'Brien. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Strudwick & Peters, for appellant. S. H. Piles and Stratton, Lewis & Gilman, for respondent.

GORDON, J. Respondent's demurrer to the complaint in this case having been sus-

tained in the court below, and appellant electing to stand upon his complaint, and refusing to plead over, judgment of dismissal was entered, from which judgment and order sustaining the demurrer this appeal is taken. Briefly stated, the complaint shows the following facts: On the 23d day of June, 1891, the parties hereto entered into a written contract, whereby the respondent agreed to grow on his farm in King county, in the year 1891, 20,000 pounds of hops of a specified quality, and to deliver them to the appellant, at a place designated in the contract, on or before the 31st day of October, in that year. Upon his part appellant agreed to pay respondent 17 cents per pound for such hops, as follows: 4 cents per pound, or \$800, at the time of the execution of the contract; 4 cents per pound, or \$800, on the 1st day of September, 1891 (both of which payments he made); and the balance, or 9 cents per pound, upon the delivery of the hops. The respondent complied with this contract in every particular, and, at the time and place fixed by the contract, tendered the hops to the appellant, who thereupon refused to receive them or to pay the balance of the purchase price. Thereafter, respondent resold said hops, for 13½ cents per pound, whereupon appellant brought this suit to recover the sum of \$950, the amount remaining in the hands of the respondent after reimbursing himself for the difference in price between the contract price and the price at which the hops were sold. Appellant does not claim that the respondent did not keep the contract in every particular. He makes no claim that the hops tendered were not of the amount, kind, and quality called for by the contract, or that they were not timely tendered at the place required by the contract. He alleges, however, that he refused to receive the hops from the respondent "in good faith believing the said hops not to be of the quality and description mentioned in said contract, and believing that he had the right so to do."

The single legal proposition involved in this case is too well settled to warrant extended discussion. It was not the fault of the respondent that this contract was not fulfilled, but wholly the fault of the appellant. The respondent offered to perform all that the contract required of him; but the appellant, having made part performance, stopped short, and refused to proceed to the completion of the contract. Under such circumstances, it would, we think, be contrary to public policy to permit him to maintain this action. The sum which he seeks to recover was paid by him in part performance of the contract, and would have inured to his benefit but for his subsequent default. To permit the appellant to recover, under the circumstances of this case, we think, would be to establish a dangerous precedent, and, in the language of the supreme court of Ohio, in *Witherow v. Witherow*, 16 Ohio, 238;

¹ Rehearing pending.

"The establishment of such a principle would have a tendency to encourage the violation of contracts,—to diminish, in the minds of contracting parties, a sense of the obligation which rests upon them to perform their agreements. Any principle which would have such an effect ought not to be recognized as sound law. It is the duty of courts to enforce the performance of contracts,—not to encourage their violation." In *Hansbrough v. Peck*, 5 Wall. 497, the court say: "No rule in respect to the contract is better settled than this: that the party who has advanced money, or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done." See, also, *Hapgood v. Shaw*, 105 Mass. 276; *Dula v. Cowles*, 75 Am. Dec. 463; *Pierce v. Jarnagin*, 57 Miss. 107; *Leonard v. Morgan*, 6 Gray, 412.

The reason assigned by appellant for refusing to receive the hops furnishes no sufficient excuse in law for his abandonment of the contract. The "quality and description" of the hops could have been determined by inspection, which it was his privilege to make, but which he neglected to avail himself of. Nor was the respondent required to retain the property after appellant's refusal to accept it in accordance with the contract. It was his right to sell the property to another. *Ketchum v. Evertson*, 13 Johns. 358; *McKinney v. Harvie* (Minn.) 35 N. W. 668. The judgment appealed from will be affirmed.

ANDERS and DUNBAR, JJ., concur.
HOYT, C. J., dissents.

MOYER v. VAN DE VANTER.

(Supreme Court of Washington. July 23, 1895.)
ELECTIONS AND VOTERS—FAILURE TO STAMP BALLOT—INDORSEMENT BY JUDGE—CONSTITUTIONALITY OF ACT.

1. An exception "to these findings of fact and conclusions of law, and to each of them," is too general.

2. Under Gen. St. §§ 382-384, which provide that there shall be printed on the back of ballots, with a rubber or other stamp, provided for that purpose, the designation "official ballot," it is immaterial whether the ballot is stamped before or after it is marked by the voter.

3. Gen. St. § 39, providing that any ballot not bearing the initials of an inspector or a judge of election shall not be counted, is in conflict with Const. art. 6, §§ 1, 6, which provide that all persons possessing the requisite qualifications shall be entitled to vote at all elections, and that all elections shall be by ballot.

Appeal from superior court, King county;
J. W. Langley, Judge.

Proceeding by William H. Moyer against Aaron T. Van de Vanter to contest the title

to the office of sheriff of King county. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

Winsor, Bush & Morris, John B. Hart, and White & Munday, for appellant. Brady, Gay & McBride, Andrew F. Burleigh, and Struve, Allen, Hughes & McMicken, for respondent.

SCOTT, J. The parties hereto were rival candidates at the last general election for the office of sheriff of King county. The county canvassing board found that respondent was entitled to the office, and declared him elected thereto, whereupon a certificate of election was issued to him. Within a few days thereafter, appellant filed a statement of contest, alleging matters to show that he had received the greatest number of legal votes and was entitled to the office. Issue was taken by the respondent upon certain of the material matters alleged, and a trial was had, which resulted in favor of the respondent, and this appeal was taken therefrom. A number of findings of fact were made by the lower court, which, with certain conclusions of law based thereon, were duly reduced to writing and made a part of the case. Whereupon appellant excepted as follows: "To these findings of fact and conclusions of law, and to each of them, the contestant excepts." An objection was made by the respondent to a consideration of any of the evidence introduced, or errors alleged with reference thereto, on the ground that no sufficient exception was taken to any fact found by the lower court; and, under repeated holdings of this court heretofore, this objection must be sustained. As a consequence thereof, the case presented upon appeal is much abbreviated; many of the questions sought to be raised by the appellant are eliminated; and the only question left for our consideration is whether the facts so found by the lower court are antagonistic to the conclusions of law and judgment. Appellant's main contention in this respect is based upon the seventh finding, which is as follows: "I find that in Franklin precinct there were 194 votes cast and counted for Aaron T. Van de Vanter, the defendant and contestee, and 17 votes for William H. Moyer, the plaintiff and contestant, for said office of sheriff, which said votes entered into and formed a part of the total legal votes hereinbefore found by me to be cast for each of the said contestant and contestee, to wit: on the part of Van de Vanter, entered into and made a part of the 4,380 votes so counted; on the part of Moyer, entered into and became a part of the 4,373 so counted for him. I further find that the election officers of Franklin precinct failed to place upon any of said ballots the initials of the inspector or any judge thereof before the said ballot was deposited in the ballot box. And I further find that a blank ballot was given to each and every elector,

without either the official stamp or the initials of an election officer thereon; and said elector took said ballot, and the same was marked by said elector and returned by him to the election officers, when, in the presence of the elector, the inspector of said election placed upon said ballot the official stamp, furnished for that purpose by the county auditor, in pursuance of law, after which the said ballot was folded and placed within the ballot box, wherein it was kept until, at the time of the counting by the election officers, and at the close of the polls, all of the ballots of said precinct were counted, and returned, in a sealed box, by a special messenger, to the county auditor, in the manner directed by law. I further find, from the evidence and stipulations in this case, that the ballots voted by the electors, in each and every instance, were placed in the said box, and that the said ballots had been safely kept, and was produced into this court as an original exhibit, as evidence of the said recount. I further find that the election officers of Franklin precinct were in close and watchful attendance at the polls and of the ballot box and ballots during the entire election; that no ballots were used except those received from the election judges, or taken under their direction; that the election was held in an orderly manner; that the votes were counted and returned to the county auditor as required by law; and that the vote so returned were the votes actually cast at Franklin precinct at said election." The important question to be determined is whether the vote cast in this precinct could be counted, the initials of no one of the election officers having been written on any of the ballots. The law provides that there shall be printed on the back of the ballots, with the rubber or other stamp provided for that purpose, the designation "official ballot," the name or number of the election precinct, the name of the county, the date of the election, the name and official designation of the clerk who furnishes the tickets to the judges of election, and that the inspector or one of the judges shall also write his initials thereon. Gen. St. §§ 382, 384. The ballots bore the proper stamp, and the fact that it was not placed thereon before they were delivered to the electors, but was done when they were returned to be deposited in the ballot box, was but an irregularity which could not vitiate them in the absence of any fraud. Section 391 is as follows: "In the canvass of the votes, any ballot which is not indorsed, as provided in this chapter, by the official stamp and initials shall be void, and shall not be counted, and any ballot or parts of a ballot from which it is impossible to determine the elector's choice shall be void, and shall not be counted; provided that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, it shall be the duty of the judges of election to count such part."

If the language of this section can be given its full force, all the ballots cast in this precinct were rendered void by the failure of the election officers to comply therewith, in not having one of their number write his initials thereon; and the effect of it would be to disfranchise all voters in that precinct for that election. The constitution (section 1, art. 6) provides that all male persons of the age of 21 years or over, possessing certain qualifications specified, "shall be entitled to vote at all elections"; and section 6 reads as follows: "All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot." Can the legislature enact a law whereby election officers can practically disfranchise all the electors of a precinct, where the electors themselves are not at fault? If so, the constitutional guaranty is of small consequence. Legislation going to promote the honesty of elections is most beneficial in character, and as a means of securing this end the general policy of the law is that the ballot shall be a secret one, that it may not be known for which candidate any particular voter voted, in order that bribery may be prevented. Provision is also made as to the duties of election officers, to the end that a fraudulent canvass of the votes cast may be prevented. There is good ground for recognizing a distinction between the obligations placed upon the individual voter and those matters which relate to the duties of election officers. Great care should be taken to distinguish between those requirements designed to prevent fraud, and which are necessary to the purity of elections, and those which, while designed for the same purpose, are not essential thereto, or we may overreach the salutary effect sought to be obtained from provisions of the character first mentioned, by going so far, in construing as valid and mandatory provisions of the second class, as to open the very door to fraud that was sought to be closed thereby. The individual voter may well be called upon to see that the requirements of the law applying to himself are complied with before casting his ballot; and, if he should willfully or carelessly violate the same, there would be no hardship or injustice in depriving him of his vote; but if, on the other hand, he should in good faith comply with the law, upon his part, it would be a great hardship were he deprived of his ballot through some fault or mistake of an election officer in failing to comply with a provision of the law over which the voter had no control. It is also a question in which the public has a direct and important interest; for the loss of such vote may have a controlling effect upon a public matter. The constitutional provision aforesaid guarantees the right to vote, and this, of necessity, carries with it the right to have the vote counted. Of course, the manner of voting

and canvassing votes must be subject to all reasonable legislative requirements. Many cases have been cited by counsel as supporting the positions taken by them, respectively, and many of these involve a consideration of various phases of the law commonly known as the "Australian Ballot Law," in force here, but which is a comparatively new thing in this country. These cases cannot all be harmonized, but the general trend thereof has been to recognize a clear distinction between those things required of the individual voter and those imposed upon election officers. There is a disposition to hold the former valid and mandatory; but, where there has been a substantial compliance with the law on the part of the individual voter, and it is made to appear that there has been in fact an honest expression of the popular will, there is a well-defined tendency to sustain the same, although there may have been a failure to comply with some of the specific provisions of the law upon the part of the election officers, or some of them. Language may have been employed in some of the cases in conflict with this position; but, when such cases are examined with reference to the specific facts decided, it will appear that this distinction has been adhered to, and it may truly be said to be the one great underlying principle of all the cases. In case of a violation of the law on the part of an election officer, punishment may be provided therefor, and in this way the law can be rendered effectual without going to the extent of depriving the voter of his right to have his vote counted, in consequence of such violation. In this connection, it may be well to note that, while there is a punishment provided for depositing an unstamped ballot in the ballot box by an election officer, there is none provided for failing to write his initials thereon. Section 389, Gen. St., is as follows: "No inspector or judge of election shall deposit in any ballot box any ballot upon which the official stamp as hereinbefore provided for does not appear. Every person violating the provisions of this section shall be deemed guilty of a misdemeanor." He can deposit a ballot properly stamped, but without the initials, without incurring any penal liability. This may be an omission due to inadvertence upon the part of the lawmakers; but it is the law, nevertheless; and, if a ballot so deposited cannot be counted, a door is open whereby great frauds may be committed with impunity, the voters of an entire precinct, as in this case, practically disfranchised, and the popular will nullified. It appears, from the facts found, that the vote of this precinct was honestly and fairly cast and counted, and that there was nothing upon the face of the ballots to indicate how any particular voter voted, and that the objections raised thereto apply to all the ballots cast for each of the candidates. The failure to comply with the law appears to

have been due to ignorance of its provisions on the part of the election officers. That the prohibition aforesaid against the counting of these votes, under the above circumstances, is an unreasonable one, and in conflict with the right guaranteed by the constitution, seems to us a clear proposition. Were we authorized to hold otherwise, such a holding would be subversive of the best interests of society, and might result in great peril to our governmental structure. Such a holding is not necessary to preserve the purity of elections; for provision can be made for an investigation of charges of actual fraud upon the part of electors and election officers. It would be an interminable task to refer to each of the cases cited in detail, and we content ourselves with giving our conclusions drawn from all of them. No decision cited has gone to the extent that we are asked to go by the appellant in this case; and, to accord with the general holdings of the courts, as we understand them, in the light of what has actually been decided in the cases, we are compelled to hold that the provision aforesaid against counting ballots where no initials are placed thereon cannot be sustained, and the decision of that question sets this controversy at rest. The finding in question by the lower court supports the conclusions of law based thereon, and the judgment rendered. The fact that the election officers failed to have booths erected which complied with the law, found in the eighth finding, was also but an irregularity which would not vitiate the election. None of the other questions raised by appellant, in the present aspect of the case, are material to this controversy, as they relate to defects in particular votes cast in the various precincts and included in the other findings; and, in case any of these votes were improperly counted, the court in each instance found a greater number were counted for the appellant than for the respondent, and the findings must be accepted as a whole. It follows that the judgment must be affirmed.

HOYT, C. J., and ANDERS, DUNBAR, and GORDON, JJ., concur.

McLAUGHLIN v. BARNES.

(Supreme Court of Washington. July 23, 1895.)

DECEDENT'S ESTATE—PAYMENT TO DISTRIBUTOR—SET-OFF BY EXECUTOR—PERSONAL CLAIM.

1. An administrator cannot set off a personal claim against a distributee against her distributive share, which he has been directed by the court to pay her.

2. Nor can he, by assigning such claim after the decree of distribution, prevent the court from compelling him to pay to the distributee her share, on the ground that he has been garnished in a suit by the assignee against the distributee on the claim assigned.

Hoyt, C. J., dissenting.

Appeal from superior court, King county; T. J. Humes, Judge.

Appeal by John G. Barnes, administrator, in the matter of the estate of Hiram C. McLaughlin, from an order directing the payment to Bertha F. McLaughlin of the balance of her distributive share in the estate. Affirmed.

John G. Barnes, in pro. per. Greene & Turner, for respondent.

GORDON, J. Appellant is administrator of the estate of Hiram C. McLaughlin, deceased. As such administrator, he presented his final account to the superior court of King county for settlement and allowance, from which account it appeared that there was chargeable to him, and then in his hands as such administrator, ready to be distributed to the respondent, the sum of \$1,554.56, and, pursuant to his petition in that behalf, said court, on the 7th day of September, 1894, made and entered a final decree of distribution. Thereafter appellant paid to respondent's order the sum of \$1,054.56, retaining and refusing upon demand to pay the balance of \$500. On the 20th day of October, 1894, respondent applied to the court for an order directing the administrator forthwith to turn over said balance. A copy of said application and the affidavit upon which it was based were, on the same day, served upon appellant, and came on for hearing before the court on the 26th day of October, 1894, at which time the appellant submitted his affidavit, which set forth, as a reason for withholding and refusing to pay over said balance, "that the said Bertha F. McLaughlin was indebted to [appellant] in said sum of \$500, for and on account of legal services performed by [appellant] for said Bertha McLaughlin, at her request, as her attorney and counselor, which services were performed by [appellant] for said Bertha F. McLaughlin, independent of his administration of said estate, and before he was appointed administrator or became administrator thereof; that on the 24th of October, 1894, he duly assigned, transferred, and set over to one E. B. Palmer his claim against said Bertha McLaughlin for said sum of \$500 for services as aforesaid; that on the 25th day of October, 1894, the said sum of \$500 in his hands as aforesaid was duly and regularly lawfully levied upon and attached by the sheriff of King county, state of Washington, in a suit at law upon said assigned claim in the superior court of the state of Washington, for King county, wherein the said Palmer is plaintiff and the said Bertha F. McLaughlin is defendant." Findings of fact were duly made by the court, and an order entered directing the appellant to pay said sum of \$500 to the respondent within 10 days from the date thereof. This appeal is from said order.

The first contention of the appellant is that the decree of distribution of date September

7, 1894, changed the liability of the administrator to the distributee from "an official to a personal one"; that after the entry of the decree of distribution the relationship existing between the administrator and the respondent, as to the money and property distributed, was that of debtor and creditor, and that respondent had a right to bring her action to recover from the administrator the property distributed to her, and against such a demand the administrator might set off the debt due him from respondent. Conceding the right of respondent, as distributee, to maintain an action of the character suggested by appellant, it was not, we think, the only remedy which the law afforded her. A decree of distribution has, "in most respects, all the efficacy of a judgment at law," and can be enforced by proceedings for contempt. *Melone v. Davis*, 67 Cal. 279, 7 Pac. 703; *Wheeler v. Bolton*, 54 Cal. 302. The decree of distribution did not operate to relieve the appellant of his trust, nor could his final discharge be effected while the duty remained, undischarged, of turning over, as administrator, the funds in his hands for distribution; and the court having jurisdiction of the administration of said estate has ample authority to compel the discharge of said duty, without requiring the distributee to resort to another forum.

It is next contended that the assignment by appellant of his claim against respondent was perfectly legal and proper; that as to that claim "no relationship whatsoever existed between respondent and appellant, excepting that of an attorney who had performed services, and a client who seeks to avoid payment therefor." As has been noticed, appellant's claim to compensation is for services rendered prior to his appointment as administrator. An administrator cannot be permitted to juggle with funds belonging to a distributee, nor avail himself of his trust relationship to secure a personal advantage in the collection of a claim against his cestui que trust; and what the law, from considerations of public policy, will not permit him to do by direct means, cannot be accomplished by indirection, through the medium of an assignee under an assignment, which, we think, is properly characterized by respondent's counsel as "merely colorable, and made to forestall an order to pay over the moneys withheld." In presenting his account, as administrator, to the court, for settlement, he made no claim or reference to the private controversy existing between himself and the respondent, probably for the very obvious reason that it in no wise concerned the administration of the estate, and was a matter which could not be adjudicated by a court of probate. *Hancock v. Hubbard*, 19 Pick. 167; *Procter v. Newhall*, 17 Mass. 81. It would be productive of infinite confusion and disaster to permit the settlement of estates to be hampered and delayed, pending the determination of such extraneous

matters. Whether funds which have been ordered distributed, but are still in the possession of an administrator, can be garnished, is a question not necessary for decision in the present case.

The judgment will be affirmed.

ANDERS and DUNBAR, JJ., concur.

HOYT, C. J. (dissenting). If the funds in the hands of the administrator were subject to garnishment (as to which I express no opinion), the proceedings set up in the affidavit were in my opinion sufficient to justify the administrator in refusing to pay over the money sought to be garnished, until the regularity of the garnishee proceedings had been determined in the action in which they were instituted.

PERU PLOW & WHEEL CO. v. WARD.

(Court of Appeals of Kansas, Northern Department, C. D. July 6, 1895.)

RELEASE OF SURETY—MODIFICATION OF TERMS.

1. A surety has a right to stand upon the very terms of his contract, and if a material variation is made therein without his assent, he is discharged.

2. One who becomes security for the payment of a debt evidenced by three notes, due, respectively, in one, two, and three years, is released from liability if, without his assent, the principals on the notes and the creditor payee agree, upon sufficient consideration, that upon the failure to pay either of said notes, they all shall become due and payable, and if, pursuant to such agreement, an action is brought within two years against the principals and the surety on the three notes.

(Syllabus by the Court.)

Error from district court, Republic county; F. W. Sturges, Judge.

Action by the Peru Plow & Wheel Company against R. B. Ward. Judgment for defendant. Plaintiff brings error. Affirmed.

Noble & Hugin, for plaintiff in error. Van Natta & Close, for defendant in error.

GARVER, J. Under date of February 1, 1887, R. B. Ward became security for M. W. Ward and Thomas Ward for the payment of an indebtedness of \$1,654.38, to the Peru Plow & Wheel Company, and as security signed three notes for \$531.46 each, due and payable, unconditionally, in one, two, and three years, respectively, after date. As additional security, and before accepting said notes, said company demanded and received from M. W. Ward a mortgage on certain real estate in the town of Scandia, the mortgage stating that it was given to secure said notes, and also containing the condition: "If said sum or sums of money, or any part thereof, or any interest thereon, is not paid when the same is due; and if the taxes and assessments aforesaid [taxes and assessments levied upon said real estate] are not paid when the same are by law made due and payable, then, and upon default of these

provisions and covenants, or any or either of them, the whole of said sum and sums, and interest thereon, shall by these presents become due and payable." The surety did not assent to this change of the contract, and defends on that ground. This presents the single question: Do the conditions of the mortgage effect such a change of the contract as will release the surety? We think they do. By the terms of the notes, neither the principals nor the surety could be called upon for payment of the second and third notes in less than two and three years, respectively, from their dates. By the terms of the mortgage, the failure to pay the first note when due, or the failure to pay the taxes which might be assessed against the mortgaged property, caused all three notes to become at once due and payable. *Stancil v. Norton*, 11 Kan. 218. Even though it might be said that such would not be the legal effect of the contract contained in the mortgage as to the surety, he not being a party thereto, yet it would be placing upon him an obligation materially different from that which he voluntarily assumed. His contract was to pay the several sums mentioned in the notes, if the principals failed to pay the same according to their express terms. He became surety upon the express agreement that the principals had three years within which to discharge this indebtedness, and not that they might be called upon for the whole amount in one year. Here is a marked and material change of the contract. A surety may stand upon the very terms of the contract which he voluntarily entered into, and other parties to such contract cannot change or vary its terms in any material particular without his consent. If they do so, the surety may allege and prove such fact, and upon it claim his discharge. As said by Mr. Justice Story in *Miller v. Stewart*, 9 Wheat. 681: "The liability of a surety is not to be extended by implication beyond the terms of the contract. To the extent, and in the manner and under the circumstances, pointed out in the obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by the change in the contract, or that it may be for his benefit. He has the right to stand on the very terms of his contract; and, if he does not assent to any variation of it, and a variation is made, it is fatal." An agreement between the principal debtor and his creditor, without the assent of the surety, to extend the time of payment of the note, releases the surety. *Rose v. Williams*, 5 Kan. 483; *Jenness v. Cutler*, 12 Kan. 500; *Hubbard v. Ogden*, 22 Kan. 363. These decisions rest upon the principle that, if the surety is held under the changed contract, he is bound by an obligation different from that which he assumed; and it is this which controls the decisions of the courts in that class of cases, rather than that the extension of time is an injury to the surety by prevent-

ing him from taking prompt action against the principal for his indemnity. The same principle applies to a shortening of the time of credit. "When he [the surety] has agreed that his principal shall pay money, or perform any other contract, by a specified day, the change of time to a different day is not the agreement into which he entered; and to enforce its performance, would be to permit other and unauthorized persons to make for him a contract." *Flynn v. Mudd*, 27 Ill. 323. "If the surety is sued upon the old agreement, to which alone his undertaking was accessory, he has only to show that that has ceased to exist, and no longer binds his principal; and, if he is sued upon the substituted agreement, he is entitled, both in law and equity, to make the short and conclusive answer, 'Non hæc in fœdera veni.'" *Ide v. Churchill*, 14 Ohio St. 372; *Mayhew v. Boyd*, 5 Md. 102. The exact question involved in this case was considered, and thus commented on, in *Bacon v. Chesney*, 1 Starkie, 192: "The claim as against the surety is strictissimi juris, and it is incumbent on the party to whom the guaranty is given, and who is enforcing it against the surety, to show that he has strictly complied with the terms of the guaranty; and, therefore, if one engage to guaranty the debt of another, provided eighteen months' credit be given, the creditor is not at liberty to vary it by giving twelve months only, and, after the expiration of six more, to call upon the surety; but the surety in such a case would be discharged." The same principle applies to the facts of this case, with the same legal effect. As bearing further on the question, see: *Wright v. Johnson*, 8 Wend. 512; *Bank v. Mattingly*, 92 Ky. 650, 18 S. W. 940; *Mayhew v. Boyd*, 5 Md. 102; *Paine v. Jones*, 76 N. Y. 274; *Gower v. Holloway*, 13 Iowa, 154; *Coburn v. Webb*, 56 Ind. 96. Counsel for plaintiff in error claims that the evidence shows that the surety subsequently assented to the change of the contract. Any such question is disposed of by the findings of the court, on conflicting, and we think sufficient, testimony, and it is not now a subject for review by this court. The judgment will be affirmed. All the judges concurring.

(1 Kan. A. 18)

LIVERPOOL & LONDON & GLOBE INS. CO. v. HALL et al.

(Court of Appeals of Kansas, Northern Department, C. D. July 6, 1895.)

DEMURRER TO EVIDENCE—INSURANCE—APPRAISEMENT OF LOSS—DEFENSE TO POLICY.

1. A demurrer to the evidence of the plaintiff should be overruled when the evidence fairly tends to prove the allegations of the petition.

2. In an action to recover on a policy of fire insurance for a loss by fire, the failure on the part of the insured to comply with a demand, made in accordance with the conditions of the policy, by the insurer, for an appraisal of the amount of loss, must be alleged and proved as matter of defense.

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3. Where the right to demand such appraisal exists only "in the event of disagreement as to the amount of loss," the insurer, relying, for a defense to an action on the policy to recover for the loss, upon the failure of the insured to agree to an appraisal when one was demanded, must allege and prove that there was an actual disagreement as to the amount of the loss.

(Syllabus by the Court.)

Error from district court, Republic county; F. W. Sturges, Judge.

Action by M. E. and I. B. Hall against the Liverpool & London & Globe Insurance Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Quinton & Quinton, for plaintiff in error. Noble & Surface, for defendants in error.

GARVER, J. We are met at the threshold of this case by the defendants in error objecting that the record is not in such condition that the court can consider the errors complained of. The first objection is that there is no petition in error which the court can recognize, and that what purports to be an amended petition in error cannot cure defects in the first petition, because it was filed in the supreme court more than one year after the entering of the judgment sought to be reversed. The amendment to the original petition in error being as to a mere matter of form, it was permissible at any time before the hearing. *Coghall v. Spurry*, 47 Kan. 448, 28 Pac. 154. The objection to the manner in which exceptions were taken to the ruling of the court upon defendant's demurrer to the plaintiffs' evidence we will pass by, as the judgment must be affirmed upon another ground.

This was an action brought by the Halls upon a policy of insurance, issued by the defendant below, now plaintiff in error, insuring against loss or damage by fire, on a stock of goods owned by them in Republic county. The petition contains the usual allegations of the execution of the policy of insurance, the loss by fire of the property insured, the compliance on the part of the insured with the conditions of the policy as to notice and proofs of loss, the amount of the loss, and the failure on the part of the insurance company to pay. The policy attached to and made a part of the petition contained the condition: "In the event of disagreement as to the amount of loss," the same should be ascertained by three appraisers, to be selected in the manner provided by the policy, and the award in writing of any two of the appraisers should determine the amount of the loss; that the company should not be held to have waived any condition of the policy by any proceeding on its part relating to appraisers; and that the loss should not become payable, nor suit brought, until after the amount of loss had been determined by award of the appraisers, when appraisal had been required. The answer of the defendant consisted of a gener-

al denial of the allegations of plaintiffs' petition, specially admitting the execution of the policy and the fact of a loss by fire at the time alleged by plaintiffs, and the further defense that the insurance company served notice upon the insured of a demand for an appraisal of the amount of the loss, in accordance with the conditions of the policy, and that they refused to select appraisers or to act with the company in securing an appraisal.

The evidence introduced by the plaintiffs below tended to prove all the material allegations of the petition. It is contended by counsel for plaintiff in error that the evidence proved more than this; that it showed that they had refused the demand of the insurance company to appraise the amount of the loss; hence, as counsel says: "Nothing was due on the policy sued upon, or became due on the same, until after an award had been made by the appraisers. If nothing was due at the time of the commencement of this action, the action was prematurely brought. The ascertainment of the amount of loss by award was a condition precedent to the claimants' right of action." If counsel's position is correct, the demurrer to plaintiffs' evidence should have been sustained. In the view we take of the case, it is unnecessary, at this time, to decide whether or not the conditions of this policy make an award of appraisers, when appraisal is required, a condition precedent to a right of action to recover for the loss. The weight of authority, however, seems to be in favor of the validity of such a condition, and to hold that arbitration of the amount of loss is a right which either party may demand of the other, and that when such demand is made, in accordance with the terms of the policy, by the insurer, no action can be maintained by the insured to recover for the loss until such demand has been complied with and an appraisal made. *Wolff v. Insurance Co.*, 50 N. J. Law, 453, 14 Atl. 561; *Mentz v. Insurance Co.*, 79 Pa. St. 481; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Reed v. Insurance Co.*, 138 Mass. 572; *Hall v. Insurance Co.*, 57 Conn. 105, 17 Atl. 356; *Johnson v. Insurance Co.*, 41 Minn. 396, 43 N. W. 59; *Insurance Co. v. Etherton*, 25 Neb. 505, 14 N. W. 406; *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. 945; *Insurance Co. v. Wilson*, 45 Kan. 250, 25 Pac. 629.

It is not necessary, however, in order that the insured may maintain an action on such a policy, that he negative this condition, or prove a compliance with the same on his part. That is matter of defense. It should also appear that there was an admitted liability for something, and that there was an actual disagreement as to the amount of the loss. All liability under the policy cannot be denied, and, at the same time, a demand made to submit the amount of the loss to arbitration. Of cases above cited, see *Mentz v. Insurance Co.*, *Insurance Co. v. Etherton*,

Wolff v. Insurance Co.; also, *Dyer v. Insurance Co.*, 53 Me. 118; *Fogg v. Griffin*, 2 Allen, 1; *Williams v. Insurance Co.*, 54 N. Y. 577. The answer contained no allegation of dispute or disagreement as to the amount of loss. Hence, in this respect, it failed to state facts sufficient to constitute a defense on this ground. Neither does the evidence in the case fairly tend to show admission of liability, or actual disagreement as to amount of loss. So far as the evidence indicates, little or no effort was made to agree upon the amount of loss, and no opportunity was afforded for an actual disagreement.

Again, the only testimony concerning a demand for an appraisal of the loss was brought out by evidence of a conversation which occurred, soon after the fire, between one of the plaintiffs and one Van Valkenberg, who was probably an adjusting agent for defendant. On cross-examination of M. E. Hall, one of the plaintiffs, counsel for the defendant identified a certain paper, purporting to be a demand for appraisal, which was handed to the witness by Van Valkenberg. It was addressed to the plaintiffs Hall, and signed, "M. W. Van Valkenberg," designating him as state agent for defendant. The court admitted the testimony of this conversation between the witness and Van Valkenberg, over the objection of counsel for defendant below, with the express statement at the time that such testimony was not competent, and would not be considered by the court, unless it was shown by competent testimony that Van Valkenberg was an agent such as he represented himself to be. The record does not show that any competent evidence of agency was introduced on the trial. Nor is there anything tending to show that Van Valkenberg was authorized by the company to submit the question of amount of loss to arbitration. Under such circumstances, there was no competent evidence for the court to consider on the demurrer to the evidence tending to show a demand by the company for the appointment of appraisers.

Again, beyond the mere statement of the fact of the identification of the claimed written demand for appraisal, the only other reference in the record to such demand is that counsel for the defendant, on the cross-examination of the plaintiff M. E. Hall, offered in evidence the paper purporting to be such written demand. The record is silent as to the ruling of the court upon such offer. Neither does it appear that it was read or considered in evidence. When the court passed upon the demurrer to the evidence, it could very properly have ignored all the testimony offered or introduced pertaining to the appointment of appraisers; or, at least, would have committed no error in holding that such testimony was not sufficient to overthrow the prima facie case made by the plaintiffs. The demurrer to the evidence was properly overruled. The judgment will be affirmed. All the judges concurring.

(3 Kan.A. 708)

BONEBRAKE et al. v. AETNA LIFE INS. CO.

(Court of Appeals of Kansas, Northern Department, C. D. July 8, 1895.)

APPEAL—PARTIES.

A joint judgment rendered against the principal and sureties on a bond cannot be reviewed or disturbed by proceedings in error, when the principal to such judgment is not made a party in the appellate court, and no valid reason appears for such omission.

(Syllabus by the Court.)

Error from district court, Dickinson county; M. B. Nicholson, Judge.

Action by the Aetna Life Insurance Company against J. E. Bonebrake and others. From a judgment for plaintiff, defendants bring error. Dismissed.

Stambaugh & Hurd, for plaintiffs in error. John H. Mahan, for defendant in error.

GARVER, J. The plaintiffs in error were sureties upon a bond given by one M. P. Abbott to defendant in error, conditioned for the faithful performance by the said Abbott of his duties as general state agent in Kansas for said insurance company. In an action brought on the bond against the principal and sureties for alleged breaches thereof, trial was had in the district court of Dickinson county, and a joint judgment for \$925 rendered against M. P. Abbott as principal and the plaintiffs in error as his sureties. This proceeding in error to reverse such judgment is brought by the sureties alone, the said M. P. Abbott not being made a party in this court.

Objection is made by defendant in error, in the brief and on oral argument, to a consideration of the errors assigned, for the reason that M. P. Abbott is a necessary party to this proceeding before any reversal of the judgment can be had. We think this objection is well founded. The rule is well settled, and is of universal application, that all the parties to a joint judgment must be made parties to a petition in error, and a failure in this respect is fatal for the appealing party. *McPherson v. Storch*, 49 Kan. 313, 30 Pac. 480, and cases cited; *Masterson v. Herndon*, 10 Wall. 416; *Simpson v. Greeley*, 20 Wall. 152, 157. Notwithstanding this objection, we have examined the errors assigned, and are of opinion that no reversible error was committed. The case will be dismissed. All the judges concurring.

(1 Kan.A. 86)

HALBERT et al. v. ELLWOOD.

(Court of Appeals of Kansas, Northern Department, C. D. July 8, 1895.)

NEGOTIABLE NOTE—BONA FIDE HOLDER.

1. A negotiable promissory note payable to bearer does not lose its negotiable character by the payee indorsing it payable to a third person,

omitting the words "or order"; nor by an indorsement in blank by such third person, preceded by a guaranty of payment and waiver of protest.

2. The holder of a negotiable note so indorsed is presumed to have acquired the same in good faith, before maturity, free of all equities and defenses that may exist between the makers and payee. Before the makers of such note can defend against the holder, on the ground of fraud or want of consideration in the inception of the note, they must allege and prove that he is not a bona fide holder, or that he took the note after maturity.

(Syllabus by the Court.)

Error from district court, Mitchell county; Cyrus Heren, Judge.

Action by W. L. Ellwood against Enos Halbert and others. Judgment for plaintiff. Defendants bring error. Affirmed.

A. W. Hicks and Stevens & Stevens, for plaintiffs in error. A. H. Ellis, E. S. Ellis, and F. T. Burnham, for defendant in error.

GARVER, J. This was an action brought by Ellwood against the plaintiffs in error to recover upon a negotiable promissory note given by them, and payable to one J. E. Rogers or bearer. Upon the back of the note are the following indorsements: "Pay the within note to C. W. Culp. J. E. Rogers." "For value received, I hereby guaranty the payment of the within note at maturity, or at any other time thereafter, and hereby waive protest, demand, and notice of nonpayment. C. W. Culp." In his petition, the plaintiff alleged the execution of the note by said makers, the transfer of the same by indorsement and delivery to himself before maturity, and that he was the owner and holder thereof. The answer of defendants contained two defenses,—the first denying that Ellwood was the owner and holder of said note, and alleging that C. W. Culp was the owner and the real party in interest in the subject-matter of the action. The second defense referred to and made the first defense a part of the second, and alleged that C. W. Culp and not J. E. Rogers was the real party in interest in the transaction in which said note was given; that J. E. Rogers, as payee, took said note as a mere agent or representative of Culp; that Rogers never had any real interest in the note, and that there was fraud and want of consideration in its inception. Trial was had by jury, the defendants below assuming the burden of proof. Evidence was introduced by them tending to prove the second defense of their answer, except that there was no evidence tending to show that the plaintiff was not the real owner of the note. The court sustained a demurrer to defendants' evidence, and instructed the jury to return a verdict for the plaintiff, which was done, and judgment thereon entered. Defendants' motion for a new trial being overruled, exceptions were properly saved, and they bring the case to this court, alleging error in the ruling of the court sus-

taining the demurrer to the evidence and directing a verdict for the plaintiff.

The decision of the court below turned upon the question of the negotiability of the note sued on, when it came into the hands of the plaintiff. The defendants insisted, and still insist, that the indorsements upon the note destroyed its negotiability; and that, as the plaintiff alleged the transfer to him by such indorsements and delivery thereunder, he must be held to have acquired the note subject to the equities existing between the original parties to the note. On the other hand it is claimed that the note, at all times, retained its negotiable character; and that, in the absence of evidence to the contrary, it will be conclusively presumed that the plaintiff is a bona fide holder for value, before maturity. There is no issue made by the pleadings as to whether or not Ellwood became a bona fide holder and owner of the note before maturity, without notice of equities or of want of consideration. So far as the matter of ownership goes, the issue is joined upon the broad allegation of defendants' answer that C. W. Culp, and not Ellwood, is the owner of the note and the real party in interest in the subject-matter of the action. If the testimony tends to show that the note was either not owned by Ellwood or was not negotiable in his hands, the demurrer to the evidence should have been overruled. But there was no evidence whatever offered by the defendants, tending to show that Ellwood's connection with the note was other than what the law presumed it to be from his production of it at the trial. Hence, the ruling of the court was correct, so far as the first defense was concerned. As the case thus stood, Ellwood was the conceded owner of the note. Therefore, if it came into his hands clothed with the immunities of negotiable paper, the evidence of fraud in the inception of the note, or want of consideration, raised no defense as to him. That the note was negotiable we think is beyond question. Payable in the first place to bearer, it requires something stronger than either of the indorsements on the note to strip it of its negotiable character. The first indorsement, "Pay the within note to C. W. Culp," is an indorsement in full, with the same legal force and effect as if made to C. W. Culp or order. A similar indorsement was considered in the case of *Edie v. East India Co.*, 2 Burrows, 1216, and held to be an indorsement within the law merchant which did not affect the negotiability of the note. Considering the legal effect of a like indorsement of a negotiable note, the court, in *Leavitt v. Putnam*, 3 N. Y. 494, said: "The note in the present case was upon its face transferable, and its character in respect to negotiability could only have been changed by an indorsement containing express words of restriction. The defendants' indorsement was a full one, containing the name of the party in whose favor it was made, but omitting the words 'to or-

der,' the legal effect of which was, nevertheless, to make the note payable to himself or his order, and his indorsement, therefore, was effectual to transfer the note to the plaintiff." The general rule is thus laid down by Judge Story, in his work on Bills. "Where the bill is originally negotiable, or payable to order, an indorsement directing payment to a particular person, by name, without adding the words, 'or his order,' will not make it an indorsement payable to him only, and restrain the negotiability thereof; for, in all cases of indorsement, the restriction must arise by express words or necessary implication, to produce such an effect." Story, Bills, (3d Ed.) § 210. The legal effect of the second indorsement is that of an indorsement in blank, making the note thereafter transferable by mere delivery. The guaranty of payment written over the name of the indorser adds nothing to his liability beyond what the law implies from an indorsement in blank with waiver of protest. There are no words indicating an intention to restrict the negotiability of the note. The authorities are numerous and conclusive upon this proposition. *Upham v. Prince*, 12 Mass. 14; *Crosby v. Roub.*, 16 Wis. 645; *Judson v. Gookwin*, 37 Ill. 286; *Robinson v. Lair*, 31 Iowa, 9; *Partridge v. Davis*, 20 Vt. 499; *Myrick v. Hasey*, 27 Me. 9; *Heard v. Bank*, 8 Neb. 10; *Johnson v. Mitchell*, 50 Tex. 212; Story, Bills, § 215. In *Upham v. Prince*, where the indorsement was similar to the one we are considering, the court said: "We are all of opinion that the note did not lose its negotiability by this special indorsement, any more than it would if it had been indorsed with the words 'without recurrence to the indorser,' which is a common form of indorsement where the indorser does not intend to remain liable." In *Partridge v. Davis*, the payee of a note payable to order indorsed it with the words, "I guaranty the payment of the within note," and the court said the indorsement "is the same thing, in legal effect, and for every practical purpose, as an indorsement, and may be treated as such." In the above reference to Story on Bills the author says: "An indorsement by the payee, or other lawful holder, may enlarge his responsibility beyond that ordinarily created by law, without in any manner restraining the negotiability of the bill. * * * In such a case [where the liability of the indorser is enlarged], there is no reason to infer that the indorser means to restrain the further negotiability of the bill, even if he does mean to restrain the effect of the guaranty to his immediate indorsee. * * * And a holder has a right to hold him as indorser of the bill, as he has left its negotiability unrestrained." There was nothing presented in the evidence of the defendants tending to show that the plaintiff did not occupy the position of an innocent holder, before maturity, of the note. He therefore held it free of all defenses that might have been

interposed between the original parties. The demurrer was properly sustained. The judgment must be affirmed. All the judges concurring.

(1 Kan.A. 43)

GERMAN INS. CO. OF FREEPORT, ILL.,
v. HALL et al.

(Court of Appeals of Kansas, Northern Department, C. D. July 6, 1895.)

**ACTION AGAINST FOREIGN INSURANCE COMPANY—
SERVICE OF PROCESS—FORM OF SUMMONS—
WAIVER OF PROOFS OF LOSS—PLEADING.**

1. Where an insurance company incorporated under the laws of another state, in compliance with the provisions of chapter 50a, § 41, Gen. St. 1889, files in the insurance department of this state its written consent irrevocable that service of process on the superintendent of insurance shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or chief officer of such corporation, such company thereby, in effect, stipulates that, in so far as the matter of obtaining personal jurisdiction of it is concerned, the superintendent of insurance is the chief officer of the corporation; and service of process on the superintendent of insurance is service of process on the corporation. The form of the process and the manner of its service are for the legislature alone to prescribe.

2. Where it is intended that a summons against an insurance company incorporated under the laws of another state shall be served on the superintendent of insurance of this state in the manner prescribed by chapter 50a, § 41, Gen. St. 1889, the form of the summons is the same as that prescribed by section 59 of the Code, except that it is directed to the superintendent of insurance, and not to the sheriff.

3. Where such a summons is issued on June 23d, requiring the defendant to answer the petition on or before August 4th thereafter, and is forthwith forwarded by the clerk of the court to the superintendent of insurance, and the summons was received by him on the following day, and a copy thereof was by the superintendent immediately forwarded to the secretary of the company sued, *held*, that the court obtained personal jurisdiction of the insurance company.

4. The requirement of the statute that the superintendent shall forward a copy of the summons to the secretary of the company sued, and another copy to the general agent of said company, if any such agent resides in the state, is directory only, and compliance therewith is not essential to jurisdiction.

5. Where no objection is made to the proofs of loss submitted under a fire insurance policy until nearly 30 days after their receipt by the company, and until after the expiration of the time allowed the policy holder under the contract of insurance in which to submit his proofs of loss, no reason being shown for the delay in objecting to the proofs furnished, the insurance company must be *held* to have waived any informality or irregularity in the proofs of loss as submitted.

6. Where the contract of insurance provides that the amount of loss is to be paid in 60 days "after the loss shall have been ascertained in accordance with the conditions of the policy," and it does not appear from the petition that, at the commencement of the action, 60 days had elapsed after the loss was ascertained in accordance with the conditions of the policy, *held*, the petition fails to state a cause of action against the insurance company.

(Syllabus by the Court.)

Error from district court, Republic county;
F. W. Sturges, Judge.

Action on a policy of insurance by M. E. & I. B. Hall, partners, against the German Insurance Company of Freeport, Ill. Plaintiffs had judgment, and defendant brings error. Reversed.

H. M. Jackson and G. W. Barnett, for plaintiff in error. Noble & Surface, for defendants in error.

CLARK, J. The first question we are asked to consider arises upon the objection made by the plaintiff in error to the summons and the service thereof. Gen. St. 1889, c. 50a, § 41, of this state, provides that every insurance company incorporated under the laws of any other state as a condition precedent to obtaining any authority to transact any business of insurance in this state, "shall file in the insurance department its written consent irrevocable that actions may be commenced against such company in the proper court of any county in this state in which the cause of action shall arise or in which the plaintiff may reside, by the service of process on the superintendent of insurance of this state, and stipulating and agreeing that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or chief officer of such corporation." This section further provides, that "the summons shall be directed to the superintendent of insurance," and "shall be forthwith forwarded by the clerk of the court to the superintendent of insurance who shall immediately forward a copy thereof to the secretary of the company sued and another copy to the general agent of said company, if any such agent reside in this state; and thereupon, said superintendent shall make return of said summons to the court whence it issued, showing the date of its receipt by him, the date of forwarding such copies, and the name and address of each person to whom he forwarded such copy." The plaintiff in error contends that the true construction of the statute is that the summons must be issued to the sheriff as otherwise required by the Code, and by him served upon the superintendent of insurance, upon service of which the superintendent must notify the company of the service of such summons. We cannot agree with counsel in this construction of the statute. In speaking of the form of such summons in *Insurance Co. v. Coverdale*, 48 Kan. 446, 29 Pac. 682, the supreme court held that "where an action is commenced against an insurance company of another state, or of a foreign government doing business in this state, and the only service obtained upon the company is through the superintendent of insurance of the state, the summons must be directed to the superintendent, * * * but the form of the summons is the same as prescribed in section 59 of the Code, except it is directed to the superintendent of insurance, and not to the sheriff of the county where the action is

pending." The summons in this case was in exact compliance with the requirements of the statutes of this state as construed by the supreme court.

It is admitted by the pleadings that the plaintiff in error was engaged in the business of fire insurance in this state, and it is conclusively presumed against it that, before so doing, it duly assented, as required by the statute, that in actions brought against it jurisdiction might be obtained by service upon the superintendent of insurance in the manner prescribed by the statute which authorized it to do business in this state upon compliance with its terms. *Insurance Co. v. French*, 18 How. 404; *Ehrman v. Insurance Co.*, 1 McCrary, 123, 1 Fed. 471; *Railroad Co. v. Harris*, 12 Wall. 65; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354; *Gibbs v. Insurance Co.*, 63 N. Y. 114; *Insurance Co. v. Curran*, 8 Kan. 9. Having assented that jurisdiction might be obtained by service upon the superintendent of insurance of this state, the company became, so far as the matter of obtaining personal service is concerned, a resident within the state, and the legislature had ample authority to prescribe both the form of the summons and the manner of service thereof upon the designated agent. *Pennoyer v. Neff*, 95 U. S. 714; *Ex parte Schollenberger*, 96 U. S. 369; *Knott v. Insurance Co.*, 2 Woods, 479, Fed. Cas. No. 7,894; *Dillon v. Heller*, 39 Kan. 603, 18 Pac. 693. In the case last cited, Valentine, J., says: "All things within the territorial boundaries of a sovereignty are within its jurisdiction. * * * To obtain jurisdiction of anything within the state of Kansas, the statutes of Kansas may make service by publication as good as any other kind of service." In this case, the service of the summons was made upon the superintendent of insurance in the manner prescribed by the statute, and the superintendent made return thereof showing that the summons was received by him on the day following its date, and that on the same day he forwarded a duly-certified copy of the same to the secretary of the company sued.

It is objected that the return of service on the summons was insufficient. This objection is based upon the fact, as stated by counsel, that "it does not appear from the return of such service that a copy of said summons was sent to the general agent of the company of this state, nor does it appear that said company had no general agent in the state of Kansas." While the statute requires the superintendent of insurance to forward a copy of the summons to the secretary of the company sued, and another copy to the general agent of said company, if any such agent resides in the state, we do not think these acts are essential to jurisdiction. That the requirement of the statute that a copy of the summons shall be forwarded to a resident agent of the company is not jurisdictional is evident from the fact that jurisdiction exists

just as fully without forwarding such copy, if no general agent of the company resides in the state. The forwarding of a copy of the summons to the secretary of the company in another state gives no aid to the jurisdiction of the court over the person. The service of summons, to have that effect, must be made upon one in this state who stands as a representative of the company. *Pennoyer v. Neff*, supra; *Amsbaugh v. Bank*, 33 Kan. 105, 5 Pac. 384. The superintendent is directed to forward these copies of the summons in order that they may have notice of the fact that a suit has been commenced against the company by service of process upon him as the designated agent of the company upon whom service is authorized by the company; thus emphasizing the duty which he owes to the company, even though the statute were silent upon that point. That the company received notice of the commencement of the action in due time to prepare its defense thereto is clearly shown by the record. Hence, the sole object of the requirement of the statute concerning the forwarding of these copies has been attained. We think it clear, on principle and authority, that every precedent condition was complied with to acquire jurisdiction in this case, and that the motion to quash the summons and the motion to set aside the service thereof were properly overruled.

The proofs of loss, as submitted, were sufficient under the contract of insurance, if not objected to within a reasonable time after their receipt by the company. No objection to the proofs of loss having been made until nearly 30 days after their receipt, and until after the expiration of the 60 days which defendants in error had, under the contract of insurance, in which to submit their proofs of loss, and, no reason being shown for the delay in objecting to the proofs furnished, the company must be held to have waived any informality or irregularity in the proofs of loss as submitted. *Insurance Co. v. Schueller*, 60 Ill. 465; *Keeney v. Insurance Co.*, 71 N. Y. 396.

The existence of concurrent insurance was matter of defense. It was not necessary for the plaintiffs below to allege or prove such fact to entitle them to recover.

The plaintiff in error complains of the order of the court overruling its motion "to make the petition more definite and certain by stating therein, definitely and with certainty, when the proofs of the loss were made out, and how and to whom the same were transmitted to the defendant." This action was commenced on June 23, 1890, alleging a loss by fire March 6, 1890. A copy of the contract of insurance was attached to, and made a part of, the petition. Under this contract, the insured had 60 days after the loss occurred within which to make their proofs of loss. The petition alleges a compliance with this condition of the contract,

but does not specify the particular date upon which the proofs were submitted to the company. The petition also alleges, among other things, that the plaintiffs "have done and performed each and every thing necessary on their part precedent to their right to a recovery of the said loss." The allegations as to the date of making and transmitting the proofs of loss are sufficient, under section 122 of the Code, which provides that, "in pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegations be controverted, the party pleading must establish on the trial the facts showing such performance."

The contract further provides that the amount of loss was to be paid in 60 days "after the loss shall have been ascertained in accordance with the conditions of the policy." There is nothing in the petition showing that the amount of the loss had been ascertained in accordance with the conditions of the policy 60 days prior to June 23d, the date of the commencement of this action. Hence, there was nothing to show a failure on the part of the insurance company to pay the amount of the loss within the time stipulated in the contract. As was said in *Bradley v. Parkhurst*, 20 Kan. 462, "Where there is an absolute want of allegations sufficient to make out a cause of action, demurrer, and not motion to make more definite and certain, is the proper remedy." In order to show a cause of action arising out of contract the petition must state facts showing a breach of the contract and failure on the part of the defendant to do, in the manner and within the time stipulated, that which the agreement of the parties said should be done. When the contract is to pay money on or before a certain date, the petition must show a failure to pay within that time. 1 Chit. Pl. 341; Gould, Pl. c. 3, § 63; Bliss, Code Pl. § 296. As it did not appear from the petition, or any of the pleadings filed in the case, that at the commencement of this action 60 days had elapsed after the loss was ascertained in accordance with the conditions of the policy, no cause of action was alleged against the insurance company, and the court erred in overruling the objection of the defendant below to the introduction of any evidence under the petition. *Carberry v. Insurance Co.*, 51 Wis. 606, 8 N. W. 406; *Doyle v. Insurance Co.*, 44 Cal. 264; *Perry v. Assurance Co.*, 8 Fed. 643; *Lester v. Insurance Co.*, 55 Ga. 475; *First Nat. Bank of Baton Rouge v. Dakota Fire & Marine Ins. Co.* (S. D.) 61 N. W. 439; *Cowan v. Insurance Co.* (Cal.) 20 Pac. 408; *Cooledge v. Insurance Co.* (Vt.) 30 Atl. 798; *Paul v. Hodges*, 26 Kan. 225.

The judgment of the court will be reversed, and the case remanded for further proceedings in accordance with this opinion. All the judges concurring.

(1 Kan. A. 492)

CONNOR, Sheriff, v. WILKIE.¹

(Court of Appeals of Kansas, Southern Department, C. D. Aug. 8, 1895.)

REPLEVIN—ALLEGATIONS OF OWNERSHIP—REVIEW ON APPEAL—OBJECTIONS TO INSTRUCTIONS.

1. The petition in this case examined, and *held* to sufficiently state a cause of action.

2. Where a demurrer to a petition is overruled, and the defendant elects to answer, and proceeds to trial, and said cause is tried upon the petition so demurred to, and then brought here by the party demurring, the ruling of the trial court will be passed on here, even though more than one year has elapsed since the making of such ruling.

3. Objections to the instructions of the trial court, to be available in this court, should be made, and the rulings excepted to, on the trial, otherwise they are waived.

4. A rule requiring a request for written instructions to be made at the commencement of a trial is unreasonable, but where a request for written instructions is delayed until within a few minutes of the close of the evidence, and at a time when the granting of such request would necessarily detain the business of the court while the instructions were being prepared and reduced to writing, such request is not made in time, and the refusal thereof is not error.

5. A remark made by the court concerning the testimony of a witness, which, though open to criticism, is not deemed to have affected the result, will not require a reversal of the judgment.

6. The testimony examined, and *held* sufficient to sustain the judgment.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Replevin by Neil Wilkie against J. W. Connor, sheriff. Judgment for plaintiff, and defendant brings error. Affirmed.

Dalton & Dalton and Beach & Torrance, for plaintiff in error. C. J. Peckham and Redden & Schumacher, for defendant in error.

COLE, J. This is an action in replevin brought by Neil Wilkie against J. W. Connor, sheriff of Cowley county, Kan., in the district court of Cowley county, to recover possession of 93 head of hogs which had been levied upon by said sheriff under an execution against one D. M. Carlton. Before trial of the cause, plaintiff became insolvent, and the action proceeded in the name of one G. W. Ogg, as assignee of said insolvent debtor. There was a verdict and judgment for plaintiff below, and Connor brings the case here for review. The first error complained of is the overruling of the demurrer of plaintiff in error to the amended petition of the defendant in error. The defendant in error claims that this ruling of the district court cannot now be reviewed here, for the reason that more than one year has elapsed between the overruling of the demurrer and the filing of the petition in error in the supreme court. This position is not well taken. Where a demurrer is overruled, and the party filing same elects to

¹ Rehearing denied.

plead in the action, he must await the result of the final trial, and cannot be permitted to file a petition in error in the supreme court until such final trial is had. *Railway Co. v. Estes*, 37 Kan. 229, 15 Pac. 157; *Hulme v. Dittenbacher*, 53 Kan. 181, 36 Pac. 60. However, we consider that the demurrer to the petition was properly overruled. The amended petition alleged in substance that on or about May 10, 1888, Neil Wilkie and D. M. Carlton entered into an agreement, the terms of which were that Wilkie should furnish to Carlton certain moneys to be used in the purchase of hogs, which were to be shipped to market and sold, and the proceeds to be applied—First, to the expenses of shipment and selling; and, second, to the payment of Wilkie of all moneys so advanced, with interest at 12 per cent., and, if the amount realized by the sale of the hogs was insufficient to pay the expenses and the money so advanced, with interest, then Carlton was to pay Wilkie the deficiency. And it was further agreed that all the hogs so purchased should remain the property of Wilkie, and that the proceeds of the sales should be applied as agreed. If there was any remainder after the payments, as above specified, were made, such remainder was to be paid to Carlton. The petition further alleged, in substance, the purchase of the hogs levied upon under the terms of the said agreement; that they were purchased by moneys furnished by Wilkie; that they were the property of Wilkie, and that he was entitled to possession of them; that the defendant, Connor, wrongfully and unlawfully withheld the property from Wilkie; and further stated the value of said property, and alleged a demand prior to the commencement of the action. Certainly these allegations are sufficient to support a claim of ownership on the part of said Wilkie as against a demurrer. It was immaterial as to who was to have the actual possession of the property from the time they were purchased until they were sold; for, if Wilkie furnished money under a contract like the one alleged in said petition, Carlton merely acted as an agent in the transaction, and never had any ownership of any of the property so purchased, and no interest in the proceeds from the sale of such property, unless there should be a surplus after repaying the money expended, with interest and expenses. We see nothing inconsistent in such agreement.

The second assignment of error is the overruling of the motion of the plaintiff in error for a new trial, and under this head the plaintiff in error urges seven reasons why said motion for a new trial should have been sustained, the first of which reasons is practically answered by the views above expressed. There was an abundance of evidence to sustain the position of the defendant in error that he was the absolute owner

of the property levied upon, and a demurrer to the evidence was therefore properly overruled. The second reason urged by the plaintiff in error why the motion for a new trial should have been sustained is the giving of certain instructions by the trial court to the jury, and under this head plaintiff in error again argues with considerable force that there was nothing in the petition or the issues framed in the case that would require the court to submit to the jury the claim of actual and absolute ownership of the property in question. As we have before said, the petition under which the cause was tried alleges absolute ownership. The answer of the sheriff was—First, a general denial; and, second, that the property which was levied upon belonged to D. M. Carlton, and was so levied upon under an order of attachment issued against the property of the said Carlton. The answer further attempted to set up that, in the action where said order was issued, the title of said property had been fully litigated. The evidence in the case both for plaintiff and defendant was directed towards the question whether Wilkie or Carlton was owner of the property; and all the circumstances surrounding the transactions, including the terms of the contract alleged to have been made between Wilkie and Carlton, the manner of the purchase and shipment of the hogs, were inquired into, and this with the evident purpose of showing, upon the one hand, that Wilkie was owner of the property, and upon the other hand that he had simply loaned Carlton the money, and that the hogs were the property of Carlton. Under these issues and this testimony, the instructions of the court with regard to the ownership of the property were proper, but if the instructions had been erroneous the plaintiff in error could not now be heard to complain, for the record nowhere discloses any exception to these or any part of the instructions given by the court.

Objections to the instructions of the trial court, to be available in this court, should be made, and the ruling excepted to, on the trial. Otherwise they are waived. *Gafford v. Hall*, 39 Kan. 166, 17 Pac. 851; *Mercantile Co. v. Fullum*, 43 Kan. 181, 23 Pac. 104; *Railway Co. v. Johnson*, 44 Kan. 660, 24 Pac. 116. For the same reason the further objection raised in this court by the counsel for the plaintiff in error to other portions of the instructions given by the court, as well as the remark of the counsel in his argument to the jury, which is now complained of, cannot be considered.

This brings us to the fourth reason given why a motion for a new trial should have been sustained, viz. the refusal of the court to instruct the jury in writing. And this we consider the most serious question urged by counsel for the plaintiff in error. It appears from the record that a short time before the close of the evidence the attorney for

the plaintiff in error, defendant below, requested the court to instruct the jury in writing, and thereupon the court refused to so instruct in writing, using the following language: "The court refuses to instruct the jury in writing, upon request of the defendant—First, because under our rule this request is to be made at the commencement of the trial; and we also overrule it because the request is made only a few minutes before the conclusion of all the evidence in the case, and because the request might just as well have been made yesterday, at the conclusion of the day's business, and the court could then have had opportunity to prepare the instructions during the adjournment, and not have delayed and detained the business of the court; and the court refuses, lastly and finally, because the request, coming at this time, would necessarily detain the business of the court while the instructions were being prepared and reduced to writing." Counsel for the plaintiff in error urges that the statute makes it mandatory upon the trial court to instruct the jury in writing whenever requested so to do by either party, and cites the case of *Rich v. Lappin*, 43 Kan. 666, 23 Pac. 1038, in support of his position; but in that case it does not appear that the question of the time when such request was made became a material factor either in the refusal of the trial court to give written instructions or the decision of the supreme court reversing the judgment for the failure of the trial court so to do. The record in that case disclosed that the court delivered his instructions orally to the stenographer, who wrote them out after the jury had retired, and the supreme court held that this did not comply with the statute requiring written instructions to be given upon request of either party. After careful investigation, we have failed to find any case upon the point raised decided by our supreme court since the adoption of our present statute in regard to the order of procedure of trials in civil cases; but in the case of *Railway Co. v. Franklin*, 23 Kan. 75, the question as to whether a request for written instructions was submitted in time was passed upon in an opinion written by Valentine, J. After citing a number of cases decided by the supreme court of Indiana, from which state the statute of Kansas of 1868, with reference to giving and refusing instructions in civil cases and reducing the same to writing, was copied, and announcing the rule laid down by such decisions, the court say: "The rule also seems reasonable to us, for, while it imposes no hardship upon either of the parties or the counsel, a different rule might impose great hardship or great inconvenience upon both the court and parties in other cases waiting for their cases to be heard. If counsel may wait until the close of the argument before making the request, it would necessarily cause great delay in the proceedings of the court, and

materially increase costs and expenses. Generally it would require an adjournment of the court to enable the judge to prepare his written instructions." Under our statute as it then existed, the argument of the counsel preceded the giving of the instructions by the court, while now the instructions are given at the close of the evidence and before the argument of the counsel, and it would seem that the rule, as laid down in the case last cited, ought to apply with the same force now to a request made just at the close of the evidence as it did under the former statute in the case of a request that was made just at the close of the argument. The business of the court under the order of procedure laid down by the present statute would be delayed to the same extent, and an adjournment would be necessary in nearly every case, unless the request for written instructions is made at a reasonable period of time before the close of the evidence. In the case at bar we cannot hold that a rule requiring this request to be made at the commencement of the trial is a reasonable one, for in many cases it is impossible for counsel to determine at the commencement of the trial whether written instructions will be desired or not; and, while it would impose no hardship upon the counsel to make a request for written instructions at the commencement of the trial, yet we could not hold that, if not then made, the request would be too late. But it further appears from the record that the request in this case was made only a few minutes before the conclusion of all the evidence in the case, and at a time when a compliance therewith would necessarily delay the business of the court while the instructions were being prepared and reduced to writing. Impressed as we are with the soundness of the reasoning in the case above quoted, we are forced to the conclusion that the request for written instructions was made too late, and was therefore properly refused.

Plaintiff in error further complains of a remark made by the court in the presence of the jury during the trial of the cause, and alleges that said remark was prejudicial to the rights of the plaintiff in error, and should cause a reversal of the judgment. The record shows that D. M. Carlton was examined by both plaintiff and defendant at different times, and his testimony introduced in the form of depositions at the trial. The statements of the witness in the two depositions were very conflicting, and would impress even a casual observer with the idea that the witness was far from reliable. When the second deposition given by Carlton was offered at the trial, the court asked the question, "Whose deposition is that?" and, upon being informed that it was the deposition of the witness Carlton, made use of the following expression: "He must be an awful liar." There can be no doubt that a remark of this character was extremely reprehensible, and

tended to detract from the dignity of the court and the entire proceeding. No court can expect either litigants, the bar, or the public to retain respect for its proceedings when the court itself is lacking in the dignity which should attend the trial of causes; but it is not every expression of the court, however reprehensible it may be, that will work the reversal of a judgment. The remark made by the court in this case applies as fully to the testimony of the witness offered by the plaintiff below as it did to the testimony of the same witness when offered by the defendant below. In the case of *State v. Burwell*, 52 Kan. 686, 35 Pac. 780, a witness was personally giving testimony before the jury, and, in response to an objection made to an inquiry, the trial court remarked, "It seems to me that the state could just let this witness go right on with his romance." This was a remark touching the testimony of a witness introduced by the defendant alone, and upon trial of a felony case; and while the supreme court, in passing upon the remark of the trial court, criticised its action quite severely, yet they declined to reverse the judgment on account of such a remark. In this case, then, had the remark not been made which was made by the trial court, the jury must have been impressed with the fact that the witness Carlton did, either in the one deposition or the other, testify falsely upon the material facts at issue, and we apprehend they could have given neither deposition much weight in the determination of the case. We cannot see that the plaintiff in error was prejudiced by the remark of the court, and therefore the judgment will not be reversed on account of such remark.

The seventh and last reason urged for a reversal of the judgment is that the verdict is not sustained by sufficient evidence, and the counsel for the plaintiff in error reiterates his argument in regard to the question of special or general ownership claimed by the plaintiff below, and refers particularly in his brief to the affidavit in replevin made by the plaintiff below. A careful examination of this affidavit shows to us that practically the same claim was made therein as was made in the amended petition upon which this case was tried, and while the affidavit makes use of the expression "special ownership," yet it also alleges that the hogs were bought with the moneys of plaintiff, under a contract with Carlton by which plaintiff was to furnish the money, and the hogs purchased with such money were to be shipped and sold in plaintiff's name, and that of the proceeds of the sales Carlton was to have no part excepting what arose from the profits. These specific statements are consistent with general ownership, and with the whole theory upon which the case was tried by both parties. There being no material error, the judgment of the district court is affirmed. All the justices concurring.

KEYSER v. REHBERG.

(Supreme Court of Montana. July 22, 1895.)

QUANTUM MERUIT—SERVICES RENDERED.

Plaintiff, who was employed by defendant to superintend a ranch at a fixed sum for a year, to be paid from the proceeds of the ranch, was forced, through the threats and orders of defendant, and without fault on his own part, to abandon the work before the end of the year. *Held*, that he could recover on a quantum meruit for the services performed.

Appeal from district court, Lewis and Clarke county; W. H. Hunt, Judge.

Action by Eugene Keyser against Edward Rehberg. There was a judgment for plaintiff, and defendant appeals. Affirmed.

G. W. Fleischer and Sidney Sanner, for appellant. C. B. Nolan, for respondent.

PER CURIAM. This is an action for work, labor, and services alleged by plaintiff to have been rendered to the defendant as a superintendent or foreman upon the ranch of the defendant. The defense set up in the answer was that plaintiff and defendant made a contract by which the plaintiff should conduct the affairs of the ranch for a year, and that defendant should receive \$1,000 from the products of the ranch for that year, and that all over that sum should belong to the plaintiff. The replication of plaintiff admits that the contract between the parties was substantially similar to that alleged in the answer, and pleads further that before the completion of the contract the defendant ordered the plaintiff to leave the ranch, and drove him away by the use of dangerous weapons. It appeared by the evidence that a serious altercation took place between the parties before the termination of the year. The defendant, in his testimony, endeavored to make it appear that he was not greatly in fault, while the plaintiff's testimony was that defendant ordered him absolutely away from the premises, and assaulted him with a plowshare, and threatened to run him through with a pitchfork, and also threatened an attack with an iron rod. The testimony of the plaintiff was that he was compelled to leave the ranch by reason of the conduct of the defendant. There is ample evidence in the record to sustain the plaintiff's position,—that he was driven from the ranch by the assaults, threats, violence, and orders of the defendant, and that he did not leave through any fault of his own. If the defendant, by his own conduct, made it clearly impossible for the plaintiff to complete the contract which had been made between the parties, the plaintiff may recover upon quantum meruit for the services which he had performed up to the time when the defendant made it impossible for plaintiff to continue work under the contract. The trial was before the court without a jury, and the court evidently believed the testimony of

the plaintiff, and found for plaintiff in the value of his services as a laborer upon the ranch. The court also allowed a counter-claim of \$171 in favor of the defendant.

The evidence is ample to sustain the judgment and the decision. The appeal is from the judgment, and also from an order denying a new trial. There is no judgment in the record in the case, and that appeal must be dismissed. The order denying a new trial is affirmed.

HUNT, J., not sitting.

(16 Mont. 467)

BACH, CORY & CO., Limited, v. BOSTON & M. CONSOLIDATED COPPER & SILVER MINING CO.

(Supreme Court of Montana. July 29, 1895.)

ASSIGNMENT OF CONTRACT — LIABILITIES OF ASSIGNEE.

1. In an action on a contract, brought by the assignee thereof, who, by the terms of the assignment, had expressly agreed to carry out all the conditions of the contract, "for and in the place and stead of" the assignor, the defendants set up a claim for certain goods delivered by them under the contract, and offered in evidence an itemized list of such goods, together with proof that the goods were delivered to the assignor's predecessor under the same contract sued on. *Held* admissible.

2. Where the terms of an assignment of a contract bound the assignee to perform all the conditions of the contract for and in the place of the assignor, the liability of the assignee related back to the date of the contract, and not merely to the date of the assignment.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by Bach, Cory & Company, Limited, against the Boston & Montana Consolidated Copper & Silver Mining Company, for breach of contract. Judgment for plaintiff, and defendant appeals. Reversed.

Cooper & Piggott, for appellant. Leslie & Downing, for respondent.

PER CURIAM. Action in contract. On January 28, 1892, McDonald & Brand, as a firm, executed a contract with defendant. By the terms of the agreement McDonald & Brand were to carry on a boarding and mess house for the defendant for the period of one year, or until January 28, 1893. The defendant furnished McDonald & Brand certain buildings, and a large amount of such personal property as would ordinarily be connected with the business of a boarding or mess house. It was agreed by McDonald & Brand, in the contract, that they would keep the buildings in repair, and replace any breakage, and repair any damage, that might occur through their neglect, or through the neglect of any of their employes, during the life of the agreement, and to replace and repair fixtures that might be broken. The defendant was to protect McDonald & Brand in their board collections, deducting the same from the monthly pay roll of its employes. Afterwards, on February 26, 1892, McDonald

& Brand assigned said contract and agreement to the plaintiff, Bach, Cory & Co. The defendant assented to the assignment by the following written contract: "The Boston & Montana Company, above named, hereby assents to the assignment of the above foregoing contract to Bach, Cory & Co., on condition that said Bach, Cory & Co. hereby agree to faithfully perform all the terms and conditions of said contract for and in the place and stead of McDonald & Brand, and on the further condition that the price of the board of the men boarding at the general boarding house and rooming at the bunk house be reduced to \$5.50 per week, and in all other respects the foregoing contract shall be and remain the same. Witness our hands and seals the 26th day of February, A. D. 1892. Boston & Montana Con. C. & S. Mfg. Co., Per F. Klepetko, Supt., Bach, Cory & Co." Plaintiff pleads performance of the contract in place of McDonald & Brand, but alleges that defendant has not protected it in deducting board collections, as provided, and in other respects has violated the contract. Judgment is asked for \$2,936.93. Defendant, after denying that it had failed to comply with the conditions of the contract, denied the indebtedness sued for, or that plaintiff had carried out the contract. By way of separate defense, defendant alleges that McDonald & Brand had received certain personal property, dishes, etc., from defendant, under and by virtue of their contract, to enable them to run the boarding and mess house, and that it was the duty of said McDonald & Brand, under said contract, to return all said goods and chattels so used to defendant, at the end of the time mentioned in the contract; but McDonald & Brand did not return the same, or any part thereof. That Bach, Cory & Co., under and by virtue of its contract with the defendant company, became, and still is, under obligations to carry out and perform the terms and conditions of said contract made by and between defendant and said McDonald & Brand, but that plaintiff has not performed said contract in the place and stead of McDonald & Brand, as agreed, and plaintiff neglects and refuses to return the goods and chattels described in Schedule A, or any part thereof, as was its duty to do. That said goods are worth \$418.23, and that defendant is entitled to have said value of said goods set off against the claim and demand of plaintiff. The list appended to the answer is an itemized statement of the articles alleged to be missing. The replication denies that McDonald & Brand received the articles mentioned in the said schedule, or any of them; denies that plaintiff is indebted for such materials in any sum, or that defendant is entitled to have said account set off as a credit on plaintiff's demand, or that plaintiff is entitled to any credit whatever, except as stated in the complaint. The case was tried to a jury, and verdict rendered for the plaintiff for \$458.30. Judgment was entered on the verdict. A motion for a new trial was

made, upon the ground of errors of law in the instructions, and exclusion of certain testimony. From the order overruling the motion for new trial, and the judgment, the defendant appeals.

The case seems to have been tried by counsel on both sides upon the theory that for any goods not returned there was a liability under the contract. This proposition being therefore accepted as correct, it is plain that from and after the date of the execution of the contract, to wit, January 28, 1892, McDonald & Brand assumed such liability, until Bach, Cory & Co., with the consent of the defendant, agreed to faithfully perform all the terms and conditions of said contract, for and in the place and stead of said McDonald & Brand. One of these conditions and requirements was to replace all the goods delivered under the contract to McDonald & Brand, at the time of the execution of the contract, January 28, 1892. The replication having denied that the goods claimed to have been missing ever went into the possession of McDonald & Brand, the defendant assumed to prove just what property was delivered to McDonald & Brand, under the contract. The defendant offered an itemized list of goods for the purpose of showing that the goods and chattels described therein came into the possession of McDonald & Brand, under the contract. The plaintiff objected to the introduction of this evidence, upon the ground that it was immaterial and irrelevant. Defendant further offered to show that J. H. Brand ran this same boarding house, under a contract like the one sued on, up to January 28, 1892, and that this contract and said Brand were succeeded by the contract of McDonald & Brand, under which Bach, Cory & Co., claim, and that the goods mentioned in Schedule A, attached to defendant's answer, passed from the possession of Brand to McDonald & Brand, and that Bach, Cory & Co. are liable for the return of said goods. The court sustained the objection. Clearly this was error. It was a most essential feature of the case, and the ruling prevented defendant from interposing a main defense. The offer was direct, and made to sustain issues made by the pleadings. Our view of the law applicable to the case is that when Bach, Cory & Co. accepted the assignment of the contract, and entered upon the performance of it, they not only assumed the performance of all acts to be performed by McDonald & Brand, had they remained parties to the contract, but that they expressly agreed to carry out the terms and conditions of the agreement "for and in the place and stead of McDonald & Brand." By this assumption they agreed to replace all property which had been turned over to McDonald & Brand by defendant, and for which McDonald & Brand could have been held liable at the expiration of the life of the contract. The defendant offered evidence tending to show that Brand had run the

mess before, and that he had had possession of these various goods, and had delivered them to his successor. If there were a more expeditious way of arriving at exactly what goods were delivered to McDonald & Brand, or were in their possession at the date of their contract in January, 1892, we should say that that testimony became immaterial, but as a matter of inducement, and leading up to the material point just mentioned, it was appropriate and ought to have been admitted.

By instruction No. 5 the jury were charged as follows: "The plaintiff, being assignee of the contract of McDonald & Brand, was under the same obligation (after such assignment) that McDonald & Brand were under to carry out and fully perform the terms and conditions of said contract, and unless plaintiff shall prove, by a fair preponderance of evidence, that it has in all material things kept and performed the terms and conditions of said contract to the same extent that McDonald & Brand were required to keep and perform the same, it cannot recover." If the instruction had omitted the parenthetical modification, we think it would have been proper as a succinct statement of the law; but, by limiting the liability or obligations of Bach, Cory & Co. to the period after they agreed to fulfill the contract of McDonald & Brand, we think the court erroneously construed the legal attitude of plaintiff towards the defendant, it being our opinion that plaintiff's liability related to the date of the instrument, January, 1892. It did not extend further back, but commenced at that time.

The judgment must be reversed, and the cause remanded, with instructions to the district court to grant a new trial.

(16 Mont. 376)

QUAINTANCE v. GOODROW et al.

(Supreme Court of Montana. July 15, 1895.)

PROMISSORY NOTE—WAIVER OF DEMAND AND NOTICE.

One who, on indorsing a note, tells the payee to look to him alone for payment, and on the last day of grace and subsequently promises to pay the note, and asks not to be pressed, waives notice of demand and nonpayment by the maker.

Appeal from district court, Jefferson county; Frank Showers, Judge.

Action by A. C. Quaintance against Moses Goodrow, W. J. King, and others. From a judgment against him for the full amount, and an order denying a new trial, defendant King appeals. Affirmed.

W. L. Hay and Walsh & Newman, for appellant. Cowan & Parker, for respondent.

PEMBERTON, C. J. This is an action on a promissory note. On the 17th day of June, 1892, Moses Goodrow executed his promissory note to plaintiff for the sum of \$750, with interest payable six months after date.

Defendant King indorsed the note at the date of its execution. The note was not paid at maturity, and this suit was brought for its collection. The defendant King alleges as a defense that the plaintiff did not demand the payment of the note, at maturity, of the maker; that the note was not protested for nonpayment; and that he was not in any manner notified of the nonpayment thereof. The complaint alleges, in effect, that defendant King, by divers promises made to pay the note, before, at, and subsequent to the maturity thereof, waived protest, presentation, and notice of nonpayment. The case was tried to the court without a jury. The court found, as questions of fact, that defendant King, at the time he indorsed the note, stated to plaintiff that he was to look to him (King), and no one else, to pay the note, and that he would pay it promptly; that, on the third day of grace, the agent of plaintiff demanded of King payment of said note, and that he promised then, and at various times thereafter, to pay the same. The court rendered judgment against King for the full amount of the note. King appeals from the judgment, and also from the order denying a new trial. The testimony of the witnesses is to the effect that the defendant King, at divers times after the maturity of the note, promised to pay it. He asked not to be pressed, and promised that, as soon as he could get the money, or arrange it, he would pay the note. He promised to pay it on the last day of grace, and asked not to be pressed. We think the evidence amply supports the findings of the court in respect to this contention. Daniel, in his work on Negotiable Instruments (4th Ed. § 1090) says: "When presentment of the bill or note at maturity has been dispensed with by prior agreement between the parties, or, in other words, has been waived by the party entitled to require it, the holder is excused for his failure to make it. It would be fraud upon the holder to permit him to suffer by acting upon the assurance of the party to whom he looks as security upon the paper; and, as a prompt presentment is a requirement solely for the benefit of the drawer and indorsers, they are themselves the sole judges to determine whether or not they will enforce it. The waiver may be either verbally or in writing. It may be expressed in totidem verbis, or inferred from the words or acts of the parties. And it matters not what particular language may be used, so that it conveys the idea that the presentment at maturity is dispensed with. The like observations apply to the protest and notice." It is not necessary that the waiver should be direct and positive. Daniel, Neg. Inst. § 1091. See sections 1090-1108, inclusive, for a general discussion of the doctrine of waiver. In *Yaeger v. Farwell*, 13 Wall. 6, a case involving the question of waiver, the court say: "The indorser can, by his own conduct, place himself in such a position that he is estopped

from alleging want of demand and notice of nonpayment. Although, accurately speaking, there can only be a waiver of demand and notice by the indorser before the note is due, yet, after it is due, he can waive proof of them, or, what is more to the purpose, he can so act towards the holder of the note as to render the fact that demand was not made or notice given wholly immaterial." In *Gove v. Vining*, 7 Metc. (Mass.) 212, a case almost identical in its facts with the case at bar, Mr. Chief Justice Shaw says: "And the court are of opinion that when an indorser, at or shortly before the time when the note becomes due, says to the holder that an arrangement for its payment is about being made, and in direct terms, or by reasonable implication, requests the holder to wait, or give time, it amounts to an assurance that the note will be paid,—that the promisor or indorser will pay it,—and is a waiver of demand and notice. It tends to put the holder off his guard, and induces him to forego making a demand at the proper time and place; and it would be contrary to good faith to set up such demand and notice—caused perhaps by such forbearance—as a ground of defense." See, also, authorities cited. *Markland v. McDaniel* (Kan. Sup.) 32 Pac. 1114; *Sheldon v. Horton*, 53 Barb. 23. We are of the opinion that the defendant King, by his conduct and frequent promises to pay the note, waived demand and notice of nonpayment thereof. The judgment and order appealed from are affirmed.

DE WITT and HUNT, JJ., concur.

FIRST NAT. BANK OF BUTTE v. PARDEE et al.

(Supreme Court of Montana. July 22, 1895.)

TRIAL—GENERAL AND SPECIAL VERDICT—FORECLOSURE OF MORTGAGES—DEFICIENCY JUDGMENT.

1. Where, in an action on a note by a bank as assignee, it appears that limitations are a good defense if, as defendant claims, the price of stock sold to a member of the assignor bank was paid and credited on the note on August 30, 1883, as agreed, instead of December 21, 1883, as indorsed on the note, a general verdict for plaintiff is not inconsistent with special findings that the vendee purchased the stock of the defendant in August, 1883, and that the credit on the note should have been made in that month, but that plaintiff did not receive the money till December 21, 1883.

2. Under Code Civ. Proc. § 358, authorizing the court, in an action for foreclosure of a mortgage, to enter a deficiency judgment for the balance due against the defendants liable for the debt, a deficiency judgment may be entered, against a grantor in a deed of trust given to secure a debt, independent of any provision in the deed.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by the First National Bank of Butte against James K. Pardee and others. From

a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

F. W. Cole and H. R. Whitehill, for appellants. Forbis & Forbis, for respondent.

PER CURIAM. This is an action on a promissory note, and for a decree foreclosing a deed of trust given to secure the payment thereof. On the 16th day of April, 1881, the defendant executed and delivered to S. T. Hauser & Co., bankers at Butte, his promissory note for \$11,000, with interest, payable 30 days after date. The deed of trust was executed to secure the payment of the note. Thereafter the note and deed of trust were assigned to plaintiff. At the time of the bringing of the suit the note had on the back thereof the following indorsement: "Dec. 21st, 1883, paid \$5,980.59, sale of stock at 8c." The defense to the note is the statute of limitations, the defendant insisting that said payment was made on said note on the 30th day of August, 1883, and, if so, the statute of limitations had run before the institution of the suit. The replication denies that the note is barred by the statute. Defendant testifies, in substance, that in August, 1883, he sold mining stock to A. J. Davis, who was a member of the firm of S. T. Hauser & Co.; that the price of the stock was the sum indorsed on said note; that it was the understanding that said sum should be paid on said note by Davis; that it was his impression that Davis was acting for said firm in the purchase of said stock, but did not know; that Davis never told him so; that he thinks it was in the month of August, because the weather was hot. The evidence of the officers of the bank is to the effect that the dealing between Davis and the defendant in relation to the stock was a private matter between them; that the bank had no interest or concern whatever in the transaction, and that the money was paid to the bank on the 21st day of December, 1883, by Davis, and credited on the note on that day. The case was tried to a jury. Special findings of fact were made, and a general verdict returned in favor of the plaintiff. As special findings of fact, the jury returned that A. J. Davis purchased the mining stock of defendant in August, 1883, and that the credit on the note should have been made in that month, but that the plaintiff did not receive the money until the 21st day of December thereafter. The court entered judgment for plaintiff for the amount due on said note, decreed the foreclosure of the deed of trust, and also rendered the further judgment: "That if the moneys arising from the said sale shall be insufficient to pay the amount so found due to the plaintiff, as above stated, with the interest, and costs and expenses of sale as aforesaid, the sheriff specify the amount of such deficiency and balance due

the plaintiff in his return of said sale; and that, on the coming in of said return, a judgment of this court shall be docketed for such balance against the defendant James K. Pardee, and that the defendant James K. Pardee, who is personally liable for the payment of the debt secured by such mortgage, pay to the said plaintiff the amount of such deficiency and judgment, with legal interest thereon from the date of said last-mentioned return and judgment; and that the plaintiff have execution therefor." From the judgment, and order refusing a new trial, defendant appeals.

The appellant contends that the general verdict is contrary to the special findings, and that, as a consequence, the special findings should prevail. In view of the evidence, we do not think the contention can be sustained. It may be true that Davis bought the stock in August, and that the purchase price should have been paid by Davis, and credited on the note, in that month; but the evidence is ample that Davis did not pay it to the bank until the 21st day of December. The bank, as the evidence of plaintiff shows, had nothing to do with the transaction between Davis and the defendant in relation to the stock. There is nothing in the case to authorize the holding of the bank responsible for the failure of Davis to pay the money at the time claimed to have been agreed upon between him and the defendant. We think there is no real conflict between the special findings and the general verdict.

Appellant further contends that there is nothing in the deed of trust or complaint to warrant a deficiency judgment in this case, and claims that the judgment in that respect should, at least, be modified. Section 358 of the Code of Civil Procedure, at page 158, provided: "In actions for the foreclosure of mortgages the court shall have the power, by its judgment, to direct a sale of the incumbered property (or as much as may be necessary), and the application of the proceeds to the payment of the costs of the court, and expenses of the sale, and the amount due to the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient and a balance still remains due, judgment shall be docketed for such balance against the defendant, or defendants, personally liable for the debt, and shall then become a lien on the real estate of such judgment debtor, as in other cases, in which execution may be issued." We think this statute affords ample authority for the rendition of that part of the judgment complained of. We think there was no abuse of discretion or error in the action of the court in refusing to continue the case on appellant's application. The showing for a continuance was insufficient. We think the judgment should be affirmed; and it is so ordered.

JACKSON et al. v. GLAZE.

(Supreme Court of Oklahoma. July 27, 1895.)

FRAUDULENT SALES—BONA FIDE PURCHASER—REPLEVIN—DAMAGES—PLEADING—WITHDRAWAL OF INTERPLEA.

1. Where a party, without actual or constructive notice of fraud, purchases a stock of goods, paying therefor a reasonable price, such purchaser obtains a good title thereto, notwithstanding the party making the sale sold with the fraudulent intent to hinder and delay his creditors.

2. Where the record shows that one of the questions in dispute in the trial of the cause below was whether or not a party purchasing a stock of goods had notice that the same were being sold to hinder, delay, and defraud creditors, and where the court below found that the party purchasing had no knowledge of the intended fraud, this court will not reverse the judgment based on such finding.

3. There are two elements of damages which may be recovered in action in replevin. They may be (1) general damages which follow as a necessary result from the detention of the property; and (2) special damages which are incident to a particular case. Damages which follow as a necessary result of the unlawful detention of the property need not be specifically pleaded.

4. It is not error for the trial court to permit a party to withdraw an interplea.

(Syllabus by the Court.)

Error from district court, Canadian county.

Replevin by S. H. Glaze against T. R. Jackson and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Blake & Blake and Ellis & Cook, for plaintiffs in error. Dille & Schmook and C. H. Carswell, for defendant in error.

DALE, C. J. March 15, 1894, Samuel H. Glaze commenced an action in replevin in the district court of Canadian county against Thomas R. Jackson, E. L. Gay, and H. H. Cook, to recover possession of a stock of dry goods and notions. The case was tried by the court, and resulted in a judgment for Glaze for the return of the property, or its value,—\$2,200,—and \$300 as damages for the unlawful detention of the same.

Briefly stated, it appears that on March 9, 1894, Glaze purchased from one Charles Bartley a stock of dry goods, notions, etc., for the sum of \$1,200 in cash, and immediately took possession of the same, and transferred the stock to another storeroom, where he, Glaze, was carrying on the business of a dry-goods merchant. The two stocks were intermingled and used by Glaze as one stock of goods until March 14th, when Cook, a judgment creditor of Bartley, caused an execution to be levied upon the goods in the storeroom of Glaze. It was intended by Cook to have the execution run only upon goods which Glaze had purchased from Bartley; but some of the stock which Glaze was carrying prior to the time the Bartley stock was added was seized by the sheriff upon the execution. The indebtedness from Bartley to Cook arose as follows: In December,

1893, Bartley purchased from debtors of Cook a stock of goods, located in Texas, for the sum of \$3,600, of which sum \$1,000 was paid in cash, and \$2,600 in notes given for the balance due upon such purchase. The first note, in the sum of \$264.19, fell due March 3, 1894. After the purchase by Bartley of the stock of goods, he moved the same from Texas to El Reno, at which last-named place he began doing business as retail merchant, and so continued until he sold to Glaze on March 9th. While Bartley was engaged in business, he sold at retail and wholesale from the stock, and made a few purchases of new goods, so that, at the time of the purchase by Glaze, the actual worth of the stock was from \$1,500 to \$2,500. The witnesses are at variance upon this question. Immediately after the sale of the stock from Bartley to Glaze, Cook brought suit upon his notes against Bartley, obtained judgment thereon, and, to satisfy the judgment against Bartley, caused the execution to be run upon the goods in possession of Glaze. Glaze, claiming ownership, replevied the goods, and made Jackson, the sheriff who levied the execution, and Gay, Jackson's deputy in charge of the goods, parties defendant with Cook. The defendants entered a general denial. While the suit was pending, the Parrotte-Andrews Company, upon motion, was allowed to interplead, and in their petition alleged, in substance, that they were the owners of and entitled to the possession of a certain lot of goods, which they, as a wholesale company, had delivered to Bartley; that such delivery was induced by fraud upon the part of Bartley; that they had accepted an order from Bartley for a certain bill of goods; that Bartley had accompanied such order with a statement of his financial condition, and, relying upon such statement, which was false, they had shipped to Bartley a bill of goods. But, after discovering the fraud, they elected to rescind the sale, and take back their goods, which they claimed were a part of the stock received by Glaze from Bartley, and afterwards seized under the execution. After obtaining the leave and coming into the case in this manner, the interpleaders were by the court, over the objection of defendant Cook, and shortly after the commencement of the trial, permitted to dismiss their cause of action and retire from the case. In the court below a jury was waived, and the case tried to the court. The court found Glaze to be the owner of the property, and entitled to the possession thereof; that the property was of the value of \$2,200; and that said property was wrongfully detained by defendants, and that, by reason of such wrongful detention, plaintiff had been damaged in the sum of \$300. Upon such findings the court rendered a judgment "that the plaintiff do have and recover judgment against the said defendants for a recovery of the possession of the property described in the amended petition herein.

and for the sum of three hundred dollars damages for the wrongful detention of said property, and the costs. And it is further adjudged by the court that the plaintiff have judgment against the defendants for the value of said property, to wit, two thousand two hundred dollars, in case delivery cannot be had." The appellants ask a review of this case upon the following assignments of error: First, error in holding that Glaze obtained a good title in the goods purchased from Bartley. Second, in holding that Glaze was a purchaser without notice of fraud upon the part of Bartley. Third, in awarding damages to Glaze in the sum of \$300 for the detention of the goods. Fourth, in permitting a withdrawal of the interplea by the Parrotte-Andrews Company.

1. The first assignment of error brings into discussion section 2662 of our statutes, which reads as follows: "Every transfer of property, or charge thereon made, every obligation incurred and every judicial proceedings taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors in interest, and against any persons upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor." We think the evidence warrants a finding that Bartley sold to Glaze with the intent to hinder and delay his creditors. Under such state of facts it is contended that such fraud operates to defeat the transfer to Glaze, although Glaze may have purchased without knowledge or notice of such fraud. And the section of our statutes above quoted is relied upon in support of such contention. Numerous cases are cited in support of this doctrine, but a careful reading of the same does not support the claim of counsel. In the cases to which our attention is called, it will be noticed that the property purchased is not disturbed when found in the hands of an innocent purchaser, but the money or the property paid or exchanged to the fraudulent vendor may be followed and subjected to attachment or execution. But nowhere do the courts permit a creditor of a vendor who has transferred, for an adequate consideration, to a person without notice or knowledge of the fraud, to pursue the property into the hands of such innocent vendee. Our statute is from Dakota, and in *Shauer v. Alterton*, 151 U. S. 607, 14 Sup. Ct. 442, appears a case, which went up from the supreme court of South Dakota, wherein the statute under consideration received judicial construction adverse to that contended for by counsel for appellant, and which we believe to be in harmony with the decisions of the courts of this country upon this question.

2. One of the questions before the lower court, and upon which the court below must have passed, was whether or not Glaze knew, at the time of his purchase from Bartley, that Bartley was selling the goods with the fraudulent intent to hinder and delay his

creditors. And the finding of the court below upon such disputed question must stand unless, under the evidence, it may be said that, as a matter of law, Glaze had such notice or knowledge of Bartley's fraud as made him privy to it. This is the contention of counsel for appellants, and in that view we have examined the record. The stock of goods purchased by Glaze for \$1,200 was worth from \$1,500 to \$2,500. Glaze testified that he thought, when he bought, he was getting about \$1,500 worth of goods. Other witnesses claim that the goods were worth a much greater sum. Under the evidence in this case, we are unable to find with certainty the value of the goods. There was conflicting evidence before the trial court. The judgment finding that the value of the goods was in the sum of \$2,200 does not aid us in determining the value of the goods purchased by Glaze from Bartley, because, under the execution, goods were seized which were not a part of the Bartley stock. Glaze testified that the sheriff seized, in addition to the Bartley stock, goods to the value of about \$1,000, and all of the witnesses testified that some goods other than those belonging to such stock were taken. Under such circumstances, we cannot find affirmatively that Glaze knew, at the time of the purchase, that he was getting the goods at a price greatly below their real value. Glaze first heard of the opportunity to purchase the stock upon the morning he made the purchase. He was advised that the stock could be purchased cheaply. He inquired of Bartley whether or not there were any debts against the property, and was advised that there was but one,—a chattel mortgage to a bank at El Reno in the sum of \$224. Glaze was in the store but about one hour, examining the stock, before purchasing. He inquired of the man who first spoke to him about purchasing the goods if everything was all right, and if Bartley owed any money except to the bank, and was advised that he thought he did not. Under these circumstances, Glaze bought. And it is contended that, under the law, he had notice of Bartley's intended fraud, and was, therefore, a party to such fraud; that he should have inquired further of Bartley, or of the clerk in the store of Bartley, or should have asked to examine the bills and accounts of Bartley, to determine the truthfulness of Bartley's statements relative to his financial condition. If Bartley was intending to defraud his creditors, he would have told a falsehood, if Glaze had made the inquiry of him; and it would have been an unusual thing for a man going into a store, to buy a stock of goods, to inquire of a clerk about the financial standing or business integrity of his employer; and we are not advised how an examination of Bartley's bills and accounts would have enlightened Glaze as to Bartley's integrity. The law does not expect or ask of a man that he do those things not

usually done by honest men in their dealings with each other. The law of constructive notice (it is not claimed that any actual notice was had) requires the proof of such facts and circumstances as are sufficient to put a prudent man upon inquiry. A man purchasing is not bound to be overly suspicious or inquisitive. He may presume that he is dealing with an honest man, and not until some suspicious circumstance arises in the transaction—that is, something appears that is not reconcilable with ordinary business integrity—is a person bound to stop and inquire. Measured by this rule, which we deem a fair one, under our statute, what do we find? Glaze purchased for \$1,200 what was worth from \$1,500 to \$2,500. He made such purchase after he had satisfied himself that he was getting \$1,500 worth of goods. Was the price so wholly inadequate as to excite suspicion? That is questionable. In this territory, business ventures are frequently experiments. Men come here with stocks of goods, do not find conditions pleasurable, and sell at a great reduction, in order to close out and leave. A sale of goods in an old and well-settled community which would excite suspicion there would be regarded as a common occurrence here. The inquiry as to debts, both from Bartley and of the man who suggested the purchase, seems ample in that respect. The length of time required in the purchase of the goods may or may not be material. Some men act quickly when their judgment prompts them, and whether or not a speedy purchase is a badge of fraud would depend upon the circumstances surrounding a particular transaction. In short, after an examination of the entire testimony, we conclude that there is not in the evidence sufficient upon which to predicate a conclusion of law that Glaze purchased the goods from Bartley with notice of the latter's fraudulent intent to cheat, hinder, or delay the creditors of Bartley.

3. In an action of replevin, the plaintiff can recover damages which follow as a necessary result of the use of the property, or, if he has been specially injured, he may plead such injury and recover therefor. In the case under consideration, the plaintiff alleged, generally, that he had been damaged in the sum of \$100, for which, in addition to the property in dispute, he asked judgment. The court below rendered a judgment for the return of the property and \$300 damages for the unlawful detention thereof, and, in case a return of the property could not be had, a money judgment in the sum of \$2,200. As we take it, the court below intended to render a judgment as damages in the sum of \$300, provided the goods were returned. In case the goods were not returned, no damages should be recovered, but the sum of \$2,200 should be the full amount of plaintiff's recovery. Under our statutes, "judgment for the plaintiff may be for the possession or for the recovery of possession or

the value thereof, in case a delivery cannot be had, and damages for the detention." Chapter 66, § 185. In this case, the judgment being for the recovery of possession, it was proper, if supported by proof, to render such judgment as would recompense Glaze for the detention of the goods. If, on the other hand, the goods cannot be recovered, the judgment is for their value. If the goods are not returned, payment of the sum of \$2,200 will satisfy the judgment. This construction of the verdict would seem to be in harmony with the statutes. In this case, however, if the plaintiff below had demanded it, we think he was entitled to recover interest upon the money judgment, as that appears to be the rule in Kansas, from which state our statute comes. *Palmer v. Meiners*, 17 Kan. 478, and cases therein cited. As we view the verdict and evidence in this case, the defendant below has the option to return the property, together with \$300 damages for its unlawful detention, or he may pay the sum of \$2,200, and, in either case, the judgment will be satisfied. We think the evidence sufficient to sustain such a verdict.

4. At the trial below the Parrotte-Andrews Company were permitted, over the objection of plaintiffs in error, to withdraw their interplea, and we are asked to reverse this case upon that ground. We fail to see how such an action prejudiced the rights of plaintiffs in error. Under the law the defendants at the trial could have interposed, under their general denial, any defense which may have been offered by the Parrotte-Andrews Company. *Holmberg v. Dean*, 21 Kan. 73. But, in any event, we do not understand that the court could have compelled the Parrotte-Andrews Company to proceed if such party desired to withdraw. The court might have rendered a judgment against the Parrotte-Andrews Company, or, if such company should again desire to litigate the questions raised in their interplea, the question of their right to prosecute their suit can then be determined. The judgment of the lower court is affirmed.

BURFORD, J., having presided at the trial below, not sitting. The other justices concurring.

VAUGHN LUMBER CO. v. MISSOURI MINING & LUMBER CO.

(Supreme Court of Oklahoma. July 27, 1895.)

APPEAL—REVIEW—OBJECTIONS WAIVED.

Failure to except to the overruling of a motion for a new trial is a waiver of error as to such ruling, and all alleged errors of law occurring at the trial for which a new trial might be granted. *City of Atchison v. Byrnes*, 22 Kan. 65.

(Syllabus by the Court.)

Error from district court, Grant county; before Justice Bierer,

Replevin by the Vaughn Lumber Company against the Missouri Mining & Lumber Company. There was a judgment for defendant and a motion denying a new trial, and plaintiff brings error. Affirmed.

Burwell & Burwell, Asher & Asher, and G. C. Clegg, for plaintiff in error. Charles E. Dailey and Buckner, Bird & Lake, for defendant in error.

DALE, C. J. November 20, 1893, the Vaughn Lumber Company instituted an action in replevin in the probate court of Grant county against one R. H. Hagar, to recover a certain lot of shingles which had, prior thereto been shipped by the Vaughn Lumber Company to one J. J. Ellis, at Pond Creek. The goods were seized by Hagar, as sheriff, to satisfy an execution against Ellis, which execution had been obtained by the Missouri Mining & Lumber Company. Hagar, by answer, showed his lack of interest in the property, except as an officer holding the same by virtue of his execution, whereupon the Missouri Mining & Lumber Company obtained leave to be substituted for Hagar, as defendant in the action brought by the plaintiff below. The Missouri Mining & Lumber Company answered by a general denial. The case was tried in the probate court, and judgment rendered for the defendant therein, and from there appealed to the district court of the county, and, on April 14, 1894, tried in the district court, upon an agreed statement of facts, after which submission of the agreed statement of facts the defendant demurred, which demurrer was by the court sustained; and a judgment was rendered in the action in favor of the defendant, adjudging that the defendant was entitled to the possession of the property, and that the interest of the defendant in the property was the sum of money, to wit, \$105, which the defendant had advanced to the railway company as freight charges at the time the execution was by the sheriff levied upon the property, as the property of Ellis. After the rendition of the judgment, the plaintiff below filed his motion for a new trial, which motion is as follows, to wit: "The verdict and the decision of the court is not sustained by sufficient evidence, and is contrary to law, for that the court committed error at the trial of said cause, which was excepted to by the plaintiffs herein." The motion for a new trial was by the court overruled, no exception being taken by the plaintiff below to the ruling of the court upon the motion for a new trial. In the case made presented to us for consideration, the only objection or exception saved by the plaintiff below was upon the ruling of the court sustaining the demurrer of the defendants, and granting judgment upon such demurrer; and that brings before us the proposition as to whether or not this court will, in the absence of an exception to the ruling of

the court overruling the motion for a new trial, consider any of the matters which should have been alleged and presented to the court below upon such motion. This question was passed upon by the supreme court of the state of Kansas in *City of Atchison v. Byrnes*, 22 Kan. 65; and numerous decisions therein cited show that the practice was well settled, at the time of the adoption of our Code, to the effect that the supreme court of that state would not consider questions which should have been presented to the court below upon the motion for a new trial, unless an exception to the ruling of the court upon the motion is saved. By the adoption of the Code of the state of Kansas, we took with it the decisions of the supreme court of that state upon questions of practice; and, in this territory, it must be considered as a settled practice that this court will not review errors assigned upon a motion for a new trial, unless the party presenting the motion in the lower court saved an exception to the ruling of the trial court upon the motion. Outside of this question, there is nothing left in the case made. Under the pleadings filed, the judgment of the court below was one within the issues, as shown on such pleadings; and, upon the record presented to us, there is nothing for this court to do except to affirm the judgment of the court below. Judgment affirmed.

BIERER, J., having presided at the trial in the court below, not sitting. The other justices concurring.

MASON v. CROMWELL.

(Supreme Court of Oklahoma. July 27, 1895.)

HOMESTEAD—ADVERSE CLAIMANTS—INJUNCTION—DISTRICT COURT—JURISDICTION.

The probate judge, in the absence from the county of the judge of the district court, issued an order enjoining a party from the use and occupancy of all except a small portion of a tract of land covered by his homestead entry. *Held*, that the district court has the right to modify the order, notwithstanding such modification permitted the party to use and occupy portions of the homestead inclosed by fences erected by the adverse party.

(Syllabus by the Court.)

Error from district court, Garfield county.

Action by Calvin F. Mason against Fullerton C. Cromwell for injunction. There was a judgment for plaintiff and an order of the district court modifying the same, and plaintiff brings error. Affirmed.

Beauchamp & Rush, for plaintiff in error. Gillett & Brown, for defendant in error.

DALE, C. J. May 15, 1894, Calvin F. Mason commenced an action against Fullerton C. Cromwell in the district court of Garfield county, in the absence of the judge of the district court from such county, and procured an order from the judge of the probate court en-

joining Cromwell from the use and occupancy of all that part of a tract of land covered by his homestead entry, except about 14 acres outside of his fences. Afterwards, Cromwell applied to the judge of the district court for a modification of the order. The judge of the district court granted the relief asked, and allowed Cromwell to use and occupy a portion of the land inclosed within the limits of the fence of Mason, which order was to remain in force and effect until the further order of the court. Mason brings the case to this court, and assigns numerous errors, which may be briefly summarized by stating that the case is here for the purpose of seeking the dissolution of the order of the district court modifying the injunction theretofore issued by the probate judge. It appears from the record that Mason settled upon the S. W. $\frac{1}{4}$ of section 20, township 23 N., of range 6 W., as a homestead, on the 13th day of October, 1893; that at the time such settlement was made the land was a part of the public domain; that, on the 27th day of October, 1893, Cromwell, at the United States land office in Enid, Okl., filed a homestead entry for the tract; that Mason, prior to the time Cromwell sought to go upon the tract of land, inclosed about 147 acres of the same with a wire fence; that Cromwell, after such inclosure was made, settled upon the tract of land outside of the inclosure of Mason, and, after such settlement, attempted to go inside of the inclosure of Mason, for the purpose of further perfecting his settlement right, and reducing to his own use and occupancy portions of the tract of land in controversy. Mason procured an order of the probate judge restraining Cromwell from entering into any portion of his inclosure. Cromwell, in the district court, obtained a modification of such order, in which the judge of the district court permitted Cromwell to enter into the inclosure of Mason for the purpose of improving, cultivating, and using the land for agricultural purposes, and restrained and enjoined Mason from further maintaining his fence upon the premises in such manner as to prevent Cromwell from ingress and egress to the lands.

The only question before us in this case is whether or not the district court had jurisdiction to modify the order theretofore made, and whether, if it had such jurisdiction, it exceeded its discretion in permitting Cromwell to use portions of the land which had, previous to the time Cromwell attempted to settle on the land, been inclosed by Mason. This case is in all respects similar to many which have arisen in this territory, some of which have been passed upon by this court. In *Peckham v. Faught*, 37 Pac. 1085, it was held that: "The district court has power to make an order which grants to an adverse

homestead claimant the right to remain inside a wire fence erected by a person who claims the land by virtue of a settlement made prior to the filing of an entry by such adverse claimant." In the case under consideration, it appears, from the record, that both Mason and Cromwell claim a superior right to the tract of land in dispute,—Mason, by virtue of his settlement prior to the time the land had been segregated from the public domain; and Cromwell, by virtue of the filing of his homestead entry. Under the law of congress, each of these parties has the right to reside upon the tract of land, to cultivate and improve the same, until the question of title is settled in the land department. It should be assumed, from a reading of this record, that both parties are there in good faith. Both believe that they will ultimately be awarded the title to the tract of land. The courts of this territory should give effect to the laws of congress, and this can only be done in this case by giving to each party the right to the use and occupancy of the tract of land until such time as the tribunal especially created to determine the question of title shall have put at rest said title by their decision.

It is contended by plaintiff in error that, because he had reduced to possession, by a fence, 147 acres of this land, therefore he should be permitted to retain the entire use and occupancy of that portion of the tract of land, pending the litigation in the land department; that there still remains 13 acres of the tract upon which Cromwell may proceed, under the laws of congress, to make his settlement and residence; and that, therefore, the court below erred in its application of the law, in giving to Cromwell the right to enter into his inclosure. Such an application of the law would be manifestly unjust to Cromwell; for each of these parties has an equal right to reside upon, cultivate, and improve this tract of land, pending the litigation in the land department. To give to one of them almost the entire tract would be such an inequitable disposition as would work manifest injustice, which courts of equity will not do. As we view this question, the land department has exclusive jurisdiction of the question of title, because congress has created a tribunal for that special purpose. The courts of the territory have exclusive jurisdiction of all those matters relating to possession, for the reason that congress has not reserved such jurisdiction in any manner. *Peckham v. Faught*, supra, is decisive of the principle involved in this appeal. The judgment of the lower court is affirmed.

Justice BURFORD, having presided at the hearing of the cause below, not sitting; the other justices concurring.

CITY OF GUTHRIE v. SWAN.

(Supreme Court of Oklahoma. July 27, 1895.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—ACTION FOR INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

1. The question as to whether or not a party is guilty of contributory negligence in passing at night over a street that is being graded and where there are no barriers or danger signals, and where there is a conflict in the evidence as to the condition of the street, and as to whether it was lighted or not, and where the party injured claims she did not know the condition of the street, but supposed it was in a safe condition, is a question of fact for the jury, under the circumstances of the case, and not of law for the court.

2. While the right of the city to grade or otherwise improve a street is paramount to the right of the public to use the same during the time of making such repairs or doing such grading, if such grading or improvement makes the street dangerous for travel in the nighttime, it is the duty of the city to place warning signals for passers-by, or to place barriers preventing travel during the time of improvement.

3. The question as to whether or not the whole width of a street of a city must be kept in a safe condition for travel is a question of fact for the jury, and not of law for the court to determine.

(Syllabus by the Court.)

Appeal from district court, Logan county; before Justice Frank Dale.

Action by Cynthla E. Swan against the city of Guthrie to recover damages for personal injuries. There was a judgment for plaintiff and an order denying a new trial, and defendant brings error. *Reversed*.

B. T. Hainer, for plaintiff in error. Gardner & Risley, for defendant in error.

BIERER, J. The plaintiff below, defendant in error here, recovered a judgment against the city of Guthrie for the sum of \$2,250, damages sustained by her on account of the negligence of the city, in that it did not keep its streets in a safe condition for travel. There is much dispute in the evidence, but the testimony of the plaintiff tends to show that she was a married woman, 41 years of age; that, on the night of the 18th of April, 1892, she had attended church, and on her way home came on Noble avenue, going west to its intersection by First street, extending north and south; that the city of Guthrie was grading First street by an excavation, which did not disturb the west side of First street, but cut down about three feet on the east side; that, as she approached First street on the south sidewalk of Noble avenue, she observed that the sidewalk was torn up for some distance, before she reached First street; that, the ground being rough where the sidewalk had been, she left the sidewalk and went into the street, and, upon getting closer to First street, observed that it had been graded; and she then went further north to the wagon road, to where the ground had been washed or displaced, and where she supposed it was safe to cross. She thought the descent

to First street there was about a foot, and, in her effort to step down onto First street, fell, and sprained her ankle; and she thinks the step off must have been two or three feet. There were no danger signals placed at the street where the excavation was made; but it is shown that there were two electric lights on streets, each one block, or about 300 feet, away from the place of the accident; and the plaintiff does not claim that she was unable to see the condition of the street plainly, excepting the bottom of the ditch into which she stepped, and where she says it was dark in the ditch. Many of these facts are strenuously opposed on the part of the city, tending to show that the two electric lights made it perfectly light at the place of crossing, and that, in the progress of the grading, there was an approach made in a part of the street for travel for vehicles, about 35 or 40 feet in width, and that the ground where the sidewalk had been was also cut away, and steps made for safe passage for foot passengers. Counsel for defendant insists that, in that state of the case, plaintiff admitting that she observed the grading recently done and the condition of the street, she is guilty of contributory negligence in attempting to cross the street; that, when she attempted to cross in the condition in which she found the street to be, she did so at her own risk; and cites the case of *Wright v. City of St. Cloud (Minn.)* 55 N. W. 819, as authority. The law, as laid down in the case cited, is not applicable to this case. In that case the plaintiff knew fully the condition of the street. It was in broad daylight, and she knew that the street was covered with snow and ice, and she knew its dangerous condition, but only overestimated her ability to cross it in safety. In such a case, of course, she took her own chances. In this case, the plaintiff claims that she did not know that the approach to First street was as high as it was; that she supposed it was only about a foot high at the place where she attempted to cross, although she found when she fell, on trying to cross, that it was two or three feet high. She says she made an effort to find a safe place to cross the street, and that she came to the place where it appeared that the wagons had been crossing, and, there being no danger signals or obstruction to her passing, she made the effort to cross, and in doing so in the dark she got hurt, although she was endeavoring to pass in safety. There is evidence disputing her claim that the crossing was unsafe at that point, or that it was dark there, and also some evidence, consisting of statements made by herself soon after the accident, tending to show that she did not cross where she testified she did. We cannot say, under such circumstances, that she was guilty of contributory negligence; for that was a question of fact for the jury to determine from the conflicting evidence. *City of Wy-*

andotte v. Gibson, 25 Kan. 236. The city had the right to grade and improve its streets, and this right, during the time of such grading and improvement, was paramount to the right of the public to use the street; but this did not relieve the city from all responsibility in the premises. The city must use reasonable care to protect the public from injury; and, if the grading leaves fatal defects to safe public travel, then the city must close up the street or give warning of the danger. The case of the *City of Lincoln v. Calvert* (Neb.) 58 N. W. 115, is not opposed to this view. In that case the court says: "But, where a city is charged with the care of streets and the duty of improving them, the duty of keeping them in a reasonably safe condition for travel is remitted during the time occupied in making repairs or improvements. *James v. San Francisco*, 6 Cal. 528; *Williams v. Tripp*, 11 R. I. 447. In order, however, that the city should be protected from liability upon this ground, it must exercise reasonable care to protect the public from the consequences of the unsafe condition of the street. *City of Covington v. Bryant*, 7 Bush (Ky.) 248. Therefore, an impassable condition of the street requires that the city should erect guards or barricades to keep the public off."

A more serious question in the case is presented by instruction No. 7, given by the court to the jury, which instruction is as follows: "7. You are instructed that any person traveling upon a sidewalk of a city which is in constant use by the public has a right, when using the same with diligence and care, to presume, and to act upon the presumption, that it is reasonably safe for ordinary travel throughout its entire width, and free from all dangerous holes, obstructions, and other defects; and, if you believe from the evidence that the plaintiff, while traveling along one of the streets of this city, was injured, as alleged in her petition, and that the injury would not have happened if the street had been in reasonably good repair and safe condition, then the defendant is liable for such injury, provided you believe from the evidence that the plaintiff was exercising reasonable care and caution to avoid injury while passing over said walk, and that the defendant did not use reasonable care to keep their streets in a safe condition." This instruction is abstractly correct, but concretely wrong. It states the law correctly, as applied to sidewalks, or to the part of the street which is open to and being used for public travel, or to a street where, under the circumstances, all of it, throughout its entire width, should be kept in a safe condition for travel; but it states the law incorrectly in holding, as a matter of law, but not as a matter of fact, for the consideration of the jury, that the entire width of all streets must be kept in a safe condition for travel, and that the jury might find negligence to exist on the part of the city from the mere fact of not

keeping the entire width of the street in safe condition for travel for foot passengers. This instruction means that, when applied to this case. It is true it starts out with a statement of the law with reference to sidewalks; but it then proceeds to tell the jury that, if the plaintiff received her injury while traveling with due care "along one of the streets of the city * * * and that the injury would not have happened if the street had been in reasonably good repair and safe condition, then the defendant is liable for such injury," and if they further believed that the plaintiff was using due care "while passing over said walk, and that the defendant did not use reasonable care to keep their streets in a safe condition." The plaintiff's own evidence showed that she had left the sidewalk at the time she received the injury, and had passed onto the street, so that the jury could not have understood this instruction to apply only to sidewalks proper, but that the place where the plaintiff crossed should be treated the same as a sidewalk; and the jury were at liberty then to find negligence on the part of the city if the entire street was not kept in the safe condition for foot passage that a sidewalk should reasonably be in. The question submitted to the jury involved as much a question of the negligence of the plaintiff as of the defendant's negligence. If the plaintiff was to any extent guilty of carelessness, then she could not recover, no matter how careless the city may have been. She claims she took care to examine where she was going. The city claims she did not, and that, if she had exercised reasonable care, she would have had no trouble in passing in safety, by going over the place cut down for the passage of wagons and vehicles. She claims that there was an abrupt fall in the wagon road, where she crossed, of considerably more than a foot, as she had supposed it to be. The city claims that the wagon way was cut down with a gradual slant to the bottom of the excavation. There was no contention, however, but that the bank between the wagon way and the sidewalk was from two to three feet high, and the plaintiff's evidence tended to show that the bank was the same height under the sidewalk, and that it, likewise, had not been cut down. Now, if the plaintiff was clothed with the presumption that all parts of the street were in a safe condition for travel, then it would make little difference whether she received her fall while passing over the wagon road or over the space between the wagon way and the sidewalk, and the jury could entirely avoid the difficulty which existed, under the evidence, of determining from the testimony whether the wagon road was in a reasonably safe condition for travel or not; for the law, as thus laid down, would give them the right to evade this difficult question and find for the plaintiff, if she was using the reasonable care of a traveler while passing along the traveled portion of the highway.

The presumption that the street was reasonably safe for travel at all places simply means that the city was bound to keep the streets in a safe condition for travel at all places. Under such high rule of responsibility on the part of the city, the degree of care on the part of a traveler might be very small, while, on the other hand, the attempt to pass over a place where the city was not bound to keep the street in a safe condition for travel, when the passenger could see the proper place for his passage, might be and probably would be absolute negligence. The plaintiff nowhere contends that she could not see the sidewalk, or that she could not see the wagon road, so that it is not a case where the traveler fell, unawares, over the embankment created by the grade. The erroneous instruction might be immaterial in this case, if there was no dispute upon the question as to where the plaintiff crossed the grade. If there was no dispute but what she crossed over at the sidewalk, without knowledge of its dangerous condition, or over the wagon road, then she was properly clothed with the presumption of their safety, until she acquired knowledge to the contrary; but there was a dispute in the evidence on that question. Mrs. Swan testified that she went down where the wagons had gone down, and she thinks it must have been two feet and a half or perhaps three feet of a fall. She afterwards testified that she crossed "near the wagon road." In support of her testimony, she offered two witnesses, Mr. and Mrs. McConnell, who had crossed this same street over the wagon road, going from church, the same night, and who were standing near Noble avenue and Second street, one block west of where the accident happened, at the time it occurred. Mr. McConnell swore that Mrs. Swan stated that she went over where the sidewalk was. Mrs. McConnell swore that Mrs. Swan said that she fell in a deep place close by the barn, which would mean, under the evidence, about the place where the sidewalk had been. Mr. and Mrs. McConnell had passed over the roadway, at this same point, on this same night, and evidently shortly before Mrs. Swan, in perfect safety, and without experiencing, at least so far as they stated, any difficulty or danger whatever. Mrs. Swan testified that she thought that the place where she went over "was not less than two feet, perhaps three," by which expression her further answer shows she meant two feet, and perhaps three feet, deep. The city contended, by what we are compelled to admit was stronger proof than that offered on her part, that the electric lights were burning; that it was light generally on this street; that the wagon road had been graded, so that it was in a reasonably safe condition for travel, taking into consideration the fact that improvements were then being made. This left the question fairly open for the jury as to whether or not she did

pass down on the traveled way prepared, or whether she went over the embankment outside of the traveled way. Her action can in no way be supported on the theory that she went, without notice, over the high part of the embankment, and that the city was liable for not placing a danger signal there; for the action is not so prosecuted, and we must review it on the theory on which it was tried below. Had the question been properly presented to the jury, it might have found that it was the duty of the city to keep the street safe for travel at this point throughout its entire width, but the court could not hold that as a matter of law. This was a question of fact for the jury, to be determined from the evidence offered, under proper instructions; and, in determining this, the jury should take into consideration the proof as to how much of this street, throughout its entire width, had been in use, and whether it was in the business portion of the city or in the residence part, whether the city at that place was densely or sparsely populated, and all of the matters on which the jury could make its determination. The authorities are not harmonious on the question as to whether the city must keep the entire width of an open street in safe condition for travel, but the great weight of authority is that it is a question of fact for the jury, and not a question of law for the court to determine. Elliott, on Roads and Streets, while giving both sides of the question, and the authorities thereon, on page 455 states the rule thus: "The general rule appears to be that the duty to keep in repair extends only to the 'traveled path,' or portion of the way in actual use, provided it is wide enough to be safe." This question was squarely involved in the case of *City of Wellington v. Gregson*, 31 Kan. 99, 1 Pac. 253, in which the court, by Mr. Justice Brewer, said: "In other words, the city is not bound, as matter of law, to keep, not only the traveled track in good and safe condition, but also to keep a space of a carriage width on each side of such traveled track free from posts, stones, or other objects large enough to upset a buggy or wagon running over them; and yet that is substantially what the court instructed the jury. It is unquestionably the duty of the city to keep its streets in a reasonably safe condition for travel, in the ordinary modes. In 2 Dill. Mun. Corp. (3d Ed.) § 1019, the author says: 'It is sufficient, we think, if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day; and whether they are so or not is a practical question, to be determined in each case by its particular circumstances.' In the discharge of this duty, in places it must keep the whole width of the street in a safe condition for travel. *Bryant v. Biddefield*, 39 Me. 193. In other places, it is sufficient if it keep a traveled track in good repair. *Hull v. Richmond*, 2

Woodb. & M. 337, Fed. Cas. No. 6,861; Ireland v. Plank-Road Co., 13 N. Y. 526; Bassett v. City of St. Joseph, 53 Mo. 290; Brown v. Mayor, etc., of Glasgow, 57 Mo. 157. Whether, in any given case, the public needs are such as to require the whole width of the street to be kept in safe condition, is generally a question of fact for the jury. In 2 Dill. Mun. Corp. § 1016, the rule is thus laid down: 'Nor is a municipal corporation bound to keep all of its streets, and all parts of the streets, in good repair; but, when it opens a street and invites public travel, it must be made reasonably safe for such use; but this does not necessarily imply, as a matter of law, that the whole width of the street must be in good condition. Whether the street was wide enough to be safe; whether it was in a reasonably safe condition for public use by travelers who use ordinary care to avoid injury,—are almost always questions for the jury.' See, also, City of Wyandotte v. Gibson, 25 Kan. 236; Osage City v. Brown, 27 Kan. 74; Maultby v. City of Leavenworth, 28 Kan. 745." In the case of Craig v. City of Sedalia, 63 Mo. 417, the court held (page 419): "In the case of Bassett v. City of St. Joseph, 53 Mo. 290-303, it was expressly decided that a city is not bound to keep all of its streets in good repair under all circumstances; that it is only bound to keep such streets and parts of streets in repair as may be necessary for the convenience and use of the traveling public. It was further remarked in that case that: 'It may be, and doubtless is, the case, that there are streets and parts of streets in many cities which are not at present necessary for the convenience of the public, that will be brought into use by the growth of the city; or there may be streets that have more width than is necessary for the present use or the requirements of travel; and that all that is required in such cases is that the city shall see that, as the streets are required for use, they shall be placed in a reasonably safe condition for the convenience of travel.' The same doctrine was announced by this court in the case of Brown v. Mayor, etc., of Glasgow, 57 Mo. 157, where the foregoing extract was quoted and approved. See, also, Howard v. Inhabitants of Bridgewater, 16 Pick. 189. Every defect or imperfection in the streets of a city is not actionable. It must appear that under the particular circumstances of the case, it was the duty of the city to have removed the obstruction or repaired the defect which occasioned the injury, and that the person complaining was at the time in the exercise of ordinary care. These are questions of fact, to be determined by the jury, under appropriate instructions. In the case at bar, the court declared as a law that it was the duty of the defendant

to keep the whole of the street on which the accident occurred in repair. This was error." In the case of Kelley v. Town of Fond du Lac, 31 Wis. 179, the court, while holding that a party has a right to deviate from the traveled track when the conditions are such as to create a reasonable belief of danger in the traveled track, used the following language with reference to the obligation of the city to keep the whole width of the street in safe condition for travel: "The responsibility of towns, without doubt, primarily extends only to losses or damage sustained by reason of defects in the traveled portion of the highway; for they are not bound to keep the highway in its whole width in a suitable or safe condition for travel. It is, in general, the duty of the traveler, therefore, to remain in the traveled track, or that part of the highway which, to a reasonable width, has been graded or prepared for that purpose. * * * A person who, in the lawful use of a highway, meets with an obstacle or other cause of insufficiency, may yet proceed, if it is consistent with reasonable care so to do; and this is generally a question for the jury, depending upon the nature of the obstruction or insufficiency and all the circumstances surrounding the party." In the case of Goeltz v. Town of Ashland, 75 Wis. 642, 44 N. W. 770, the court again affirmed this doctrine, and said: "This court has repeatedly held that it is not the duty of a town to prepare and keep in repair a public highway to the whole width thereof. Kelley v. Fond du Lac, 31 Wis. 179, 186, 187; Hawes v. Fox Lake, 33 Wis. 443, 444; Matthews v. Town of Baraboo, 39 Wis. 677; Prideaux v. Mineral Point, 43 Wis. 523; James v. City of Portage, 48 Wis. 681, 5 N. W. 31; Cartright v. Belmont, 58 Wis. 373, 17 N. W. 237." We think this a safe doctrine to follow, and one that cannot be injurious to either the traveler or the city, and that the instruction as given was one which under the circumstances was likely to and did mislead the jury; "and, where inapplicable instructions are given which may have misled the jury to the prejudice of the party complaining, the verdict cannot be permitted to stand." Railway Co. v. Pierce, 33 Kan. 61, 5 Pac. 378.

There is a question raised as to the right of the plaintiff to recover for medical attendance; but, as the testimony is not definite as to whether the medical attendance was furnished upon the plaintiff's own individual contract or whether her husband was responsible for the same, we will not pass on this question, the error already noticed requiring the reversal of the case. The judgment of the court below is reversed, with directions to grant a new trial. All the justices concurring.

(3 Okl. 105)

SHARPE, Treasurer, et al. v. MANEY et al. SAME v. ESPERSON et al. SAME v. KERFOOT et al. SAME v. EL RENO WATER CO.

(Supreme Court of Oklahoma. July 27, 1895.)

TAXATION—TIME OF LEVY.

1. A taxpayer cannot enjoin the collection of taxes on the ground that they were not levied on the third Monday in July or within 10 days thereafter, as directed by St. 1893, art. 5627, as the levy, if not made within the time so fixed, may be legally made afterwards. *Sharpe v. Engle* (Okl.) 39 Pac. 384, followed.

2. The duty of levying territorial taxes devolves on the county commissioners only in case of the failure of the auditor to transmit to the county clerk a statement of the territorial taxes levied by the territorial board of equalization within 10 days after the third Monday in July; and a petition to enjoin the collection of such taxes, alleging that no levy was made by the county board within the time fixed, but failing to allege that none had been made by the territorial board or transmitted by the auditor, states no cause of action. *Sharpe v. Engle* (Okl.) 39 Pac. 384, followed.

McAtee, J., dissenting.

Appeals from district court, Canadian county; before Justice John H. Burford.

Separate actions by James W. Maney and others, Nells Esperson and others, Marian M. Kerfoot and others, and the El Reno Water Company, a corporation, against Ernest Sharpe, county treasurer, and Canadian county, to enjoin the collection of taxes. Judgment for plaintiffs in each case, and defendants appeal. Reversed.

Thomas R. Reid, Co. Atty., and C. H. Carswell, for plaintiffs in error. Dille & Schmook and Blake & Blake, for defendants in error.

BIERER, J. These cases are all appeals from judgments of the district court of Canadian county enjoining the collection of taxes in that county for the year 1893. The cases involve the identical questions passed upon by this court in the case of *Sharpe v. Engle* (at the January term, 1895, of this court) 39 Pac. 384, and the cases were submitted without briefs to abide the decision of the court in that case. Following that decision, the judgment in these cases must all be reversed, at costs of defendants in error, with direction to the court below to overrule the demurrers to the petitions of the plaintiffs in the district court.

DALE, C. J., and SCOTT, J., concurring; McATEE, J., dissenting; BURFORD, J., not sitting.

(3 Okl. 161)

UNITED STATES v. RENFROW.

(Supreme Court of Oklahoma. July 27, 1895.)

INTOXICATING LIQUORS—SALES TO INDIANS—CITIZENSHIP—HOW ACQUIRED.

1. Section 2139, Rev. St. U. S., which provides that "every person who sells, exchanges, gives, barter, or disposes of any ardent spirits, etc., * * * to any Indian, under charge of

an Indian superintendent or agent," is applicable to all Indians who are, in any degree, under the control or charge of an Indian agent.

2. The fact that an Indian received allotted land in Kansas in the year 1866, and took the oath of allegiance to the United States, and became an elector of the state of Kansas, and is above the age of 21 years, is not sufficient to take him out of the inhibition contained in section 2139, supra, provided he has not been released by the government from the charge, supervision, and control of an Indian agent.

3. Neither does the fact that an Indian may be living upon allotted land, and not drawing any annuity from the government, authorize the sale to such Indian of intoxicating liquors, provided such Indian is still under the supervision or control of an Indian agent.

(Syllabus by the Court.)

Appeal from Pottawatomie county court; before Justice Scott.

Isaac C. Renfrow was convicted of unlawfully selling spirituous liquors to Indians, and appeals. Affirmed.

Pendleton, Melton & Blakeney, for appellant. Caleb B. Brooks and Roy Hoffman, for appellee.

DALE, C. J. In December, 1893, in the district court of Pottawatomie county, sitting with the powers and jurisdiction of a federal court, Isaac C. Renfrow pleaded not guilty to an indictment therein pending against him, wherein he was charged, in substance, with the sale of spirituous liquors, in three separate counts, to three different persons, described as Indians in the charge of an Indian agent. The case was duly submitted to the trial court upon an agreed statement of facts, which may be briefly stated as follows: First, Renfrow, the defendant, is a citizen of the United States, duly licensed to sell intoxicating liquors, under the laws of the territory of Oklahoma. Second, Renfrow sold whiskey to one Joe Moose, a full-blood Pottawatomie Indian, residing upon allotted land, and holding the same pursuant to treaty, ratified by act of congress (26 Stat. 1016), and his relations to the general government, to the Indian department, and to the Indian agent at Sac & Fox Agency, being the same as that of all other of the Pottawatomie Indians, under the acts of congress governing such relations; and that there was, at the date alleged in the indictment, a United States Indian agency at Sac & Fox Agency, in Lincoln county, in the territory of Oklahoma, with an agent in charge, who claimed to have charge and control of the Pottawatomie Indians. It was further stipulated that said Joe Moose and his father received allotted lands in Kansas, in the year 1866, and took the oath of allegiance to the United States, and became electors of the state of Kansas, and of the United States, at that time, under the provisions of a certain act of congress providing for the naturalization of Indians. That afterwards, together with the other Pottawatomie Indians, he removed to the Indian Territory, and went upon what

was called the "Pottawatomie Reservation," which was afterwards allotted under a treaty, ratified by act of congress (26 Stat. 1016). Third. It was further agreed that said Renfrow sold spirituous liquor to one Thomas Goodbo, at the time and place alleged in the indictment, and that said Thomas Goodbo's relations to the general government and the Indian department were the same as those of the said Joe Moose, except that said Goodbo is a mixed-blood Pottawatomie, his father being a white man, and a native-born citizen of the United States, and his mother being a Pottawatomie Indian. Fourth. It was further stipulated that a sale of spirituous liquors was made by Renfrow to one Joseph Burnett, at the time and place charged in the indictment, and that statements made regarding Joe Moose and Thomas Goodbo apply to said Joseph Burnett, excepting that said Burnett is a mixed-blood Pottawatomie Indian, his father being a Pottawatomie Indian who was naturalized at the same time as the said Joe Moose; his mother being a white woman, and a citizen of the United States. It was further agreed that, under the acts of congress, the Pottawatomie Indians have abandoned their tribal relations, and do not at this time draw annuities, and that none of the sales stated above in the indictment took place on any Indian reservation. The facts thus agreed to were presented to the court upon the motion of the defendant for his discharge. The court overruled the motion and adjudged the defendant guilty upon each of the three counts in the indictment. The defendant filed his motion for a new trial, which was overruled, and the court then passed sentence upon him. To reverse the judgment of the court below, the defendant appeals, and assigns as error the conclusions of the court below, finding him guilty upon the facts as agreed upon.

The questions involved in this case are of great importance. Almost every county in this territory has Indians located upon allotted lands, many of whom do not draw annuities, and numbers of whom have become naturalized citizens of the United States. In all cases, however, the government is, by its Indian agents, exercising more or less control over such Indians. Under the agreed statement of facts it appears that the Pottawatomie tribe of Indians have dissolved their tribal relations, and are living upon their allotted lands, and are not drawing annuities from the government of the United States, but that an Indian agent, located at Sac & Fox United States Indian Agency, still claims to exercise supervision and control over them. The extent of the control so exercised is not stated, and we will have to determine what supervision and control the Indian agent does exercise, under the acts of congress and direction of the Indian department, and from such sources determine whether or not these Indians are in

fact under such control and supervision of the Indian agent as makes it a criminal offense for a person to sell them intoxicating liquors. Under the policy of the government, the old methods adopted by the Indians themselves are giving way, and they are gradually growing out of their tribal relations, and becoming self-supporting, and taking on the ways of white people. To protect the Indians in the progress of their emancipation from former conditions, and, to the extent to which they become capable of assuming a higher civilization, relaxing the surveillance which the government has placed around them, has ever been our policy in dealing with the Indians; and it is intended and hoped, by a diligent pursuit of this policy, to ultimately save and civilize the Indians, in order that they may not continue to be a source of trouble to our government, or become extinct. In carrying out this policy of our government, congress has from time to time adopted such means as are deemed best suitable to effectuate this intention, and we, therefore, have laws governing commerce between the white citizens and the Indians, laws to protect from invasion upon reservations, set apart for the different tribes, and laws which prohibit any person from selling to an Indian in charge of an Indian agent intoxicating liquors. Congress has also passed laws having for their purpose the enlargement of the privileges of an Indian, such as giving them their land in severalty, providing for their taking land as a homestead, and, upon their reaching a certain condition of self-reliance and intelligence, they may become naturalized citizens of the United States, with the right to vote, hold office, and exercise any of the privileges usually accorded to a citizen of this country. In a discussion of the questions under consideration, it becomes important to bear these suggestions in mind, as they are factors in arriving at a correct conclusion. Previous to February 27, 1877, congress, by different enactments, passed laws having for their purpose the prohibition of the sale of liquor to Indians, and on the date last mentioned provided, in Rev. St. U. S. § 2139 (19 Stat. p. 244, c. 69), as follows: "No ardent spirits shall be introduced, under any pretence, into the Indian country. Every person, except an Indian in the Indian country, who sells, exchanges, gives, barter, or disposes of any spirituous liquors or wine to any Indian under the charge of an Indian superintendent or agent, or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punished by imprisonment for not more than two years, and by a fine of not more than \$300." July 23, 1892, section 2139, supra, was amended to read as follows: "No ardent spirits, ale, beer, wine or intoxicating liquor or liquors of whatever kind shall be introduced under any pretence into the Indian country, and every person who sells, exchanges, barter, or disposes of

any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under the charge of an Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the Indian country, shall be punished by imprisonment for not more than two years and by fine of not more than \$300 for each offense." 27 Stat. 280. This section, as amended, is the one relied upon by the prosecution to sustain the conviction in this case; and it becomes, therefore, highly important to accurately fix the status of the Indians named in the indictment to whom liquor was sold, and determine whether or not they are still such Indians for whose protection the statute was enacted. It will be conceded that congress has a right to regulate commerce between the whites and Indians, and punish for a violation of its laws relating thereto. *U. S. v. Holliday*, 8 Wall. 407; *U. S. v. Forty-Three Gallons of Whiskey*, 93 U. S. 188.

The first treaty with the Pottawatomie tribe of Indians was concluded between Major General Anthony Wayne and the Pottawatomies, and proclaimed December 22, 1795. Subsequent to that time more than a score of treaties between the government and these Indians have defined the varying status of their relations. In all of them the government asserts its amity, friendship, and protection to these Indians. In the treaty proclaimed August 7, 1868, by President Andrew Johnson, the preamble recites that it is for the purpose of purchasing a home for the Pottawatomie Indians in the Indian country south of Kansas. Article 1 recites that such tract of land, not exceeding 30 miles square, shall be set apart as a reservation for the reasonable use and occupancy of the tribe. Article 4 provides: "A register shall be made, under the direction of the agent and the business committee of the tribe within two years of the ratification of this treaty, which shall show the names of all members of the tribe who declare their desire to remove to the new reservation, and of all who desire to remain and to become citizens of the United States." Under the provisions of this treaty, the tract of land was purchased which was included within the boundaries of Oklahoma upon the organization of this territory. This reservation was by the treaty ratified March 3, 1891 (26 Stat. 1016), ceded and relinquished back to the United States, and, as part consideration for such relinquishment, patents to allotments in severalty were issued to certain members of the tribe, under certain conditions, among which we find that "when said allotments shall be so confirmed and approved by the secretary of the interior, the title in each allottee shall be evidenced and protected in every particular, in the same manner and to the extent provided for in the above-mentioned act of congress": referring to the act approved February 8, 1887, known

as the "Dawes Act," which is entitled "An act to provide for allotment of lands in severalty of Indians on the various reservations, and to extend the protection of the laws of the United States and territories over the Indians, and for other purposes." Under this act, these Indians, Moose, Goodbo, and Burnett (the Indians to whom it is agreed the defendant Renfrew sold the intoxicating liquors), received allotments in severalty, and the protection provided for in the treaty of February 8, 1887, such treaty extending over them, in common with the other members having allotments under the provisions of the same.

It becomes important to notice what steps, if any, the secretary of the interior and the commissioner of Indian affairs have taken to carry into effect the protection guaranteed by the treaty above referred to, and under what authority they assume to act in the premises. Section 2114, Rev. St. U. S., provides: "The president is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange of territory under authority of the act of May 28, 1830, 'To provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the Mississippi,' and to cause such tribe or nation to be protected at their new residence against all interference or disturbance from any other tribe or nation of Indians, or from any other person or persons whatsoever." We find in section 2052, Rev. St. U. S., authority for the appointment of an Indian agent for the Wichita, and neighboring tribes west of the Chocktaws and Chickasaws, and in section 2059, Id., we find that "the president whenever he shall judge it expedient to discontinue any Indian agent may transfer the same from the place or tribe designated by law to such other place or tribe as the public service may require." Under this authority an Indian agent was appointed for the Sac & Fox Indian Agency, in the Indian Territory, and the jurisdiction of said agency subsequently extended over the Iowas, Pottawatomies, Kickapoos, and absentee Shawnees. Such was the jurisdiction of this agency at the time when the organic act constituting this territory included the same within the boundaries of the territory of Oklahoma. An agent has continued to reside, and now resides, at Sac & Fox Agency who draws a salary from the government, for the purpose of looking after the interests and supervising the affairs of the Indians above named. While the Pottawatomie Indians have advanced rapidly in the scale of civilization, have taken their lands in severalty, and relinquished their reservation to the government, and while the government control over their affairs does not now exist in the degree it once did, yet no act or utterance, either by treaty, congress, or department can be found, whereby the government vigi-

lance is entirely relaxed, and its control over their affairs abandoned. At the date named in the indictment, the agency still continued, and the agent had other employees appointed and paid from government funds for the manifest purpose of keeping the directing arm of the government around these Indians until they shall have grown out of their pupillage unto full responsibility of citizenship. And by virtue of such control in their affairs may be cited the fact that no Pottawatomie Indian can lease his allotment, except the lease receives the approval of the department; and the government's official representative in these matters, stationed at the agency, is the authority through which the department acts in approving or disapproving the leasing of the allotments. And, under the provisions of the treaty, the allotted lands cannot be sold for a period of 25 years, and all contracts made in relation thereto for such period are declared absolutely null and void. Act Cong. Feb. 8, 1887, *supra*. Section 2053, Rev. St. U. S., reads as follows: "It shall be the duty of the president to dispense with the service of such Indian agents and superintendents as may be practicable." And in section 2050, *supra*, the president is authorized to discontinue any Indian agency or transfer the same from place to place as the public service may require. This power so granted to the president has not been exercised to discontinue the Indian agency at Sac & Fox Agency, so far as it relates to the supervision and control of the Pottawatomie Indians. And it may, therefore, be assumed, we think, that, in the mind of the president, and the commissioner of Indian affairs, the time has not yet arrived when the Pottawatomie Indians may be entirely outside the protection of the laws of the United States, as defined in the treaty with such tribe. And it would appear reasonable that, until some affirmative act or declaration was made by the authorities of the government having such matters in charge to that effect, such supervision and control exists.

It is contended by counsel for appellant that there is no satisfactory proof of the fact that these Indians are still under the authority of an Indian agent. Under the agreed statement of facts, we find the following allegation: "And that there was, at the date alleged in the indictment, a United States Indian agency at Sac & Fox Agency in said territory, with an agent in charge, who claimed to have charge and control of the Pottawatomie Indians." While it may be properly stated that this is somewhat indefinite, yet it occurs to us that we are not at liberty to presume that a public officer is exercising functions of office not in conformity with the rules and regulations of the department which he served; and we therefore think that the court below was warranted in holding that the allegation referred to was sufficient to justify such court in presuming that the

agent was acting within the scope of his authority.

Upon the question as to whether or not the spirituous liquor sold to these Indians must have been sold within an Indian reservation, in order to convict the defendant of the crime charged in the indictment, the case of *U. S. v. Holliday*, 3 Wall. 407, is in point. Mr. Justice Miller, delivering the opinion of the court, said: "The facts referred to concisely are that spirituous liquor was sold within the territorial limits of the state of Minnesota, and without any Indian reservation, to an Indian of the Winnebago tribe, under the charge of the United States Indian agent for said tribe. * * * The policy of the act is the protection of those Indians who are, by treaty or otherwise, under the pupillage of the government, from the debasing influence of the use of spirits; and it is not easy to perceive why that policy should not require their preservation from this, to them, destructive poison, when they are outside of a reservation as well as within it. The evil effects are the same in both cases." In *U. S. v. Haas*, 3 Wall. 407, the same justice discusses further the proposition, and arrives at the same conclusion. We conclude, then, that it is wholly immaterial whether an Indian is within or without a reservation, so long as he is under the charge of an Indian agent. A person is amenable to the law who sells him intoxicating liquors. The act of congress of 1887, *supra*, in *Eells v. Ross*, 12 C. C. A. 205, 64 Fed. 417, and in *Beck v. Flournoy Live-Stock & Real-Estate Co.*, 12 C. C. A. 497, 65 Fed. 30, has received judicial construction, and, as we gather from those cases, the allotment of lands and becoming naturalized citizens of the United States do not, necessarily, release the Indians from the control of the Indian agent. There is still much wherein the Indian agent may act in the protection of the Indians after they have taken their lands in severalty and become naturalized citizens of the United States. They are still Indians, with the same intelligence and power to protect themselves after the passage of the act that they had previous thereto. The Indian department is still compelled to assist them in the leasing of their lands, and to exercise supervision over them in various ways wherein it is deemed necessary for their protection. And in the act of February 8, 1887 (24 Stat. 388) under the provisions of which the appellant says he has not violated the act of congress prohibiting him from the sale of liquors to these Indians, will be found a provision which reads as follows: "That upon the approval of the allotments provided for in this act, by the secretary of the interior, he shall cause patents to issue therefor, in the name of the allottees, which patents shall be of the legal effect and declare, the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall

have been made, or in case of his decease, to his heirs, according to the laws of the state or territory where such land is located, and that, at the expiration of such period, the United States will convey the same, by patent, to such Indian or his heirs aforesaid, in fee, in discharge of such trust, and free of all charge or incumbrance whatsoever, provided: that the president of the United States may, in any case, in his discretion, extend the period." And under this provision, and in accordance with the general policy of the government, the commissioner of Indian affairs has, through the agent at Sac & Fox Indian Agency, assumed and exercised the right to supervise the leasing of these allotted lands, and to take such general supervision over the Indians formerly belonging to the Pottawatomie tribe as, in his judgment, is necessary for their protection against the encroachments of other parties.

There seems to be a contention upon the part of counsel for the defendant below that, because these Indians have become, under the laws of the United States, naturalized citizens, therefore people are at liberty to deal with them to the same extent as they would with white citizens. We think counsel are in error in this regard. These Indians may be citizens of the United States, and yet not possessed of all the privileges given to other citizens. There is such a thing as a qualified citizenship. In *Eells v. Ross*, supra, in speaking upon the question of citizenship, under the act of 1887, the court says: "The act of 1887, which confers citizenship, clearly does not emancipate the Indians from all control. * * * Section 3 provides for leasing of lands, under certain contingencies, under the regulations of the secretary of the interior, and the proviso of the section contemplates agents in charge of the reservations. Besides, the practice of the department has been and is to maintain them, and this practice is respectable evidence of a correct interpretation of the statute by officers who may have suggested the policy and written the provisions of the statute. * * * That the abolition of reservations and of the guardianship of the Indians is the ultimate hope of the policy there can be no doubt; but it will not be soonest realized by attributing fanciful qualities to the Indians, or by supposing that their natures can be changed by legislative enactment. * * * The patent has clear words of prohibition against alienation, and, even if it had omitted them, the treaties and law imposed them. *Taylor v. Brown* (Dak.) 40 N. W. 527. The power of the government to impose the restraints is not questioned, and its purpose is certainly not ambiguous." This decision is a construction upon the act of 1887, the authority under which the Pottawatomies resident in Oklahoma reduced their holdings in common to allotments in severalty; and if congress had the power to continue the government's protection over the individual holdings, and to authorize its agents

or superintendents to see that these provisions are enforced, it certainly cannot be deduced that the application of section 2139, supra, is destroyed, or that these Indians are not under the charge of an Indian agent, within the meaning of the liquor traffic restriction.

As to the question of the length of time these Indians have been citizens, and also as to whether they became citizens under the act of 1887, supra, or in Kansas, in 1866, is, we think, immaterial. The statement of facts shows that they bear the same relation to the general government, to the Indian department, and to the Indian agent at Sac & Fox Agency as do the other Pottawatomie Indians. Neither do we think that it matters whether they are full-blood Indians, or less than full-blood Indians. The relation they bear to the general government, by treaty stipulations, is that of Indians, still to some extent under the control of the Indian department. 20 Op. Attys. Gen. U. S. 711; *Famous Smith v. U. S.*, 151 U. S. 50, 14 Sup. Ct. 234.

After consideration of the questions involved in this case, we conclude, therefore, that when it is shown that the Indian has not reached that condition of intelligence and self-reliance which, in contemplation of law, entitled him to all the rights, privileges, and immunities granted to other citizens, or that the president has not, under the authority granted him by congress, discontinued the control and supervision of the Indian agent over the Indians, a person who sells or disposes of liquor to such Indian is guilty of a violation of the law. The judgment of the lower court is affirmed.

SCOTT, J., having presided at the trial of the cause below, not sitting. The other justices concurred.

BLEVINS v. ATCHISON, T. & S. F. R. CO.
(Supreme Court of Oklahoma. July 27, 1895.)
CARRIERS—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—GENERAL VERDICT—SPECIAL FINDINGS—INCONSISTENCY—SETTING ASIDE.

1. If one ships cars of cattle on a railroad stock train upon a contract which provides that he shall be transported upon the caboose attached to such train, and that he shall care for said cattle during transportation and upon their delivery at their destination; and he takes passage upon the caboose of such train, goes to sleep upon it, and is awakened by an employé of the railroad company, who is himself a passenger upon the train, and has nothing to do with its running or management, who tells him that the train has reached its destination, and that his cars of stock are being "set out at the stock chute"; and he is not told or notified to leave the train by any one of the company's servants having charge thereof, and the train has in fact reached the point of destination, between 9 and 10 o'clock at night, the night being very dark, but has stopped at a distance from the passenger station, and upon a bridge 25 or 30 feet in height; and he goes out of the caboose, and, with no lights or depot in sight, and without endeavoring to ascertain the situation of the train, steps off the platform, and in doing

so falls 25 or 30 feet to the ground, thereby suffering injuries,—he cannot recover damages from the company. Such a case does not disclose negligence on the part of the railroad company. The cause of the injuries to the plaintiff was his own negligence.

2. When a general verdict is rendered in behalf of the plaintiff, and findings of fact are made by the jury upon special interrogatories proposed to it, and the defendant files his motion for judgment in his favor, and against the plaintiff, upon the findings of fact contained in the answers to the special interrogatories proposed to it, the general verdict will be set aside when the special findings of fact are inconsistent with the general verdict, and exclude such a conclusion as would authorize a recovery for the plaintiff. When the special findings of fact are inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly.

3. In order to justify the jury in finding a general verdict for the plaintiff in this case, it was necessary that they should have found that the plaintiff's injuries were caused wholly by the negligence of the defendant in error, and that he should not himself have contributed to them by any negligence on his own part.

(Syllabus by the Court.)

Error to district court, Oklahoma county.

Action by George W. Blevins against the Atchison, Topeka & Santa Fé Railroad Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

R. G. Hays, J. H. Woods, and J. W. Johnson, for plaintiff in error. Asp, Shartell & Cottingham, for defendant in error.

McATEE, J. This is a suit brought by the plaintiff in error, plaintiff below, against the defendant in error, to recover damages on account of injuries claimed to have been suffered in consequence of the negligence of the defendant in error. On the 26th day of March, 1892, the plaintiff filed his complaint in the district court of Oklahoma county against the defendant, alleging the incorporation of the defendant; that it was running a railroad train through Oklahoma City, in this territory; that on the 26th day of February, 1892, the plaintiff contracted with the defendant to convey two car loads of cattle from its station of Purcell to Oklahoma City, for which the plaintiff had agreed to pay the defendant; that, as a part of this contract, the plaintiff was to have transportation for himself between said points; that the defendant railroad company agreed to transport the plaintiff from Purcell to Oklahoma City upon the caboose attached to the freight train in which the plaintiff's cars of stock were shipped, so that the plaintiff would be able to care for the stock during transportation between said points; that, under said contract, the plaintiff shipped his cars of stock on the defendant's road, and became a passenger thereon between said points; that when the said defendant's train, on which the plaintiff was a passenger, was nearing Oklahoma City, on the night of February 29, 1892, the plaintiff being in the caboose attached to said train for the accommodation of passengers, the agents and em-

ployés of the defendant in charge of the train negligently stopped the train about half a mile south of Oklahoma City, and that the caboose on which the plaintiff was riding was stopped upon and directly over the bridge, which was about 25 or 30 feet in elevation above the ground; that the night was very dark, and that the conductor in charge of the train came to the plaintiff, while the car was stopped upon the bridge, and negligently informed him that the train had arrived at Oklahoma City, whereupon the plaintiff, relying upon the information imparted to him by the conductor, went upon the platform of the caboose in which he was riding, to alight from said train; that, owing to the extreme darkness of the night, the plaintiff was unable to see that the car was standing upon the bridge, but supposed the same to be standing at the station at Oklahoma City, and in attempting to alight from the car, and owing to the darkness, that everything looked black, plaintiff supposed that the car was the usual distance from the ground, and supposed that the blackness he perceived was coal cinders, and he stepped off the platform of the caboose, whereupon he fell to the ground, a distance of 25 or 30 feet from the car; that there were no lights on the platform or steps of the car at the time he attempted to alight. The plaintiff further alleged that he was without negligence on his part in attempting to so alight, and that his fall from the car was wholly occasioned by the carelessness and negligence of the agents and employés of the defendant in charge of the train, and that by reason of said fall the plaintiff was greatly and permanently injured and disabled. In answer, the defendant averred that the train upon which the plaintiff was riding by virtue of the said contract was a freight train, and that the danger, as plaintiff well knew, was more upon a freight train than upon a passenger train, and that the injury to the plaintiff was not caused by any negligence on the part of the defendant, or its agents and employés, and that the plaintiff was guilty of negligence on his part, which was the direct cause of the injury to the plaintiff complained of; that the plaintiff was guilty of negligence in this: that he took passage upon a freight train, and went to sleep upon said train, and that, the train having stopped, the plaintiff, without any notice from the agents of the defendant in charge of the train that the train had stopped at the station, and without asking any of the agents or servants of the defendant in charge of the train whether the train had stopped at the station, in the darkness of the night aroused himself from sleep, and, with a long "prod pole" in his hand, voluntarily went out of the caboose in which he was riding, and, without making any inquiry to ascertain whether said train had stopped, or whether it was standing on the bridge or embankment, voluntarily jumped from the

train, while the train was standing on the bridge, and was thereby injured; that the plaintiff failed to use the pole which he had in his hand to ascertain whether the train was standing on the bridge or on the level ground; that such negligent conduct on the part of the plaintiff was the sole cause of the injury, if the plaintiff was injured at the time and place mentioned in his complaint. To this answer the plaintiff replied by a general denial, and alleging that he was illiterate, and did not know the character of the contract he had signed. A trial was had upon these issues by a jury.

Special questions were submitted to the jury, and returned into court signed by the foreman, in behalf of the jury, as follows: "Q. 1. Did the plaintiff ship the stock from Gainesville, Texas? A. Yes. Q. 2. Is Purcell in the Indian Territory? A. Yes. Q. 3. Did the plaintiff sign the contract at Purcell, introduced in evidence? A. Yes. Q. 4. Did the plaintiff ship the cattle to Oklahoma City? A. Yes. Q. 5. Did the train stop south of the station at Oklahoma City, and south of the switches and side tracks at said station? A. Yes. Q. 6. Did the train stop where it did for the purpose of switching the plaintiff's cattle to the stock yards? A. Yes. Q. 7. Was the train on which the plaintiff was riding a freight train? A. Yes. Q. 8. Was the plaintiff asleep on the train between Norman and Oklahoma City? A. Yes. Q. 9. When did the plaintiff wake up from his sleep? A. After the train whistled for Oklahoma City. Q. 10. Who waked plaintiff up? A. Mr. Speed. Q. 11. Did the plaintiff get up and put on his overcoat immediately after he was awakened? A. Yes. Q. 12. Did the plaintiff then say to the witness Speed, 'Where are we at?' A. No. Q. 13. Who told the plaintiff 'they are setting your cars out at the stock chute,' if any one? A. Mr. Speed. Q. 14. Did the conductor say anything to the plaintiff after he was awakened, and before he went out of the caboose? A. No. Q. 15. Who was the conductor of the train, in charge of the train? A. Hamrick. Q. 16. Who told the plaintiff to get off the caboose at the time he got off? A. No one. Q. 17. Did the plaintiff tell any one he was going to get off the caboose before he did get off? A. No. Q. 18. Was any one with the plaintiff when he got off the caboose? A. No. Q. 19. Did any one see the plaintiff get off the caboose? A. No. Q. 20. Did the conductor know that the caboose was standing on a bridge? A. No. Q. 21. If the plaintiff had remained in the car until the train got up to the station, would he have been injured? A. No. Q. 22. Did the plaintiff do anything when he was on the steps of the caboose to ascertain whether the train was standing on a bridge or on the ground? A. No. Q. 23. Did the plaintiff have a 'prod pole' in his hand while he was on the steps of the caboose? A. Yes. Q. 24. Did the plaintiff do anything with the 'prod pole' to

ascertain the distance from the car to the ground? A. No." In addition to the findings of fact here recited, evidence had been adduced to show: The contract for the shipment of cattle, which provided that the plaintiff should load and unload the stock, feed, water, and attend to the same at his own expense and risk while they were in the stock yards of the company, and while on the cars, and at feed and transfer points, or where they were to be unloaded. That, when the whistle sounded for the station at Oklahoma City, the conductor came down into the car from the "lookout," and was looking over his papers, preparing for the arrival at the station. That the train stopped at the point it did with the view of unloading the plaintiff's stock. There were no lights in the car, or on the platform or steps of the car, except the lantern which the conductor had inside on his arm looking over his papers. This was about half past 9 o'clock at night, and the night was very dark. That the plaintiff passed on out upon the steps of the car, and looked down from the steps. Everything looked black, and supposing that the ground was the usual distance from the steps of the car, and that the blackness which he saw was the coal cinders in the yard at Oklahoma City, he stepped off, and fell a distance of 25 or 30 feet, severely injuring himself. He testified that his purpose in stepping off the car was to carry out in good faith his portion of the contract. The caboose had been left standing over the bridge, 25 or 30 feet in height, immediately south of the defendant company's yards and depot grounds at their station in Oklahoma City, where plaintiff's stock was being switched to the stock yard, as aforesaid. That neither the conductor or other person inside the car knew of the plaintiff's fall at the time it occurred, but they still kept on their preparations to alight, and the conductor, going out with them to assist them to alight from the car, supposing that the car was standing in the yard, first ascertained that the caboose was standing over the bridge; that the plaintiff had fallen in his attempt to alight from the train. Whereupon the plaintiff was taken up from his position and conveyed to the hotel, and there cared for at his own expense. At the conclusion, the jury rendered a general verdict in favor of the plaintiff for damages to the amount of \$2,000. And on November 17, 1893, the defendant filed its motion for a judgment on the special findings of the jury, which motion is as follows: "And now comes the above-named defendant and moves the court to render judgment in its favor, and against the plaintiff, upon the special findings of fact returned by the jury herein, the general verdict of the jury to the contrary notwithstanding." After argument the court sustained the motion setting aside the general verdict in favor of the plaintiff, and rendered judgment against plaintiff, and for costs, upon the special findings of fact

made by the jury. The plaintiff thereupon filed his motion to set aside this judgment of the court, and the answers of the jury to the special interrogatories, and to questions 13, 14, and 22, and to grant the plaintiff a new trial, which motion was overruled by the court. The plaintiff thereupon filed his petition in error in this court, making various assignments of error, all of which, for the purpose of argument in this cause, were included in the fifth assignment of error, to wit: "That the court erred in setting aside the general verdict of the jury in favor of the plaintiff in error on the special findings of fact, on the motion of defendant in error, after the facts so produced in evidence had so sustained the allegations of the petition."

A very different case would have been presented for the determination of the court than that upon which it actually passed if the evidence had supported the allegations of the petition. The special findings of fact show that the plaintiff had shipped stock from Gainesville, Tex.; that the train stopped at the place where it did for the purpose of switching plaintiff's stock to the stock yards; that he was asleep until the train whistled for Oklahoma City, when he was waked up by Mr. Speed, who, though an employé of the company, as a civil engineer, had nothing to do with the management or running of the train, and was himself a passenger; that the conductor did not say anything to the plaintiff either before or after he was awakened, and before he went out of the caboose; that no one told the plaintiff to get off the caboose at the time. On the contrary, having been told by Mr. Speed that the cars had stopped to switch his cattle, he must have been aware that the caboose was not at the depot, and that the train had stopped for the transfer of cars alone. The plaintiff told no employé, agent, or servant of the company that he was going to get off the caboose, nor did any one see him get off. The conductor did not know that the caboose was standing on the bridge. There were no lights, buildings, or platform at the place where the plaintiff got off to indicate a depot or any provision for alighting, or a safe place at which to alight. The plaintiff would not have been injured if he had remained in the train. Upon getting out of it, he did nothing to ascertain whether the train was standing on the bridge or on the ground, although he had a "prod pole" in his hand, and could, by the exercise of slight care, have ascertained that the car was not upon solid ground. It has been repeatedly held that, in order to entitle the plaintiff to recover, he must himself have been free from negligence. Was he in fact so? The night was exceedingly dark. The plaintiff went out of the caboose and upon the platform upon his own motion, and without notice from the servants or agents of the defendant, and without making any use of the means at his command to learn where the car was or

what position it was in. The slightest use of his eyesight would have informed him that he was not at the depot. The use of the "prod pole" in his hand would have informed him that he was not at a place where it was safe for him to alight. The announcement to the plaintiff and passengers by the servants and agents of the company that they had arrived at the station would have justified the plaintiff in presuming that the place where the train was then stopping was a safe and proper place at which he might alight, but, in the absence of such notice, it is difficult to understand how negligence can be imputed to the defendant. If passengers, without exercising even slight care, walk off the railroad train at any point where the train may stop, in the exigencies of the traffic in which the railroad company is engaged, upon what principle can the railroad company be held liable in damages? The negligence of the plaintiff himself, in such circumstances, is the cause of the injury. The stopping of a cattle train at a distance from the railroad depot, for the purpose of transferring and switching cars of cattle into stock yards, is one of the ordinary incidents of traffic upon railways. It is a usage which the shipper of cattle upon a particular train must be aware of, and of which he must be required to take notice. Nor are railroad companies required at such times to give special notice to every passenger not to get off; and under such circumstances, if a passenger gets off in the darkness without notice, and at a point which he must know is away from the depot, he certainly does so at his own risk. It is the duty of the passengers to be watchful and guarded, and not to endeavor to alight without notice from agents or servants of the company in charge of the train. If they attempt to leave the train in the darkness of the night at a distance from the station, without notice, they must assume the liability of such loss as they may suffer in consequence thereof. In this case the plaintiff did not exercise the ordinary care by which he could have avoided the injury, nor can we see that the defendant was guilty of any negligence. A large part of the freight traffic of railroad companies must necessarily be carried on at night. The character of this traffic, in which long trains are employed, requires that stoppages be made at unusual points. All these matters belong to the common usage and custom of railway traffic, and are matters of which notice must be taken by such persons as see fit to avail themselves of the passenger facilities which are afforded upon trains of that character. Railroad Co. v. Becker, 76 Ill. 31; Frost v. Railroad, 10 Allen, 92; Mitchell v. Railway Co. (Mich.) 16 N. W. 388; Davis v. Railroad Co. (Sup.) 19 N. Y. Supp. 516; Nichols v. Railway Co. (Mich.) 51 N. W. 364; Nagle v. Railroad Co. (Cal.) 25 Pac. 1106; Beach, Contrib. Neg. § 161; Smith v. Railroad Co. (Ala.) 7 South. 119.

Plaintiff cites in his argument chapter 17, art. 9, § 38, of the Statutes of Oklahoma, 1893, which provides that: "When fare is taken by any railroad corporation for transporting passengers on any mixed train of passenger and freight cars, * * * the same care must be taken, and the same responsibility and duties are assumed by the corporation as for passengers on passenger cars." It is, however, contended by the defendant in error that this statute can have no force or effect, when applied to interstate contracts, in the rules of law, regulating the rules of commerce, if it attempts to impose upon the carrier any additional burden to that which is imposed upon the carrier by the general rules of law. It is not necessary to determine this contention. The rule here announced is applicable upon railway trains. It simply requires that the plaintiff should not, by his own negligence, contribute to the cause of the injury.

It is contended by the plaintiff in error that the court erred in setting aside the general verdict and in entering up judgment upon the special findings of fact made by the jury. It is provided by the Code of Civil Procedure (chapter 66, art. 34, § 754, of the Statutes of Oklahoma) that "the provisions of this Code do not apply to proceedings in actions or suits pending, when it takes effect. They shall be conducted to final judgment or decree, in all respects, as if it had not been adopted; but the provisions of this Code shall apply after a judgment, order or decree, heretofore or hereafter rendered to the proceedings to enforce, vacate, modify or reverse it." This action was begun March 26, 1892, and the section of the Code of Civil Procedure before recited went into force August, 1893. The proceedings in the cause, up to final judgment in the district court, were governed by the Code of Civil Procedure of 1890, and the construction placed upon them by the supreme court of the state of Indiana, from which state that Code was adopted.

The findings of fact were made by the jury that the plaintiff was told by Mr. Speed that "they are setting your cars out at the stock chute." The plaintiff was thus informed that the train was not at the depot. It was further stated by the jury that the train stopped where it did for the purpose of switching the plaintiff's cattle to the stock yards at Oklahoma City, to which point the plaintiff had shipped them. It was further found that nothing was said to the plaintiff by the conductor in charge of the train, and that he was not told to get off the train by any one in charge of the train; that he got off the train of his own motion, and would not have been injured if he had remained on the train, and that he got off the train in the dark without making any effort to discover where he was. It will thus appear that the defendant was not guilty of negligence in stopping the train where it did, but that the stoppage was in the discharge of its duty.

We do not think the contention can be sustained that in getting off the train at his own motion, at a place other than the depot in the dark, without lights, notice, or inquiry, and with no attempt to find out where he was, the plaintiff exercised the care which a reasonable and careful man should have exercised, and may be required to exercise before claiming damages which result from the consequences of such an act. The plaintiff was not a cripple, and he had in his hand a "prod pole," by which he was especially enabled at the time to ascertain the position of the train. His failure to make use of any means whatever to guard against accident shows the want of ordinary care. And yet the absence of such care on his part is that negligence on his part which precludes a recovery at law. The plaintiff was not entitled to recover if he was himself guilty of negligence. In order to justify the jury in finding a general verdict for the plaintiff, it was necessary that they should have found the plaintiff's injuries were caused wholly by the negligence of the defendant in error, and that he should not himself have contributed to them by any negligence of his own. The finding of facts was thus inconsistent with the general verdict in favor of the plaintiff, and the defendant was entitled to judgment, notwithstanding the general verdict. *Jewett v. Meech*, 101 Ind. 289; *City of Indianapolis v. Cook*, 99 Ind. 10; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Howe v. Young*, 16 Ind. 312; *Gripton v. Thompson*, 32 Kan. 367, 4 Pac. 698. The judgment of the court below is affirmed.

DE FORD et al. v. PAINTER, Sheriff.

(Supreme Court of Oklahoma. July 27, 1905.)

HOMESTEAD—BUSINESS LOT—USE OF BUILDING—TRIAL JUDGE—RIGHT TO QUESTION WITNESS.

1. De Ford, one of the plaintiffs in error, owned a lot with a building thereon in the business part of the city of Guthrie, and rented the basement and first floor for the sum of \$1,300, and a part of the second floor for offices for the additional sum of \$250. He resided with his family on a portion of the second floor, valued at the sum of \$250 per annum. The family had no other home. *Held*, that the building was the dwelling of De Ford, and the home of his family, within the meaning of section 2, c. 34, St. 1893, and was the homestead of plaintiffs in error, and as such exempt from execution.

2. Under this section of the statute, providing for the exemption of land, as a homestead in a city, which has been improved by a building used by the family as a home, the homestead is not lost or forfeited by the circumstances that the style of the building resembles in its architecture ordinary business structures, and that it is on one of the principal business streets, flush with the sidewalk, that the larger portion of the house is rented for the purpose of business and revenue, and the smaller part used for a home, and that the family resides on the second floor and not upon the first floor of the building. If the building is in fact the only home of the family, it is exempt from execution, although its principal use may be for business purposes.

3. The interrogation of witnesses by the judge, during the progress of the case, is not

error, and he may, in the exercise of his discretion, aid in eliciting material matter, suggested by the evidence.

(Syllabus by the Court.)

Error from district court, Logan county.

Action by Irwin S. De Ford and another against W. W. Painter, sheriff, for injunction. There was a judgment for defendant and a motion denying a new trial, and plaintiffs bring error. Reversed.

Green & Strang, for plaintiffs in error.
Wisby & Horner, for defendant in error.

MCATEE, J. This is a proceeding in injunction to restrain the sheriff of Logan county from selling under execution the following described property, to wit, lot numbered 13, in block 56 in Guthrie proper, in Logan county, for the reason that the property was and is exempt from execution as the homestead of the plaintiffs in error. In the year 1890, Irwin S. De Ford, one of the plaintiffs in error, erected the building situated on the lot herein described, being a lot 32 feet by 80 feet, in the central part of the business portion of Guthrie, to be used, upon his own statement, as "a building to live in, and a part of it to rent for an income for a living" for his family, which consisted of his wife and three children. The basement and first floor were arranged for business purposes. The rooms on the second floor were arranged to be used as business offices, and a portion thereof for the use of himself and family as a "building to live in." There appears to have been no yard or appurtenances of any kind. The three front rooms on the second floor were expressly arranged for office rooms, and the seven remaining rooms on the second floor appear to have been arranged in such a manner (a part of them with folding doors) that they could have been rented for offices or used as a residence. About the 1st of March, 1891, the plaintiffs in error moved into the building, and occupied the rooms on the second floor (either four or six; the number does not definitely appear), and were so residing at the time this action was commenced in the court below. Their residence, as stated, has been continuous from the time the building was completed and occupied. The building is a business building in architecture, construction, and appearance, and cost \$8,000. The basement has been rented, at various times, as justice's court room, saloon, and restaurant. The present rental value thereof is estimated at \$300 per annum. The first floor is occupied as a post office for the city of Guthrie, and its rental value is \$1,000 per annum. The rental value of the second floor is estimated at \$500. The value of the portion occupied by plaintiffs in error is estimated by Irwin De Ford at \$250, which he afterwards stated he thought was too high an estimate. Upon the trial below, the presiding judge interrogated one or more witnesses freely and at length upon matter upon which he

had not been examined in chief, over the objection of the plaintiffs in error. Upon the findings made on the hearing in the trial court, the court concluded that the building in question was not exempt from execution as a homestead, and that the temporary order of injunction theretofore issued in this case should be dissolved, and that the building should be subject to the execution in the hands of the defendant in error, and for costs of the action taxed to the plaintiffs. To all of which conclusions of law the plaintiffs excepted. The plaintiffs, at the same time, filed their motion for a new trial, which was overruled, to which they excepted. Upon the evidence and findings of the trial court, the questions to be determined in the case upon the facts are: (1) Whether the leasing of so large a part of the building, which is claimed by plaintiffs in error as a home, for the purpose of obtaining revenue therefrom for the maintenance of the owner and occupant and his family, destroys the homestead character of the property and the right of plaintiffs in error to claim the same as exempt from execution by reason of the claim thereof as a home by them; and (2) whether the interrogation of the witnesses by the judge in the court below is error, and, if it is error, whether it is of such a character as to entitle the plaintiffs in error to have the case reversed.

Upon the first proposition it is correctly observed, in the brief of the defendant in error, that, upon the general subject of the homestead laws, the views of the court may be "arranged into three classes, namely, those which hold that if any portion of the property be occupied for homestead purposes the whole is exempt; those which hold that the portion occupied is exempt, and the remainder not; and those which hold that the test of exemption is the principal use to which the property is devoted." The view has been held by the supreme court of Iowa "that the portion occupied is exempt, and the remainder not." This, however, has not been adopted, so far as we know, by any other court; and no argument has been presented for its adoption here. The defendant urges for acceptance the view which makes the principal use of the property the test of its exemption as a home, or of its liability to execution; that is, if the major interest in the property claimed as exempt be dedicated to use as a home, the property is exempt; but if the major use of the property claimed as exempt be dedicated to business purposes, then the property is not exempt from execution. In support of that view, the principal cases from the courts of the Western states upon the subject of urban homestead have been carefully reviewed; and it is thereupon concluded by the defendant in error that the doctrine of principal use is that which pervades the later cases. While the limit of area is that which is prescribed for the homestead in this territory,

that of value is the limitation selected and provided for by the statute of a number of the states. The laws of the various states differ in other respects; and little satisfaction, certainly, or advantage can be derived from an examination of the decisions coming from states of which we have not the statutes before us, or, having them before us, find them to be dissimilar to our own. No decision has, however, been hitherto made upon this subject in this territory, and it is important that the principal cases cited in the argument should be examined. In the leading Wisconsin case of *Phelps v. Rooney*, 9 Wis. 70, cited and commented upon by both plaintiffs and defendant in error, the question was whether the south one-third of lot 4, in block 5, in the city of Milwaukee, with the building and appurtenances thereon situated, constituted a homestead, under the provisions of the Wisconsin statutes. The Wisconsin statutes provide: "Sec. 51. A homestead consisting of any quantity of land not exceeding forty acres used for agricultural purposes, and a dwelling house thereon and its appurtenances, to be selected by the owner thereof, and not included in any town plat, or city, or village; or instead thereof, at the option of the owner, a quantity of land not exceeding in amount one quarter of an acre, being within the recorded town plat, or city, or village, and a dwelling house thereon, and its appurtenances, owned and occupied by any resident of the state, shall not be subject to forced sale or execution, or any other final process from a court, for any debt or liability contracted after the first day of January in the year one thousand eight hundred and forty-nine." Rev. St. 1849, c. 102. The style of the building was a store, situated in a block in one of the principal business streets in the city of Milwaukee. The basement and first floor were leased by Rooney, and occupied by tenants under him, and produced, in rents, \$1,500 a year. The rooms above were used by Rooney, the defendant in error, as a dwelling, and were worth \$250 or \$300 a year. Upon this state of facts, the court said: "We have a statute which exempts as a homestead * * * a quantity of land not exceeding in amount one-fourth of an acre, in a city or village, with a dwelling house thereon and its appurtenances, and which exempt property we all know may be, and frequently is, worth ten, twenty, or forty thousand dollars. And the whole policy of the legislation of the state has been to extend, rather than to restrict, the privileges of the exemption laws. The courts, whatever they may think of the general policy of this legislation, and whatever hardships may arise in particular cases in consequence of it, can only construe and interpret the statute as they find it. When a law is on its face sufficiently intelligible, and when a case clearly falls within the operation of its provisions, I feel it my duty rigidly to enforce

it, whatever may be my notions of its policy or equity; so, in the present case, while it may be a hardship that the respondent should enjoy, free from all compulsory powers of the court to subject it to the payment of his just debts, the property (the homestead, as I think it is), a portion of which he can rent for twelve or fifteen hundred dollars a year, I think the statute exempts it, and we must so declare." And, after stating that Rooney occupied the premises as a dwelling house, and that it was his "home," the court says that: "We therefore cannot see why, to all intents and purposes, it is not his homestead, within the meaning of our statute." It continues as follows: "The circumstance that the dwelling was situated on one of the principal business streets, or the fact that its external appearance or internal arrangement was like a wholesale or retail store, or because it would be vastly more valuable as a place of business than as a residence, could not affect the question. The case rests upon the fact as to whether the building was really and truly occupied as a dwelling house for himself and family. If so, they are secure in the enjoyment and use of it as such. This, we think, constitutes a homestead under the statute." The court says further that: "After what has already been said as to the signification of the word 'homestead,' as used in our statute, and the expression of our opinion that it intended to limit the amount of land in a city upon which is situated a dwelling house or habitation or abode of the owner and his family, it is only necessary further to remark that this court cannot restrain the operation of the statute within narrower limits than its words import." And the conclusion of the court, upon a review of the whole matter, was that: "I cannot believe, in view of the legislation upon this subject, that the legislature intended that a person should lose or forfeit the benefit of the homestead exemption by omitting to use a portion of his dwelling house, or residence of his family, or by devoting such portion to some other use."

But it is claimed by the defendant in error that this case, thus clearly and definitely interpreting a statute like our own, was completely overruled in the later case of *Casselman v. Packard*, 16 Wis. 114. In that case the property claimed as exempt was situated in the village of Sparta, the land not exceeding in quantity a quarter of an acre. There were situated upon it, besides the dwelling house, in which the claimant resided with his family, various other buildings, which were used and occupied for stores, ware-rooms, shops, schoolrooms, offices, etc. The claimant occupied the only dwelling house thereon, and its appurtenances. He rented the other buildings upon the one-fourth of an acre for stores, ware-rooms, shops, school-rooms and offices. He yet claimed them also as his homestead, in addition to the dwell-

ing house wherein his family resided, and which he occupied as a home. The circuit court did not sustain his claim as to the various other buildings, which were rented. That court, in passing upon this state of facts, says that: "I cannot believe the legislature ever intended that a person should hold all the buildings which might be erected on a quarter of an acre of ground in a city or village, whatever might be their character, or for whatever purpose they were designed, under the homestead exemption law, merely because he might live in one of them. Such a construction seems to us most unreasonable. The statute exempts a given quantity of land, with a dwelling house thereon, and its appurtenances. Of course the exemption of that quantity of land has regard to the purposes for which it is used. It was supposed that this amount of land might be convenient and necessary for the comfort and enjoyment of the dwelling house. Nor are we prepared to say that the entire quantity of land must be devoted exclusively to the use of the dwelling. In addition to the dwelling, a person might erect a small shop or building of that character on the lot, which he himself might use and occupy for the purposes of his trade or business, without forfeiting the exemption. But it is not necessary to express any opinion upon that point in this case; for the testimony shows that there were various buildings on the lot, which he rented for offices, stores, schools, etc.; and it is very clear that these were not exempt." The opinion was rendered in this case by the same judge who prepared the opinion in the Phelps-Rooney Case three years earlier. No reference was made to the Phelps-Rooney Case, and it was not therefore modified or overruled in any sense or to any degree. Indeed there was no occasion for it. The state of facts was wholly different. The Phelps-Rooney Case is precisely like the one in hand in this court. It determined that, upon the provisions of a statute like our own, the homestead right may exist in a building occupied as a home by the family of the claimant, notwithstanding the fact that the building was erected upon one of the principal business streets of a large city, and that the basement and first stories were rented out for business purposes, and produced a large revenue to the homestead claimant, amounting to \$1,500 per annum, and that the upper rooms occupied as a home by himself and family were of very subordinate value. The case of Casselman v. Packard simply decides, for the state of Wisconsin, that a homestead claimant may not claim as exempt the house in which his dwelling is upon a quarter of an acre of land claimed as exempt, within the business limits of a city, and also devote the rest of the quarter of an acre of land to stores, warerooms, shops, schoolrooms, offices, and other purposes, alien to the homestead character, and claim

them also as exempt. The case does not support the contention of the defendant in error, that, if the principal use of a single house in which the claimant resides within the city limits be devoted to business purposes, it will exclude the exemption of the whole house, under the statute, for homestead purposes. The cases of Blum v. Rogers, 15 S. W. 115, and Blackburn v. Knight, 16 S. W. 1075, are cases decided by the supreme court of Texas, and are interpretations of a statute which is not before us, and the provisions of which are not cited in the briefs of counsel, nor in the opinions of the court. They can therefore render but little service in determining the question. In the former case, "the owner of a two-acre block had, on the east half, his residence, and all appurtenances, except the cow lot, which was on the west half. The rest of this half he cut into three lots, on each of which he built a dwelling, for rent. Each was separately fenced, and a private alley was run between the east and west halves of the block. He reserved the ground around the houses, and the right to take water from the premises, which he sometimes exercised, although there was an abundant cistern near his residence. He also occasionally used the ground around the houses for garden and other purposes." Upon this state of facts, it was held that the three lots, separated by the alley, separately improved, each separated from the other by a division fence, and all separated from the homestead by the alley, "were practically divided from the homestead, and were not exempt from execution." In the latter case of Blackburn v. Knight, it was shown "that the defendant had long since built on the lot which they now claim as their urban homestead, and had ever since rented the premises to tenants, and only used a strip on the lot about fourteen feet wide for the purpose of hauling wood, etc., to their residence, on an adjoining lot. The claim of homestead in that case was sustained as to the strip only." No rule can be drawn from the state of facts in either of these cases by which the proposition can be sustained that the test of exemption in the occupancy of a single building is the principal use to which the property is devoted. No such doctrine was in fact sought to be established, or announced, or was in question, in either of these cases. In the case of *In re Noah's Estate* (Cal.) 15 Pac. 291, cited by the defendant in error in support of his proposition, it was held: "Noah died, making no provision in his will for his widow, leaving no community property; and a four-story brick business block, valued at \$25,000 is the only separate real property. This could not be divided, without material loss. No homestead was set apart during the husband's lifetime. The widow applied to the court to set one apart. Code Civ. Proc. Cal. § 1465, provides that the court shall set apart a homestead, none having been se-

lected during the lifetime of the deceased, out of his real estate. The section referred to provides that, 'if any homestead [as was the case here] has been selected, designated, and recorded during the lifetime of the deceased, the court must select, designate, and set apart, and cause to be recorded, a homestead, for the use of the surviving husband or wife and the minor children, * * * out of the common property, or, if there be no property, then out of the real estate belonging to the deceased.' The homestead selection was sought for by the widow. It was held that, as the property in question was of such a nature that it could not have been selected as a homestead during the lifetime of the deceased, the petition was properly denied. In the absence of the California statute, which makes provision for the family while both husband and wife are living, it is impossible to form any conclusion, or to attach to the opinion the weight which is sought to be given to it by the defendant in error. In *Ackley v. Chamberlain*, 18 Cal. 181, a building originally intended as a family dwelling and store house, but changed during its erection so as to adapt it to hotel purposes, but also occupied in part by the family as a home, was held exempt from forced sale. A like construction was placed upon a similar statute in Nevada, in the case of *Goldman v. Clark*, 1 Nev. 607, in which the supreme court of that state held that a home in an incorporated town, constructed so as to be more suitable for a boarding and lodging house than for a residence merely, and much the larger portion of which was usually rented to lodgers, was exempt as a homestead. The doctrine of principal use was plainly excluded. In the case of *Garrett v. Jones* (Ala.) 10 South. 702, the house was built in a business part of the town, and used principally as a store, although the owner (an unmarried man) slept in a small back room, and took his meals elsewhere. It was construed not a homestead. Upon that state of facts, the supreme court of Alabama said that it "may be laid down as a safe and conservative rule on that subject that where the trade adaptation and use of a building is incidental or secondary only to its habitation, where the chief use of the structure is that of a home for the owner, and some part only, not essential to this end, is fitted up and used as a shop, an office, or salesroom, it is a homestead. But, when this state of facts is reversed, and the residence feature is only auxiliary to the business use, where only a relatively small part of the building is devoted to the use of the inhabitant, and the chief adaptation and use are those of business, the building is not a homestead, even though the occupant have no other home, and uses this for all the purposes of living." In the cases above cited from Texas and California, the statutes upon which these interpretations are made is absent; and, if the statute of Alabama providing for the exemption of

homesteads is similar to our own, we understand this ruling to support the contention of defendant in error. The same remark may be made upon the case of *In re Noah's Estate* (Cal.) 15 Pac. 291.

Cases not showing a similar state of facts, nor presenting the question here proposed, and coming from states of which the statutes have not been presented to us, or are unlike our own, do not materially aid us in the solution of the case, nor can we safely follow general propositions cited from such cases. The question arises solely upon a right provided for by the statutes of this territory. We must first look to the statute itself; and, since no decisions have been made upon the statute in this court hitherto, we must, in the next place, look to the courts of states in which the statutory provisions are most like our own, and, if possible, to the courts of those states whose situation is similar to our own, and from which our people have, for the most part, come. It is not too remote to observe that, while the legislature of this territory adopted this statute, of the people who created the legislature, and from which the legislature came, a large majority of them were formerly residents of the state of Kansas, and, more remotely, of other Northern and Western states, and that the legislative representatives of this territory must have passed the statute with the interpretation placed upon similar statutes in the states where the population of Oklahoma, for the most part, originated.

The statutes which we must interpret are found in chapter 34, tit. "Exemptions," §§ 2844, 2845, p. 580, St. Okl. 1893, and are as follows:

"(2844) Section 1. The following property shall be reserved to the head of every family residing in the territory exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: * * *

"(2845) Sec. 2. The homestead of a family not in a town or city shall consist of not more than one hundred and sixty acres of land, which shall be in one tract or parcel with the improvements thereon. The homestead in a city, town or village, consisting of a lot or lots, not to exceed one acre with the improvements thereon; provided, that the same shall be used for the purpose of a home for the family; provided also, that any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired. * * *

The conditions which entitle the debtor to claim the protection here provided for, in a city, town, or village, are (1) that he shall have a family; (2) that the lot or lots in any town, city, or village shall not exceed in amount one acre, with the improvements thereon; (3) that the said lot or lots shall not exceed one acre, and shall be used for the purposes of a home for the family. The privilege is enlarged by the further provision that

any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired. The statute is without other limitations. It does not prescribe the style of the building which the homestead claimant shall erect; nor does it prescribe that the building should not resemble in architecture ordinary business structures. No limitation is placed upon his choice. It does not provide that the building in which the home is made shall not be placed upon one of the principal business streets. It does not provide that the house shall not be flush with the sidewalk, or compact with other houses, or that the family shall not take boarders in the house, or that the owner shall not rent any particular portion of it for the purpose of deriving a revenue therefrom. It is in no part of the statute provided that a part of the dwelling shall not be used for any other purpose than a home, or that the major part of the building shall be used for a residence and a minor part for business, if so used at all. Nor does it provide that the family shall live in the basement, or on the first floor, the second floor, or upon the third floor. The sole limitation upon the general subject, including all these enumerated particulars, is that "the same [the homestead] shall be used for the purpose of a home for the family, and that the space which the homestead shall occupy shall not exceed one acre with the improvements thereon." The provision of 160 acres of land, in the latter clause, is a provision intended not only as a bare homestead, but of a homestead accompanied by a method of income and a means of support for the family. Could it be contended that, if the income from the land of the rural homestead be greater in value than the rental value of the house in which the homestead claimant resides, then the doctrine of principal use should govern, and the whole homestead be forfeited as a homestead and become subject to execution? In support of such a theory, it is to be argued that the rural homestead is often of great value, and that the revenue from it exceeds the needs of the family, and that the result is thus a fraud upon creditors. And yet the doctrine of principal use has never, to our knowledge, been applied to the rural homestead. The provisions for rural homesteads are provided for in like terms by the statutes. The principles which govern the interpretation of one must be applied to the other. No substantial reason can be given for the application of the doctrine of principal use to the urban homesteads which does not apply with equal force to the rural homestead; and to make the application of that doctrine to the rural homestead would be to destroy the homestead privilege, as it is provided for by the statute, and to leave to the judgment of the court in each instance whether the value of the revenue from the homestead was not greater than the value of the mere residence upon it, and, if found to be so, that the home-

stead would then cease to be exempt, and to submit the security of the homestead not to the express and exact provisions of the statute, but to the judgment of the court. In the language of the court in *Stevens v. Hollingsworth*, 74 Ill. 208, it would be difficult to explain "why the garden, stables, yards, orchard, etc.," upon the rural homestead "shall be exempt, and the shop, mill, or business house, although indispensably necessary to earn a support for the family, and located on the same lot of ground with the residence, shall not be exempt." We are aware that, in the case of *Greeley v. Scott*, 2 Woods, 657, Fed. Cas. No. 5,746, Mr. Justice Bradley, in construing a constitutional provision of the state of Florida upon the subject of "homestead," stated that: "If the rural homestead should become the scene of a diversity of industries, and the farmer owning one hundred and sixty acres should undertake to establish thereon a sawmill, a gristmill, and a carding and fulling mill, he could not claim all of these separate businesses as pertaining to, and a part of, his homestead, and exempt from execution." The facts cited in the opinion of Judge Bradley would be an appropriate citation against a construction of our statute which would undertake to say that a diversity of industries might be established upon the various portions of an acre in a town or city, under color of the homestead privilege, and might be claimed as exempt from forced sale for the payment of debts. Such a construction we are not making. The construction here made is that which we hold the law to be in this territory, as applied to the facts as they are presented in this case. The statute may be invidious to the rights of creditors. It may be made the cover of great injustice. A large fortune derived from the wealth and resources of creditors may be invested under its protection, and be exempt. Such methods, if such be the result, might reflect very injuriously upon the credit of the territory. But, if these reflections are just, they are matters to be presented to the legislature for the purpose of urging a modification of the law.

These reflections, however, do not aid us in determining what the statute means. The judicial function is to determine and declare what the law is, as it now stands. It is the privilege of the court, as well as its duty, to refrain from undertaking to alter or to give any other than that plain meaning to the law which another branch of the government has enacted and declared. The government is more secure, and the people surer of their legislative rights, when each branch of the government keeps within its own proper province. The law seems plain; and, if the people of this territory wish it otherwise, it is in their power to make that wish manifest. The legislative body meets in this territory every two years, with full authority to legislate upon this subject, to alter, amend, or entirely revoke this statute. While this particu-

lar case may appear to bear upon the interests of the creditor, we cannot make the law, but must declare it just as we believe it to be. The statute for the state of Wisconsin, providing for the exemption of an urban homestead, is set forth above in terms so similar to those of our own as to defy distinction, except as to the amount of land which may be claimed as exempt. We approve the views of the supreme court of that case, as expressed in *Phelps v. Rooney*, cited above, interpreting and construing that statute. The statute of the state of Minnesota, providing for the exemption of a homestead, exempts, within a city, town, or village, "as a homestead a quantity of land not exceeding one lot." In the case of *Jacoby v. Distilling Co.* (Minn.) 43 N. W. 52, the following facts were, under this statute, submitted to the court for a ruling: This was an action by Fanny Jacoby to determine the adverse claims of the Parkland Distilling Company and others to a tract of land 165 by 66 feet, that being one lot, as originally platted in the city of Minneapolis, on which was erected a three-story brick building, furnished for stores below, and with rooms for a residence above. The defendants in error claimed the building under a lien, by reason of certain judgments recovered by them against George G. Jacoby, the husband of the plaintiff in error. It was admitted upon the trial that the debts for which the judgments of the defendant in error were recovered were incurred as stated, and would be a lien upon the property if it was not exempt under the homestead act. The rooms in the second story were occupied as a residence by the plaintiffs in error, and claimed by them as their homestead. Upon this state of facts, it was said by the court that: "The fact that the building on the lot in question was in part suited to and used for business purposes was wholly immaterial. No restriction is placed upon the uses of any part of the building, provided it is the dwelling of the debtor. This has been the settled construction of the statute for many years. *Kelly v. Baker*, 10 Minn. 154 (Gil. 124); *Winland v. Holcomb* (Minn.) 3 N. W. 341. Neither can the question of the value of the premises, or what proportion that value bears to the remaining property of the debtor, be at all important, so long as the premises are in area within the limit of the exemption fixed by law. Unfortunately, our statute fixes no limit as to the value upon the homestead exemption. It must be confessed that such a law may be greatly abused, and permit great moral fraud; but that is a question for the legislature, and not for the courts." In the case of *Kelly v. Baker*, here cited and relied upon, the premises in question consisted of a quantity of land in a town, upon which was a brick building two stories high, with a basement. The front part was built, rented, and used for a store, and was adapted to such use. The second story of the front part was used as a printing

and job office, by a company of which the owner was a member, and also by the owner (who was a physician) as his office. The basement under the front of the building was also rented, a part of it in connection with the store, and the other part for pork-packing, in which the owner also had some articles stored. The rear part of the building was fitted up and used by the plaintiff as his dwelling house, having one entrance through the hall in rear of his store, and connected with it by a door, and one from the rear of the building. The building was situated on a corner, having an alley in the rear. It was held that the entire building was exempt as the homestead of the owner. "It is to be observed," said Mr. Justice Berry, "that no limitations were imposed by the legislature upon the use which would be made of the homestead of eighty acres, or of one lot, provided, only, it was the dwelling place of the party claiming the exemption. As to the balance beyond what was required for the site of the house, the claimant seems to have been left free to allow it to remain unclosed, unimproved, vacant, and idle, or to devote it to any use he might choose." The statute of the state of Michigan (How. Ann. St. § 7721) exempts "a quantity of land not exceeding in amount one lot in any town, city or village, and a dwelling house thereon, and its appurtenances, owned and occupied by any resident of this state." The provision of the statute is in substance the same as that which we are now interpreting. The supreme court of that state, in *King v. Welburn*, 47 N. W. 106, November 14, 1890, interpreted this statute. The defendants, Welburn and others, occupied lots 1 and 2, in block 48, and lot 21, in block 49½, in the village of Three Rivers. Upon lots 1 and 2 was a three-story building, used as an hotel, and a two-story wooden building in the rear, used as a dwelling house, and a barn upon lot 21, used in connection with the hotel. They lived in the hotel; had no other residence or home, or land or property, out of which to construct a homestead. The homestead was disregarded by the officer bearing the execution. The court said: "It is insisted that this building was occupied by the petitioner and his family for the sole purpose of conducting an hotel, and that therefore no homestead right attached. We cannot agree with this contention. The adoption of this doctrine would be in plain defiance of the statute, and render it nugatory to those engaged in the business of hotel keeping. The benefits of the statute are to be secured to all owners of land which they occupy with their families, and who have no other home. There is no intent apparent anywhere to exclude the families of hotel keepers from the benefits of the act."

A constitutional provision of the state of Kansas (article 15, § 9) provides "that a homestead to the extent of * * * one acre within the limits of an incorporated town or

city occupied as a residence by the family of the owner, together with all improvements on the same shall be exempt from forced sale," etc. It is claimed by the defendant in error that the Kansas cases are decided upon the doctrine that the homestead was not exempt as a homestead if the building in which it is claimed is principally used for business, or other purpose than the home of the family. An examination of the Kansas cases does not give us that impression. In the case of *Hogan v. Manners*, 23 Kan. 552, *Brewer, J.*, in delivering the opinion of the court, says that: "The fact that a party may have his store or shop or office in a part of the residence will not, of itself, destroy its homestead character. We are not called upon to decide whether the occupation by the family of the owner of a single room in a large building used chiefly for stores and offices will give to the entire building a homestead character. All we do decide is that, where a building whose size and number of rooms is not shown is occupied as a residence by the family of the owner, its homestead character is not destroyed by proof that a single room or two is used by the owner for business purposes." In the case of *Rush v. Gordon*, 38 Kan. 535, 16 Pac. 700, the first or lower story and cellar were used by the wife for the purpose of carrying on a retail grocery and provision business. The entire real estate was used by the husband and wife in connection with their residence and the grocery and provision business. It was said by the court: "There is nothing to prevent it from being a homestead within the meaning of the homestead exemption laws, except that the wife keeps a grocery and provision store in the first or lower story, and makes use of the cellar and some other parts of the premises in connection therewith." The property was held exempt. In *Bebb v. Crowe*, 39 Kan. 342, 18 Pac. 223, part of the lower story and basement were leased for business purposes by tenants, and a room attached to the main building was during a part of the time leased, and during a part of the time occupied by plaintiffs as a butcher shop; and the question thereupon arose as to whether the occupancy of a part of the building would destroy the homestead right of the plaintiffs in that part of the building so used. The court said: "Why should not the owner do as he wishes with his own building, when it is in reality his own residence,—the abode, the dwelling house, the home, of his family? Of course, if it should practically become a business house rather than a home, it would then cease to be exempt. The owner had the privilege of using any part of the building for his family,—the basement, the first floor, or second floor. The exemptions do not depend upon so frail a thread as which part of a dwelling a family must use; nor does the architecture of the building, or the question whether it would be more convenient as a store than a dwell-

ing house, decide its character. The test is whether the building was used as a residence, not nominally, but actually. We believe it was in fact the residence of the plaintiffs. It certainly was the only home they had, and we believe it came within the provisions that exempt it from forced sale. * * * Homestead is limited in its extent in this state, and must be occupied as a residence of the family; but there is no limitation on its value." The doctrine of principal use, contended for by defendant in error, so far from being confirmed in these cases, seems to us to be emphatically refuted. That this conclusion is correct is confirmed by the fact that the authorities cited by the court in the latter case, as authority for the law there announced, are the cases of *Phelps v. Rooney*, 9 Wis. 70, and the Minnesota cases of *Umland v. Holcombe*, 26 Minn. 288, 3 N. W. 341, *Kelly v. Baker*, 10 Minn. 154 (Gil. 124), and *Gains v. Cannon*, 42 Ark. 508, which expressly announce the doctrine that if any portion of the property be occupied for homestead purposes the whole is exempt, and which excludes the doctrine of principal use. In the case of *Hoffman v. Hill*, 47 Kan. 611, 28 Pac. 623, the question was whether lot 5, in block numbered 16 in the city of Bunker Hill, Russell county, was exempt as a homestead. The house upon the premises was occupied as a residence by the family of Hill, and the building in which they lived was also as an hotel and boarding house. Upon this state of facts, it was declared by the court that: "It follows, from the decisions made by this and other courts of last resort, that it makes no difference that the homestead or a part thereof may be used for some other purpose than as a homestead, where the whole of it constitutes only one tract of land not exceeding in area the amount permitted to be exempted under the homestead exemption laws, and where the part claimed as not a part of the homestead has not been totally abandoned as a part thereof, by making it, for instance, another person's homestead, or a part thereof, or by using it, or permitting it to be used, in some other manner inconsistent with the homestead interests of the husband and wife." And the authorities relied upon include, along with other Kansas authorities, the case of *Bebb v. Crowe*, above cited, in which the Wisconsin, Minnesota, and Arkansas authorities are relied upon. In the case of *Layson v. Grange*, 48 Kan. 440, 29 Pac. 585, the supreme court cites, with approval, the case of *Stevens v. Hollingsworth*, 74 Ill. 202, to wit: "The intention of the legislature in enacting the homestead exemption law was not to save a mere shelter for the debtor and his family, but it was to give him full enjoyment of the whole lot of ground exempted, to be used in whatever way he might think best for the occupancy and support of his family, whether in the way of cultivating it or by the erection of buildings upon it, either

for carrying on his own business or for deriving income in the way of rent." And then the court proceeds to say that it had recently held that: "It makes no difference if a part of the homestead has been used for other purposes not inconsistent with the owner's homestead interests, where the part claimed as not being a part of the homestead has not been totally abandoned by the debtor."

These announcements upon the subject of the extent and the absolute nature of the homestead right are fortified by reference not only to all Kansas cases herein referred to, but also to the law as it existed in Illinois, and as it was announced in the case of *In re Tertelling*, 2 Dill. 339, Fed. Cas. No. 13,842. The adoption in this case of the law as it has been declared in the state of Illinois leaves to the homestead claimant not only a mere shelter for himself and family, but gives to him the full enjoyment of the whole lot of ground exempt, to be used in whatever way he might think best for the occupancy and support of his family, by carrying on his own business or for deriving income in the way of rent. It also expresses the same doctrine, in another form, when it says that the homestead claimant has not totally abandoned that part of the homestead sought to be subjected to the payment of his debts. These expressions of the law leave, in our judgment, no room for the doctrine that a building in a city, town, or village in this territory, occupied as a homestead, will not be exempt from seizure under execution if the principal use thereof be dedicated to business, or used for the purpose of deriving income by renting any portion of the property whatever, provided that some portion of such building be still used as a homestead by the debtor. We have dwelt upon the Kansas cases because the provisions of the statute of that state hereinbefore cited more nearly resemble the homestead exemption act of this territory than any other homestead act which we have found in this investigation. They are stated in their historical order; and it thus appears that, while Judge Brewer desisted from passing upon the question now under consideration, which was not in the case of *Hogan v. Manners*, then before him, yet, when the question afterward came up, the supreme court of that state, in *Bebb v. Crowe*, did meet the question, and pass upon it, as it has been herein set out. The same interpretation has been placed by Judge Dillon, while presiding as a circuit judge of the United States for the Eighth circuit (2 Dill. 339, Fed. Cas. No. 13,842). In that case, the house occupied by the bankrupt debtor was held to be exempt, although a portion of it was used for a brewery. The court there declares that: "The constitutional provision respecting the homestead exemption is exceedingly liberal to the debtor; but it may admit of some doubt whether it is just to-

ward the creditor. The quantity of land exempted is limited, but there is no limitation on the value of the land exempted, or the value of the [homestead] improvements thereon. If the building is occupied as a residence by the family of the owner, it is exempt, whatever its value. * * * We only hold that the whole house occupied as a home is exempt, though a portion of it may be used, and may have been constructed, with a view to be used for other purposes."

It was assigned as error that the presiding judge interrogated witnesses during the trial of the cause, and that such interrogation was error. We understand the law to be that it is the duty of the judge, in the exercise of sound discretion, to elicit the evidence upon relevant and material points involved in the case. The record does not show that any error was committed by the judge in the interrogatories as participated in by him. *Ferguson v. Hirsch*, 54 Ind. 337; *Blizzard v. Applegate*, 77 Ind. 516; *Lefevre v. Johnson*, 79 Ind. 554; *Huffman v. Cauble*, 86 Ind. 591; *Sparks v. State*, 59 Ala. 82. The whole building is exempt from forced sale, and the order of the district court is reversed, and the injunction herein will be made permanent..

(3 Okl. 227)

DOWNMAN et al. v. SAUNDERS.

(Supreme Court of Oklahoma. July 27, 1895.)

TOWN-SITE COMMISSIONERS—POWERS—GOVERNMENT TOWN SITE—EJECTION OF OCCUPANT OF LOT.

1. Under the law regulating the administration of the trust where lands are entered by the probate judge, for the use and benefit of the occupants of such land, as a town site, in this territory, as adopted by congress from the state of Kansas, the commissioners appointed by the probate judge to set off the lots to occupants of a town site are not a judicial tribunal, and their award is not a judicial determination, and it is unnecessary, in the petition of one who seeks to recover lots by virtue of his actual occupancy as against one who holds the deed from the probate judge, to allege fraud in the making of such award, in order to state a cause of action in his petition.

2. One who, by force and violence, enters into the possession of another on a government town site, and ejects him from his settlement and improvements, and prevents him from making further improvements by violence and intimidation, cannot defeat the prior settler in his effort to acquire title to the lots settled upon by him, because of the meagerness of the improvements of such prior settler.

3. It is not necessary that an occupant of lots on a government town site should also be a resident either of the lots or of the town site. (Syllabus by the Court.)

Appeal from district court, Canadian county; before Justice John H. Burford.

Action by George S. Saunders against Cliff K. Tucker to recover certain real estate. Robert Downman intervened. Judgment for plaintiff, from which defendant and intervenor appeal. Affirmed.

J. C. Roberts and C. H. Carswell, for plaintiffs in error. John I. Dille and John Schmook, Jr., for defendant in error.

BIERER, J. George S. Saunders brought his action in the district court of Canadian county against Cliff Tucker to recover six lots in the town of Okarche, Canadian county, Oklahoma Territory, of which he claimed he was the equitable owner, and entitled to a conveyance of the lots from the defendant, because of his occupancy thereof for town-site purposes. Afterwards, Robert Downman intervened in the case, and filed a separate answer showing that, subsequent to the filing of the action by Saunders, he had purchased the lots from Cliff K. Tucker, and claimed that he was the lawful owner of the property. Plaintiff claimed in his petition that on the 19th day of April, 1892, which is the date of the opening to settlement of what is known as the "Cheyenne and Arrapahoe Country," the town site of Okarche was settled upon by several hundred people, and the land covered by the town site claimed for town-site purposes; that Winfield S. Smith settled upon and occupied lots 1 and 3, Charles A. Cunningham settled upon and occupied lots 3 and 4, and J. N. Radeker settled upon and occupied lots 2 and 6, all in block 16, in the town of Okarche, and that they made valuable improvements thereon; that on the 22d and 23d days of April, 1892, the plaintiff purchased said lots for a valuable consideration from said parties, and took actual possession thereof, fenced said lots, and continued to be in the actual possession thereof until the 19th day of July, 1892, when Cliff K. Tucker, by force, broke down and destroyed plaintiff's fence and his other improvements on the lots, and took possession of the lots, and ejected the plaintiff therefrom, and refused to permit the plaintiff to make any further improvements on the lots, and by force, threats, menaces, and the use of deadly weapons, kept the plaintiff out of the possession of the lots; that on the 27th day of July, 1892, the probate judge of Canadian county entered the tract of land covered by said town site at the land office at Kingfisher, Oklahoma Territory, for the use and benefit of the occupants thereof, and that three persons were appointed commissioners by the probate judge to award the lots in said town site to the respective occupants; that the plaintiff filed his application and made his proof before said commissioners, but that they wrongfully and unlawfully awarded the lots to Cliff K. Tucker, and that the probate judge, over the protests and objections of the plaintiff, on the 8th day of October, 1892, the same day this action was brought, deeded said lots to said Tucker; and that he had offered and tendered to the probate judge before said deed was made all the fees, expenses, and assessments required by said probate judge and the commissioners to be paid for the issuance of a deed to said lots, and in his petition tendered and offered to pay into court, for the use and benefit of the defendant, any sum the court might find due the defendant and for the fees and assess-

ments on said lots. To this petition both defendants filed their answer, admitting all of the matters with reference to the general settlement of the land on which the town site of Okarche was located for town-site purposes, the proving up of the same, and the appointment of commissioners, etc., but denying the plaintiff's equitable claim to these lots. On a trial before the court the proof fully supported the allegations of the plaintiff's complaint, and the court found "that the plaintiff settled upon and occupied the lots one (1), two (2), three (3), four (4), five (5), and six (6), block sixteen (16), in the town of Okarche, county of Canadian, territory of Oklahoma, as alleged in his complaint, and that he was the only bona fide occupant of said lots on the 27th day of July, 1892, at the time said lots and said town site were entered at the land office by the probate judge of said county for the use and benefit of the occupants thereof, and that the other allegations of the plaintiff's complaint as to the occupancy and entry of said town site for business and trade are true; that plaintiff complied with all the requirements of said probate judge and commissioners appointed by him to survey and plat said town site, and to set off and allot lots and blocks to the respective owners thereof, with all of the requirements of law, and with all of the conditions precedent required of him to obtain legal title and a conveyance of said lots from said probate judge; that said judge refused to convey said lots to plaintiff, and unlawfully conveyed the same to defendant, Cliff K. Tucker; that at the commencement of this action plaintiff was the equitable owner of said lots, and entitled to a deed therefor, and that defendant Cliff K. Tucker was at that date the holder of the naked legal title, and was and is in equity holding such legal title as trustee for plaintiff; that intervenor Robert H. Downman purchased said lots of his codefendant Cliff K. Tucker after the pendency of this action, after the filing of a lis pendens notice herein, and after he had actual knowledge of plaintiff's claim to said lots and the pendency of this action." A motion for a new trial was made and overruled, and an exception allowed. Judgment was given the plaintiff for the recovery of the lots, from which defendant and intervenor appeal.

The first error assigned in the brief of plaintiffs in error is that the plaintiff's petition does not state sufficient facts to constitute a cause of action. They contend that the commissioners appointed by the probate judge are judicial tribunals, with similar powers and authorities to those possessed by the land tribunals for the determination of controversies between contending claimants on government lands, and that their decision upon questions of fact, of settlement, and of occupancy are final, unless impeached for fraud, accident, or mistake, and that the allegations of fraud in the complaint are simply

in general terms, and insufficient to impeach the award of the commissioners. If the first proposition were true,—that is, that the commissioners are a judicial tribunal,—we would have to sustain the objection to the complaint, because it would not be sufficient as a complaint seeking to set aside an award or judgment of the land tribunal, upon which one party had acquired title to the tract of government land, because the only allegation in the complaint that could be considered as an allegation of fraud is that the probate judge and commissioners unlawfully and wrongfully, and without authority of law, refused to report in favor of plaintiff, and to issue him a deed for said lots. Such an allegation would be wholly insufficient to impeach the decision of a body possessing judicial authority. *Marquez v. Frisbie*, 101 U. S. 478. But the commissioners, in carrying out the provisions of the Kansas town-site law, as placed in force in this territory by section 17 of the act of March 3, 1891, were not a judicial tribunal. Counsel for plaintiffs in error treat this as an open question, although it was held squarely against their position in the case of *Brown v. Parker*, 39 Pac. 567, decided by this court almost a year ago, and although, even without this decision of *Brown v. Parker*, it could hardly be said to have been an open question since the decision of the supreme court of Kansas upon this very town-site law in the case of *Rathbone v. Sterling*, 25 Kan. 444, where it was said (Mr. Justice Brewer speaking for the court): "It seems to us that the legislature intended that there should be no formal trial or conclusive adjudication,—that as to such questions as arise in this case, their award should be simply *prima facie* evidence of occupancy and right. They inquire into and report facts. They do not decide disputes or render judgments. Our conclusion, then, is that, in a case in which there was a single occupant of a lot, the award of the commissioners and the subsequent deed of the probate judge are not conclusive against the rights of the occupant." Counsel for plaintiffs in error, however, without even making a reference to these cases of *Brown v. Parker* and *Rathbone v. Sterling*, and without a single suggestion as to why they do not properly declare the law under our town-site act, still contend that the commissioners, in making their award, are a judicial tribunal, and cite in support of their contention the cases of *Anderson v. Bartels*, 7 Colo. 256, 3 Pac. 225, and *Chever v. Horner*, 11 Colo. 68, 17 Pac. 496, the last of which cases simply follows the first, which is a more elaborate opinion upon the question, and in which it is held that, under the law of Colorado, passed in pursuance of the delegated power given by the town-site law of congress to the states and territories to make regulations for the execution of the trust, an award of a probate judge is final, unless impeached on some well-known equitable

grounds therefor. These decisions, manifestly, can have no bearing whatever upon the question, for they are not made upon a statute like the Kansas statute, which came, with its construction, as ours by adoption by congress did, to this territory. The case of *Anderson v. Bartels* shows that in Colorado the probate judge was granted judicial power, and was made a tribunal to try and determine questions concerning the occupancy of parties upon a town site. A part of the language of the act, as quoted in the above-cited case, is: "It shall be the duty of said probate judge to inquire into the same by such competent testimony as may be produced before him in that behalf, and if he shall be of opinion that such lots or land have been wrongfully omitted, he shall thereupon include the same in such list, and proceed to advertise and sell the same." And upon the authority granted to the probate judge by this statute to hear and determine controversies the supreme court in this case said: "He was invested with functions analogous and similar in character to those of the land department of the general government, or of the officers of a state, charged with the same class of duties. His duties involved the hearing and consideration of testimony concerning the rights of claimants, and passing upon its competency, credibility, and weight. It also involved judicial trials before him, in certain instances, wherein he was required to render judgments, from which appeals might be prosecuted to the supreme court of the territory. The congressional act of May 28, 1864, authorized said judge to execute the trust thus reposed in him by the disposal of lots and parcels of land in accordance with rules and regulations to be prescribed by the territorial legislature." Our statute grants no such power to the commissioners. They are nowhere directed to hear testimony, to try a case, or to determine any controversy between opposing claimants. They are simply directed "to set off, to persons entitled to the same," the lots or grounds, and they were given no authority to award lots to a person not entitled to them, nor to swear witnesses, or hear proof, or make a determination that would preclude the parties from having an investigation of the facts in a court of equity, and it is a different statute entirely from the Colorado statute, and of course the construction thereon must necessarily be different.

Counsel for plaintiffs in error contend that the judgment should be reversed because plaintiff below was not an actual occupant upon the lots on July 27, 1892, the date when the land was entered for town-site purposes, and because the improvements and possession of the plaintiff were not sufficient to constitute him an occupant of the lots for town-site purposes. It would be a queer rule of law that would permit plaintiffs in error to urge either of these objections to

the plaintiff's right to lots. The findings of fact of the court below are all in favor of the plaintiff, and they are, generally, that the allegations of his complaint are true, and, specifically, that he was the only bona fide occupant of the lots at the time the town site was entered at the land office; and the evidence shows that the plaintiff, some time prior to Tucker's forcible and unlawful entry thereof, was in the actual possession of the lots, had fenced them, and had built two small foundations of two by four timbers, nailed together; that Tucker knew of plaintiff's settlement and occupancy on the lot, and had gone to plaintiff and tried to buy three of the lots for the purpose of locating his lumber yard thereon; that the plaintiff declined to sell them for that purpose, stating that he did not want a lumber yard there, and Tucker then made the remark that Saunders might as well sell them to him,—that if he did not he would jump them anyhow, as the lumber company was worth \$3,000,000, and they would beat him (Saunders) out of the lots. The evidence also shows that Saunders had made arrangements for lumber to build on the lots, and went there on July 22d for the purpose of making further improvements, and that Tucker, with a hatchet in his hand, refused Saunders permission to go upon the lots, and threatened to split his head open if he went upon them or even through his own fence. Saunders is admitted to be a prior settler to Tucker. His rights to the lots attached long prior to those of Tucker, and existed with Tucker's knowledge, and it does not lie in the mouth of a trespasser, a law breaker, a ruffian, and a bully, who keeps a settler off of government land, to claim that he has a prior right to acquire title because of the insufficiency of his adversary's occupancy and improvement, when better improvements have been prevented by the unlawful force and violence of the very person who makes these objections against the right of the settler. It would not do to hold that one settler may eject another settler from his settlement, and take possession of his improvements, and prevent the first settler from making further improvements, and then succeed on account of the slight improvements of the first party. Such a holding as that would be placing a premium upon fraud, violence, and intimidation, which we cannot consent to do. The bounty of the government in giving lands to occupants for town-site purposes at the date of the entry was not intended to aid those who unlawfully and forcibly take possession of the very ground settled upon by another party. As is said by Mr. Justice Field, in *Ricks v. Reed*, 19 Cal. 566, and quoted and approved in *Rector v. Gibbon*, 111 U. S. 276, 4 Sup. Ct. 605: "But this provision does not establish that it was the intention of congress to give the benefits of the entry to mere temporary occupants of particular tracts at

the date of the entry, without reference to the character of their occupancy, and thereby in many instances deprive the original bona fide settlers of the premises and improvements, in favor of those who had, by force or otherwise, intruded upon their settlement. Were such the effect of the provision in question, the trespasser of yesterday or the tenant of to-day would often be in a better position than parties who, by their previous occupation and industry, have built up the town and made the property valuable. We do not think that congress could have contemplated that results of this nature should follow upon its legislation, but, on the contrary, that it intended that the original and bona fide occupants should be the recipients of the benefits of the entry, to the extent, at least, of their interests." As was said by Mr. Justice Miller, in the often cited case of *Atherton v. Fowler*, 98 U. S. 513: "The generosity by which congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements, on unimproved land. To erect a dwelling house did not mean to seize some other man's dwelling. It had reference to vacant land,—to unimproved land,—and it would have shocked the moral sense of the men who passed these laws if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude."

There was no error under the evidence in finding that, in equity, Saunders was the actual occupant of the land at the date of the entry of the town site, for it clearly shows that he was an occupant prior to the interruption by Tucker, and that he would have been an actual occupant, and would have had ample improvements on the land to entitle him to a deed by virtue of his occupancy and improvements, except for the forcible resistance of Tucker; and this resistance cannot permit Tucker to acquire and to convey to another, who had notice of Saunders' claim, the title to property which, in equity and good conscience, belongs to Saunders.

Nor is there anything in the contention of plaintiffs in error that Saunders cannot recover because he was not a resident. There is nothing in the law of congress which grants to parties a right to acquire title to government land by town-site entry and occupancy that requires that a claimant shall be a resident of the town site. It is only necessary that he be an occupant of the land to which he claims title. *Greiner v. Fulton*, 46 Kan. 405, 26 Pac. 705.

The judgment of the court below is affirmed, with costs. All the justices concurring, except BURFORD, J., not sitting.

(3 Okl. 622)

NICHOLS v. TERRITORY.

(Supreme Court of Oklahoma. July 27, 1895.)

CRIMINAL LAW — JOINT INDICTMENT — SEPARATE TRIAL — RECEPTION OF VERDICT — POLLING JURY.

1. Persons jointly indicted for a felony have a right on request to separate trial, but such right may be waived, either expressly or by the conduct of the parties. Such request must be made before the trial begins, and for this purpose the trial commences from the time when the work of impaneling the jury begins. It is not error to overrule a request for separate trial made after the parties announced ready for trial and the work of impaneling the jury was commenced.

2. Section 12, art. 12, c. 68, Code Cr. Proc., relating to manner of receiving the verdict, contemplates an oral verdict. And where the verdict is in writing, and signed by the foreman, and delivered and read in open court, the requirements of the statute are obviated, and it is not error to fail to poll the jury, unless requested by one of the parties.

3. When alleged errors are expressly waived they will not be considered.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Henry Nichols was convicted of grand larceny, and brings error. Affirmed.

George Gardner, for plaintiff in error. A. H. Guston, for the Territory.

BURFORD, J. The plaintiff in error, defendant below, was prosecuted by indictment in the district court of Logan county, jointly with one Frank Sharp, for the crime of grand larceny, tried by jury, found guilty, and sentenced to two years' imprisonment in the territorial penitentiary at Lansing, Kan. A motion for new trial was filed and overruled, and exceptions duly saved. The cause is brought to this court upon a case made and petition in error, under the provisions of section 7, art. 16, c. 68, St. 1893.

Among the alleged errors complained of are the following: (4) "That the court erred in not requiring the jury to be sworn before the trial begun." (9) "That the court erred in not requiring the plaintiff in error to be present during all the stages of the trial." (10) "The court erred in overruling the motion for a new trial, the motion in arrest of judgment, and in passing sentence upon the defendant in the absence of the defendant." As each of these alleged errors is expressly waived by counsel for plaintiff in error, we will give them no consideration.

The only other assignments of error relied upon are the first and eighth. The first is to the effect that the court erred in overruling plaintiff in error's motion for a separate trial. Section 8, art. 10, c. 68, St. 1893, provides that "when two or more defendants are indicted jointly for a felony, any defendant

requiring it must be tried separately. In other cases defendants jointly prosecuted may be tried separately or jointly in the discretion of the court." The right to separate trial in felonies is a privilege extended to the defendant, to be granted by the court on his request or demand. This privilege or right is one he may waive, and he does waive it in all cases where he fails to make the request within proper time. It is a rule that, where statutory rights and privileges may be waived by the party entitled to same, such waiver may be by conduct as well as by express declaration. It appears from the record in this case that, on the day the cause was set for trial in the district court, the plaintiff in error and his codefendant were present in person and by counsel, and all parties announced ready for trial, and the impaneling of the jury was in progress, when the defendants demanded a separate trial. The demand was denied for the reason that it was not made in time. In the case of *Hullinger v. State*, 25 Ohio St. 441, the supreme court of Ohio construed a similar statute, which provides: "Where two or more persons are indicted for a felony, each person so indicted, shall, on application to the court for that purpose be separately tried." In the Ohio case the defendants demanded a separate trial after the jury was impaneled, but before it was sworn. The court said: "There is no doubt that the right of separate trials, thus secured, may be waived by the parties. Nor is there any doubt that such waiver may be implied from the conduct of the parties. The question here is whether the exercise of the right of challenge during the impaneling of the jury is such conduct on the part of the accused as will imply such waiver. We think the application for separate trials must be made before exercising the right of challenge, otherwise the right of separate trials will be deemed to have been waived." It is true, in the case under consideration, it does not appear that any challenge had been exercised, but we think the conduct of the defendant calls for the application of the same rule. The same rule is announced by Judge Maxwell in his *Criminal Procedure*, Maxw. Cr. Proc. 562. In *McJunkins v. State*, 10 Ind. 140, the court held, under a similar statute, that the right to a separate trial was waived when the demand was not made after the jury was sworn. *Moore, Cr. Law*, § 293. It is contended that it was held in *Babcock v. People*, 15 Hun, 347, that the statutory right to a separate trial is available after the jury is sworn. We cannot assent to such doctrine. If it may be made after the jury is sworn, we see no good reason why it might not be made after the evidence of the territory is in, or after the court has instructed the jury, or at any other time before final sentence. If this right to separate trial may be demanded after the trial begins at one stage of the proceedings, why may it not at any stage?

Where will the court draw the line? No authority will question the proposition that the trial has been commenced when the jury is sworn. We think the correct rule is to require such demand to be made before any of the steps are taken in the progress of the trial of the cause. It is not reasonable, fair, or just to suppose that it was intended that the courts should be used to satisfy the whim or caprice of those who may have business before them, or that a defendant may elect to go to trial, and after finding that he does not like the looks of the jury, or for some other trivial cause, demand a separate trial, and thus cause the work of the court to all be gone over again. For the purpose of determining when this right of separate trial shall be requested, we hold that it may be at any time before the trial begins; and for this purpose the trial commences from the time the parties have announced ready for trial and the work of impaneling the jury begins. The supreme court of the United States in *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, said: "For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins." And this doctrine was approved in *Lewis v. U. S.*, 146 U. S. 370, 13 Sup. Ct. 130. The demand for a separate trial having been made in the case at bar after the work of impaneling the jury was in progress, it was made too late, and there was no error in overruling it.

The next contention of plaintiff in error is that the court erred in failing to comply with the requirements of the statute concerning the reception and recording of the verdict. Section 12, art. 12, c. 68, St. 1893, provides as follows: "When the verdict is given and is such as the court may receive, the clerk must immediately record it in full upon the minutes and must read it to the jury and inquire of them whether it is their verdict. If any juror disagrees the fact must be entered upon the minutes and the jury again sent out. But if no disagreement is expressed, the verdict is complete and the jury must be discharged from the case." This provision of our statute contemplates an oral verdict, and, recognizing the usual uncertainty of oral statements, such safeguards are provided as will insure the recording of the verdict in the language and form that meets the concurrence of all the jurors; but in case of a written verdict, signed by the foreman, and delivered in court, there is no necessity for these requirements. The written verdict is as certain as it can be made. It is concurred in before it is presented to the court, and it supplies the place of the usual formalities in case of an oral verdict. The record shows that the verdict returned in this case was a written verdict, signed by the foreman of the jury, and de-

livered and read in open court. Section 11 provides that: "When a verdict is rendered and before it is recorded, the jury may be polled on the requirement of either party in which case they must be severally asked whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation." The defendant did not require the jury to be polled, and he must have been satisfied that the verdict, as read in his hearing, expressed the finding of the jury, and that all concurred therein. We find nothing in the record to warrant us in interfering with the judgment in the cause. The judgment of the district court of Logan county is affirmed, at the costs of plaintiff in error.

DALE, C. J., not sitting.

MULHALL v. MULHALL.

(Supreme Court of Oklahoma. July 27, 1895.)

PLEADINGS—AMENDMENT—VARIANCE—APPEAL—REVIEW—PRESUMPTIONS—CONTRACTS—CONSIDERATION.

1. Where the plaintiff sued the defendant for money loaned, and the defendant answered by a general denial, and also by special plea that the money had been invested in cattle, in which plaintiff and defendant were partners, and in which they had both invested certain amounts of money, and that the cattle still remained undisposed of, and where the plaintiff replied by general denial, and a trial was had by the court, and neither the evidence nor the rulings upon any of the questions occurring on the trial are saved, but the record is brought to this court on a transcript of the pleadings and the special findings and conclusions of the court, showing that the court found that the \$1,500 was invested in a partnership interest in the cattle, but afterwards the defendant agreed to take the plaintiff's interest in the cattle and to pay him back the said sum of \$1,500, and the court rendered judgment for the amount sued for in favor of plaintiff, *held*, that the case is one in which the pleadings could have been amended to correspond to the proof, and that, no objection appearing to have been made until after judgment, this court will consider the case as if proper amendments had been made, and there was not a fatal variance.

2. Where the evidence and the record of the proceedings occurring on the trial of the cause are not brought to this court, but only the pleadings, findings, and conclusions of the court, and the motions made after judgment, the presumption is that all of the proceedings of the court are regular, and that the pleadings were treated by the parties as amended, where the case is one where an amendment may be allowed.

3. A partnership interest in certain cattle, in which a party had invested \$1,500, and in which it appeared at the time of the contract that the business would be unprofitable and losses might occur, and where there is no claim of fraud or deceit, is sufficient consideration for a promise to pay \$1,500 for such partnership interest in the cattle.

(Syllabus by the Court.)

Appeal from district court, Logan county; before Justice Frank Dale.

Action by Joseph L. Mulhall against Zachariah Mulhall for money had and received.

From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Huston & Huston, for appellant. Keaton & Cotteral, for appellee.

BIERER, J. This action was brought in the court below by Joseph L. Mulhall against Zachariah Mulhall under the 1893 Code of Civil Procedure, which is the Kansas Code, adopted into this territory, to recover from the defendant the sum of \$1,500 with interest, in which amount the plaintiff alleged the defendant was indebted to him for money loaned by plaintiff to the defendant on the 16th day of February, 1893, and which the plaintiff alleged was due and unpaid. The defendant filed his answer in two paragraphs—First, a general denial; and, second, a special defense in which the defendant alleged that on the 16th day of February, 1893, plaintiff and defendant entered into a contract of partnership, whereby it was agreed that they would enter into the cattle business and would purchase a large number of cattle to feed; that they arranged with one Samuel Lazarus to procure 365 head of cattle; that plaintiff placed in said business \$1,500 (the \$1,500 for which he sued the defendant), and that the defendant placed in said business \$500, and Samuel Lazarus \$11,575; that said cattle were to be sold, and Lazarus to receive his said investment with interest thereon, after which plaintiff and defendant were to receive their respective investments, and if anything then remained it was to be divided as profits; that the cattle were to remain the cattle of the said Lazarus until his money was received therefrom as agreed; that the said Lazarus has sold and disposed of a portion of said cattle, but not sufficient to pay his interest therein, and that said partnership business still remains undisposed of, and that plaintiff and defendant have had no settlement, and cannot make any settlement until the cattle are disposed of. To this answer plaintiff filed a general denial. A trial was had by the court, a jury being waived. Upon the trial the court made the following findings of fact and conclusions of law, and rendered judgment thereon as follows, to wit:

"The court, having heard the evidence, and being fully and sufficiently advised in the premises finds the following facts: First. That on or about the 16th day of February, 1893, the plaintiff and the defendant entered into an agreement for the purpose of buying and feeding a bunch of cattle, to be purchased of one Tonk Smith, and such cattle were so purchased, under an implied agreement of partnership. Second. That in pursuance of said agreement plaintiff put in the sum of fifteen hundred dollars and the defendant the sum of five hundred dollars, and paid the same to the said Tonk Smith as the first payment on said cattle. Third. That afterwards, in order to obtain the balance of the purchase

price of said cattle, the defendant had a bill of sale for said cattle executed and delivered by the said Tonk Smith to one Samuel Lazarus, said plaintiff not objecting. Fourth. That afterwards it appeared that the said cattle deal entered into by said parties would not be profitable, and might result in loss. Fifth. That, after it appeared that said cattle deal might not prove profitable, the said defendant, Zach Mulhall, voluntarily released the said plaintiff, Joseph Mulhall, from said agreement, and assumed the risk of loss and accepted of whatever of profit there might result from the enterprise, and agreed to pay the plaintiff the sum of \$1,500. And thereupon the court finds the following conclusions of law: That the plaintiff was released from liability as a partner. Second. That the defendant is liable to the plaintiff for the said sum of fifteen hundred dollars (\$1,500) put into said partnership by the said plaintiff. It is therefore considered, ordered, and adjudged by the court that the plaintiff recover judgment against defendant in the sum of fifteen hundred dollars (\$1,500) with interest thereon at the rate of seven per cent. (7%) per annum and the costs of suit, to which judgment and conclusions of law the defendant excepts."

After the judgment was rendered, the defendant moved for judgment in his favor on the findings of the court, and also for a new trial, both of which motions were overruled, and an exception allowed. From this judgment the defendant appeals, and relies upon two propositions for a reversal of the judgment: First, that there was a fatal variance between the cause of action stated in plaintiff's petition and the cause of action upon which he recovered; second, that there was no consideration to support the defendant's agreement to repay the plaintiff his \$1,500, for which plaintiff recovered.

The first is the principal question involved in the case, and one that has caused us to spend considerable time and much effort in an investigation of the decisions upon this question, and in which we have been aided but little by the briefs of counsel, for counsel for plaintiff in error only cites decisions from other states, where the Codes are not shown to be the same as ours nor the construction similar to that of the state from whence we have borrowed our statute, nor does he cite cases which were tried the same as the one at bar must be presumed, from the record before us, to have been, and this, in matters of practice, is vital in the consideration of a case as a precedent, for how can a decision on a question of practice be in point unless the questions arose in a similar manner in the cited and in the disputed case, when the manner of the trial or the mode of appeal may waive or fail to present the very question at issue? The brief of defendant in error contains only the earlier, and none of the later, decisions on the point in controversy. The question must be determined, not from

the provisions of the Codes generally, with the decisions of other states thereon, but from the provisions of our Code, with the decisions of the Kansas supreme court thereon, for our legislature has adopted the Kansas Code of Procedure, and the Kansas decisions must control upon the question. The sections of the Code bearing upon the question are as follows:

"(4011) Sec. 133. No variance between the allegations, in a pleading, and the proof, is to be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended, upon such terms as may be just."

"(4012) Sec. 134. When the variance is not material, as provided in the last section, the court may direct the fact to be found, according to the evidence, and may order an immediate amendment without cost."

"(4013) Sec. 135. When, however, the allegation of the claim or defense, to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof."

"(4017) Sec. 139. The court, may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or conform the pleading or proceeding to the facts proved, when such amendment does not change substantially the claim or defense; and when any proceeding fails to conform, in any respect, to the provisions of this Code, the court may permit the same to be made conformable thereto by amendment."

Now it will be observed, by section 133, that no variance between the allegations of the pleadings and the proof is to be deemed material unless the adverse party has been actually misled to his prejudice in maintaining his action or defense upon the merits, and that when a party is misled by such a variance it is incumbent upon him to show to the court that he has been misled, and that then the court may allow an amendment upon terms. By section 135 it is provided that it is not a case of variance when the allegation of the claim or defense to which the proof is directed is unproved, not in some particular, but in its general scope and meaning; but it is then a failure of proof. The evidence adduced on the trial is not in the record, and is not before the court. We have nothing but the pleadings,

the findings and conclusions of the court, the judgment in the case, and the motions for judgment on the findings and for a new trial, before us. We have heretofore held that the presumptions of law are all in favor of the correctness of the judgment of the court below. *Gardenhire v. Gardenhire* (Okla.) 37 Pac. 813. So, too, the presumptions are in favor of the correctness of all of the proceedings and rulings of the court below, and error cannot be presumed but must be affirmatively shown. *Lucas v. Sturr*, 21 Kan. 482. As the evidence taken upon the trial and the rulings thereon are not brought into the record, we must presume that the evidence which was offered upon the trial was offered without any objection thereto, and that it was such as would support the findings of fact which the court has made. We must presume, therefore, that the dispute between the plaintiff and defendant, involving the defendant's liability to plaintiff for this \$1,500, was fully gone into upon its merits, and that, although the plaintiff had made no amendment to his petition alleging that, after this \$1,500 had been invested in cattle, the defendant agreed to repay him the amount of this investment, and take the plaintiff's interest in the cattle, the proof was directed to this allegation as well as to the plaintiff's allegation that he had loaned this money to the defendant in the first instance on February 16, 1893, and that no question was raised on account of the defect in the pleadings. The money involved in the controversy was evidently but the one sum. It is stated to be \$1,500 in the plaintiff's petition, and as having been loaned to the defendant on the 15th day of February, 1893. It is stated in defendant's answer as being \$1,500, and as having been invested in cattle on the 16th day of February, 1893. The prayer of the plaintiff's petition was for the recovery of the sum of \$1,500, with interest thereon, and the finding of the court is that this identical sum of money in dispute was invested on the 16th day of February, 1893, and a contract was subsequently made for the repayment of this same sum by defendant to plaintiff, and that it all grew out of the original transaction entered into by the parties on the 16th day of February, 1893. The merit of the matter laid in the question as to whether defendant owed the plaintiff the sum of \$1,500, and it is but fair to presume, in the absence of the evidence, that the facts of these parties' dealings were fully inquired into on the trial, and that the proof was freely and willingly directed by both parties to the question as to whether or not the plaintiff was entitled to receive from the defendant the sum of \$1,500 on account of the business transactions which they had had concerning this \$1,500. It is but fair to presume that the defendant's position on the trial was that this same money was still invested in the business, and that he had not agreed to pay the plaintiff this mon-

ey, and that the plaintiff should not be repaid until the cattle were sold, and it is only fair to presume that the plaintiff claimed that the defendant had agreed at some time prior to the bringing of the action to assume the plaintiff's interest in these cattle, which had arisen by virtue of his advancement of this particular \$1,500, and agreed to pay that sum to the plaintiff.

It will be observed that the case in which a total failure of proof exists is one in which "the allegation of the claim or defense to which the proof is directed is unproved," and it is claimed by counsel for plaintiff in error that the proof was directed to the allegation of a loan, as charged in plaintiff's petition, and that the plaintiff failed in this proof. It is true that the pleadings are the written allegations of the claim and defense of the parties, and that it is a fair presumption that the proof offered corresponded to the allegations in the pleadings, but it is just as fair a presumption that all of the findings of the court are supported by proof properly offered and admitted, and these findings would then show, and there is nothing in the record to dispute it, that evidence was offered, without objection, upon all the matters which they determine, and it is for plaintiff in error to overthrow their correctness, or the judgment founded thereon must stand. The language of this section (135) of the Code of Procedure does not say that allegations of the pleadings must be proved or else there is a failure of proof, but it is that the allegations of the claim or defense to which the proof is directed must be supported by the evidence. It matters not how informal or inaccurate the pleadings may be, if they pray the judgment which is rendered, and if the proof supports the claim or defense to which it is directed, then there is no fatal variance; and, as before suggested, we must presume that the findings of the court are on the same questions as the ones to which the proof was directed, and that the parties considered the pleadings as sufficient for the proof; and the parties having considered the case in this manner on the trial, should the supreme court now consider the pleadings as having been amended, or must the case be reversed because an amendment was not made?

This question, of course, involves the primary proposition as to whether or not, in a case of this character, the pleadings could be amended at all so as to change the allegation as to the nature of the transaction from which the indebtedness arose from one of the loan of a particular amount of money to a contract to return the particular sum of money after having invested it in this property. But we will consider the former question first, for, if the supreme court could not consider the amendment as having been made when it was not actually made, then, of course, we would have to reverse the judgment of the court below. There is a

long and entirely harmonious line of Kansas decisions upon this question, and they leave no doubt as to what the rule in such cases is. In the case of *Railroad Co. v. Caldwell*, 8 Kan. 244, the court held: "Though there be a variance between the allegations of a petition and the facts proved on the trial, yet, if it be a case where an amendment of the petition ought to be allowed to conform it to the facts proved, the judgment will not be reversed on account of such variance." In *Mitchell v. Milhoan*, 11 Kan. 617, it was held: "Where the judgment substantially follows the prayer of the petition, and where the variance between the judgment and the prayer of the petition is so slight that the plaintiff would be allowed to amend the prayer of his petition at any time without costs, the judgment will not be reversed for said variance." In *Pape v. Bank*, 20 Kan. 440, the supreme court of Kansas said: "If any amendment were necessary, it will be considered as made by this court." In *Gas Co. v. Schliefer*, 22 Kan. 468, it is said: "Hence, though no formal amendment was made, we think that, as plaintiff was entitled to interest, and as the defendant was clearly notified of plaintiff's intention to claim interest, we may fairly treat the case as though an amendment was in fact made, and hold that no substantial rights of defendant have been prejudiced." In *Grandstaff v. Brown*, 23 Kan. 176, it is stated: "If some of the allegations of the petition might be considered as slightly defective, still the petition may now be considered as amended so as to make its allegations correspond to the facts proved." In the case of *Hummer v. Lamphear*, 32 Kan. 439, 4 Pac. 865, this language is used: "If, however, there was any variance between the prayer of the petition and the judgment rendered, the petition could have been amended, and the judgment will not be reversed on account of such variance." In *Tipton v. Warner*, 47 Kan. 606, 28 Pac. 712, the court states the rule thus: "The petition is not, perhaps, as full and complete as it should be to constitute an action to declare and enforce a trust against Tipton, but as the evidence is sufficient to support such a cause of action, and also to support the judgment of the court, and as the petition might have been amended to conform to the evidence, this court will not reverse the judgment of the court below, but will consider the petition as having been amended to conform to the facts proved and the judgment of the court." And in as late a case as *Loper v. State*, 48 Kan. 540, 20 Pac. 687, although holding that the rule could not be applied in the case there determined, because the parties had, at every opportunity, objected to the insufficiency of the allegations of the petition, the supreme court of Kansas clearly defined what the rule is where the parties upon the trial treat the pleadings as amended, and say: "If the case had been tried by all the parties as if the pleadings had been

amended, or if no objection had been taken to the proof of all the charges of the official terms of Loper as county treasurer, we might consider the pleadings as amended to conform to the facts proved." These decisions, then, clearly define the rule to be that, if the case is one in which amendments should, upon an application, have been allowed, and the case is tried without any objection to the defects which appear in the pleadings, the supreme court will treat the amendment as having been made.

We come now to the primary and real question in the case at bar. With the answer filed in the case by the defendant, could the pleadings have been amended so as to entitle the plaintiff to recover upon his contract with the defendant to take the plaintiff's interest in the cattle and pay him back his advancement of \$1,500? It will be observed that it is the answer filed by the defendant which first brought the question of the rights of these parties growing out of this partnership transaction into controversy into this case. The plaintiff in his petition pleaded nothing with reference to it, and there was no obligation whatever on the part of the defendant to bring it into the case. His general denial would have admitted as complete a defense to the plaintiff's allegation that the money was received by the defendant as a loan, as would the allegation that it was paid by plaintiff as an advancement in a partnership arrangement. The defendant himself chose to open the controversy in this respect. He chose, also, to allege that the partnership was still in existence and was still undetermined, and that the plaintiff's \$1,500 was still invested in the partnership property. All of this, it is true, the plaintiff denied by his reply, in which he failed then to allege that the plaintiff had agreed to pay him the \$1,500 upon the settlement of the partnership transaction. This latter failure however, could cut but little figure, for the case was tried, as we have a right to presume it was, the same as if such an allegation were contained in the reply. Of course, such an allegation in the reply would have been wholly inadmissible, as it made a new issue, if the defendant had not brought this question into the controversy. The allegations, for the purpose of trying this issue, are, no doubt, defective in both plaintiff's pleadings, but these defects are cured by the pleadings of the opposite party and by the subsequent proceedings in the case. *Grandstaff v. Brown*, 23 Kan. 176; *Clay v. Hildebrand*, 34 Kan. 694, 9 Pac. 466; *Sanford v. Weeks*, 39 Kan. 649, 18 Pac. 823. Upon this subject the supreme court, in the case of *Clay v. Hildebrand*, say: "We think the allegations of the plaintiff's petition as against Walruff are defective, but by Walruff's subsequent appearance in the case, his answer, his going to trial without objection, his introducing evidence as though the issues were all properly made up, and his

making no objection in the court below at any time, we think he waived and cured the defective allegations of the petition and submitted his case to the court below upon its merits." It is true that the plaintiff in error did make an objection in the court below, but this objection was not made until after the judgment was rendered, and therefore the case comes substantially within the language of the supreme court just above given. But whether the answer of the defendant and the subsequent proceedings were such as to cure the serious defects in the plaintiff's pleadings or not, he certainly was the party who first brought the question as to the partnership transaction into the case, and he assisted, as much as an opposite party could, to bring the case within the class of cases in which other issues than those first proposed may be brought into the case by amendment.

Now as to whether this is one of the cases where so great a change could properly be made in the issues by amendment must likewise be determined from a consideration of the Kansas decisions on the question, and the rule deduced from illustrations from which the principle which governs these cases can be gathered. The cases are numerous in the Kansas Reports, and it will not be difficult to arrive at a correct conclusion after we have observed what the decisions there have been and were before we adopted their Code. In the case of *Railroad Co. v. Caldwell*, supra, the petition sought to charge the defendant for damages, resulting by the negligence of the defendant as a common carrier, to the property of the plaintiff. The special verdict of the jury found that the property had been shipped under a special agreement. Judgment was had for the plaintiff, and on appeal the supreme court held that it was a case where an amendment ought to have been allowed to the petition to conform the judgment to the facts proved, and the judgment below was affirmed. The petition in the case of *Railway Co. v. Montelle*, 10 Kan. 119, sought to charge the defendant for certain goods which it alleged had been delivered to the railroad company to be carried for a reasonable reward, and the issue was changed so that the plaintiff recovered on proof that he was a passenger and that the goods were his baggage to be carried by virtue of his being a passenger. In *Railway Co. v. Salmon*, 14 Kan. 512, an amendment was allowed to the petition so as to charge the defendant for damages on account of the negligent killing of the deceased as an employé of the railroad company, while the original petition charged the negligent killing of the deceased as a passenger on the train of the railroad company. In the case of *Hanlin v. Baxter*, 20 Kan. 134, it was held proper in a justice court to amend the bill of particulars by striking out the name of the plaintiff and substituting an entirely different party as the person against whom

the injury was committed, the alleged trespass being claimed to have been upon the premises and possessions of the latter party, but the injury done by the defendant being the same as that stated in the original complaint. In the case of *Gas Co. v. Schlefer*, supra, it is held that a judgment for interest which the plaintiff neither asked nor prayed for, but which was allowed upon the instruction of the court to the jury, should not be reversed, because the trial court might have permitted an amendment to the petition. The plaintiff, in the case of *Railroad Co. v. Hays*, 29 Kan. 193, was allowed, after judgment in the justice court and on appeal by the defendant to the district court, to amend his bill of particulars from a cause of action at common law for the negligent killing of a cow to a statutory cause of action for the injury. In the case of *Reed v. Cooper*, 30 Kan. 574, 1 Pac. 822, it was held proper after judgment in a justice court and appeal by the defendant to the district court, and after all the evidence is submitted in the district court, to permit the plaintiff to amend his bill of particulars so as to show that he is seeking to recover as administrator of an estate and not in his individual capacity. It was held proper in the case of *Packing & P. Co. v. Casing Co.*, 34 Kan. 340, 8 Pac. 403, for the plaintiff to amend its petition so as to allege that the defendant was a copartnership consisting of numerous named individuals, instead of a corporation, as alleged in the original petition. In the case of *Railway Co. v. Rice*, 36 Kan. 593, 14 Pac. 229, it was held that, where a petition, intending to state a cause of action for unlawful arrest and imprisonment, sufficiently states a cause of action for false imprisonment, and where the evidence clearly shows a cause of action for false imprisonment, and the defendant is not misled, the plaintiff had the right at any time during the trial, and possibly at any time before or after judgment, to amend the petition so as to make it state a good cause of action for false imprisonment. In *Bogle v. Gordon*, 39 Kan. 31, 17 Pac. 857, it is held that a petition on a cause of action for money had and received may be amended so as to charge that the defendant wrongfully, knowingly, fraudulently, and unlawfully appropriated and converted the money to his own use, and that such an amendment does not change the cause of action when it is evident that the amended petition is concerning the same transaction set forth in the original one. In *Organ Co. v. Lasley*, 40 Kan. 521, 20 Pac. 228, the plaintiff sued to recover the possession of an organ which had been sold upon a contract that the defendant would pay for the same the sum of \$100, in a number of payments at stated times, the property to remain that of the organ company until paid for, and a part of which, it was claimed by the organ company, had not been paid. The defendant admitted that he still owed on the property the sum of \$15, but he alleged

he had made a tender of the amount. On the trial the court found that all the amounts had been paid before suit was brought, and that the defendant was entitled to the possession of the organ. In the supreme court it was claimed that there was a fatal variance between the issues and the proof, but this contention was denied, and the supreme court held that the case should be considered as if the proper amendment had been made. In *Railway Co. v. McCally*, 41 Kan. 639, 21 Pac. 574, the action was brought for personal injuries to a brakeman occasioned by the negligence of the defendant, and it was alleged that at the time of the injury he was riding upon the pilot of the engine. Upon the issue formed by the denial of the defendant, the case was tried to a jury, and in answer to one of the special questions the jury answered that McCally, at the time he was injured, was not riding on the pilot of the engine. The evidence showed that he was standing upon the platform above the pilot of the engine, and after judgment the trial court allowed an amendment to make the petition correspond in this respect to the facts proved, and the supreme court refused to disturb the judgment. In the case of *Tipton v. Warner*, 47 Kan. 606, 28 Pac. 712, an action was brought for the recovery of money alleged to be due the plaintiff because of the defendant's breach of trust in failing to convey to plaintiff the title to certain tracts of land which had been located with land warrants furnished by plaintiff under an agreement to convey the same to plaintiff, and also to recover a certain sum of money loaned the plaintiff. The petition set up the facts with reference to the procuring of title to the land by the defendant and his refusal to convey, constituting a breach of trust, but only sought a money judgment. Upon the trial the plaintiff recovered the money judgment, and was also decreed an equity in a part of the land. On appeal the supreme court held that it would have been proper to have amended the petition so as to constitute a good cause of action to declare and enforce the trust against Tipton, and as the evidence supported such an action, and the court had rendered such a judgment, the supreme court would consider the petition as having been amended.

These cases we consider quite clearly in point, and authority permitting an amendment to be considered as made in the case at bar. In the case of *Bogle v. Gordon*, supra, the plaintiff sued for a particular sum of money had and received by the defendant for the use and benefit of the defendant. The amendment permitted the cause of action to be changed from one for the recovery of a sum of money on account to one for the unlawful conversion of the same money. But it was the same sum of money, it was the same person who owed it, and it was between the same parties, and for the recovery of the same amount. So, in the case at bar,

the action is for the recovery of the sum of \$1,500, with interest. It is money due and owing from the defendant to the plaintiff, and we cannot observe any prejudice, and none is alleged to have occurred, to the defendant on account of changing the formal allegation as to the nature of this indebtedness. The authorities cited, giving illustrations of cases where such amendments may be made, as well as the language of our statute itself, show that what is aimed at under our Code of Procedure is the protection of the rights of the parties in giving them an opportunity to fairly and fully litigate property concerns between them, and not to permit a party to be defeated in the relief he asks on account of the objections to form, particularly, unless these objections are made at the proper time, and if he has waived them until after the trial of the cause, and has litigated the controversy on its merits, he cannot then assert the invalidity of the judgment on account of a variance which has not in any way been to his prejudice. Our Code vests a broad discretionary power in the trial court to permit amendments in the pleadings or proceedings, in matter and of parties, either before or after judgment, and we cannot say that the court abused this discretion where it is not shown that the party complaining has been injured by the court's either permitting the amendment to be made or considering the amendment as made. The judgment below should not be reversed on account of the variance between the pleadings and the findings of the court.

The only other question urged for our consideration in the brief of plaintiff in error is that there was not sufficient consideration for the promise of Zachariah Mulhall to repay to Joseph Mulhall this \$1,500 invested on February 16, 1893, in the cattle business. It is claimed that, as the court found that this promise was made to repay Joseph Mulhall this money "after it appeared that the said cattle deal entered into by said parties would not prove profitable, and might result in loss," Zachariah Mulhall would receive less than \$1,500 from said property, and therefore there would not be sufficient consideration for the payment of \$1,500. This contention is untenable, both as a conclusion of fact and as a proposition of law. The finding of the court, it is true, indicated that the business would not prove profitable, but it did not hold that there would be a loss. There might be a loss, but there might also be a profit, and this was the chance that the defendant was taking in making the contract. However, if it were true as a fact fully determined that there would be an actual loss in the business, this would not prevent there being sufficient consideration for the contract. There was property there, and Joseph Mulhall was the owner of an interest in the property, and whether it would have netted him something over, exactly, or something less than, \$1,500, it would make no dif-

ference. No fraud is claimed to have been practiced in making this contract. It is not claimed but what Zachariah Mulhall knew exactly what he was getting, and, knowing this, there was an ample consideration to support the contract, and whether or not this consideration is adequate,—that is, fully equal in value to the money promised to be given in return therefor,—makes no difference. The consideration was sufficient. *Lawson, Cont. § 93; Bish. Cont. § 45; Davis v. Steiner, 14 Pa. St. 275; Shepard v. Rhodes, 7 R. L. 470; Earl v. Peck, 64 N. Y. 596.*

Having determined both questions relied upon for a reversal against the plaintiff in error, the judgment of the court below is affirmed. All the justices concurring, except DALE, J., not sitting.

(23 Nev. 417)

STATE ex rel. PYNE v. LA GRAVE, State Comptroller. (No. 1,430.)

(Supreme Court of Nevada. Aug. 9, 1895.)

MILITIA—ALLOWANCES FOR ARMORY—AUDIT OF CLAIMS—PETITION FOR MANDAMUS.

1. Under St. 1895, p. 109, § 11, declaring it the duty of a county to provide an armory for militia companies within it, and providing that all claims for expense therefor shall be audited and approved by the board of military auditors, and, on approval of such claims, they shall be presented to the state comptroller, who shall draw his warrant on the state treasurer for the amount so approved, and on its presentation the treasurer shall pay the same, such expenses not to exceed \$75 per month for each company, it is only actual expense, not exceeding \$75 a month, that is a charge against the state.

2. A claim against the state for expense of an armory, if not properly chargeable against it, does not become a legal demand simply because audited and approved by the boards designated to pass on such claims.

3. A petition for mandamus must show on its face a clear legal right to that which is demanded.

Petition for mandamus, on the relation of George D. Pyne, against C. A. La Grave, state comptroller. Writ denied.

J. Poujade, for relator. Robt. M. Beatty, Atty. Gen., for respondent.

BELKNAP, J. This is an application for a writ of mandamus requiring respondent, as comptroller of state, to draw his warrant in favor of relator, as secretary of Company B. first regiment, Nevada National Guard, for the rent of an armory for the company for the month of April, 1895. The statute under which the claim is made is as follows: "Sec. 11. It shall be the duty of the board of county commissioners of any county in which public arms, accouterments, or military stores are now had or shall hereafter be received for the use of any volunteer organized militia company to provide a suitable and safe armory for organized militia companies within said county. All claims for the expense of procuring and maintaining armories shall be audited and

approved by the board of military auditors, and upon approval of such claims they shall be presented to the state controller who shall draw his warrant upon the state treasury for the amount so approved, and upon presentation of said warrant, the state treasurer shall pay the same out of the general fund. Such expenses shall not exceed seventy-five (\$75) dollars per month for any company except that each company regularly drilling with field pieces or machine guns, and using horses therewith, may be allowed an additional sum not to exceed twelve and 50/100 (\$12.50) dollars per month for each piece or gun." St. 1895, p. 109. In his petition relator states that the county commissioners of Storey county provided an armory for the use of the company during the period mentioned, and that a claim amounting to the sum of \$75 therefor was audited and approved by the board of military auditors and the state board of examiners, etc. It will be observed that the statute provides that the county commissioners shall provide a suitable and safe armory; but whether they, or the owners of the armory building, or the company, shall present the claim for the expense of so doing, is not clear. But, aside from this, it is beyond controversy that it is only the actual expense incurred in procuring and maintaining an armory, not to exceed \$75 a month, that shall constitute a charge against the state. Upon this point the petition is silent. It says nothing about the actual expense, nor that any such expense has ever been incurred; and without such statement the petition fails to state facts showing that the demand is a legal one against the state.

Claims that are not properly chargeable to the state do not become legal demands simply because audited and approved by the boards mentioned. All the decisions agree that the writ will not issue unless the applicant shows a clear legal right to the relief demanded. Thus, in *Illinois & M. Canal Trustees v. People*, 12 Ill. 248, where a question involving a similar principle arose, the court said: "It is insisted that the alternative mandamus is too defective to sustain the judgment. An alternative mandamus becomes the foundation of all the subsequent proceedings in the case. It answers the same purpose as the declaration in ordinary actions. It must show on its face a clear right to the relief demanded by the relator. It must distinctly set forth all the material facts on which he relies, so that the same may be admitted or traversed. The defendant is called upon to perform the particular act sought to be enforced, or by a return deny the facts alleged in the writ, or state other matters sufficient to defeat the relator's application. * * * In this case, the alternative mandamus is fatally defective. It does not set forth the facts on which the relators rely. * * * This is like the case of a writ of error brought to re-

verse a judgment entered on a declaration showing no cause of action. * * * The proceedings fall, for want of a proper foundation to sustain them." Again, in *Lavalle v. Soucy*, 96 Ill. 467, it is said: "A writ of mandamus will be awarded only in a case when the party applying for it shows a clear right to have the defendant do the thing which he is sought to be compelled by mandamus to do. *People v. Glann*, 70 Ill. 232. The petition must show upon its face a clear legal right to the relief demanded, and every material fact on which the petitioner relies must be distinctly set forth." Having reached the conclusion that the writ must be dismissed, it is not necessary now to determine the further question whether an appropriation for its payment has been made. Writ denied.

BIGELOW, C. J., and BONNIFIELD, J., concur.

STINSON v. HARDY et al.
(Supreme Court of Oregon. July 20, 1895.)
MINING LEASE.

A license for possession of a mining claim, which, by the terms of the instrument creating it, is made exclusive and irrevocable, and which, by reason of expenditures of the licensee in the development of the mines under the agreement, has become a license coupled with an interest, under which possession may be maintained against the world, is a lease within Act Feb. 20, 1891, § 1, securing a lien for work and materials furnished for the working of a mine, which shall attach to the mine, provided that this section shall not apply to the owners of a mine worked by a lessee.

Appeal from circuit court, Baker county; Morton D. Clifford, Judge.

Action by William Stinson against O. B. Hardy and others to foreclose miners' liens. From a judgment for defendants, plaintiff appeals. Affirmed.

William Smith, for appellant. M. L. Olmsted, for respondents.

WOLVERTON, J. This is a suit to foreclose three several miners' liens claimed for work and labor done and performed at the instance of the defendant O. B. Hardy, who was operating certain mining properties under the following agreement with the owners thereof, viz:

"This indenture, made and entered into this 12th day of October, 1893, by and between C. M. Berry, C. M. Collier, L. M. Barnett, and J. M. Barnett, his wife, and D. L. Choate, as lessors, of Baker county, Oregon, the parties hereto of the first part, and O. B. Hardy, lessee, the party of the second part, and of the same place, witnesseth: That whereas, the said lessors, the parties of the first part, have by their joint deed of conveyance, under their hands and seals, and of even date herewith, conveyed to the said lessee all their rights, title, and interest

in and to those two certain quartz mines situated in Baker county, state of Oregon [here follows a description of the mines], and therein covenanting that the said mining claims had been recorded and worked, as required by law, to the extent of one hundred dollars worth on each of said claims for each year since its location, and have been continuously worked theretofore by themselves, their predecessors in interest for the purpose of holding the same, and making the same valid as locations. And whereas, said deed so executed and acknowledged is delivered as an escrow to the First National Bank of Baker City, Baker county, state of Oregon, to be kept upon condition of the full and complete payment by the said party of the second part herein, his heirs or assigns, of the sum of twenty thousand dollars (\$20,000) to the said first parties, their order, heirs or assigns, on or before the first day of January, 1895, and upon said condition to be delivered to the said second party herein, his heirs or assigns, as the deed of the said first parties herein of, in, and to the premises therein and herein described. And whereas, said escrow so delivered, upon condition that said mines be leased by the said first parties herein to the said second party herein until the fulfillment of or breach of the conditions of said escrow: Now, therefore, in order to carry out the terms of said escrow, the said parties of the first part do hereby deliver unto the possession of the said second party the above-named quartz mines, with their appurtenances, with the full right, power, and privilege and authority, and without let or hindrance, except as herein expressed, to extract the ore therefrom, and to work the same by whatever machinery or appliances the said second party may employ for the purpose of preparing for and working the same and taking the ore therefrom, crushing the same, extracting the gold therefrom, and otherwise using and operating the said mine in a proper and miner-like manner, doing no willful or unnecessary injury thereto, and in developing the same for the period from this, continually next ensuing, until the first day of January, 1895: provided, nevertheless, that the said second party, the lessee herein named, shall at all proper times permit either one of said lessors whom a majority of them may choose, at all proper times during the continuance of this lease, to enter upon said mine and inspect the manner in which the same is being managed and worked by said lessee, and inspect and be informed for the benefit of said lessors of the character and amount of the yield of the ore extracted from said mine. And provided, further, that said ore taken from said mine by said lessee shall be crushed and the mineral extracted therefrom in a proper manner, and at such intervals, in such quantities, as is usual in the working of mines of that character in that vicinity; and the said lessee shall preserve said mine, and all machinery, erec-

tions, and appliances erected thereon, free from incumbrances and liens, to the end that the same may be delivered, in the event of his failure to purchase the same, back to the said lessors, at the expiration of this lease, free from any such liens or incumbrances. And provided, further, that all expense incurred in procuring machinery, appliances, assistance, or otherwise in developing or working said mine, crushing the ore therefrom, and all other expenses shall be borne by the said lessee, and he shall save the said lessors harmless from all such expense, without charge therefor. And provided, further, that the said lessee shall and is hereby granted the right and privilege of applying all the proceeds and yield arising from the working of said mine, and extracting the metal and bullion therefrom, after deducting and paying such expenses for machinery and otherwise, to the payment of the purchase price of said mine to the said lessors; and the said lessors hereby covenant and agree to accept and receive the same as such payment upon said purchase price. And provided, further, that in the event of the failure of said lessee to complete this contract or to fulfill his said contract of purchase on or before the time limited therefor, then and in that event all buildings, machinery, and permanent appliances or improvements erected upon said mine by the said lessee in pursuance of these presents shall be forfeited to and become the property of and be surrendered to the said lessors as a part of said mine. And the said lessee, being the party of the second part herein named, with full knowledge of the terms and conditions of the foregoing instrument, both hereby promises, covenants, and agrees to conform to and abide by all the terms, conditions, and contracts on his part herein required and set forth; and to that end doth hereby bind himself, his heirs and assigns, to keep and perform the same. In testimony whereof, the respective parties hereto have hereunto set their hands and seals in duplicate this 12th day of October, A. D. 1893. C. M. Berry. C. M. Collier. L. M. Barnett. J. M. Barnett. O. B. Hardy.

"Witness to signatures of C. M. Berry, C. M. Collier, L. M. Barnett, and O. B. Hardy: T. Calvin Hyde. Sam Carpenter."

The liens are claimed under section 1 of an act entitled "An act for securing liens for laborers on mining claims and material men, and prescribing the manner of their enforcement," approved February 20, 1891, which provides, in effect, that every person who shall do work or furnish materials for the working or development of any mine, lode, mining claim, or deposit yielding metals or minerals of any kind, or for the working or development thereof, and all persons who shall do work or furnish material upon any shaft, tunnel, incline, adit, drift, or other excavation designed or used for the purpose of draining or working any such mine, lode,

or deposit, shall have a lien upon the same, which lien shall attach to the mine, lode, etc.: "provided that this section shall not be deemed to apply to the owner or owners of any mine, lode, deposit, shaft, tunnel, incline, adit, drift, or other excavations when the same shall be worked by a lessee or lessees."

The vital question for our determination is whether O. B. Hardy, in the light of the foregoing contract, and within the spirit and purview of this act, was or was not a lessee when the work was performed for which these liens are claimed. It is contended on the one hand that the contract or agreement is a lease, and upon the other that it is a mere license, and that the liens attach to the mines in the hands of the owners. The distinction between a lease and a license is thus aptly stated by Bean, C. J., in *Christensen v. Borax Co.* (Or.) 38 Pac. 128: "A lease is a contract for the possession and profit of land by the lessee, and a recompense of rent or increase to the lessor, and is a grant of an estate in the land. * * * A license is an authority to do some act or series of acts on the land of another, for the benefit of the licensee, without passing any estate in the land; and, when the license is to mine upon the land of another, the right of property in the minerals, when they are severed from the soil, vests in the licensee." This shows a clear and indubitable distinction between the two, and they are further distinguished in that the one is a corporeal and the other an incorporeal hereditament. Licenses are, however, frequently granted with terms and conditions and upon considerations which ally them so closely to leases that it is frequently difficult to determine when the border line has been transcended, and whether or not they are in reality leases instead of licenses. A mere license, while it remains executory, is revocable at the pleasure of the licensor, is indivisible and nonassignable. But a license may confer either a sole or exclusive right, or simply a right in common. And it has been said that, if it simply confers a right to take ore or to work in a mine, it is not exclusive, and the licensor may himself take ore from the same land or mine, or license others to do so. So a license to dig and carry away all the ore to be found in certain lands does not confer an exclusive right. Such a grant shows the extent of the license, but not its exclusiveness. It is a license without stint as to quantity, and has been likened to the grant of a right sans nombre, which does not exclude the owner. *Grubb v. Bayard*, 2 Wall. Jr. 81, 9 Morr. Mines, 199, and Fed. Cas. No. 5,849; *Iron Co. v. Wright*, 32 N. J. Eq. 248. It has also been held (*Caldwell v. Fulton*, 31 Pa. St. 475) that a grant of an exclusive right and privilege for a consideration presently paid to take ore,—in that case, "stone coal,"—without limitation, operates as a grant of ore in place, and not merely a license or incorporeal right;

and so in *Massot v. Moses*, 8 Morr. Mines, 607, it was held that a grant, upon sufficient consideration, of the exclusive right and privilege of working mines for minerals therein contained, for a term of years, operates as a demise of the minerals for the term. Again, it is said (*Funk v. Haldeman*, 53 Pa. St. 229) that a license coupled with an interest is a grant of an incorporeal hereditament, and that such license is irrevocable, and also assignable. So a grant of the privilege of raising ore on the lands of the grantor at a certain price per ton is an incorporeal hereditament, irrevocable; but an agreement to lease land for a term of years, with the exclusive right to bore for and collect oil, giving one-fourth to the lessor, passes a corporeal interest. *Blanch. & W. Lead. Cas.* 486; *Chicago & A. Oil & Min. Co. v. United States Petroleum Co.*, 57 Pa. St. 83. So we find here, from the illustrations which these cases afford, how closely a license may assimilate a lease; and whether it shall be called the one or the other often depends upon the nature of the consideration by which it is upheld and supported, and whether by its terms the grant is of an exclusive right or privilege. That the consideration mentioned was single for the entire subject conveyed by the deed was a strong feature which inclined the court in *Caldwell v. Fulton*, supra, to construe the deed as a grant of the minerals, and as evidencing an intention that the whole mineral contents of the mine should pass. So in *Massot v. Moses*, supra, the fact that the consideration was a gross sum to be paid presently was a circumstance which entered into the consideration of the court, and by which the intent of the grantor was determined, and the instrument therein construed to be a lease, instead of a license. *Gloninger v. Coal Co.*, 55 Pa. St. 9, *Grove v. Hodges*, Id. 504, and *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, are instances wherein the nonexclusiveness of the grants was the prevailing fact which impelled their construction as licenses, and not leases.

Another test in the construction of an instrument or grant, whether a license or a lease, is whether the grantee has acquired any estate in the land in respect of which he may maintain ejectment. *Bainb. Mines*, 246, cited in *Funk v. Haldeman*, 53 Pa. St. 243; *Boone v. Stover*, 66 Mo. 434. But a license may amount to a lease if conferred in such a manner as to give it validity. Such is the case where an interest in the land is given, or where the license is for a definite period. *Wood, Landl. & Ten.* § 227; *Branch v. Doane*, 17 Conn. 401. In the light of these observations and authorities, let us examine the agreement in question and determine its effect. The possession given thereunder is for a definite and fixed term, and the authority, right, and privilege conferred for working the mines and extracting ores therefrom is exclusive and irrevocable during the term; and manifestly Hardy could have maintain-

ed his possession under the agreement. It is stipulated in his behalf that he will use and operate the mines in a proper and miner-like manner, doing no willful or unnecessary injury to the same; that the ore raised shall be crushed and the mineral extracted therefrom in a proper manner, and at such intervals, and in such quantities as is usual in the working of mines of like character in that vicinity; that he shall preserve all machinery and appliances erected thereon free from incumbrances and liens, to the end that the same may be delivered back to the owners unincumbered in the event of his failure to purchase at the expiration of the time agreed upon. And it was further provided that all expenses incurred in procuring machinery, appliances, assistance, or otherwise in developing and working the mines should be borne by Hardy, and that he should save the owners harmless from all such expense. Hardy is accorded the privilege of applying the net surplus arising from the operations of the mines to the payment of the \$20,000 consideration as the purchase price thereof, but that, in the event of his failure to complete the purchase on or before the time limited, all buildings, machinery, and permanent appliances or improvements erected by him should be forfeited and become the property of the owners of the mines. It is doubtful whether these stipulations contain any provisions for the payment of a rental, reditus, or for any increase to the mine owners, which is essential to a lease. At least, there are no positive undertakings on the part of Hardy to do anything that could be said to be beneficial to the mine owners, the doing or not doing of such acts being left optional with him. Again, the absence of words of grant or demise from the agreement would indicate that it was the intention of the parties that the instrument should not operate as a lease. But, whether technically construed as a lease or license, the mine owners parted with their entire supervision and control of the mines for the stipulated time. Hardy was accorded the absolute control and management thereof, together with the possession and profits, under stipulation that they should be operated by him independently of the mine owners, and not as their agent. The mine owners were not to be responsible for any liabilities incurred. On the contrary, Hardy, by express agreement, was to bear all expenses, and to operate the mines entirely on his own responsibility. They were to have no interest in the profits arising from working the mines, nor were they in any way to be benefited thereby, except as Hardy might have seen fit to have added to the value thereof by annexing thereto permanent improvements, which, by the terms of the agreement, were to remain and become the property of the mine owners in the event of Hardy's failure to fulfill his contract of purchase. Possession given under a bond for a deed and an agreement sim-

ilar to this for the operation of a mine was held to be a lease in Montana under a statute providing that "every person, including guardians, minors, married women, and any company, association, or corporation, not tenants or lessees, for whose use, benefit or enjoyment any building, structure, or improvement mentioned in section 1 of this act shall be constructed, repaired, or altered, shall be deemed the owner or proprietor thereof for the purposes of this act." *Block v. Murray*, 12 Mont. 545, 31 Pac. 550. See, also, *Pelton v. Mining Co.*, 11 Mont. 281, 28 Pac. 310. The legislative assembly evidently intended that the property of the owner should be subject to a lien, so far as it could be justly permitted, to secure payment for labor or material furnished in the development or operation of a mine. But by the same act it is declared that the lien shall not be deemed to apply to the owner or owners when the same shall be worked by a lessee or lessees. The spirit of the act would seem to imply that when the mine is worked by some person, other than the owner, who himself has an interest independent of such owner, and absolutely independent of his supervision and control, and one under which possession can be supported and maintained, in any event, as against the owner and all other persons, a lien claimed for work performed or materials furnished the person having such interest should not apply as against the owner or owners of the mine, and hence the lien claimed in the case at bar cannot affect the reversionary interest of the owners of these mines. It is not, however, to be understood that the granting of a mere license will exempt the owner or owners from the lien; but where, as in this case, the licensee has acquired a license which by its terms is made exclusive and irrevocable, and which, by reason of his expenditures in the development and improvement of the mines, has become a license coupled with an interest, under which possession may be maintained against the grantor and all other persons, that such a license amounts to a lease within the spirit and purview of the statute.

These considerations render it unnecessary to notice the other questions raised in the briefs and by the argument of respondents' counsel. The decree of the court below is affirmed, and the cause dismissed, at the cost of appellant.

(27 Or. 377)

MITCHELL v. TAYLOR.

(Supreme Court of Oregon. July 20, 1895.)

SALE OF CORPORATE STOCK—AGREEMENT BY THIRD PERSON TO REPURCHASE—DEFAULT OF VENDEE—EFFECT—WAIVER—QUESTION FOR JURY.

1. A contract for the repurchase of stock at the option of the vendee or his legal representatives, made in consideration of the purchase of the stock by the vendee, is assignable.

2. A company agreed to sell and transfer a number of shares of its stock for a certain sum, payable in installments, on fixed dates, ti-

tle to be perfected in the vendee on full payment of the purchase price. A third person, to induce the vendee to purchase, agreed to repurchase the stock, at the option of the vendee or his legal representatives, "at any of the stated dates of payment, and to pay therefor the sum or sums actually paid in cash," with 8 per cent. interest thereon. *Held* that, after default in a payment, the vendee or his assignee could not at a subsequent date, when a payment was due, compel such third person to repurchase the stock.

3. Where a supplemental complaint, by alleging an acceptance of the assignment of a contract after commencement of the action, establishes a cause of action, and no exception is taken, the objection that no cause of action existed when the action was commenced cannot be urged on appeal.

4. In an action by an assignee of a contract by which defendant agreed to assume a contract for the purchase of stock, and repay to the vendee sums paid by him under the contract, at the option of the vendee, there was evidence that the attorney of the assignee demanded repayment by defendant of sums paid on the contract, and at the same time offered the contract, properly assigned, to him, and defendant refused to accept it, and that defendant subsequently took the contract from the office of the clerk of court, where it had been left, and kept it for some time. *Held*, that the question whether defendant accepted the contract, in spite of infirmities therein, was for the jury.

Appeal from circuit court, Wasco county; W. L. Bradshaw, Judge.

Action by T. G. Mitchell against O. D. Taylor to compel defendant under his contract to assume the purchase of stock. From a judgment of nonsuit, plaintiff appeals. Reversed.

The facts necessary for an understanding of this case are substantially as follows: On March 24, 1892, the defendant, being the president of the Columbia River Fruit Company, and acting in its behalf, induced one D. B. Cornell to enter into a contract with the company, containing, among other things, the following stipulations: "That said party of the first part [the company] has this day sold to the said party of the second part [D. B. Cornell] ten shares of the capital stock of said company for four hundred dollars per share, being the face value thereof, and amounting to four thousand dollars, and said party of the second part has agreed and does hereby agree to purchase and take said number of shares of the capital stock of said party of the first part, and amounting to four thousand dollars, and to pay said sum therefor, in installments, as follows, to wit, one hundred dollars to be paid at the beginning of this contract for each share of stock hereby subscribed and taken by said party of the second part, and one hundred dollars annually thereafter for each share so subscribed by him until the full amount subscribed is paid. Now, therefore, in consideration of the premises and the subscribing of said stock, and payment therefor by said party of the second part, it is hereby mutually understood and agreed that, when said shares of stock shall have been fully paid for as hereinbefore set forth, then the party of the first part will issue to the party

of the second part the number of shares of paid-up stock subscribed and taken by him in this contract." As an inducement to enter into this contract with the company, the defendant made, executed, and delivered to Cornell the following agreement: "This writing witnesseth that I, O. D. Taylor, of The Dalles, Oregon, in consideration of the purchase by D. B. Cornell of Saginaw, Michigan (E. S.) of ten shares of stock in the Columbia River Fruit Company, paying therefor one thousand dollars in cash, and agreeing to pay one thousand dollars annually until the par value is paid, do hereby agree to repurchase said stock if said D. B. Cornell or his legal representatives so desire, at any of the stated dates of payment, and to pay therefor the sums actually paid in cash by D. B. Cornell, with eight per centum annual interest on said sum so paid. O. D. Taylor." Cornell paid the first installment of \$1,000 to the company at the time of entering into the agreement with it. The complaint, after reciting these facts, further alleges that, on the 1st day of March, 1893, Cornell sold, assigned, and transferred to plaintiff all his right, title, and interest in and to said stock and said agreement, and the plaintiff is now the owner and holder thereof; that thereafter, and on March 24, 1893, plaintiff notified defendant of his desire to have defendant repurchase said stock, as by said agreement required, but that defendant refused to comply therewith; and that thereafter, on March 24, 1894, plaintiff duly sold and transferred in writing to the defendant said stock and the agreement of said Cornell to purchase the same, and delivered the same to defendant, and demanded the payment of \$1,000, being the sum paid by plaintiff on the agreement with the company, together with 8 per cent. per annum from March 24, 1892; but that defendant refused to comply with his said request to repurchase the stock or to pay the \$1,000, with interest, or any part thereof; and that plaintiff has fully performed on his part; that plaintiff holds said stock and agreement for defendant at his disposal, and now brings the same into court with a proper transfer to defendant. The prayer is for \$1,000 and interest at 8 per cent. per annum from March 24, 1892.

The answer puts in issue the material allegations of the complaint, except that it is admitted that the agreement between Cornell and defendant was entered into as alleged. Thereafter, on November 10, 1894, plaintiff filed a supplemental complaint, wherein it is alleged "that heretofore, and on or about the — day of July, 1894, and since the commencement of this action, the said agreement mentioned in plaintiff's complaint, and entered into by and between the Columbia River Fruit Company and D. B. Cornell, and wherein said Cornell agreed to purchase, and said company to sell, certain stock of said company, as alleged in the complaint, being

in the hands of the county clerk of this county, as brought into court in this cause, as set forth and shown in the complaint herein, the said defendant accepted and received the same, with the transfers thereof to him, and has ever since and still does keep and retain the same, but neglects and refuses to pay the plaintiff the said sum of \$1,000, as agreed, and which the said defendant promised and agreed to pay in his said written agreement mentioned in the complaint, or any part thereof." The answer to the supplemental complaint admits the taking of these documents from the clerk's office by defendant, but alleges that they were handed to him by the clerk of the court or his deputy, and that he took and received them without knowledge of what they were; that, after keeping them some time, he discovered that they purported to be the agreement between Cornell and the company and a transfer of the same from Mitchell to himself, and that thereupon he immediately returned them to the clerk; that he never accepted them, but only received them in ignorance of what they were. This new matter is denied by the reply. Under these pleadings, the cause was tried before a jury. At the trial, plaintiff offered, and the court admitted, in evidence the two agreements aforesaid; an assignment thereof by Cornell to plaintiff; a power of attorney from plaintiff to H. A. Hogue, authorizing him to demand, receive, and collect the amount owing on the contracts mentioned in the foregoing assignment, and to make such transfer, assignment, or satisfaction thereof as may be necessary; "and an assignment by plaintiff to defendant of all his right, title, and interest" in and to a certain contract for purchase by D. B. Cornell, of Saginaw, East Side, Michigan, of 10 shares of stock in the Columbia River Fruit Company of The Dalles, Or., which said contract was executed March 24, 1892, "and assigned to plaintiff by Cornell March 1, 1894." There was indorsed on this assignment, in pencil: "Left for O. D. Taylor by W. H. Wilson, May 21, 1894."

A. J. Rorick, a witness for plaintiff, testified, in substance, that, at the request of H. A. Hogue, and acting on behalf of the plaintiff, he went to the room of defendant at the Hotel Perkins in Portland, on the 24th of March, 1894, and found defendant there, and with him ex-Attorney General Geo. H. Williams, and, in giving his version of the interview, said: "I stated to Mr. Taylor that I was there to complete a transfer of some stock and an agreement that he had made, and that I had the papers with me, and this was one of the days mentioned for the transfer, and asked him if he desired to make it, or was ready to do so. Mr. Williams stated that he was Mr. Taylor's attorney, and asked me to let him examine the papers, and said he would like to consult with Mr. Taylor, and that he would return his answer to me later, and we fixed upon 1 o'clock as the

hour. I returned there at 1 o'clock, and Mr. Williams * * * said, in a jocose sort of way, that they had their war paint on, and that this was a part of some other matters, and, in the language of the poet, he would meet us at Philippi, and he turned over the papers to me, and I left." Judge Williams said they were not ready to pay the \$1,000. And, in answer to a question, the witness continued: "I was there, under the contract, to ask them if they were ready to pay the money, as agreed,—as named in the agreement. I stated that I was there as the agent of Mitchell, * * * prepared to act for him, and showed these papers [four in number]. Then Judge Williams asked me to turn them over to him. When Mr. Taylor first asked me for them, I said I wanted to know, of course, whether the papers would be returned to me or not, if he did not carry out the agreement. Judge Williams then said that he would pledge himself, as Mr. Taylor's attorney, to see that the papers were returned. I did not expect to let him have them and get no money,—of course not. I merely left them with Judge Williams to obtain their answer, whether they would pay over the one thousand dollars. Q. You did not intend that the papers should go out of your possession permanently unless you got the money? A. No, sir. * * * I intended and did demand the money, and stated that I was there to deliver the papers, * * * and stated my readiness to turn them over to him." A. G. Johnson testified, in substance, that he had been deputy clerk since the 1st of July, 1894; that, some time after he became deputy, Taylor came into the office and inquired for some papers in another matter in which he was interested; and that, while hunting for the papers, Taylor stepped out of the office. Continuing his testimony, and referring to the Cornell papers, the witness further said: "I went to the safe, and found these papers. I took them out of the safe, and went to the door and spoke to him. 'Here,' I said, 'I see some papers that seem to have been left for you,' and gave them to him in the hall, in front of the office door. I told him that they were marked 'Left for O. D. Taylor by W. H. Wilson.' I think he asked me the question what they were. I just opened them and said they seemed to be something connected with the Columbia River Fruit Company. I think he said if they were his he would take them, or made some such remark as that." The witness then relates that, after having them out some time, Taylor returned the papers at the time he swore to the supplemental answer, and had the same filed, with the remark, "You remember, now, I returned those papers before I swore to that." This was Taylor's explanation attending the return of the papers to the deputy clerk. The papers were taken out some time in the summer, and returned November 19, 1894. Other testimony was given, but the foregoing is

the substance of all that is material for a full understanding of the questions involved. No proof was offered to show that on March 24, 1893, plaintiff gave notice of his desire to have defendant repurchase, or that defendant refused to comply therewith. When plaintiff rested, defendant moved for a nonsuit, which was allowed, and judgment entered against plaintiff for costs, from which he appeals.

William H. Wilson, for appellant. A. S. Bennett, for respondent.

WOLVERTON, J. (after stating the facts). In support of the action of the court below, the defendant submits several propositions, only three of which we are called upon to notice at this time, viz.—First, the agreement to purchase, upon which the action is based, is by the terms thereof made conditional upon the personal desire or at the option of Cornell or his legal representatives, and therefore not assignable; second, Cornell, being in default with the Columbia River Fruit Company upon his contract therewith, could not compel the defendant to repurchase it in its defaulted condition; and third, plaintiff's remedy in a court of law, if he is in other respects entitled to recover, is for the damages which he has sustained by the breach of the contract, and the measure of damages is the difference between the true value of the property and the price agreed to be paid therefor. Aside from these propositions, there is a question as to whether there is evidence in the record sufficient to carry the case to the jury. Of these in their order.

1. Defendant's counsel claims that, as Taylor agreed to repurchase this stock "if D. B. Cornell or his legal representatives so desire," he could not be compelled to repurchase if any one else besides Cornell or his legal representatives so desired, and hence this contract, in so far as it stipulates for an option to require a repurchase of the stock on the part of Taylor, is not assignable. The contention is that Taylor contracted for the personal act of Cornell, if living, or, if dead, of his legal representatives, and that none other will fill the measure of the agreement. The criterion by which to determine the assignability of things in action is to ascertain what demands survive upon the decease of a party, and what die with him. Those only which survive are assignable. Those that do not survive are: All torts to the person or character, when the injury and damage are confined to the body or the feelings; and those contracts generally, though not always, implied, the breach of which produces only direct injury and damage, bodily or mentally, to the person; and contracts, so long as they are executory, which stipulate solely for the special personal services, knowledge, and skill of a contracting party. Pom. Code Rem. § 147. The reason why a

contract for special personal services does not survive, and consequently is not assignable by the person obligating himself to perform the services, is that it is presumed that the services were sought on account of the peculiar skill and fitness of the person employed to perform the particular work or task in hand. There is here no peculiar fitness or skill required on the part of Cornell to assert a desire to have Taylor repurchase. Indeed, Cornell is not required to perform any kind of service, nor is he required to enter into any personal obligation with Taylor as an act prerequisite or concurrent with the demand for a repurchase of the stock. Cornell is accorded a right under the contract, which he may assert or not, at his option. It is valuable to him, as he might be able to better his condition by an exercise of it. Whether he exercised the right personally or by an agent, directly or indirectly, could make no sort of difference to Taylor. It could impose no additional burden upon him, nor change the contractual relation to his detriment in any material respect; so that the reason upon which the nonassignability of a contract for special personal services or skill is based does not exist here. That an option is assignable in equity there is no longer any doubt. *House v. Jackson*, 24 Or. 99, 32 Pac. 1027; *Kerr v. Day*, 14 Pa. St. 112. It is said in *La Rue v. Groezinger*, 84 Cal. 289, 24 Pac. 42, that: "An optional contract, upon sufficient consideration, is binding. And the mere fact that it is optional cannot be a reason why it should not be assigned." We conclude, therefore, that the Cornell-Taylor contract was assignable by Cornell before asserting his option, and that he could thus transfer his interest therein, together with any right of action arising thereunder to the plaintiff.

2. It is next contended that Cornell was in default with the company at the time plaintiff asserted his option to have defendant repurchase, and that for this reason defendant could not be compelled to take the defaulted contract off his hands. This involves a consideration of both contracts, and of their relations one with the other. The execution by Cornell of the contract with the company was the sole and only consideration for the execution by Taylor of his contract with Cornell. Hence, it must be presumed that Taylor contracted with reference to the company contract, and had in view at the time the rights accorded to Cornell by its terms and stipulations. The company contract is not a sale of stock to Cornell, but an agreement to sell and transfer a certain number of shares in the future. This is manifest from the fact that the stock was not to issue until Cornell had fully paid the stipulated price of \$4,000; so that, instead of acquiring stock with which he could deal directly he merely obtained the obligation of the company to issue and transfer to him 10 shares of stock in the future. The Taylor contract is, in substance, "I, O. D.

Taylor, * * * in consideration of the purchase by D. B. Cornell, * * * of 10 shares of stock in the Columbia River Fruit Company, paying therefor \$1,000 in cash, and agreeing to pay \$1,000 annually until the par value is paid, do hereby agree to repurchase said stock, if D. B. Cornell or his legal representatives so desire, at any of the stated dates of payment, and to pay therefor the sum or sums actually paid in cash by Cornell, with 8 per cent. annual interest on said sum so paid." This latter was, therefore, not a contract to repurchase stock of Cornell, but a contract to purchase of him his right to obtain 10 shares of stock in the company, acquired by virtue of his contract therewith. In effect, it is an agreement to take Cornell's contract off his hands if he so desired. If this agreement is not capable of this construction, it is nudum pactum, and of no binding force or effect whatever. The 10 shares of stock alluded to herein are the same which Cornell contracted with the company for, and which it agrees to issue to him upon his completion of his payments. The Taylor contract contemplates a purchase from Cornell before he (Cornell) can acquire the title, and even before the company is required to issue the stock; so that when his contract stipulates for the repurchase of stock it simply amounts to an agreement on Taylor's part to purchase of Cornell, at his option, at any one of the several stated times, the company's agreement with Cornell, and thereby be placed in such position under the contract that he (Taylor) may comply with the conditions thereof, and thus acquire the stock for himself. This construction seems reasonable, in the light of the two contracts and the surrounding circumstances. The two contracts are incapable of being construed as parts of one, as the parties to each are not the same; but the Taylor contract should be construed with reference to the conditions of the company contract, as the rights acquired under the latter constitute the subject-matter of the former. Now, Cornell has undertaken, by the terms of the company contract, to pay \$4,000 for the stock, as follows: "One hundred dollars to be paid at the signing of the contract [March 24, 1892] for each share of stock hereby subscribed and taken, * * * and one hundred dollars annually thereafter, for each share so subscribed by him, until the full amount subscribed is paid." He made the first payment of \$1,000 as agreed, but no other payment has been made upon said contract, either by Cornell or plaintiff. After having defaulted in the payment of \$1,000 due March 24, 1893, and at the date when the second deferred payment became due (March 24, 1894), and without paying it, the plaintiff, the successor in interest of Cornell, declared his desire to have the defendant "repurchase," and at the same time tendered the stock contract, with an assignment thereof to Taylor, and demanded payment of \$1,000, with interest at 8 per cent. per annum from March 24, 1892.

Taylor refused to comply with the demand, and it is contended refused to accept the assigned company contract. He now claims that he was not compelled to take the company contract in its defaulted condition, and that it was incumbent upon the plaintiff to tender him a perfect one that he could enforce without question. The effect of a failure to make a payment of an installment of a purchase price falling due at a stated time may or may not preclude an action for breach thereof, and depends somewhat upon other facts and circumstances attending the default. If the breach is the result of accident or oversight, or is accompanied with facts and circumstances inconsistent with an intention to abandon, and which incline one to presume the buyer intended fully to perform, then the failure to pay an installment at the agreed time does not work a forfeiture of the whole contract, and, by a subsequent tender of the installment with further installments due, he may claim the benefit of the sale. Tied. Sales, § 210; Hime v. Klasey, 9 Ill. App. 166; Winchester v. Newton, 2 Allen, 492. But, if the acts of the buyer in failing to comply with his agreement in making payment of an installment indicate an intention to abandon the contract, as where the refusal to pay is willful, and not through inadvertence or accident, the contract is thereby held to be forfeited, and the seller cannot be compelled to perform. So, a refusal to pay because of one's pecuniary inability, if more or less continued, would create a presumption that the purchaser intended to abandon further performance. Tied. Sales, supra; Ourtis v. Gibney, 59 Md. 131; Bradley v. King, 14 Ill. 339; and Robson v. Bohn, 27 Minn. 333, 7 N. W. 357. If this view of the law touching the effect of defaulted payments is correct, it is, to say the least, questionable whether the company contract could now be enforced against it, and would be a matter for the determination of a jury. It is apparent, therefore, that the contract tendered to Taylor was not free from infirmities, which infirmities are the result of plaintiff's failure to comply with its terms and stipulations. Taylor did not agree to accept such a contract of doubtful validity, and hence was not guilty of a breach of his contract with Cornell if he declined to accept and to repay the money, with interest, paid by Cornell on the company contract. Plaintiff should have tendered a contract unimpaired by any default on his part, before it was incumbent upon Taylor to accept, and without which plaintiff could have no action against Taylor.

3. The foregoing conclusions render an examination of the third point unnecessary, as plaintiff cannot maintain an action in either case, whether upon the contract for the purchase price, or for breach thereof and for damages, unless Taylor has accepted the contract tendered, with its infirmities, in which case he would be deemed to have waived

the objection thereto arising from the default, and plaintiff's action for the agreed price would then be appropriate.

4. We come now to the question whether the case should have been sent to the jury, and this must be determined under the pleadings as they come here, including the supplemental complaint, answer, and reply. It appears that the supplemental complaint, filed without objection, alleges an acceptance by Taylor subsequent to the commencement of the action, and, no exceptions having been taken to it either by demurrer, motion, or otherwise, it is now too late to make the objection for the first time in this court that no cause of action existed at the date of the commencement thereof. *Lowry v. Harris*, 12 Minn. 267 (Gil. 166); *Smith v. Smith*, 22 Kan. 702. The turning point in the trial was whether Taylor did or did not accept from plaintiff the company contract, and thereby become responsible to him for a repayment of the sum of money paid thereon, with interest. We think there was evidence on this question which should have been allowed to go to the jury. The testimony of Johnson showing that Taylor took the assigned company contract from the clerk's office with knowledge of what it was, and retained it for a considerable length of time, had a tendency to support plaintiff's contention that Taylor did accept, and it was the province of the jury to say from this testimony, when taken in connection with Rorick's, whether he did or not. The court below was in error in granting the nonsuit, and its judgment is therefore reversed, and a new trial ordered.

(12 Wash. 468)

GILMORE et al. v. H. W. BAKER CO. et al.
(Supreme Court of Washington. July 30, 1895.)

LANDLORD AND TENANT—NOTICE TO QUIT—DOCUMENTARY EVIDENCE—COMPETENCY OF WITNESS.

1. Under 2 Hill's Code, § 549, subd. 3, making a tenant guilty of unlawful detainer who, on notice requiring in the alternative payment of rent or surrender of the premises, given by the person "entitled to the rent," fails to pay the rent or surrender the premises, a notice to quit, signed by a joint owner of premises in his own name, and as one of the executors and as attorney in fact of the other executors of the estate, which holds the remaining interest requiring payment of rent due or surrender of the premises to him, is good.

2. The certificate of the clerk of the superior court of a county, in which an action of unlawful detainer is brought by executors of an estate, that the copy of the will contained in a copy of the record of probate proceedings in a foreign county is a true copy of the will filed in his county, will authorize the admission of such probate record in evidence.

3. Where one negotiates a lease for himself and subsequently becomes the president of a corporation which has by assignment succeeded to his rights under the lease, such president, in an action against the corporation by executors of the deceased lessor for unlawful detainer, is a "party in interest," within 2 Hill's Code, § 1640, prohibiting a "party in interest" from testifying as to any transaction or conversation

with a deceased person in an action by or against his legal representatives.

4. Objection to the admission of evidence cannot be urged by one at whose request it is admitted.

5. Where parties to an action for rent rely on express contract, evidence as to the reasonable rental value of the premises is inadmissible.

6. Where both parties to an action for rent request the court to order the jury to view the premises, and the court, on refusing, states that he cannot prevent them from viewing the premises if they so desire, to which no exception is taken, error cannot be urged on the ground that two jurors by viewing them of their own accord have an advantage over the others.

7. An instruction in an action of unlawful detainer to find for plaintiff if the notice to quit served was such "as the law required, as the court has indicated to you," and was not complied with, will not be held reversible error, where it appears that such notice was in fact legal.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by David Gilmore, in his own right, and him and others, as executors, against the H. W. Baker Company, a corporation, and others, for unlawful detainer. From a judgment for plaintiffs, defendants appeal. Affirmed.

Stratton, Lewis & Gilman and John Fairfield, for appellants. James Leddy (E. C. Hughes, of counsel), for respondents.

GORDON, J. This is an action of unlawful detainer. The respondents allege that the premises were let to the appellant from month to month at an agreed monthly rental of \$500, payable in advance on the 1st day of each and every month; and the appellant asserts a written contract for lease, with verbal modification, at \$275 per month. There was a verdict for the respondents in the lower court, and, appellants' motion for new trial having been denied, judgment was entered upon the verdict, from which judgment, and order denying said motion for a new trial, this appeal is taken.

1. We think the complaint states facts sufficient to constitute a cause of action for unlawful detainer, and that appellants' demurrer thereto was properly overruled.

2. It is contended that the court should have sustained appellants' objection to the introduction in evidence of the alleged "notice to quit." It appears that, when appellant went into possession of the premises in question, said premises were owned by David Gilmore and William Kirkman. Subsequent thereto, and prior to the commencement of this action, said William Kirkman died testate, and the said David Gilmore, Isabella Kirkman, Fanny A. Kirkman, John Kirkman, W. H. Kirkman, and John F. Boyer are the executors named in the last will of him, the said William Kirkman, which will has been duly admitted to probate in Walla Walla county, in this state, the same being the county in which the said Kirkman resided at the time of his death. The "notice to quit" is signed by the said David Gilmore,

"in his own right and as one of the executors of the last will and testament of William Kirkman, deceased," and by David Gilmore, "attorney in fact and duly authorized agent" of the other executors of said will, naming them. The notice required the appellant to pay the rent then due and owing, or surrender the premises to him, the said Gilmore; and we think it a sufficient notice under the statute,¹ and that the objections urged to it were properly overruled. It appears from the record that the act which is here questioned was authorized and sanctioned by all of the executors. Aside from this, as one of the executors, a notice given by David Gilmore would be sufficient in law. The act of one of two or more executors in a matter within the sphere of his authority as executor is the act of all. In the case of joint executors, the authority of each is entire. "They are esteemed in law but one person, representing the testator, and the acts done by any one of them * * * are deemed the act of all." *Shaw v. Berry*, 35 Me. 279; *Dean v. Duffield*, 8 Tex. 235; *Willis v. Farley*, 24 Cal. 491.

3. It was not error to permit the introduction of the record of the probate proceedings, certified by the clerk of the superior court of Walla Walla county.

4. Upon the trial of the cause, the appellant called as a witness H. W. Baker, its president, and in the course of the examination he was asked concerning a conversation occurring between himself and the said William Kirkman, deceased, in reference to an alleged modification of the written contract to pay \$500 per month for rent, and an agreement to receive and accept in lieu thereof the sum of \$275 per month, in view of a decrease of the business. This conversation was objected to by respondents, as relating to a transaction between the witness—a party in interest—with a deceased person, and hence within the statute. The court excluded the testimony. Counsel for the appellant very ably and earnestly contends in his brief that such ruling of the lower court was error, and that the testimony should have been admitted. It appears from the record that the appellant corporation was organized on February 1, 1893; that the original lease to these premises was executed to H. W. Baker, and thereafter the same was assigned to Bacon and Baker, and by them to H. W. Baker Company, and by H. W. Baker Company to the corporation known as the "H. W. Baker Company," the appellant. The conversation in question occurred before the appellant corporation was organized. It related to a transaction in which the witness was at that time the real

party in interest, and in which the witness was representing himself. The facts that the present corporation (appellant) succeeded to the business of Bacon and Baker and H. W. Baker Company, and that the witness became its president and one of its stockholders, did not remove the disability which the law imposed upon him as a party in interest. To hold otherwise would, for practical purposes, be to ignore the spirit of the statute,² by permitting one whom the law, from considerations of public policy, requires to remain silent as to any transaction had by him with a deceased person, to evade the statute and avoid the disability imposed by it, and become an effective witness, merely by assigning his interest in the subject-matter of the action, or by forming a corporation in which he might be the president and only stockholder, and thus by indirection accomplish that which the law prohibits to be done. For this reason, alone, we think the testimony was properly excluded; and we do not feel called upon to pass on the question of whether an officer of a corporation can be permitted to testify to a transaction with a deceased person, in a suit between such corporation and the representative of such deceased person.

5. At the close of the trial, a request was made for the jury to inspect the premises, and consent thereto was given by both parties; but the court declined to order the jury to make such view, saying to the jury and counsel that: "The court has no power to prevent them [meaning the jury] from going and looking at them [the premises] on their own responsibility. The court will not order them to go there. I don't see any good purpose it will serve in this case." No exception was taken by either counsel. In support of its motion for a new trial, the appellant filed affidavits showing that two jurors, separate and apart from their fellow jurors, visited the premises during the noon recess and investigated their condition, thus, as it is insisted, giving them an advantage over the remainder of the jury in determining the character of the premises in dispute and their reasonable rental value. In the first place, the question of reasonable rental value of the premises was not an issue in this case, each party asserting and relying upon express contract. The court below permitted the appellant (over respondents' objection) to go into this question, and thereafter respondents submitted considerable testimony upon it. In charging the jury concerning this testimony, the court said: "This is not for the purpose of having you fix a reasonable rental value for the use of that property. Both parties to this controversy claim a contract was made be-

¹ 2 Hill's Code, § 549, subd. 3, makes a tenant guilty of unlawful detainer who, on notice requiring on the alternative payment of rent or surrender of the premises given by the person "entitled to the rent," fails to pay the rent or surrender the premises.

² 2 Hill's Code, § 1646, prohibits a party in interest from testifying as to any transaction or conversation with a deceased person in an action by or against the legal representatives of the deceased.

tween them fixing the rental that was to be paid for the premises. The object of this testimony was to aid you in coming to a conclusion as to what amount it is likely the parties themselves fixed." In our opinion, the court should have excluded the testimony entirely. However, the appellant is not in a position to complain because the court permitted its introduction upon appellant's request. For another reason, however, the appellant cannot be permitted to urge the alleged misconduct and irregularity of the jury in visiting the premises, because that is what the court, in effect, told the jury they might do, by saying to them that "the court has no power to prevent them from going and looking at the premises on their own responsibility," to which remark counsel for the appellant made no objection and took no exception. What followed was nothing beyond what was reasonably to be expected.

6. The court, among other things, charged the jury as follows: "If you find that there was a default in the payment of it [the rent]; that the notice was served, such as the law requires, as the court has indicated to you; and that the notice or requirement was not complied with for a period of three days after the service of that notice,—you will find for the plaintiff; otherwise you will find for the defendant." It is objected by appellant that this charge left it to the jury to decide what is a legal notice, and what kind of a notice the law requires, whereas the sufficiency of the notice was a question of law for the court. We think that this objection is well taken, but it does not follow that the cause should be reversed. The error was harmless, because, as has already been said in this opinion, the "notice to quit" was a good and sufficient notice in law; and, clearly, appellant was not prejudiced by the court's failure to so charge the jury. The other alleged errors referred to in the brief of appellant's counsel in this cause have been duly considered; but we do not regard any of them as being sufficiently important to warrant a reversal. No reversible error appearing in the record, the judgment appealed from will be affirmed.

HOYT, C. J., and SCOTT, DUNBAR, and ANDERS, JJ., concur.

STATE v. KRUG.

(Supreme Court of Washington. July 15, 1895.)

JURY—SUMMONING AND IMPANELING—COMPETENCY—EMBEZZLEMENT BY CITY TREASURER—INDICTMENT—INSTRUCTIONS.

1. Code of Procedure (section 58) provides that the board of county commissioners, before the first Monday in February, shall select the names of 100 persons qualified to act as grand jurors, and the same number of petit jurors, and certify the same in separate lists to the clerk of the superior court. Section 62 provides that the failure of any officer to perform

the duties within the required time, or other irregularity in drawing, shall not invalidate the drawing, etc., of the jurors. Section 63 provides that, if the court sees fit to set aside the venire for grand or petit jurors, an open venire may issue to the sheriff. *Held*, that the failure of the commissioners to select and certify the list of jurors is not ground for a motion to quash an indictment.

2. The treasurer of a city of the first class, the charter of which is voted by the people, is a "city officer" * * * appointed under the constitution or laws" of the state (Pen. Code, § 57), and may be punished under such section for using public funds to make a profit out of the same.

3. Penal Code, providing that an indictment in a prosecution of a public officer for using money intrusted to him for personal profit, or for any purpose not authorized by law, need only allege that the officer had made a profit out of the money, or had used it for a purpose not authorized by law, without specifying any further particulars, is constitutional. *Anders and Gordon, JJ., dissenting.*

4. In a prosecution for the embezzlement of city funds, a taxpayer of the city is a competent juror.

5. A challenge for actual bias to a juror, testifying that he has formed an "impression" as to defendant's guilt, but not an opinion, is properly overruled.

6. In a prosecution against a city treasurer for using public funds for personal profit, a challenge for actual bias to a juror, testifying that he had formed an opinion that defendant had loaned money, but that he did not know whether it was his own money or not, is properly overruled.

7. An instruction that no inference of guilt "should" arise in the jury's mind from defendant's silence, is not ground for reversal for failure to use the mandatory word "shall."

8. An instruction that the law presumes the innocence of a person accused of a crime, and the presumption is not a matter of form merely, which the jury may disregard at pleasure, and this presumption continues with defendant throughout all the stages of the trial, until the case has been formally submitted to the jury, and the jury has found that this presumption has been overcome by the evidence of the prosecution beyond a reasonable doubt, is not erroneous.

9. An instruction that a reasonable doubt is such a "doubt as a man of ordinary prudence, * * * in determining an issue of like concern to himself as that before the jury is to defendant, would allow to have any influence on him, or cause him to pause * * * in arriving at his determination; that such a doubt should grow out of the evidence of the case, and not be merely speculative, conjectural, or imaginary,"—is not erroneous, as assuming that there might be a doubt in the minds of the jury, but that such doubt would be speculative.

10. In a prosecution under Pen. Code, § 57, against a city treasurer for using the public funds for personal profit, an instruction that the object of the statute was to restrain public officers from using money intrusted to them for their own profit, is not erroneous.

11. Where a city treasurer, for personal profit, gives a check on the bank in which he has deposited city funds, and the payee on the presentation of the check is given foreign exchange for the amount thereof, and the account of the city charged therewith, the money being obtained on the exchange at its place of payment, he is guilty of using the funds for personal profit, within the meaning of Pen. Code, § 57.

Appeal from superior court, King county; James Z. Moore, Judge.

Adolph Krug was convicted of a crime, and appeals. Affirmed.

Jas. Hamilton Lewis, Stratton, Lewis & Gilman, J. Henry Denning, and Chas. F. Fishback, for appellant. John F. Miller, Pros. Atty., and A. G. McBride, for the State.

DUNBAR, J. A grand jury was impaneled in King county to investigate a charge of embezzlement, and other unlawful use of the funds of the city of Seattle, by its treasurer, Adolph Krug, the appellant herein. An indictment was returned against the appellant, and a trial was had before the Honorable J. Z. Moore, of Spokane county, who presided in the absence of the regular judge, Hon. T. J. Humes. The indictment was based upon section 57 of the Penal Code, charging the unlawful use of the money of the city of Seattle in order to make a profit out of the same. Appellant introduced no testimony in his own behalf, but demurred to the complaint, raised many objections to the introduction of testimony, and, upon the testimony of the state, was found guilty as charged. Judgment was pronounced, and an appeal was taken to this court upon the errors alleged.

The first contention of the appellant is that the court erred in not sustaining a motion to quash the indictment, made upon the ground that the grand jury was not properly selected, properly impaneled, and properly chosen. It is insisted that the grand jurors had not been selected by the county commissioners for the years 1893 or 1894; that the same had not been certified in separate lists to the clerk of the superior court, as provided in section 58 of the Code of Procedure, which provides that "every board of county commissioners, on or before the first Monday of February in each year, shall select from the persons in their county qualified to serve as petit jurors the names of one hundred persons to serve as petit jurors for the ensuing year, and from the persons in their county, qualified to serve as grand jurors, the names of one hundred persons to serve as grand jurors for the ensuing year, and shall certify the same in separate lists to the clerk of the superior court." These provisions of the statute, it is insisted by the appellant, are mandatory, and intended to secure for each year a new list of qualified electors and freeholders; and that, the question of the qualification of the grand jury having been timely raised, it was prejudicial error on the part of the court to overrule the motion. We do not think this contention can be sustained. We are inclined to think that this was only an irregularity which does not affect the substantial rights of the defendant. Section 62 of the same chapter which provides for the selection of the grand jury provides especially that "the failure on the part of any officer to perform the duties required within the time, or other irregularity in said drawing, shall in no way invalidate the se-

lecting, drawing or summoning of said jurors." This, it seems to us, would sufficiently indicate that the intention of the legislature was that the provision relied upon by the appellant was not a mandatory provision, the omission of which would invalidate the proceedings. But, as further showing that there is no particular virtue in the provision, section 63 of the same chapter provides that "if for any cause the court shall see fit to set aside the venire for grand or petit jurors, returned as above provided, an open venire may thereupon issue to the sheriff," etc.; and, as further sustaining the same idea, the latter part of section 58 (the section relied upon by appellant) provides that "if from any cause the county commissioners are unable to select the full number of names in this section provided for, they shall select such less number as they may agree upon." The whole chapter seems to refute the idea that the provisions of section 58 are mandatory, or that the defendant has any vested right in any particular mode of choosing the grand jury. Mr. Bishop, in his work on Criminal Procedure (section 875, 3d Ed.), under the head of "Directory Statutes," says: "A statute may be only directory to the officers; as that the grand jurors shall 'be summoned at least five days before the first day of the court,' or that the court shall impanel the grand jury on the first day of the term,—a noncompliance with which is no ground for setting aside the proceedings on application of the defendant." The objection in the case at bar is simply an objection of time. We think, under the authorities and under the provisions of the statute itself, the objection should not be sustained, and that the court committed no error in refusing the motion. In fact, we judge from the record in this case that it was really not the desire of the counsel for the defense that this motion should be sustained by the court, for the new judge was informed by the counsel that it had been the practice of the court that the jury had a right to remain until it should please the judge to issue a new venire, and that the judge of that court had ruled against him upon this contention. But, however that may be, nothing appears in the record to indicate that the defendant was in any way injured by the action of the court, or that the grand jurors were not qualified grand jurors under the law. The qualification of a grand juror, after all, is the main question to decide, and that question could have been decided in each instance by an examination of the individual juror.

The next contention is that section 57 of the Penal Code does not include within its provisions a city officer. The section is as follows: "If any state, county, township, city, town, village or other officer, elected or appointed under the constitution or laws of this state. * * * shall, in any manner not authorized by law, use any portion of the money

intrusted to him for safe keeping, in order to make a profit out of the same, or shall use the same for any purpose not authorized by law, he shall be deemed guilty of a felony," etc. The defendant was an officer under a freeholder's charter, to wit, one voted by the people in cities of the first class, viz. the city of Seattle, and it is contended, therefore, that he is not a city officer, elected or appointed under the constitution, because he is nowhere denominated or designated as one of the officers for the execution of the mandates or provisions of that instrument; that he is not an officer elected or appointed under any law of the state of Washington prescribed by the legislature of the state for the execution of any law of the state of Washington; and that, therefore, he is not within the provisions of section 57 of the Penal Code, nor within the letter or intent of the same. We think that such a construction of the law would be forced and unnatural, and the authorities cited by the appellant to sustain his contention are not in point. Most of them enter upon a discussion of who were or who were not state officers. It is not contended by the state in this case that the appellant is a state officer, but that he, as a city officer, falls within the provisions of section 57. The statute specially names a city officer, and it seems to us that there can be no question that such officer is elected under the constitution and laws of this state. The legislature, by authority of the constitution, grants the charters to cities of the first class, and under the provisions of the charter which is granted by the legislature the city treasurer is elected. Of course, this is a somewhat indirect operation of the law, but the election of the city treasurer nevertheless flows from the laws and the constitution, and certainly, were it not for the laws of the state, the office of city treasurer of the cities of the first class could not exist. Consequently, it must logically follow that this officer is elected under the constitution and laws of the state, for the law conferring upon cities a right to provide for the election of its officers is a delegation of the power of the state to the city. Section 521 of the General Statutes provides that "the legislative powers of any city, organized under the provisions of this act * * * who, together with such other elective officers as may be provided for in such charter, shall be elected at the times, in such manner, and for such terms, and shall perform such duties and receive such compensation, as may be prescribed in such charter." As we have before said, the action of the city, and the validity of its acts in electing its treasurer, all flow from and are dependent upon these provisions of the law. The constitution itself, in section 14 of article 11, seems to have initiated the idea upon which this statute is based, and provides that the making of profit out of county, city, town, or other public money, or using the same for any purpose not authorized by law, by

any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law; and the enactment of section 57 is in perfect harmony with this provision of the constitution, and makes provision for carrying it into effect. It would, indeed, destroy not only the manifest intention of the constitution, but of the statute, to hold that this provision of the statute did not apply to treasurers who were not directly elected under the provisions of the law.

A question, however, which has given the court vastly more trouble than the one just discussed, and which is really the vital question in this case, as we view it, is embodied in the contention that the demurrer should have been sustained because the indictment did not state facts; that is, that it was neither direct nor certain as regards the crime charged, nor was it direct or certain in charging the particular circumstances of the crime necessary to constitute a complete crime under the law. The charging part of the indictment is as follows: "Adolph Krug and Henry Fuhrman are accused by the grand jury of the state of Washington in and for King county, said state, by this indictment, of the crime of using public money in order to make a profit out of the same, and for purposes not then and there authorized by law, committed as follows: That on the 2d day of July, 1892, the said Adolph Krug, then and there being, and at said time was, a city officer, to wit, the duly elected, qualified, and acting city treasurer of the city of Seattle, in the county of King, state of Washington, and being then and there charged under the provisions of the charter and the amendments thereto of the said city of Seattle, the said charter being commonly known as the freeholders' charter, with the receiving and safe-keeping of all moneys belonging to and the property of the said city of Seattle, the said city of Seattle then and there being a municipal corporation duly organized and existing under and by virtue of the laws of the territory, now state, of Washington, and as such officer and city treasurer as aforesaid the said Adolph Krug was then and there, by virtue of his said city office, intrusted with a sum and amount of \$10,000 in lawful money, for safe-keeping, the same being public money belonging to and the property of the said city of Seattle, and which said money was under the care, custody, and control of the said Adolph Krug, as such officer and city treasurer as aforesaid; and the said Adolph Krug, officer and city treasurer as aforesaid, on the 2d day of July, 1892, in said King county, state of Washington, unlawfully, feloniously, and in a manner not authorized by law, did use the said \$10,000 public money as aforesaid, of the value of \$10,000 in lawful money, in order to make a profit out of the same, and for purpose then and there not authorized by law," etc. It is most earnestly urged by the appellant that

no statement of facts is set forth in this indictment which would notify the defendant of the particular crime with which he was charged, and many cases are cited to support this contention, notably a case decided by this court, viz. *State v. Carey*, 4 Wash. 424, 30 Pac. 729. There is no question but that as a general proposition of law, under the ordinary statutes and under the common-law requirements, this indictment would not be sufficient, and the case of *State v. Carey*, supra, was based upon the provisions of our statute and the general provisions of law in relation to criminal procedure. But that case, with all cases of similar character, is not in point here, for the reason that our statute especially provides that the ordinary requirements of an indictment may be omitted from indictments for this particular crime, section 58 of the Penal Code providing that, "In prosecutions for the offenses named in the next preceding section [the section under which this indictment was brought], it shall be sufficient to allege generally, in the information or indictment, that any such officer * * * has made profit out of the public money in his possession or under his control, or has used the same for any purpose not authorized by law, to a certain value or amount, without specifying any further particulars in regard thereto; and on the trial evidence may be given of all the facts constituting the offense and defense thereto." So it will be seen that this statute carries the indictment in this case beyond the pale of the common law, or the ordinary provisions for criminal pleadings in statutes; and, as the indictment follows as closely as it could be made to do the provisions of the statute, the only question that remains to be determined is, is the statute constitutional, or can it be sustained in the face of the fourteenth amendment to the constitution of the United States, and section 22, art. 1, of the constitution of the state of Washington?

It is contended by the appellant, with some show of reason, that the information furnished in this indictment is of rather a meager quality as well as quantity, and many cases are cited bearing on this proposition. We think, however, that they can all be distinguished from the case in point. The nearest to an analogous case, and the one which is referred to in nearly all the other cases cited, is that of *U. S. v. Cruikshank*, 92 U. S. 542. There it was held that in criminal cases the defendant had a constitutional right to be informed of the nature and cause of the accusation, and that the indictment must set forth the offense with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged, and that every ingredient of which the offense was composed must be accurately and clearly alleged. In that case the defendant was charged with an intent "to hinder and prevent the parties in their respective free exercise and enjoyment of the rights,

privileges, immunities, and protection granted and secured to them, respectively, as citizens of the United States and as citizens of said state of Louisiana, * * * for the reason that they * * *, being then and there citizens of said state and of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof;" and the indictment further charged them with an intent to hinder and prevent them "in their several and respective free exercise and enjoyment of every, each, all and singular, the several rights and privileges granted and secured to them by the constitution and laws of the United States." The same general statement of the rights to be interfered with was found in the other counts; and the court said: "According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offense in the language of the statute, or whether the offense has here been described at all. The statute provides for the punishment of those who conspired 'to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States.' These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of 'every, each, all and singular,' the rights granted them by the constitution, etc. There is no specification of any particular right. The language is broad enough to cover all." After laying down the general propositions of law which we have before noted, the court proceeds to say: "All crimes are not so punishable. Whether a particular crime be such a one or not is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by a motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination, with an intent to prevent the enjoyment of any right granted or secured by the constitution, etc. All rights are not so granted or secured. Whether one is so or not is a question of law to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proven, support a conviction for the offense alleged. * * * These counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading." It will be seen, by an investigation of the law upon which the indictment in the case at bar is based, that

the trouble anticipated by the court in the case of *U. S. v. Cruikshank*, supra, cannot arise, for the indictment here charges the unlawful act, or the particular act which by the law is made unlawful, viz. the use of the money intrusted to him for the purpose of making a profit out of it, and the use of it in a manner not provided by law. And the accused in this case has the benefit of the specification of the particular act constituting the crime, for, under the statute, the crime consists of the acts specified. If he makes a profit out of the money intrusted to his care in any way, he falls within the provisions of the statute; or, if he uses the money in any way not provided by law, he falls within the provisions of the statute. The legislature, doubtless recognizing the fact that it is exceedingly difficult to convict for embezzlement in cases of this kind, where the ordinary rules of criminal practice obtain, sought, in the interest of justice, and at the same time without depriving the defendant of any material right, to formulate a statute which would render easy the administration of justice, and under which the real facts in the case could be ascertained. This provision of the law may well be sustained, at least so far as its application goes to officers who, under the law guiding and directing their duties, have sufficient notice furnished them by an indictment drawn under this statute. A provision of the charter which prescribes the duties of the city treasurer of the city of Seattle is to the effect that "it shall be the duty of the city treasurer to receipt for moneys of the city and pay out the same only on warrants drawn in pursuance of the order of the city council, signed by the mayor and countersigned and registered by the city comptroller." It follows that any use of money by the city treasurer, except upon warrants, is unauthorized by law; and it would be a complete and easy defense by this officer to show that all the money which had come into his hands, as said treasurer, over and above the amount remaining in the treasury, had been paid out upon warrants in the manner prescribed by law. If he can show this, then the accusation that he has used it in a manner not authorized by law, or that he has made profit out of the funds of the city, cannot be sustained. If he cannot show it, the presumption ought to attach that the accusations are true; for, in the very nature of the office and the duties of the officer, it is impossible for the state to allege or prove the embezzlement of any particular money, or any particular part of any funds. Any such restrictions as these would have the effect of allowing embezzling officers of this description to escape the penalties of the law, while the liberal provisions of the statute do not in any way prevent them from making a complete defense to the charge, in case of their innocence. For this reason, we think the statute in this case should be sustained; and

for the reasons mentioned above, viz. the impossibility of describing particular moneys or particular funds, all the objections by the appellant to the introduction of evidence in this case, without specifically mentioning them, will be overruled.

It is alleged that the court erred in refusing the challenge for cause to juror William Fox, on the ground that the juror testified "that he was a resident for years, and a taxpayer, in the city of Seattle, and had paid money to the city treasury, of which Mr. Krug was treasurer, and which money he was being charged with having converted." We think this contention is hardly worthy of discussion. Carried to its logical conclusion, every taxpayer in the country would be held to be an illegal juror in all cases where officers were charged with having embezzled or misappropriated the public funds, and indeed in every criminal case, for, under our laws, upon the conviction or acquittal of a person charged with a felony depends a question of costs to the state or county.

The next contention—that the court erred in not sustaining the challenge to juror Fox for actual bias—is equally without foundation. The juror nowhere said that he had an opinion as to the merits of this case. It is true that he stated that, from some accounts he had seen in the newspaper, he had an opinion or an impression that the appellant Krug had loaned money; but he continuously asserted that he did not know or have any idea whether it was his own money or whether it was the city's money, and several pages of adroit cross-examination failed to elicit proof that the juror had any opinion as to the guilt or innocence of the defendant of the crime with which he was charged. In fact, he positively asserted all the time that he had not. He may have had an opinion that the defendant had loaned money, or that he had bought a horse or sold a farm, but such an opinion could in no way be material to the issue involved, viz. whether he had made a profit out of money of the city of Seattle.

It is also claimed that the court erred in not sustaining the challenge to the juror Cullis, on the ground of actual bias. We do not think the record will sustain this contention. This juror, upon his examination, in answer to the question, "Now, on the assumption that the facts were true, as you read them in the paper, you formed an opinion, did you not?" said, "Well, I think not. I formed an impression;" and the whole cross-examination did not elicit the fact that there was anything more than a mere floating impression pervading the mind of the juror at the time of the trial. The word "impression," if it can properly be applied to a mental operation, does not reach the strength of an opinion. An opinion is a conviction which is based, and must be based, upon testimony. An impression is a mere fancy or lodgment in the mind which is not based upon testimony, and

the existence of which cannot be traced to proof; and in this case the juror himself distinguished between an opinion and an impression by insisting that he had not formed an opinion, and did not entertain any at the time, but that it was a mere impression. We think that the case does not fall within the spirit or reasoning of the cases of *State v. Murphy*, 9 Wash. 204, 37 Pac. 420, or *State v. Willcox* (Wash.) 39 Pac. 368. The same may be said of the action of the court in overruling the objection to juror Manogue.

The objection that, under the constitution and laws of the state, Judge Moore was ineligible to try this cause, was disposed of in the case of *State v. Holmes* (decided June 26, 1895) 40 Pac. 735. A careful examination of the instructions given by the court convinces us that no error was committed in this particular. The charge was evidently carefully prepared, and guarded every material right of the defendant, while it correctly enunciated the law so far as the rights of the state were concerned. The criticisms of the appellant on this charge were mostly hypercritical, as is shown by the following: "The court erred in giving charge 10, as to defendant's silence. It was wrong in this: (1) It stated to the jury that from his silence no inference of guilt should arise in the minds of the jury against the defendant. This was equivalent to saying to the jury that no inference of guilt ought to arise in their minds. It left to the jury the mere fact, that, as a matter of propriety or ordinary justice, probably no inference ought to arise; that is, should arise. The statute is mandatory. It says that the court must charge the jury that no inference shall arise. In other words, that the jury should be charged that the inference of guilt shall not arise from the silence. The mandatory words of the statute should have been given and not the discretionary clause." It is evident from the reading of the charge that the court complied fully with the statute in respect to the inference of guilt in his instruction to the jury on this point; and if appellate courts should interfere with the verdicts of juries and the administration of the law, upon such strained construction of language or choice of words as is here indicated, the administration of law would become a farce, and trial by lower courts a useless labor.

It was particularly erroneous, alleges counsel for the appellant, for the court to say to the jury that "the presumption of innocence remained with the defendant only up to the submission of the cause to the jury, and then ceased when the presumption had been overcome by the evidence." It might have been error if the court had given any such instruction as the one complained of, but the record shows that it did not. Instruction No. 2 was as follows: "The law presumes the innocence of a person accused of a crime, and this presumption is not a matter of form, merely,

which the jury may disregard at pleasure, but it is a part of the law of the land, and it is a right guaranteed by that law to every person accused of crime, and this presumption continues with the defendant throughout all the stages of the trial, until the case has been finally submitted to the jury, and the jury has found that this presumption has been overcome by the evidence of the prosecution in the case beyond a reasonable doubt." So that the contention of the appellant that the presumption of innocence attends the defendant throughout the deliberations of the jury, and until the arrival of the verdict, is fully sustained by the instruction criticised; for under this instruction the jury are told that this presumption is not only with the defendant throughout all the stages of the trial, and until the case has been finally submitted, but until the jury have found that this presumption was overcome by the evidence. The jury cannot find that the presumption is overcome by the evidence until they go into an investigation of the evidence, and it is idle to talk about a jury being misled by such an expression as this, even if the court had stopped with the expression "until the case has been finally submitted to the jury," for everything that is submitted to the jury goes with them into their deliberations. That is the only object of the submission of evidence, or the submission of an instruction to a jury, and a jurymen who would be dull enough to place the construction contended for by appellant upon any such an instruction, and conclude that this presumption of innocence ceased before it would avail the defendant anything, would be so dull as to be absolutely irresponsible to any intelligent instruction at all.

Instruction No. 3 is to the effect that a reasonable doubt is such a doubt as a man of ordinary prudence, sensibility, and decision, in determining an issue of like concern to himself as that before the jury is to the defendant, would allow to have any influence upon him or cause him to pause or hesitate in arriving at his determination; that such a doubt should grow out of the evidence in the case, and not be merely speculative, conjectural, or imaginary. This instruction is criticised because it is alleged that it assumes that there might be a doubt in the minds of a jury, but that such would be a speculative, conjectural, or an imaginary one. We do not think there is anything in the instruction that would warrant the conclusion that there was any such an assumption, or that it could be deduced that the court thought that if there was a doubt such doubt would be speculative, conjectural, or imaginary. As a matter of fact, speculative, conjectural, or imaginary doubts should not lead to the acquittal of the defendant charged with any crime. It might be that it would have been a better use of language if the court had instructed the jury that a proper doubt could be entertained from

the want of evidence; but we think that the jury were not misled by going into any refined distinctions between the phrases "want of evidence" and "should grow out of the evidence."

And the fourth objection—that it admitted the right of a doubt arising upon the law as charged to the jury—is not tenable, for the jury have no right to doubt the law. Legal propositions are for the court. It is a juror's province to decide questions of fact, by applying to them the principles of law announced by the court.

Objection is made to charge No. 5, for the reason that to state the object of the statute was to invite injunctive proceedings by the jury, the court in this case stating that the purpose of this statute was to restrain public officers from using, for their own profit, the public money intrusted to them for safe-keeping, or in any other manner than as authorized and directed by law. If the defendant's case is so shaky that it will not bear the discussion of a law proposition, or a proper definition of the statute in the presence of the jury, that is his misfortune and not the fault of the law. The purpose of this statute had to be understood by the jury before they could come to a correct determination as to whether or not the defendant had violated the provisions of the statute in committing the acts with which he was charged.

In charge No. 6 the court instructed the jury that if they believed from the evidence that there was money deposited to the credit of the city in the Washington National Bank, and if the defendant drew an instrument, signing the same as city treasurer, directing Henry Fuhrman to be paid \$10,000, and that the Washington National Bank obeyed the direction, and charged on its books the money to the city, and lessened its credit \$10,000, such was a payment of money, and that the jury should construe the check or instrument merely as the instrumentality by which the city of Seattle's money was transferred from the possession of the defendant to Henry Fuhrman; and upon these facts, if the transfer was a profit, they must find the defendant guilty as charged. We think this instruction was exactly right. The facts proven upon which the instruction was based were substantially as follows: The defendant gave Henry Fuhrman a check on the Washington National Bank for \$10,000. Fuhrman presented the check for payment. The bank had more than enough city funds on hand to pay it in money, but the defendant preferred New York exchange, which he received. The exchange was sent to New York and paid, and Fuhrman got the \$10,000. Under these facts the appellant claims there was only an exchange of credits, and no money was paid. The instruction of the court is based upon the theory that, in contemplation of law at least, this was money. It would be a travesty upon the administration of the

law if treasurers who are the custodians of the funds of the people should be allowed to escape the penalty of embezzlement by any such subterfuge as this theory would protect. The treasurer, by law, is made responsible for all moneys which come into his possession. He is the custodian of those moneys. He can keep them in a safe under his own personal inspection and jurisdiction, or he can deposit them in the banks; but, whether kept in a personal safe or deposited in a bank, they are still, to all intents and purposes, the funds of the city. The practical result of the transaction in this case was that when this check was given to Fuhrman, and was paid to Fuhrman by the New York exchange, and that amount charged to the account of the city, the city of Seattle had its account decreased to the amount of the check, and it was just as much a disposition of that \$10,000 by the treasurer as though he had gone to the bank and got the money himself, and paid it to Fuhrman, or had loaned him that amount of money out of the specie which he received, before it had been taken to the bank at all; and, if followed another step, this theory would reach the case criticised by Judge Christlancy in *People v. McKinney*, 10 Mich. 54, where he says: "The whole force of this objection, therefore, rests upon the assumption that the treasurer could perform no act by which the money could be thus abstracted or converted to his own use or benefit, unless, at the time of the act, he were personally present where the money happened to be. This assumption is so manifestly unfounded, in law or in fact, as to require no comment." A great many of the objections raised by the counsel to the instructions and to the admission of testimony are based upon this false theory that there can be no proof of any transaction which does not involve the actual specified money of the city.

Errors are founded upon the court's refusal to give certain instructions prepared by counsel for the defense, but we think that all the instructions which properly stated the law had been already given, in substance, by the court of its own motion.

We have examined all the errors—and they are numerous—alleged by the appellant, and, with the exception of those discussed, think they are entirely without merit. The judgment will therefore be affirmed.

SCOTT, J., concurs.

HOYT, C. J. I concur in the opinion of Judge DUNBAR, except that I am of the opinion that titles of the first class derive their powers from the constitution, and not from the legislature.

ANDERS, J. I dissent, on the sole ground that, in my opinion, the indictment fails to state the facts constituting the offense at-

tempted to be charged. Although it is in the language of the statute, I nevertheless think that it did not apprise the defendant of the nature and cause of the accusation, and therefore deprived him of a constitutional right.

GORDON, J. I agree with what is said by Judge ANDERS.

CITY OF CONCORDIA v. HAGAMAN et al.
(Court of Appeals of Kansas, Northern Department, C. D. July 6, 1895.)

CITY OFFICERS—CONTRACTS WITH CITY.

1. Section 2466, Gen. St. 1889, being section 4, c. 132, Laws 1867, has no reference to city officers. The title of the act being "An act to restrain state and county officers from speculating in their offices," the legislature is presumed to have intended to restrict the provisions of the act to the two classes of officers named, and such construction must be placed upon it as will be consistent with such restricted application.

2. In the absence of a penal prohibitive statute, on grounds of public policy alone, an express contract entered into between the mayor and council of a city of the second class and one who is at the time a councilman of such city, for the performance of services for the city, will not be enforced. Such contract, while not absolutely void, may be avoided by the city, at will, so long as it remains executory; but when it was entered into in good faith, was for the doing of lawful and necessary work for the city, and has been, without objection, fully executed, the city receiving and retaining the benefit thereof, a recovery may be had on the quantum meruit for what the services were reasonably worth.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action by James M. Hagaman and others against the city of Concordia. Judgment for plaintiffs, and defendant brings error. Affirmed.

Pulsifer & Alexander, for plaintiff in error. J. W. Sheafor, for defendants in error.

GARVER, J. This was an action brought by the defendants in error against the city of Concordia to recover a balance alleged to be due for certain services performed for the city in revising, compiling, and publishing in pamphlet form the city ordinances. This work was done under a special contract entered into between the defendants in error and the mayor and council of the city, the city agreeing to pay therefor one-half the legal rate prescribed by law for the publishing of city ordinances in a newspaper. At the time the contract was made and the services performed, J. M. Hagaman was a member of the city council of Concordia, and he and his two sons, as partners, were engaged in the newspaper and job printing business in that city. The work contracted for was well done, in a manner satisfactory to the mayor and council, and the compilation of the ordinances was received and used by the city. At the contract

price, the work amounted to \$408, of which sum the city paid \$200, and refused to pay any more. The court found that the work was reasonably worth \$300, and gave judgment for that sum, less the \$200 paid. The bill of particulars alleged that the services were reasonably worth the amount sued for, being the same as the contract price. The city defended by claiming that the contract entered into was "in violation of law, and was illegal, and forbidden both by statute and by common law on grounds of public policy, and that therefore plaintiff could recover nothing for the work done, either the contract price or the reasonable value thereof."

Counsel for the city rely, in the first place, upon section 2466, Gen. St. 1889, as prohibiting the contract in question and barring any recovery. This section is section 4 of chapter 132, Laws of 1867, and provides: "All officers, state and county, and all officers appointed or elected for the purpose of overseeing and directing any of the public improvements of the state, and all officers holding and exercising any office of trust or profit under, and by virtue of, any law of the state, be and they are hereby prohibited from taking any contract, or performing or doing, or having performed or done for their own profit, any work in and about the office holden by them, or in or about any work over which they have in whole or in part the supervision, or direction or control, and from furnishing any material used in any such work. * * * The act is entitled "An act to restrain state and county officers from speculating in their offices." On the part of defendants in error it is contended that this section cannot be construed so as to include city officers. With this contention we agree. The only language in the section quoted that can be held to be broad enough to include a city official is that contained in the phrase, "All officers holding and exercising any office of trust or profit under, and by virtue of, any law of the state." Were it not for the restrictive title of the act, this language would warrant the construction claimed by the city. The legislature, however, saw fit, by the title, to limit the provisions of the act to state and county officers. It would have been an easy matter to have made the title comprehensive enough to include all public officials. The fact that the title was thus limited clearly indicates that it was the legislative intention to restrict the act to these two classes of officers. Had this section made express reference to city officials, it would, to that extent, have been unconstitutional, as violative of section 16, art. 2, of the constitution, which requires that the subject of every bill "shall be clearly expressed in its title." As said by Mr. Justice Brewer in *State v. Bankers' & Merchants' Mut. Ben. Ass'n*, 23 Kan. 400: "The constitution has said that the title must be an index to the law, and courts may not sanc-

tion as a valid enactment any part of a statute to which the finger of the title does not point. If we should attempt to enlarge the title, we should defeat the very purpose of the constitutional intention, which was to make the title of the bill notice of all contemplated legislation." Whatever might be said as to the scope of this section, if considered alone, when it is read in connection with the title of the act it cannot be construed so as to include a class of officials entirely distinct from "state and county officers." By no reasonable construction can a city councilman be held to be either a state or a county officer. Our attention is called to the cases of *City of Lawrence v. Killam*, 11 Kan. 499, and *Weston v. Lane*, 40 Kan. 479, 20 Pac. 260, in which, it is claimed by counsel for the city, the supreme court has given to this statute the broad construction now contended for. An examination of those cases shows that no such question was in controversy or decided in either of them. The court, by common consent, seems to have assumed the correctness of the construction conceded in these cases. Hence, we do not think that we are precluded by anything said therein, not in accord with the views of this court, now that the application of the statute is challenged.

A more serious question is the one raised by the objection to the court granting any relief to the defendants in error on the ground that the contract entered into is illegal and void, as being against public policy, independently of any special statute on the subject. We think the court below correctly held the contract in question not binding upon the city. While, perhaps, not absolutely void, it was at least voidable at the option of the city, and at any time before its execution the city could have refused to carry it out. One of the plaintiffs below, J. M. Hagaman, as councilman, was acting in the capacity of agent or trustee for the city. As such, it was his duty to supervise, and exercise his best judgment upon, all contracts entered into on behalf of the city. It was inconsistent with that duty for him to stipulate as to the terms for doing a thing for the city which his office required that he, as a representative of the city, should see done well and faithfully, and on the best terms. There is little conflict in the decisions of the courts upon this proposition. Considerable diversity of opinion, however, exists upon the question whether the courts will allow compensation on the quantum meruit for services actually performed under such contract, and which have been appropriated for the benefit of the principal. On the one hand, it is claimed that there can be no recovery upon the implied promise to pay what the services were reasonably worth, upon the ground that there can be no implied promise where there is no power to contract, or where the contract is, for any reason, illegal. To this effect are *Smith v. City of Al-*

bany, 61 N. Y. 444; *Stropes v. Board of Com'rs of Greene Co.*, 72 Ind. 42; *City of San Diego v. San Diego & L. A. R. Co.*, 44 Cal. 112. On the other hand, we think the better reason and authority permit a recovery, in the absence of express prohibition of law, on the quantum meruit, where the services contracted for and actually performed were proper and necessary, and no unfairness was used, or undue advantage taken, in obtaining the contract.

In considering the question of illegality of the contract, it is proper that a distinction be made between a contract which is illegal because its execution requires the performance of an immoral or unlawful act, or transgresses an express statutory prohibition, and one wherein the act to be performed is lawful, but the agreement is invalid because of the manner it was entered into, or because of incapacity to contract in either of the parties. The first receives no aid or encouragement whatever from the courts, on the principle, "*Ex turpi causa non oritur actio.*" Of this character were the contracts in the following cases: *Gerlach v. Skinner*, 34 Kan. 89, 8 Pac. 257; *Hinnen v. Newman*, 35 Kan. 712, 12 Pac. 144; *Bowman v. Phillips*, 41 Kan. 369, 21 Pac. 230; *Sheldon v. Pruessner*, 52 Kan. 579, 35 Pac. 201; *Yount v. Denning*, 52 Kan. 629, 35 Pac. 207; *Oscanyan v. Arms Co.*, 103 U. S. 261, cited in the preceding case. When the contract looks to the doing of a lawful act, but may be avoided by one of the parties to it because the other party at the time acted in a fiduciary capacity for the first, the rule is applied in order to avoid the possibility of reaping any undue advantage from the contract. When it has been executed without objection, and actual benefits have been received under it, all parties acting in entire good faith, the law is maintained and the ends of justice subserved by disregarding those parts of the express agreement wherein advantage might have been taken, and allowing compensation merely for the reasonable value of the benefits received under it. Considerations of public policy do not require the doing of less than this. The defense of public policy has no element of punishment in it; nor is it allowed out of consideration for the defendant. It is upheld by the consideration which the law ever entertains for the protection of the public, and the settled policy of the courts to give no aid to the enforcement of contracts whose general tendency is injurious to the public. Hence, the courts refuse all relief to one who asks compensation for the doing of an act which is conclusively presumed to be hurtful to public interests or morals. When, however, the thing accomplished is proper and beneficial, and not placed under the ban of any penal prohibitory enactment, the reason for the rule fails, and it should not be applied any further than is necessary for the public good. No rule which is applied for the prevention of wrong should be

used to work injustice to either of two parties who have both been equally innocent of intentional illegality or wrongdoing. Principles based upon public policy fall in their object when used as instruments of wrong. We are supported in this position by the following cases: *Gardner v. Butler*, 30 N. J. Eq. 702; *Call Pub. Co. v. City of Lincoln*, 29 Neb. 149, 45 N. W. 245; *Mayor, etc., of City of Macon v. Huff*, 60 Ga. 221; *Pickett v. School Dist.*, 25 Wis. 551; *Spearman v. Texarkana*, 58 Ark. 348, 24 S. W. 883; *Ashhurst's Appeal*, 60 Pa. St. 290; *Mayor, etc., of Niles v. Muzzy*, 83 Mich. 61; *Currie v. School Dist.*, 65 Minn. 163, 27 N. W. 922. In *Gardner v. Butler*, Van Syckel, J., said: "It [the claim for compensation] must rest exclusively upon its fairness and justice, and be enforced upon the quantum meruit. That such is the full scope and effect of the rule and the extent to which the contract is annulled will be found by an examination of the cases. * * * The cupidity and avarice of the trustee is guarded against by giving the cestui que trust the right to repudiate the contract at all times when it is executory, and to allow simply a just remuneration, without reference to the contract price, when it is executed. The trustee thus derives no advantage from his breach of duty, and the company can suffer no detriment from his service in his behalf." The court in *Pickett v. School Dist.*, expressed itself thus: "There seems ground for a distinction between contracts which are held to be against public policy, merely on account of the personal relations of the contractor to the other parties in interest, and those which are void because the thing contracted for is itself against public policy. In the latter class the parties acquire no rights which can be enforced either in the courts of law or equity. But in the former, the thing contracted for being in itself lawful and beneficial, it would seem unjust to allow the party who may be entitled to avoid it to accept and retain the benefit without any compensation at all." In *Currie v. School Dist.*, considering the contract of a director of a school district with the school board, *Vandenburgh, J.*, said: "If chattels which the board is authorized to purchase for the use of the district are accepted and retained by the district, or by the trustees, it would seem just and reasonable that it should become liable for the reasonable value thereof, in the proper action therefor, though the contract of purchase under which they were delivered was unauthorized or unratified. The corporation should not be permitted to repudiate the contract, and retain the fruits of it." We think the views expressed in these cases commend themselves as more in accord with justice than to hold that all remedy or relief should be denied one who has, in good faith, given his services in the performance of things needful and necessary for the party seeking to repudiate all obliga-

tion therefor. The mayor and council solicited defendants in error to make the contract in question in this case. The evidence shows that they dealt honestly and fairly with the city, and gave it valuable and necessary service. We think they should receive the reasonable value of the work performed. The court below adjusted the differences of the parties upon this just and equitable basis. In doing so it committed no error. The judgment is affirmed. All the judges concurring.

(16 Mont. 384)

S. C. HERBST IMPORTING CO. v. HOGAN.
(Supreme Court of Montana. July 15, 1895.)

JUDGMENT BY DEFAULT—VACATING—ASSUMPSIT—
GOODS SOLD—PLEADING—ACTION BY
CORPORATION.

1. A refusal to set aside a judgment by default on the ground of excusable neglect, in that counsel for defendant was distracted by sickness in his family, and defendant was called away by the illness of his mother, will not be disturbed.

2. A complaint for the price of goods, which fails to allege indebtedness of the defendant or delivery by plaintiff, is fatally defective.

3. Want of capacity of a corporation to sue must appear from allegations of the complaint, to support a demurrer on that ground.

4. A complaint alleging indebtedness on a balance for goods sold and delivered to defendant in a given month, and assignment of such account to plaintiff, and that defendant has not paid the same, or any part thereof, though due and payable, is good on general demurrer.

5. A special demurrer will lie to a complaint, in an action to recover a balance of account assigned to plaintiff by a corporation, for failure to allege the legal existence, and the nature thereof, of the assignor.

6. Failure of an affidavit in attachment to allege whether the contract sued on is express or implied, and to properly entitle the same, is a defect which may be cured by amendment.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by the S. C. Herbst Importing Company against Joseph Hogan for the purchase price of goods and for the amount of an assigned balance of account. From a judgment by default for plaintiff, an order refusing to set the same aside, and an order refusing to dissolve an attachment in the suit, defendant appeals. Reversed.

Plaintiff alleges that it was a corporation by the name of the S. C. Herbst Importing Company. The complaint then proceeded as follows: "For a first cause of action against defendant, plaintiff says defendant is indebted to — in the sum of two hundred and eighty-two and $\frac{9}{100}$ dollars for goods and merchandise sold and delivered to defendant at his instance and request in the month of May, 1893; that the defendant has not paid therefor, or any part, although the same is now due and payable. For a further and separate action against defendant, plaintiff says that said defendant was heretofore justly indebted to the Silver City Distilling Company in the sum of one hundred and $\frac{25}{100}$ dollars, on a balance of account for

goods and merchandise sold and delivered by said company to defendant in the month of September, 1893; that said Silver City Distilling Company, prior to commencing this action, sold and assigned said account to plaintiff, who is the owner and holder thereof; that defendant has not paid said account, or any part, although the same is due and payable. Wherefore plaintiff demands judgment," etc. The defendant demurred to the first cause of action, generally and specially. The special demurrer alleges that the complaint was ambiguous, unintelligible, and uncertain, in this: "Because it does not state how, when, or where, or under the laws of what state, nation, or jurisdiction, the plaintiff was organized or incorporated, or any reason or purpose for its existence, or any kind of business it is authorized to do, or where it carries on or transacts any kind of business whatever." Defendant also demurred to the second cause of action, generally and specially, and for ground of special demurrer alleges that the complaint was ambiguous, unintelligible, and uncertain, in this: "That it does not sufficiently describe the alleged assignor or vendor of the balance of account owed for the pretended Silver City Distilling Company, or whether it has any legal existence whatever, or whether it has authority or capacity to do or transact any business of any kind or at all. It does not show when, where, or how, or by what means, if any, it was either organized or incorporated." The demurrers were overruled. The default of the defendant for want of an answer was entered, and judgment ordered in favor of plaintiff, as prayed for in the complaint. The defendant's counsel moved to set aside the default on the ground of excusable neglect. The affidavit which was made the basis of this application for relief was, substantially, that defendant's counsel was very busy with other professional matters, and was embarrassed by attention upon members of his family who were ill, and by the absence of the defendant himself, who was called away by the illness of his mother. With the application to set aside the default the defendant tendered an answer. The court refused to set aside the default. Plaintiff secured an attachment. The title of the court in which the action was brought, and immediately preceding the affidavit proper, was imperfectly stated. The allegations of the affidavit were, among others, that the defendant was indebted to the plaintiff in the sum of \$382.34, over and above all legal set-offs and counterclaims, upon a contract for the payment of money, etc. There was a motion to dissolve the attachment on the ground of irregularity and insufficiency of the affidavit in omitting to state that the alleged contract sued upon was either express or implied, or the kind or nature of said contract. The motion to dissolve this attachment was overruled. The defendant appeals

from the judgment, and from the order overruling the motion to set aside the default and judgment, and from the order refusing to dissolve the attachment.

John T. Baldwin, for appellant. Stephen De Wolfe, for respondent.

HUNT, J. (after stating the facts). We find no error in the exercise of the discretionary power of the court in refusing to set aside the default of the defendant, but are constrained to reverse the case upon other grounds.

The first count of plaintiff's complaint is fatally defective, and upon a general demurrer should have been so held. The plaintiff nowhere pleads any indebtedness by the defendant to plaintiff, or to any one else. This omission may have been a clerical error, but it is none the less material. Nor does plaintiff aver that the goods and merchandise sold and delivered to defendant were sold or delivered by plaintiff, or by any one in behalf of plaintiff, or by any one else. There is no averment whatsoever of the count to so connect the parties with any wrong done as to entitle the plaintiff to redress.

By the special demurrer to the first count, appellant attempts to raise a question more properly tested by a demurrer based upon the ground that plaintiff has no legal capacity to sue. Bliss, Code Pl. (3d Ed.) § 408a; Maxw. Code Pl. pp. 370, 371. As bearing directly on this point, see the following cases, which hold that a legal capacity to sue is an ordinary incident to a corporation, and that ground of demurrer for want of capacity to sue must appear from allegations as made in the complaint, and not from want of allegations: *Sewing Mach. Co. v. Moore*, 2 Dak. 280, 8 N. W. 131; *Manufacturing Co. v. Reed*, 3 Utah, 506, 24 Pac. 1056; *Pom. Code Rem.* § 208; *Smith v. Sewing Mach. Co.*, 26 Ohio St. 562; *Bank v. Donnell*, 40 N. Y. 410.

The general demurrer to the second count was properly overruled. But, while the count states a cause of action, we think the special demurrer was well taken. Whether the Silver City Distilling Company, assignor of plaintiff, had or had not a legal existence, and what the nature of its existence was, ought, by all reasonable rules of pleading, to appear with some degree of certainty. The practice of most Code states makes uncertainty in a complaint ground for a motion to have the objectionable pleading made more certain, but, under the Montana practice, demurrer is the appropriate remedy. Code Civ. Proc. § 87; Boone, Code Pl. § 54.

The answer proposed by defendant pleads that the plaintiff is a foreign corporation, and never has complied with the laws of the state requiring a certificate to be filed in the office of the secretary of state, designating an agent, who shall be a citizen of the state, upon whom service of summons and other process may be made, and providing, fur-

ther, that, if such foreign corporation shall fail to comply with the provisions of the statute referred to, all its contracts shall be void as to the corporation, and no court of this state shall enforce the same in favor of the corporation. Act March 8, 1893 (Sess. Laws 1893, p. 91). The court, being without brief or argument on this point, refrain from expressing any opinion upon how noncompliance with the statute may affect the contracts of the plaintiff, if the allegations of the answer are true. When this identical question was incidentally raised in Dakota, the court, by Shannon, C. J., said: "Before determining so grave a question, we must not only have a proper case, but great care must be taken to examine that class of authorities which assert the doctrine that when a statute prohibits an act, or annexes a penalty for its commission, it does not always follow that the unlawfulness of the act was meant by the lawmakers to avoid a contract made in contravention of it." *Sewing Mach. Co. v. Moore*, 2 Dak. 280, 8 N. W. 131, and cases therein cited.

We think the affidavit in attachment is defective in not stating the nature of the contract sued upon, whether express or implied. It should also be properly entitled. These defects, however, can be cured by amendment. *Pierse v. Miles*, 5 Mont. 549, 6 Pac. 347; *Langstaff v. Miles*, 5 Mont. 554, 6 Pac. 356; *Magee v. Fogerty*, 6 Mont. 237, 11 Pac. 668; *Joseph v. Clothing Co.*, 13 Mont. 195, 23 Pac. 1.

The judgment of the district court is reversed, and the cause is remanded with directions to sustain the defendant's general demurrer to the first count of plaintiff's complaint and defendant's special demurrer to the second count of plaintiff's complaint. The order of the district court denying the defendant's motion to dissolve the attachment is also set aside, and the cause is remanded with directions that the plaintiff have an opportunity to give such a new affidavit in attachment as the law requires. Reversed and remanded.

PEMBERTON, C. J., and DE WITT, J., concur.

MONTANA CATTLE CO. v. FORSYTHE et al.

(Supreme Court of Montana. July 15, 1895.)

AFFIRMANCE ON APPEAL.

Where the statement of facts is, on motion of a respondent, stricken from the record, and appellant's counsel concede that there is no error in the judgment roll, the judgment will be affirmed.

Appeal from district court, Yellowstone county; George R. Milburn, Judge.

Action by the Montana Cattle Company against B. O. Forsythe and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Massena Bullard, for appellant. John T. Smith, Clifton George, and Gib A. Lane, for respondents.

PER CURIAM. The statement, on motion for a new trial in this case, having heretofore been stricken from the record, on motion of respondents, there is nothing now to consider, on the appeal from the judgment, but the judgment roll. As our attention has not been called to any error in the judgment roll, and as counsel for the appellant concede that there is no error therein, the judgment appealed from is affirmed.

KIMPTON v. JUBILEE PLACER MIN. CO. et al.¹

(Supreme Court of Montana. July 15, 1895.)
GENERAL AND SPECIAL VERDICT—REMAND ON APPEAL—NEW TRIAL.

1. On a suit to determine the right to 200 inches of water from a stream, it appeared that plaintiff and defendant claimed the same as appurtenant to land bought from the same grantor. Special findings were rendered that plaintiff's deed of the land, with the water appurtenant, was executed and recorded long prior to defendant's; that, when plaintiff bought, the water was actually conducted on the land, and he never ceased to use the same; that 160 inches were necessary for plaintiff's use. A general verdict for plaintiff for 160 inches was rendered. *Held*, that it was error to set aside the general verdict, adopt the special findings, and enter judgment for defendant on them, as they warranted a judgment for plaintiff.

2. Error of court in setting aside a general verdict for plaintiff, adopting the special findings, and entering judgment on them for defendant when they warranted a judgment for plaintiff, is not error occurring at the trial which will require a new trial, but may be corrected by remanding the case and ordering judgment to be entered for plaintiff.

Appeal from district court, Jefferson county; Frank Showers, Judge.

Action by Washington I. Kempton against the Jubilee Placer Mining Company and others to determine his right to 200 inches of water from a stream. From a judgment for defendants, plaintiff appeals. Reversed.

This action was brought by the plaintiff to determine his right, as against the defendants, to the use of 200 inches of the waters of Crow creek for the purposes of irrigation. He asks for a perpetual injunction restraining defendants from the use of said waters to the extent of his claim of 200 inches. The plaintiff and the defendants claimed title from a common source. The plaintiff claimed the use of said waters by virtue of the conveyance to him of 160 acres of land with the said waters as appurtenant thereto. The defendants claimed the use of said water by virtue of later conveyances of land with the water appurtenant, from the same common source of title, and also set up the statute of limitations as against the plaintiff's right. The case was tried to the court with a jury. The jury found a general verdict in favor of the plaintiff. They also

¹ For opinion on rehearing, see 43 Pac. 102.

made a large number of special findings. The court set aside the general verdict, and adopted all of the special findings, and entered judgment in favor of the defendants for their costs. Plaintiff appeals from the judgment. There is nothing before us but the judgment roll, containing the pleadings, verdict, findings, and judgment. No motion for new trial appears to have been made, and the evidence is not before us. The findings are, therefore, the unquestioned facts. The matter for decision is whether the findings support the judgment. Appellant contends that they do not, but that, upon such findings, judgment should have been rendered for plaintiff. The other facts of the case are stated in the opinion below.

Joole & Wallace, Cowan & Parker, Walsh & Newman, and Shober & Rasch, for appellant. Henry C. Smith and Thos. J. Galbraith, for respondents.

DE WITT, J. (after stating the facts). With the elaborate special findings contained in this case, the setting aside of the general verdict by the court is not important. Special findings control the judgment, even if the general verdict be contrary thereto. Code Civ. Proc. 1887, § 275. As noted in the statement, the parties claim the use of the waters from a common source of title. The plaintiff's title is long prior to that of the defendants. He purchased the ranch many years before the defendants purport to have purchased certain other premises, with, as they claim, the same waters appurtenant thereto. The jury found that, when the plaintiff purchased the ranch, there were three ditches tapping the waters of Crow creek, and conveying the same to and upon the ranch of plaintiff during the irrigating season; that the carrying capacity of said ditches at that time was, respectively, 800, 200, and 1,000 inches; that the grantors of plaintiff owned sufficient of the waters of Crow creek to supply said ditches. This last finding, however, must be interpreted to the effect that said grantors owned the use of sufficient water to supply the ditches. It is also found that these ditches and waters were those mentioned in the deeds from plaintiff's grantors. These deeds, it is to be observed, were prior to the conveyances to defendant, the Jubilee Placer Mining Company. These deeds from plaintiff's grantors to him of said ranch and water right were duly acknowledged and recorded at the time the defendants purchased of plaintiff's grantors the right they claim in the water. At the time when the defendants purchased whatever right they had in and to the use of the waters of Crow creek, the plaintiff had one ditch, which he used during the irrigating season in carrying the waters of Crow creek upon his ranch. The carrying capacity of that ditch was 200 inches. The amount of water requisite and necessary to properly

irrigate plaintiff's ranch was 160 inches. The plaintiff purchased this ranch, ditches, and water right on the strength of the representations of his grantors that he was entitled to the use of said waters to the amount of 200 inches. The plaintiff paid for said ranch, ditches, and water right the sum of \$3,190. The plaintiff would be seriously and materially damaged if deprived of the use of said waters. When defendants purchased from plaintiff's grantors, the said ditches were easily observed. The jury also found that the defendants, or their grantors, had not used this water in question, nor has this water been used by them for the purpose of irrigating, or for their ordinary use, or for any other useful or beneficial purpose, for a period of five consecutive years before the commencement of this action. Such were the findings which the court adopted, and upon which it rendered judgment for the defendants for their costs. How the court arrived at such a conclusion is to us inscrutable. The facts were found in favor of the plaintiff fully and completely. Prior to the inception of the defendants' claim upon the waters, plaintiff had bought his land from the defendants' grantor. He bought it with the water appurtenant thereto, with the water actually conducted upon the land. He continued to use the water. It was necessary for the cultivation of the land, and he would be damaged if he were deprived of the same. Plaintiff claimed 200 inches. By the findings he was allowed 160 inches. We do not obtain any light from the respondents' brief which enables us to understand the action of the court in entering a judgment absolutely contradictory to the findings.

Some questions of practice are discussed in respondents' brief, as well as that of appellant; but, in the view we take of the case, those questions are not important. One of them is as to whether the court in an equity case may set aside the findings or verdict as only advisory. But that question has long been at rest in this court. The only finding which the court set aside was the general verdict. But that, as remarked, is not important.

The respondents' counsel contends that it was the duty of the court, in rendering judgment, to construe the special findings in connection with all the testimony. It would seem, from the view that we are able to get of the case, that the court rendered its judgment totally without regard to the findings, and, perhaps, upon some testimony which is not before us. We know nothing about the testimony, and must assume that the findings are correct. If the court thought that the findings were not sustained by the testimony, it should not have adopted them, but should have made findings that the testimony supported. This judgment must be reversed, because not warranted by the findings. Furthermore, the findings are ample

upon which to render a judgment in favor of the plaintiff, establishing his right to the use of 160 inches of the waters, to which the jury found him entitled. There is no occasion for a new trial in this case. The error of the court did not arise during the trial, within the contemplation of the cases below cited, but arose in rendering a wrong judgment upon the facts as found and undisputed. *Woolman v. Garringer*, 2 Mont. 405; *Collier v. Ervin*, Id. 557; *Barkley v. Teleke*, Id. 435; *Ditch Co. v. Henry* (Mont.) 39 Pac. 1054; *Stackpole v. Hallahan* (Mont.) 40 Pac. 80. It is therefore ordered that the judgment of the district court be reversed, and that the case be remanded, with directions to enter a judgment in favor of the plaintiff, determining his right to the use of said 160 inches of water, as found by the jury, and perpetually enjoining the defendants from interfering therewith.

PEMBERTON, C. J., and HUNT, J., concur.

HAMILL v. JALONICK.

(Supreme Court of Oklahoma. July 27, 1895.)

LANDLORD AND TENANT—EJECTMENT—DENIAL OF LANDLORD'S TITLE—ESTOPPEL OF TENANT.

1. Under article 32, c. 70, Laws 1890, a landlord may maintain an action for the possession of property held by his tenant.

2. Where it is shown that a tenant is in possession of property by permission of his landlord, *held*, that he is estopped from denying the title under which he holds.

(Syllabus by the Court.)

Error from Canadian county court; before Justice Burford.

Action by Isaac Jalonick, Jr., against Robert M. Hamill to recover possession of land. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Frank G. White, for plaintiff in error. Dille & Schmook and Baxter & Severy, for defendant in error.

DALE, C. J. This case was commenced in the district court of Canadian county April 7, 1893, and an answer by a general denial was filed April 18, 1893. It was brought as a suit in ejectment under article 12, c. 70, Code 1890, and was for the recovery of lot No. 16, in block 81, in the city of El Reno. October 24, 1891, Jalonick executed to Hamill a written lease for a building 20x40 feet, located upon the above described property, for the period of one year, at a monthly rental of \$40. The lease was signed by both parties. In the body of the lease it was agreed that, upon the nonpayment of the rent, or any portion thereof, Jalonick might, at his election, either distrain for rent due, or declare the lease at an end. In June or July, 1892, Hamill quit paying rent for the property, and claimed thereafter to hold adversely to Jalonick, but it is not contended that

Hamill surrendered possession to Jalonick before he sought to assert such claim. In December, 1893, judgment was rendered for the plaintiff, and a new trial granted, under the statute. June 11, 1894, after trial, a second judgment was rendered in favor of Jalonick, to reverse which Hamill brings the case here. It will not be necessary to consider the assignments of error set forth by appellant separately, as they are all involved in one proposition: Was it error for the court below to exclude the evidence offered by Hamill for the purpose of showing no title in Jalonick, and that a contest proceeding for the title to the lot was pending, undetermined, before the land department, between Hamill and Jalonick?

This action was commenced under section 1, art. 12, c. 70, Laws 1890, and was for possession of property held under a lease. The suit was not for the purpose of trying the question of title, nor, as between the parties, was such question involved. Under section 1, two kinds of actions are contemplated. One may be brought to determine the title, and the other the right of possession. This action was for the possession of the property. Jalonick claimed as a landlord against Hamill, his tenant. We think counsel for appellant fails to properly distinguish between the two actions. Jalonick could not maintain the action as against Hamill for the title, because the question of title is one yet to be determined in another tribunal. But, if the contract of lease was valid, in the first instance, as between Jalonick and Hamill, it always retained its validity, until Hamill had, by a surrender of possession under the lease, put an end to the contract between them. Keeping these distinctions in mind, we may arrive at a correct solution of the question involved. Jalonick, in support of his right of possession, introduced his lease, and showed, by evidence, that its terms had been violated by Hamill, and then rested his case. Hamill offered to show—First, that Jalonick had no title in the property; and, second, that there was a contest pending between himself and Jalonick in the land department over the title to such property. The court excluded both defenses, and adjudged Jalonick to be entitled to the possession of the property; and of this ruling Hamill complains. Section 1, art. 32, *supra*, provides that: "Any person having a valid subsisting interest in real property and a right to the possession thereof, may recover the same by action to be brought against the tenant in possession. * * *" This statute is a part of the Indiana Code, adopted by our legislature, and comes to us with a well-settled construction. Under this statute, a landlord may maintain an action against his tenant. *Huffman v. Starks*, 31 Ind. 474; *Nelson v. Davis*, 35 Ind. 474; *Bethell v. McCool*, 46 Ind. 303; *Frakes v. Elliott*, 102 Ind. 47, 1 N. E. 195. In this case, the remedy invoked by the landlord was that which arose under the

lease. He asked for no judgment of title. The question of Jalonick's right under the lease being the only one in dispute, the court, very properly, rejected all evidence which did not meet such issue. Hamill had entered into possession of the property under a contract of lease; and, unless he could show that such lease was procured by fraud, he must stand by his contract. Big. Estop. (4th Ed.) 452, in discussing this principle, tersely puts the proposition: "Enjoyment by permission is the foundation of the action, and is therefore the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions are essential to the existence of the estoppel: first, possession; second, permission. Where these conditions are present, the estoppel arises." Apply this rule. Jalonick leased to Hamill, who took possession by permission of Jalonick. Hamill has placed himself in exactly the position defined by the text writer above quoted. This doctrine is world-wide in its application, and is sound in morals, as well as in law, and the court below committed no error in awarding to Jalonick a judgment for possession.

BURFORD, J., having presided at the trial of the cause below, not sitting; the other justices concurring.

DUNHAM et al. v. HALLOWAY.

(Supreme Court of Oklahoma. July 27, 1895.)

APPEAL—ERROR WAIVED—EXCEPTIONS—SUFFICIENCY—PLEADING—RELIEF—STATUTES OF ANOTHER STATE—SUFFICIENCY OF EVIDENCE.

1. Where no exception is taken to the introduction of incompetent testimony, error is waived.

2. Where the court gives a series of instructions, each of which is separately stated, and the record of the exception reads as follows: "To the giving of which instructions and each of them the defendant at the time excepted,"—*held*, an exception is properly saved for review by the supreme court.

3. Where an itemized account, showing the dates when the several items were purchased and the time when such purchases were to be paid for, is attached to and made a part of the complaint, and the prayer of the complaint asks for judgment for the principal sum, together with interest thereon, according as the same may appear to be due from the items of said exhibit, *held*, that such prayer is sufficient to support a verdict for the principal sum and interest, as computed from the date when payment for each of the several items as set forth in the exhibit became due to the date of the verdict.

4. If a party to an action wishes to avail himself of the law of another state, which fixes the rate of interest upon a contract at a different rate than that fixed by the laws of the territory, he must plead such statute.

5. Where a party sues out a writ of attachment, and in his affidavit therefor sets forth two grounds for said writ, and evidence is offered in support of both grounds, and the jury finds against the defendant upon each of the issues so joined, and such verdict is approved by the trial judge, this court will not disturb

the verdict for the reason that the same is not supported by the evidence.

(Syllabus by the Court.)

On motion for rehearing. Motion granted, former judgment set aside, and judgment of the lower court affirmed.

For former opinion, see 35 Pac. 949.

DALE, C. J. A petition for rehearing has been filed in this case, and the attention of this court has been properly called to the fact that, in the consideration formerly given to the matter, important testimony contained in the record was overlooked. The statement of facts and assignments of error will not again be fully set out, but commented upon only sufficiently for a proper understanding of the questions discussed. In the former opinion we held that the trial court was in error in not sustaining the objections of defendant below to the introduction of the depositions of James H. Dunham, John T. Dutcher, Henry Walker, and Edwin Davis, and that, if such depositions had been rightfully excluded, no evidence would appear in the record tending to establish the validity of the amount of the debt sued upon. In this conclusion we erred. In the deposition of Bradley, agent of the plaintiff, is found testimony which shows that Bradley acting for plaintiff below, presented the account of said plaintiffs to Holloway, demanded payment therefor, and that the amount of the claim was agreed to by Holloway, and payment refused simply upon the ground of inability to meet the obligation. This testimony is uncontradicted. It appears from the record that Holloway, except by his answer, raised no issue upon the question of indebtedness. The depositions which were by the court below improperly admitted only go to the question of indebtedness. They nowhere bear upon the issue raised under the attachment proceeding. Consequently, the evidence contained in such depositions was cumulative, and, there being sufficient without them to prove the indebtedness, the ruling of the court below did not prejudice the rights of Holloway. We will now take up the discussion of the assignments of error, not noticed in the former opinion, which are as follows: First, error in refusing to allow certain interrogatories in depositions to be read to the jury and excluding testimony in behalf of defendant; second, in giving and refusing instructions to the jury; third, in not setting aside an excessive judgment; fourth, error in that the verdict of the jury on the attachment issue is not supported by sufficient evidence.

1. At the trial, upon objection, the court refused to allow certain cross-interrogatories and answers thereto in depositions to be read to the jury. Witnesses were interrogated by the plaintiff below relative to the residence and whereabouts of defendant and his family at and about the time of the commencement of the attachment suit. The witnesses

testified, in effect, that Halloway and two of his sons left Ft. Worth, Tex., about the middle of September, 1891, and that the other members of his family, consisting of his wife and daughters, remained at and continued to reside in Ft. Worth for some time after that date. By cross-interrogatories the witnesses were asked if Mr. Halloway stated, when he left Ft. Worth in September, 1891, that he intended to make Oklahoma City his home, which question was answered in the affirmative. This answer was permitted to go to the jury. The witnesses were then asked if they had heard members of Mr. Halloway's family make statements as to their intention of moving to Oklahoma, which questions were also answered in the affirmative. This testimony was excluded, and we think correctly. The question of the residence of Mr. Halloway alone was in issue. Proof of the residence of the family was admissible as a circumstance affecting the residence of Mr. Halloway. Beyond this it was not competent for any purpose. Statements made by members of the family, as to their intention of changing their abode, were clearly inadmissible, because irrelevant. Upon an examination of the record we find that counsel's assignment of error based upon the refusal of the court to allow witnesses to testify as to what Halloway said to them in connection with his efforts to procure a house at Oklahoma City is not well taken. One of the witnesses was asked to detail the conversation, and an objection to the testimony was offered, and, without ruling upon such objection, the court stated that the fact of his renting a house could be proved. No exception was taken to the statement of the court limiting the proof, and if there is error it was waived.

2. Complaint is made of the instructions given by the court to the jury. The attachment was based upon two grounds, to wit: That Halloway was disposing of his property with the fraudulent intent to cheat, hinder and delay his creditors, and that he was a nonresident of the territory of Oklahoma. The instructions of the court relative to the nonresidence of Halloway are particularly complained of. After the instructions were prepared, they were numbered and signed by the judge, and following this there appears in the record this entry: "To the giving of which instructions and each of them the defendant at the time excepted." Then appears a full set of instructions which were presented by the defendant, and the refusal of the court to give the same, to which action of the court an exception is saved. It is insisted by appellee that, under the Code of 1890, the appellant has not properly saved his objections to the instructions. We have examined all of the decisions cited in the brief of counsel for appellee and fail to find that an exception taken in the manner of the one under consideration has been passed upon by the supreme court of Indiana. The court in

Elliott v. Woodward, 18 Ind. 183, in speaking to this question says: "Where instructions given by a court to a jury consist of several distinct propositions, a general exception to the instructions is unavailing if any one of them is correct,"—citing *Garrigus v. Burnett*, 9 Ind. 528, to the same effect. In *Jolly v. Drawbridge Co.*, 9 Ind. 417, we find the court has pointed out how exceptions must be saved in order to make them available in the supreme court. Upon this point the court says: "It is necessary that the exception, and the assignments of error based upon it, should indicate each instruction deemed erroneous, separately." And, where an objection is made which fails to clearly designate the instructions deemed erroneous, the court further, in the same opinion, concluded: "Unless the instructions are clearly erroneous, under any hypothesis, the case will not be reversed. All presumptions are resolved in favor of the trial court and the correctness of the instructions,"—citing *Murray v. Fry*, 6 Ind. 371. In *Sherlock v. Bank*, 53 Ind. 73, the court again places the same construction upon the Code, and particularly points out how exceptions to instructions must be taken. In *Olds v. Deckman*, 98 Ind. 162, the court construes the identical statute we adopted from that state, and holds that it is substantially the same as that which had formerly been in force, and upon which the decisions heretofore cited were based. The appellant is here by bill of exceptions, but the same rule relative to exceptions to instructions is laid down in *Short v. Stutsman*, 81 Ind. 115. As we view the law and the decisions based thereon, an exception to an instruction, in order to be available in the supreme court, must be taken at the time such an instruction is given, and must particularly designate the instruction excepted to. But an exception as made in this case, which objects to all and each of the instructions given, is, in many of the courts of last resort, held to be sufficient. *People v. De Fore*, 64 Mich. 693, 31 N. W. 385; *Railroad Co. v. Retford*, 18 Kan. 245.

Inasmuch as the courts of Indiana have not passed upon the question here presented, we will adopt the view that an exception was properly saved, and will consider the same. Just how much attention we should give to the evidence we are not entirely clear. The original bill of exceptions contained none of the evidence of the witnesses. But there appears to be a second or substituted bill of exceptions, containing all the evidence, and as it will make no difference in the final conclusion reached, we will consider the bill of exceptions containing the transcript of the entire proceedings. We find, as before stated, two grounds set forth in the affidavit filed as a basis for the attachment,—the ground of nonresidence, and that of the charge of fraudulently disposing of property with intent to cheat, hinder, or delay creditors. Evidence was introduced tending to support both of these issues. The two issues

were submitted to the jury in the form of special questions, under proper instructions from the court. The jury found on both propositions against the defendant. There being no issue as to the indebtedness, if the court correctly instructed as to either question raised in the attachment affidavit, no good reason exists for disturbing the verdict. We are not certain that the court stated the law correctly upon the question of nonresidence. It appears that Halloway was in this territory engaged in the business of merchandising, and that he had no other place of business. This territory was the place of his residence for that purpose. In giving his instructions, the court below seemed to take the view that this was not enough to make him a resident, in contemplation of the attachment law. We are not certain that the court correctly stated the law upon this proposition. *Way v. Way*, 64 Ill. 407; *Williamson v. Parisien*, 1 Johns. Ch. 388; *Frost v. Bisbin*, 19 Wend. 11. It would seem that residence and domicile do not mean the same thing. The court below instructed, in effect, that a man's residence must be at the place of his home. But, grant that the court was in error upon this proposition, upon which question it is unnecessary for us to pass at this time, there still remains the further question raised upon the issue of the fraudulent disposition by Halloway of his property. The instructions of the court upon this question are not subject to serious criticisms. How, then, were the rights of Halloway prejudiced by the error of the court in wrongly instructing the jury upon the question of nonresidence? There were two issues decided against defendant upon the attachment. A decision upon either adverse to the defendant below would have been sufficient to carry the verdict. We therefore hold to the view that, where a suit in attachment is based upon two distinct grounds, and a judgment is rendered against a defendant upon both grounds alleged, error of the court in instructing as to one of such grounds is not error such as will warrant a reversal of the case.

3. It is contended that the court erred in instructing the jury that they "need not be unanimous in their verdict,—that 9 were sufficient to return a verdict." As held by this court since this cause was tried below, such an instruction was erroneous (*Bradford v. Territory*, 1 Okl. 366, 34 Pac. 66); but no exception was properly taken to it at the time it was given, and the record fails to show that the jury was polled or that the verdict was returned by a less number than 12 jurors. We cannot, therefore, consider the objection.

4. It is contended that the judgment was excessive. The sum sued for was \$5,004.58, together with interest from the time the same became due, at 7 per cent. per annum. The jury returned a verdict in the sum of \$5,434.61. The suit was instituted upon an account, and an itemized bill of the goods pur-

chased was attached to and made a part of the complaint. The time of such purchase and the dates when the several items so purchased were to be paid for was set forth. The prayer of the complaint asked for judgment for the sum of \$5,004.58, "with interest thereon according as the same may appear to be due from the items of said exhibit at the rate of 7 per cent. per annum." The exhibit so attached to the complaint is as much a part of the same as if incorporated in the complaint. *Budd v. Kramer*, 14 Kan. 101; *State v. School Dist.*, 34 Kan. 237, 8 Pac. 208. By reference to the exhibit for the purpose of ascertaining the date when each purchase became payable, and computing the interest, no trouble is found in determining the exact sum sued for. Therefore the defendant was fully apprised of what plaintiffs were claiming, and the jury could by a simple mathematical computation arrive at a correct conclusion. Such being the case, the verdict was not excessive unless the jury made an error in figuring the interest. We have not examined for the purpose of determining just what the interest on the different sums amounted to from the date they fell due until the time of the verdict, but if there was an excess of interest allowed the plaintiffs below should be directed to file a remitter.

5. Counsel for appellant insist that interest should be computed at 6 per cent., as that is the law of the state of New York, the place where the contract was made. Six per cent. may be the rate of interest in the state of New York, but if so counsel should have pleaded the statute. In the absence of such pleading and proof, we will presume that the rate of interest in the state of New York is the same as in Oklahoma.

6. As heretofore stated, evidence was offered upon the trial in support of both grounds set forth in the affidavit for attachment. The jury found against the defendant upon each of the propositions. The trial judge approved the verdict. This court will not set aside a verdict reached under these conditions, upon the ground that it is contrary to the evidence. The decision heretofore reached in this case is set aside, and the judgment of the lower court is affirmed. The other justices concurring.

DAY v. MOONEY.

(Supreme Court of Oklahoma. July 27, 1895.)
APPEAL—REVIEW—WAIVER OF OBJECTIONS—CONTRACTS—ACTION TO RESCIND—SUFFICIENCY OF PETITION.

1. Where, in a civil cause, the issues are made up by a petition, answer, and reply, and, on the cause being called for trial, the defendants make application for continuance on account of the absence of witnesses, and, the court overruling such application, they by leave of court withdraw their answer and demur to the petition, and, upon the overruling of the demurrer, elect to stand upon their demurrer and refuse to plead further, and judgment is rendered

on the petition, such action is a waiver of any error that may have been committed in ruling upon the application for continuance.

2. In a petition in equity to procure the rescission of a contract for exchange of real estate on account of false and fraudulent representations, if the petition contains the other material allegations, it is sufficient to offer to return all that was received by the exchange.

(Syllabus by the Court.)

Appeal from district court, Logan county; before Justice Frank Dale.

Action by Mary A. Mooney against Adelia Day. From a judgment for plaintiff, defendant appeals. Affirmed.

Buckner & Son, for appellant. Jones & Deveraux, for appellee.

BURFORD, J. This was an action for rescission of a contract for sale of real estate. The material allegations of the complaint are, in substance, that on the 8th day of August, 1893, the plaintiff, Mary A. Mooney, was the owner of lots 1, 2, 3, 4, and 5, in block 51, in West Guthrie, in Logan county, Oklahoma Territory; that on said day the defendants, George W. Day and Della Day, intending to cheat, wrong, and defraud her, falsely represented and stated that they were the owners in fee simple of a quarter section of land in the state of Kansas, subject to a mortgage of \$600, the accrued interest, and the taxes on said land; that said tract embraced 80 acres of good bottom land; that said tract was improved by a house 16x24, in good condition, a stone barn, and a good well of water; that there was also on said land an orchard consisting of 4 acres of apple and peach trees; that it had 40 acres fenced with two wires for a pasture; and that there was a hedge fence on two sides of the tract. It is then alleged specifically that each of said representations were false, that said defendants were not the owners of said land, and that there were no improvements thereon; that the plaintiff had no opportunity to inspect the land, and relied upon said representations; that, relying upon and believing said representations, the plaintiff agreed to barter and exchange her lots in West Guthrie for said Kansas land, and, pursuant to said agreement, did by deed convey to the defendant, Della Day, said lots, which deed was afterwards recorded in the register of deeds' office in Logan county, and plaintiff received from defendants a deed for the Kansas land, which had never been filed for record. A decree was prayed, setting aside and vacating the deed to the West Guthrie lots, and that plaintiff be decreed the owner thereof, and an offer was made to surrender the deed to the Kansas land. The defendants answered, a reply was filed, and cause set for trial. On the day of trial the defendants made application for a continuance on account of absent testimony, which

application was overruled, whereupon defendants by leave of court withdrew their answer and demurred to the complaint. On presentation of the demurrer, the court overruled the same. The defendants excepted to this ruling, refused to plead further, and judgment was rendered on the demurrer and complaint. The decree cancels and vacates the deed from Mooney to Day of the West Guthrie lots, confirms the title in Mary Mooney, and orders the deed from Day to Mooney of the Kansas land deposited with the clerk of the court for the use of the Days. From this judgment and decree the appeal is taken.

There is no merit in the appeal. The appellants complain of the action of the court in overruling the application for a continuance. By their abandonment of the issues made by their answer, and relying upon their demurrer, they waived such error if any was committed. We have examined the application for continuance, and find that the same does not conform to the ordinary statutory requirements, and there was no error in overruling it. The next alleged error is, that the court erred in overruling the demurrer to the petition. The petition contains all the necessary allegations to entitle the plaintiff to a rescission of contract. It alleges the fraud specifically, and offers to return the unrecorded deed, and prays for a cancellation of the deed made by her to the defendants. Under the allegations of the petition, all she had received was the deed for the Kansas land. This she offered to restore. This was all that is required by section 894, St. 1890. This was not a tender after suit brought, as in the Kansas cases cited by appellant, but was an offer to do equity, which the rules of pleading require. Counsel cites us section 6341 of Oklahoma Statutes of 1890, which relates to breach of warranty. The complaint in this case is not based upon a breach of warranty, but is an action to rescind for fraud, and a different rule applies. Fraud vitiates all contracts, and a court of equity has power to relieve from fraudulent contracts, although the party might be able to recover damages. Section 6658, St. Okl., is also called to our attention, which is to the effect that the redelivery of a grant of real property to the grantor does not operate to transfer the title. This is correct as a general principle, but in this case the court had the whole question before it, and had the power to direct such things to be done as equity would require. If the defendants desired the decree to direct a reconveyance of the Kansas land, they should have requested it. We find no error in the record which has prejudiced the appellants. The judgment is affirmed, at the costs of appellant. All the justices concurring, except DALE, C. J., not sitting.

DAVIS v. HULL.

(Supreme Court of Oklahoma. July 27, 1895.)

JUSTICES OF THE PEACE—TIME OF ELECTION—CONSTRUCTION OF STATUTES.

Justices of the peace, in cities of the first class, must be elected at the general election held biennially in November, and section 1, c. 33, St. 1893, held to control the date of such election.

(Syllabus by the Court.)

Error from district court, Oklahoma county; before Justice Scott.

Mandamus by D. W. Hull against J. W. Davis. There was a judgment for relator, and defendant brings error. Reversed.

Reddick, Lewis & Snyder, for plaintiff in error. Amos Green & Son, for defendant in error.

DALE, C. J. May 14, 1894, D. H. Hull instituted a proceeding in mandamus in the district court of Oklahoma county against J. W. Davis, to obtain possession of the books, records, and paraphernalia pertaining to the office of justice of the peace. The relator, in his petition for the writ, alleged, in substance, that he was qualified to hold the office of justice of the peace; that he was a candidate for such office at the election held in April, 1894, and that said election was a regular city election for the election of city officers and two justices of the peace in the city of Oklahoma City; that he received a majority of the votes cast at such election, and was duly elected, and received a certificate of such election from O. A. Mitscher, mayor of said city; that he had duly qualified as a justice of the peace, and was entitled to the office and all records pertaining thereto; that he had demanded possession of the same, and was refused; and he prayed a writ of mandamus against said J. W. Davis, requiring him to turn over and deliver all the books, dockets, and papers in the custody of said Davis to him (Hull) as his successor in office. Davis answered, and denied that his term of office expired at the time of the alleged election and qualification of the relator. He alleged that he was elected justice of the peace for the township of Oklahoma City in April, 1892, had duly qualified, and was in possession of the office under such election; and denied that the election referred to in the petition for mandamus was held for the election of a justice of the peace to succeed him, or to hold the office of justice of the peace. Upon the petition and answer, the court below rendered a judgment in favor of Hull, and issued a mandatory order requiring Davis to turn over all dockets, books, papers, records, etc., in his custody and possession, pertaining to the office of the justice of the peace. Davis, in his appeal, alleges error—First, in the decision of the court below holding that the relator was duly elected

to the office in question; second, in holding that the relator's term of office commenced prior to January, 1895.

The question involved in this case must be wholly determined under our statute, and all the provisions we have bearing upon this subject are: First. Section 8, art. 1, c. 15, St. 1890, which reads as follows:

"The annual election in cities of the first class, shall be held on the first Tuesday in April, 1891, and each year thereafter. At the annual election, in 1891, there shall be elected a mayor, city clerk, police judge, city treasurer, city attorney, city assessor, treasurer of the school board, one councilman and one member of the school-board from each ward, who shall hold their office for two years, and one councilman, and one member of the school board, from each ward, who shall hold their office for one year. All officers elected thereafter shall hold their office two years, and until their successors are elected and qualified."

This section was passed by the legislative assembly, and approved December 25, 1890. On the same day, the legislature passed another act, entitled "Townships and township officers," (chapter 83, St. 1890), and provided, in article 1, §§ 43, 44, of such chapter, as follows:

"Sec. 43. No city of more than one thousand five hundred inhabitants shall be included within the corporate limits of any township, but each of such cities shall constitute a township for the purpose of electing justices of the peace and constables, as provided in this act, and for the exercise of the powers, and jurisdiction of such officers, as prescribed by law. In such cities, said officers shall be elected at the regular city election.

"Sec. 44. No change or alteration of the boundaries of a township or a city shall vacate the office of any justice elected and residing therein, but such justice shall be a justice of the township or city into which he may be thrown by such change or alteration, and shall hold his office for the term for which he was elected. Constables shall also be subject to the provisions of this section."

Under the pleadings above set forth, it was shown that Davis was elected a justice of the peace of the township of Oklahoma City at the city election in 1892, and was exercising the functions of the office at the time this action was brought; and, if Hull recovers, it must be on the strength of his own title.

On March 13, 1893, we find that the legislature, by general law (St. 1893, c. 33, § 1), fixed the date upon which all township officers should be elected. This section reads:

"General elections for the purpose of electing a delegate to congress, members of the legislature, and all other county, township and district officers shall be held on the Tues-

day succeeding the first Monday in November, 1894, and biennially thereafter."

This being a later act, and general in its nature, must, if applicable, govern. Article 1, § 48, c. 80, supra, intends to and does create a township out of a city, for the purpose of the election of a justice of the peace; and the general law (section 1, c. 33, supra) fixing the time of their election at the regular biennial election, which was held on the Tuesday succeeding the first Monday in November, 1894, appears to have changed the date when justices of the peace should be elected in cities from April to November. The election held at Oklahoma City in April, 1894, in so far as it relates to justices of the peace, is a nullity. Hull, not being legally entitled to the office, the mandate requiring Davis to turn over the office and records was improvidently issued, and the judgment of the court below is reversed, and the case remanded.

SCOTT, J., having presided at the trial in the court below, not sitting; the other justices concurring.

STATE ex rel. WESTERFIELD, State Treasurer, v. TYRRELL, County Treasurer.

(No. 1,444.)

(Supreme Court of Nevada. Aug. 19, 1895.)

LIABILITY OF STATE FOR SALARIES OF COUNTY OFFICERS—REPEAL BY IMPLICATION.

St. 1885, p. 85, § 21, making the state liable for a portion of the salaries of county assessors, auditors, and treasurers, is not repealed by St. 1891, pp. 182, 183, known as the "Revenue Act," because the latter act, being a re-enactment of the revenue act of 1865, which made the state liable for a portion of such salaries, omitted the sections of the act of 1865 providing for such liability.

Mandamus on the relation of W. J. Westerfield, state treasurer, to compel George A. Tyrrell, treasurer of Ormsby county, to pay over moneys claimed to belong to the state. Writ denied.

Robt. M. Beatty, Atty. Gen., for relator. A. J. McGowan, Dist. Atty. of Ormsby County, for respondent.

BIGELOW, C. J. Application by the relator, as state treasurer, for a writ of mandamus to compel the respondent, as treasurer of Ormsby county, to pay over to him the sum of \$285.69, alleged to be a part of the state's revenue, unlawfully detained by respondent. As we understand it, the respondent claims the right to retain such moneys, under sections 136, 137, of the revenue act of 1891 (St. 1891, pp. 182, 183), as a part of the compensation due to Ormsby county from the state on account of the salaries of the assessor, auditor, and treasurer of that county. The question presented is whether the state is liable for any part of those salaries.

It appears that the revenue act of 1865 pro-

vided for the state's paying a portion of such salaries, but that, when that act was revised and re-enacted in 1891, the sections to that effect were left out. Under these circumstances, the old act being repealed, it was supposed, upon the argument, that the liability of the state depended upon section 9 of the act of 1887 (St. 1887, p. 126), regulating the compensation of the officers of Ormsby county; and the constitutionality of this act was attacked, on the ground that it was local and special legislation. This was the question principally argued; but it now appears that the state's liability is equally established by section 21 of the salary act of 1885 (St. 1885, p. 85), the validity of which is in nowise attacked or questioned, except upon the ground that it has been repealed, by implication, by the revenue act of 1891. We, however, find no conflict between the two acts, and consequently are of the opinion that section 21 of the act of 1885 is still in force. We are also of the opinion that, when that section provides that the sum to be allowed by the state to the various counties shall be "the proportion of the state tax to the whole tax levied by the county, on the basis of the salaries allowed by the act," it refers to the salary act of which that section is a part, and which had just fixed the salaries of county officers, instead of to the revenue act of 1865, which, so far as it fixed officers' salaries, was then impliedly repealed. This being so, and it nowhere appearing in the pleadings, or otherwise, that the county is claiming or withholding more than is justly due her under that section, there is no necessity to determine the constitutionality of the law of 1887; as, whether valid or not, the same result would follow. If the county is retaining more, it must be made to appear in a legal manner before notice can be taken of it. Writ denied.

BELKNAP and BONNIFIELD, JJ., concur.

STATE ex rel. NORCROSS, District Attorney, v. BOARD OF COM'RS OF WASHOE COUNTY. (No. 1,432.)

(Supreme Court of Nevada. Aug. 3, 1895.)

CONSTITUTIONAL LAW—TITLE OF ACT—CONSTRUCTION OF ACT.

1. The act of March 16, 1895 (St. 1895, p. 107), to amend an act concerning the purchase and preservation of newspapers, in so far as it attempts to regulate the matter of legal advertising and printing, is in conflict with the provisions of the constitution (article 4, § 17), requiring that each law shall embrace but one subject, which shall be briefly expressed in the title. Bonnifield, J., dissenting.

2. The purpose of that provision of the constitution was to prevent the combination in one act of incongruous and distinct subjects, and also imposition upon the members of the legislature and the public by covering up, under innocent titles, vicious and harmful provisions.

3. Where, by the title, the subject of an act is restricted to a certain purpose, the purview

of the act cannot be extended to other purposes not indicated in the title. The act can be no broader than the subject expressed in the title.

4. While this clause of the constitution should be liberally construed, to the end that there may be no unnecessary hampering of legislation, this liberal construction should not go to the extent of nullifying the constitution. Where an act clearly embraces two distinct and independent subjects, or the real subject of the act is not expressed in the title, it is the duty of the courts to declare the act void.

(Syllabus by Bigelow, C. J.)

Application by the state on the relation of F. H. Norcross, district attorney, against the board of county commissioners of Washoe county, for a writ of certiorari. Dismissed.

F. H. Norcross, Dist. Atty., Alfred Chartz, William Webster, and R. M. Clarke, for relator. Torreyson & Summerfield, for respondent.

BIGELOW, C. J. Original application for a writ of certiorari. By St. 1895, p. 107, the legislature enacted a law entitled "An act to amend an act entitled 'An act for the purchase and preservation of public newspapers printed and published in the several counties of this state,' approved February 1, 1865." The body of the act is as follows: "Section 1. The recorders of the several counties of this state are hereby authorized and required to subscribe for one newspaper printed and published at the county seat of each county of the state, and the board of county commissioners of the respective counties shall designate the paper so subscribed for as the official paper of the county, wherein all legal advertising and printing shall be done; provided, the rate for such work shall not exceed the rate now established by law. No paper shall be so subscribed for and designated unless it shall have been established for at least one year, and is printed and published in its entirety at its place of establishment." Pursuant to this statute the county recorder of Washoe county, on the 3d day of May, 1895, subscribed for the Nevada State Journal, a newspaper coming within the terms of the act, and notified the board of his action. June 3, 1895, the respondents, as such board, made the following order: "It is hereby ordered that the county printing of Washoe county, Nevada, be and hereby is awarded to the Reno Evening Gazette until otherwise ordered by this board." The relator, as district attorney of Washoe county, has applied for a writ to review this order, upon the ground that it is in conflict with the foregoing statute.

Although several interesting questions might be raised upon that statute, and as to whether the order of the board is in conflict with it, the point which has been principally argued, and to which we shall confine this opinion, is whether the act is in conflict with section 17 of article 4 of the constitution, which provides that "each law enacted by the legislature shall embrace but one subject, and

matter properly connected therewith, which shall be briefly expressed in the title." As originally enacted in 1865 (Gen. St. § 2197 et seq.), the law, the first section of which was amended as above stated, clearly embraced but one subject, which was correctly stated in the title to be "the purchase and preservation of public newspapers printed and published in the several counties in this state." Section 1 requires the recorders to subscribe for not less than one nor more than three such county papers as the board of commissioners may select. Sections 2 and 3 direct how the papers shall be preserved and paid for, what the recorder shall be paid for his services, and the penalty for a failure to discharge his duties in that regard. Section 4 provides a punishment for abstracting or defacing the papers purchased under the act. Under the liberal construction of this clause of the constitution adopted by the courts (*State v. Board of Com'rs of Humboldt Co.*, 21 Nev. 235, 20 Pac. 974), this was undoubtedly a homogeneous and valid law. While it contains many details, they are all of matters connected with the purchase and preservation of the newspapers, the subject stated in the title, and consequently are unobjectionable. But into this comparatively unimportant act, involving an expenditure of probably not to exceed \$30 or \$40 a year, this amendment, without anything in the title to indicate the purpose to do so, injects the matter of legal advertising and printing, amounting to hundreds and perhaps thousands of dollars, whether we regard that term as applying to all legal advertising and printing or simply to that to be done for the counties. As so amended, it seems to us that the act clearly embraces two separate and independent subjects, only one of which is stated in the title; and that the one not stated is the real subject, while the other is merely the incident.

The object sought to be accomplished by the constitutional provision is not difficult to discover, and has been many times stated by the courts. It was to defeat "log-rolling" legislation, or the combining in one act of incongruous and distinct subjects, and to prevent fraud upon members of the legislature and the general public by covering up, under innocent titles, vicious and harmful provisions, of which the titles gave no hint, and of which, consequently, no knowledge might be obtained until they were enacted into laws. *State v. Silver*, 9 Nev. 227; *State v. Board of Com'rs of Humboldt Co.*, *supra*. Among the great number of bills that are introduced every session, both members of the legislature and the people must necessarily largely depend for their knowledge of the purposes of the proposed measures upon the titles under which they are presented, and experience has amply demonstrated that the constitutional provision, if fairly and liberally construed, is a great aid to good legislation, and an embarrassment only to that which is not, or at least may not be, open and above board.

Certainly, *prima facie*, the subject of legal advertising and printing, and the subject of purchasing and preserving newspapers, are disconnected and independent matters. If they can be shown to be related in any manner it must be through some subtle reasoning that does not occur at first blush. The only argument seriously made in support of the law as amended is that the real purpose of the legislature in enacting it was that a record of current events, legal advertisements, etc., should be preserved, and that the better to accomplish that purpose it was germane to that object to provide that the paper to be preserved should contain all such advertisements. But that argument will not bear examination. In the first place, the subject of the act must be the subject stated in the title; and, next, the constitution does not say that all matters connected with the purposes or objects of the act may be contained therein, but only matter connected with the subject so stated. For instance, in *Ex parte Hewlett*, 22 Nev. —, 40 Pac. 96, the object of the legislature in enacting the amendment then under consideration was to afford better protection to the fish of the state, and all the provisions of the amendment were properly connected with that purpose; but, as in the title its subject was stated to be the amendment of one particular section of the original act, the constitution did not permit its being extended to the amendment of other sections. If the title is restricted to certain purposes, the purview or body of the act must also be restricted to that subject. The act can be no broader than the subject expressed in the title. *Suth. St. Const.* § 87. The title here restricts the subject to the "purchase and preservation" of newspapers, and consequently the act cannot be extended to a regulation of what they shall contain. But the truth is the real subject of the amendment under consideration is not stated in the title at all. That subject is legal advertising and printing, or, as restricted to its narrowest limits, county advertising and printing. The statement that the purpose of the act is to amend the act concerning the purchase and preservation of newspapers is a mere cover. That this is the fact is easily shown by a consideration of the effect of the amendment. Previous to its enactment, the power to designate in what paper ordinary legal advertisements should be placed rested in the district judges and other officers, and county commissioners controlled the county printing. It was the duty of such commissioners, and certainly was within their power, where the possibility of competition existed, to let such contract to the lowest bidder. It may even be questionable whether the order of the board here is not in conflict with the statute, upon the ground that it constitutes the letting of a contract, without advertising, that amounts to more than \$500. *Gen. St.* § 1972; *Sadler v. Board of Com'rs of Eureka*

Co., 15 Nev. 39. At any rate, they could advertise and let it to the lowest bidder, and, where they have acted with an eye single to the interests of the taxpayers, we may suppose they have done so. They could at least have some understanding about the prices to be charged, and if not satisfactory could go elsewhere. But by this simple amendment all this is changed. All power over legal advertising is taken from all the other officers, and vested in the county recorder alone. That officer simply subscribes for a paper, and, following that, the commissioners must designate it as the official paper, and all legal advertising and printing must be done therein. This, too, without regard to the prices to be charged, or how poor an advertising medium it may be. We say without regard to price, for although the act provides that the "rate" shall not exceed the rates established by law, if that means the prices to be charged for such work, we find no such rates established for the great mass of county printing or legal advertising. Every county, every newspaper, and every individual in the state is, or may be, affected by the provisions of the act upon that subject, and when, as compared with these important changes in the law, we remember that the only change made by the act as to the purchase and preservation of newspapers is that, instead of the recorder subscribing for from one to three papers, to be selected by the commissioners, he is to subscribe for but one to be chosen by himself,—an immaterial change, made only to facilitate the changes in the matter of advertising and printing,—the real subject of the act becomes clearly apparent, and the statement in the title that its subject is the purchase and preservation of newspapers, decidedly ironical. It well illustrates the wisdom of the constitutional provision, and the necessity of a reasonable adherence to its directions. The title was concerning a matter of but little importance, and well calculated to escape attention. The bill, in truth, passed the legislature under false colors that gave no notice of its real character to those to be affected by it.

We have often held, and still hold, that the constitution is to be liberally construed, to the end that there shall be no unnecessary hampering of legislation, but there is a wide difference between liberal construction and nullification, which would be the effect of deciding that an act, passed under a title so misleading as this, is, notwithstanding, a valid law. The section might as well be stricken from the constitution at once as a dead letter. This distinction is well illustrated by cases heretofore decided by this court. *Those of State v. Ah Sam*, 15 Nev. 27; *Ex parte Livingstone*, 20 Nev. 287, 21 Pac. 322, and *State v. Board of Com'rs of Humboldt Co.*, *supra*, of which we entirely approve, and which, in our judgment contain nothing in conflict with what is here held, were all cases in which, by liberal construction, the

court was able to uphold the validity of the acts then under consideration; while, on the other hand, the cases of *State v. Silver*, supra; *State v. Hallock*, 19 Nev. 384, 12 Pac. 832, and *State v. Hoadley*, 20 Nev. 317, 22 Pac. 99, fell on the other side of the line, and, notwithstanding the rules of liberal construction, the acts then being reviewed were held to be unconstitutional. Speaking of a similar provision in the constitution of New York, the supreme court of that state used language which we consider quite applicable here. It said: "The manifest intention of the constitutional provision was to require sufficient notice of the subject of proposed legislation of a private or local character to be so expressed in the title as to put not only interested parties, but also all persons concerned in the proposed legislation, upon their guard, and to inform all persons reading it of the general purpose and scope of the act. While this is not required to be done by pursuing any formula, or with much detail of specification, and great liberality of construction should be indulged in by the courts to uphold the constitutionality of legislation, yet a due regard to constitutional requirements demands that, when its plain and obvious purposes are disregarded or evaded, the judgment of the court should give effect to its provisions." *Johnston v. Spicer*, 107 N. Y. 185, 202, 13 N. E. 753. To our minds it is quite clear that this title not only gave no such notice as is required in that case of the intention to deal with the matter of legal advertising and printing, but that it was well calculated to actually mislead by inducing the belief that it did not refer to any such subject. It follows that, as passed, the act is evasive in both the letter and spirit of the section of the constitution under consideration. It embraces the very evil against which the provision was directed, and under such circumstances the court would fall in its most important function if it did not follow the mandates of the higher law.

The act being unconstitutional, and consequently no law, so far, at least, as the subject of legal advertising is concerned, the order of the board cannot be in conflict with it, and the writ will therefore be dismissed. It is so ordered.

HELKNAP, J., concurs.

BONNIFIELD, J. (dissenting). By following the logical course of reasoning adopted by this court heretofore in cases similar to this, and adhering to the well-established rules of interpretation for considering the question of the constitutionality of statutes, a proper solution of the matters in hand may be arrived at. In order to keep the subjects under consideration more clearly in view, the title of the amendatory act and the provisions of the act are here given: "An act to amend an act entitled 'An act for the purchase and preservation of public newspapers, printed

and published in the several counties in this state.' Approved February 1, 1865. Section 1. * * * The recorders of the several counties of this state are hereby authorized and required to subscribe for one newspaper printed and published at the county seat of each county of the state, and the board of county commissioners of the respective counties shall designate the paper so subscribed for as the official paper of the county wherein all legal advertising and printing shall be done; provided, the rate for such work shall not exceed the rate now established by law. No paper shall be subscribed for and designated unless it shall have been established for at least one year, and is printed and published in its entirety at its place of establishment." It is claimed that this act is in conflict with the provisions of section 17, art. 4, of the constitution, which are as follows: "Each law enacted by the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title." It is argued that there is more than one subject embraced in the act, to wit: (1) The subject of the purchase and preservation of public newspapers; (2) the subject of legal advertising and printing,—and that the second subject is not matter properly connected with the first subject which is expressed in the title. This is, as I understand it, the substance of the argument, and the essence of the contention raised against the validity of the law. Before proceeding to the specific consideration of the act in question, and its title, it may be well to call attention to the substance of certain rules adopted and recognized by the courts in passing upon such questions as are involved in this case, and to other preliminary matters: First. The presumption is that the legislature had an honest intent and had in view a meritorious object in passing the act. Second. It will be presumed that the members had average intelligence, and understood the object of the act and the object expressed in the title. Third. No legislative act will be annulled by the courts unless it clearly appears to be in conflict with the constitution; that every reasonable construction and intentment will be indulged to harmonize the two instruments, and, if there be a rational doubt as to the invalidity of the act, the doubt will be solved in favor of its validity. Fourth. If the matters in the act are not independent, separate, incongruous, and disconnected matters from, and bear no proper connection with or relation to, the general subject of the act as indicated, or briefly expressed in the title, the act will stand the constitutional test of said section 17 of article 4, no difference how many separate matters it may contain. This latter rule is illustrated in the case of *State v. Board of County Com'rs*, 17 Nev. 101, 28 Pac. 122, in which the court, by way of illustration, says: "An act concerning crimes and punishments is not unconstitutional for the reason that it treats of different crimes. Es-

cape, larceny, robbery, and murder are different crimes; but they are upon the same subject, viz. crimes." In *Ex parte Livingstone*, 20 Nev. 287, 21 Pac. 322, in illustration of this rule, the court said: "Take, for example, the general appropriation act. Every section, in fact, most every line, in a strict sense, refers to a different subject, as different appropriations and for different purposes. * * * It is not designed to require the body of the act to be mere repetition of the title. Neither is it intended to prevent including in the bill such means as are reasonably adapted to secure the object indicated by the title. It is intended to prevent legislators from being entrapped into the careless passage of bills on matters foreign to the ostensible purpose of the statute as entitled." In case of *State v. Board of Com'rs of Humboldt Co.*, 21 Nev. 235, 29 Pac. 974, the title of the act is, "An act fixing the salaries of the officers of Humboldt county and consolidating certain offices." It was the contention on the part of the relator "that both the act and the title embrace more than one subject, to wit, the subject of salaries and the subject of consolidating offices, and is therefore in contravention of section 17 of article 4 of the constitution of Nevada." The court properly held that the act was valid. The rules of interpretation are so concisely stated, and the logical line of argument so clear, in the opinion, which is so pertinent and applicable to the case at bar, that large quotations are here given and adopted as a part of this opinion. After specifying the objects of section 17, art. 4, of the constitution, the court said: "This, then, being the mischief against which this clause of the constitution is directed, it should be so construed as to correct the evil, but at the same time not to needlessly thwart honest efforts at legislation. There is scarcely any subject of legislation that cannot be divided and subdivided into various heads, each of which might be made the basis of a separate act, and in which the connection between them may be made a matter of controversy. The reports show that seldom, indeed, has the validity of a law come seriously in question without its being claimed that it was in conflict with this clause of the constitution. This shows how necessary it is to adopt liberal rules of construction in order to sustain laws not coming within the spirit and meaning of the constitutional prohibition. If the provisions of a statute all relate directly or indirectly to the subject expressed in the title, it is permissible to unite them in the same act." Citing *Coal & Iron Works Co. v. Brown*, 13 Bush, 685; *Phillips v. Bridge Co.*, 2 Metc. (Ky.) 222; *State v. Kinsella*, 14 Minn. 524 (Gil. 395). "The insertion in a law of matters which may not be verbally indicated by the title, if suggested by it or connected with it, or proper to the fuller accomplishment of the object so indicated, is held to be in accordance with its spirit. All presumptions are in favor of the

constitutionality of a statute, and it will be held valid until the mind of the court is clearly convinced to the contrary." Citing *Evans v. Job*, 8 Nev. 322; *Railroad Co. v. Morris*, 65 Ala. 193. "In all cases of doubt, every possible presumption and intendment will be made in favor of the constitutionality of the act in question. The courts will only interfere in cases of clear and unquestioned violation of the fundamental law." Citing *State v. Irwin*, 5 Nev. 120; *People v. Parks*, 58 Cal. 635. "The objections should be grave, and the conflict between the constitution and statute palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraces more than one subject." Citing *Montclair v. Ramsdell*, 107 U. S. 155, 2 Sup. Ct. 391; *Suth. St. Const. § 82*. "It is only the subject of the act which must be stated in the title; matters properly connected with the subject need not be mentioned." Citing, *Humboldt Co. v. Churchill Co.*, 6 Nev. 30. "If they are mentioned it simply makes the title unnecessarily prolix."

If the legislature that passed the original act in 1865 could have, under the title given, properly incorporated the provisions contained in the act of 1895, certainly no one will deny that it was competent for the legislature of 1895 to do so, unless the title of the late act is restrictive, and this precludes it; that is, unless it specifies some particular part of the original act as the object of amendment, as was done in the title of the act considered in *Ex parte Hewlett*, 22 Nev. —, 40 Pac. 90. But the title of the act of 1895 is not restrictive. It does not specify any particular in which it is proposed to amend the old act, nor does it limit the amendment to any particular matter. The whole scope of legislation is left open to such matter as would have been proper to enact by the former legislature. In *State v. Ah Sam*, 15 Nev. 31, and in several other cases, the subject of an act and the object of an act are treated as synonymous terms by this court, and they will be so regarded in this opinion. Now, bearing the foregoing rules of interpretation in mind, let the vital questions in this case be examined. The title of the old act is the substance of the title of the amendatory act. What, then, is the subject of the act, or, in other words, what was the object the legislature had in view in passing it, and what object is indicated by its title, to wit, "An act for the purchase and preservation of public newspapers"? What is a newspaper? "A newspaper is a sheet of paper printed and circulated, at short intervals, for conveying intelligence of passing events; a public print that circulates news, advertisements, proceedings of legislative bodies, public documents, and the like." *Webst. Dict.* This definition accords with the general understanding of the public. There could have been no disagreement among the members of the legislature, and no member could have been forgetful

as to what newspapers are while reading the title or considering the bill. It is manifest that the object the legislature had in view in passing it (the original as well as the amendatory act) was not simply to preserve printed sheets of paper, but to preserve, in newspaper form, intelligence of passing events, for public use. To subserve this object there could not have been any legislation more appropriate than to provide for the purchase and preservation of newspapers,—the instruments containing the intelligence desired to be preserved. And what more appropriate title than the one adopted—expressive of, and clearly indicating, the general object of the act—could have been devised? The general object of the act being clear, and the title of the act clearly indicating the object, it seems to me that no room is left for the assumption that any member of the legislative body or any member of the general community might have been misled by the title. The general object of the act being to preserve intelligence of passing events in newspaper form, and the title of the act clearly indicating that object in specifically giving the object to be “for the purchase and preservation of public newspapers,”—the very instruments containing such intelligence,—it follows that the provision of the act requiring that “all legal advertising and printing shall be done” in these newspapers is not legislating upon a matter that is not germane to and properly connected with the general object of the act, as clearly indicated by the title. Legal advertising or printing is intelligence of one class of passing events. The legislature having exclusive control of legal advertising and printing, it certainly is matter properly connected with the subject or object above named to require that this class of intelligence or current news shall be preserved in manner and form as the other classes. This class is not only matter properly connected with the general subject, but is a part of the general intelligence of passing events, the preservation of which is the object of the act. If the object of the act and the object as expressed in the title can be reasonably construed in two ways, one militating against the constitutionality of the act and the other sustaining the law, it is imperatively required of the court to adopt the latter construction.

In *State v. Ah Sam*, 15 Nev. 27, the title of the amended act is “An act to regulate the sale or disposal of opium and to prohibit the keeping of places of resort for smoking or otherwise using opium.” The act prohibits the sale of opium, unless upon the prescription of a physician, and in that case only allows druggists and apothecaries to sell it. It prohibits the keeping of places of resort for smoking opium, prohibits the leasing of houses for such purposes, and finally it prohibits all persons from resorting to places kept for such purposes, and provides

severe penalties for resorting thereto. It will be observed that the subject of resorting to such places is not expressed in the title in terms. Ah Sam was convicted under this act, not for selling opium, not for keeping a place of resort for smoking it or otherwise using it, but for simply resorting to such a place. On appeal to this court his counsel claimed and urged that the act embraced two or more subjects: (1) The regulation of the sale of opium; (2) the prohibition of keeping places of resort for smoking opium; (3) makes it criminal for any one to resort to a place kept for smoking opium,—and that the latter subject is not embraced in the title. The court held the act to be constitutional, and the conviction of Ah Sam proper. It said: “Clearly it does not embrace more than one subject, and if its title had been ‘An act for the suppression of opium dens’ we think no one could be found to question its constitutionality. It is apparent that the legislature, in passing the act in question, had but one object in view, viz. the suppression of places commonly known as opium dens, and nothing is contained in the law that is not conducive to that end.” So it may be said with equal force in this case, on the same line of argument, and by the same logical course of reasoning, that clearly the act does not embrace more than one subject, and if the title had been “an act to preserve intelligence of passing events or current news contained in newspapers” we think no one would have been found to question its constitutionality. It is apparent that the legislature in passing the act in question had but one object in view, viz. to preserve intelligence of passing events or current news, found in newspapers, and nothing is contained in the law that is not conducive to that end. The court in that case further said: “The title of the act does not profess in explicit terms to aim at the suppression of opium dens by every legitimate means, but merely to prohibit the keeping of such places, and upon strict rules of interpretation it would be difficult to maintain that the latter expression is as broad as the former, or that it will cover anything besides provisions for punishing the keepers of such resorts.” That is, upon strict rules of interpretation, the title embraces the prohibition of keeping such places of resort, and the punishment of the owners and keepers thereof, and does not embrace the matter of making it a criminal offense for any one to resort to such places. And the court said: “In dealing with this particular objection to parts of statutes which, as a whole, embrace but one subject of legislation, the courts of the different states have adopted an exceedingly liberal rule of construction in favor of their validity. * * * It is not inconsistent with these provisions [of the constitution] to give some slight enlargement to the literal meaning of the title of a law.” So, applying what the court said in that case to this one, it may be said here that the title of the act

does not profess in explicit terms to aim at the preservation of intelligence of passing events or current news by every legitimate means, but merely to preserve newspapers containing such intelligence or news, and it is not inconsistent with the provisions of the constitution to give some slight enlargement to the literal meaning of the title of the law, and the said liberal rules adopted by the courts of the several states should be adopted in this case. "The constitution does not require that the title of an act shall be the most exact expression of the subject which could be invented. The general purpose of section 17, art. 4, of the constitution, is accomplished when the law has but one general object, which is fairly indicated by its title. The different steps by which the result is to be accomplished are not different subjects, but minor parts of the same subject." *Klein v. Kinkead*, 16 Nev. 194. It is submitted that in this case there is but one general object of the act, which has been pointed out herein, and which is fairly indicated in the title; that the step of publishing legal advertising and printing in the designated paper is a step by which the result is to be accomplished, and is not a different subject, but a minor part of the same subject.

If the cases of *Esser v. Spaulding*, 17 Nev. 289, 30 Pac. 894, *State v. Atherton*, 19 Nev. 332, 10 Pac. 901, and *Ex parte Livingstone*, 20 Nev. 282, 21 Pac. 322, be examined, and the interpretations there given and the reasoning therein contained be applied in this case, the constitutionality of the act of 1895 will further clearly appear. The objection that the act regulates legal advertising and printing is not a valid objection to its constitutionality. This is simply an incident to and not the object of the act. Notice by publication is required to be given in the following matters: Delinquent tax suits; sale of property for delinquent taxes; notice to creditors of deceased persons; notice of elections; expiration of time of registration; meeting of the board of equalization; and in many other matters. These notices are legal advertisements or legal printing, and are simply incidents to and not the subject of the several acts wherein their publication is required. The objections that the act requires legal advertising and printing to be done in these papers without regard to the price to be charged, and that no rates are fixed by law, are not well taken. There are rates fixed by law for some legal advertisements. If the paper should refuse to do any given work at the rate fixed for similar work, it certainly would leave the matter open for competition, and to the lowest bidder; for the act provides that legal advertising and printing shall be done in the designated papers, "provided, the rate for such work shall not exceed the rate established by law." If there be no rate established for the particular work, certainly it is not required that such work shall be done in these papers, unless

terms can be agreed on by the officers and the proprietors of the papers, otherwise they would have to do the work without compensation, if at all. The matter of rates, in all cases where rates are not fixed by law, is left exactly where it was before the law was passed. The county recorder only designates the paper; he has nothing to do with the rates, nor with legal advertising and printing, but they are left in the hands of the respective officers as before. It is not probable that the respondents, or any officer having such printing to be done, would agree with the designated paper for higher rates than those asked by a competitive paper.

From the foregoing views it follows, not only that the public interest cannot be injured by the law, but that the act is clearly constitutional, and upon the latter ground the proceedings of the respondents in the premises should be annulled. I therefore respectfully dissent from the judgment of the court.

VIETTI v. NESBITT et al. (No. 1,433.)

(Supreme Court of Nevada. July 31, 1895.)

MINING PARTNERSHIP—REVIEW ON APPEAL—OBJECTIONS TO EVIDENCE—MINING CONTRACTS—INTEREST.

1. The defendants, with others, were the owners of a mine, which was being worked by the plaintiff under an agreement that the ore extracted should be worked in a mill belonging to defendants, and the proceeds divided as follows: The defendants were to be paid \$25 per ton for milling; the plaintiff was then to be paid the expense of extracting the ore; and the balance was to be divided equally between him and the owners of the mine. *Held*, that these parties were simply tenants in common of the ore and its proceeds, and no partnership existed between them.

2. Facts found by the trial court upon conflicting evidence are conclusive upon appeal.

3. Where parol evidence of the contents of a written agreement is admitted without objection, no advantage of the fact of its incompetency can be taken afterwards. Under such circumstances, the parol evidence is competent to establish what the terms of the contract were.

4. Upon a question of the amount of moisture contained in the ore, evidence of the amount found in other ore taken from the same ore body and worked under similar circumstances is relevant.

5. Where by the agreement the mill men were to return a certain per cent. of the "assay value" of gold ore worked in the mill, this meant the standard assay value of gold as known everywhere, and not the value of gold bullion at the place where produced.

6. Interest, as such, can only be collected where authorized by statute. In an action upon contract, where there has been no settlement, and the balance due upon the contract is uncertain and unascertained, interest cannot be collected.

(Syllabus by Bigelow, C. J.)

Appeal from district court, Lincoln county; G. F. Talbot, Judge.

Action by John B. Vietti against J. Nesbitt & Bros. Judgment for plaintiff, and defendants appeal. Modified. Digitized by Google

Geo. S. Sawyer and Richards & MacMillan, for appellants. Rives & Osborne, for respondent.

BIGELOW, C. J. The Jim Crow mine, owned by a number of persons, was held by the plaintiff under what the complaint designates a lease, and was producing ore. While the lease was in force, the defendants purchased a half interest in the mine. The defendants were also the owners of a quartz mill. In October, 1893, while this state of facts existed, a contract or agreement was entered into by all the parties in interest, whereby the defendants were to haul the ore so produced to their mill and there reduce it to bullion, they to account for 85 per cent. of the assay value of the ore. Of the proceeds, the defendants were first to be allowed \$25 per ton for hauling and working the ore, and then plaintiff was to be paid the expense of extracting it from the mine. There is no question upon either of these items. Fifty per cent. of the balance was to be paid to the plaintiff, and the rest divided among the owners of the mine in proportion to their interests therein. Except as to the percentage to be accounted for, there seems to have been no serious controversy that these were the general terms of the agreement. The questions in the case are principally concerning matters incidental to the agreement. Several of the co-owners have assigned their claims under it to the plaintiff, and the action is brought to recover the 50 per cent. due him, and the amount due those co-owners upon the reduction of the ore. Judgment was rendered in the plaintiff's favor for \$25,266.08, and defendants appeal.

They first contend that the owners of the mine and the plaintiff were partners, and that consequently no action at law can be maintained by one against the others until there has been a settlement of partnership affairs, and a balance struck. This contention is based upon the allegations of the complaint; but, while that document is by no means a model, and is in some respects confused and self-contradictory, we are unable to find that it states such a state of affairs as would constitute a partnership between the parties here. Whatever may have been the terms of the original lease, which are not stated, no question is made but that the rights of the parties are to be determined under the agreement of October, 1893. The owners of the mine were, as such, tenants in common, pure and simple. They were not engaged in working the property; so there was no mining partnership between them. The mere fact that they, either jointly or severally, made a lease of the mine, under which each was to receive his proportional share, had certainly no tendency to establish that relationship. Each seems to have acted for himself, and defendants were to account to each for his portion of the proceeds, individually. The plaintiff was, in the first in-

stance, to mine the ore at his own expense, and it does not appear that the owners were to have anything to do with that part of the business. While the plaintiff was to be repaid that expense out of the proceeds, this was simply one of the terms of the agreement under which the ore was being extracted. If no ore had been found, or it had paid nothing over milling expenses, the plaintiff must have sustained the entire loss. After the ore was mined, the plaintiff and the several owners of the mine became the joint owners of it, in accordance with their several interests under the contract. It became personal property, in which they were tenants in common. *Freem. Coten*, §§ 16, 100. A mere joint ownership in personal property does not constitute the owners partners. *Quackenbush v. Sawyer*, 54 Cal. 439. In *Hudepohl v. Water Co.*, 80 Cal. 553, 22 Pac. 339, speaking of a similar contract, the court said: "As we construe the agreement, it was one for the working of the mine on shares, and the parties became tenants in common of the products of the mine when taken out. Such a contract does not create the relation of landlord and tenant, but fixes a rule for compensation for services rendered. It is, in all its essential features, a contract for labor to be performed, and to be paid for by a share of the profits realized from such labor." See, also, *Stuart v. Adams*, 89 Cal. 367, 26 Pac. 970. Certainly no partnership existed so far. Then, as to the hauling and milling of the ore. That was done the same as defendants might have done similar work for any one else, and upon terms the same as those upon which the owners of the ore might have had it worked at any other mill. The mill men were paid a certain price therefor, and were to return a certain per cent. of its assay value. Whatever profit they made upon the working was their own, and any loss must have been sustained by them. Of course, under the terms of the agreement, both the expense of milling and the expense of mining the ore would reduce the net proceeds which would in the end go to the several parties, but it was the proceeds of ore which they held as tenants in common, and not as partners. The question here is one of actual partnership between the parties, and not as to what might render them liable, as partners, to third persons. Actual partnership depends upon the intention of the parties. "The true test of partnership, then, is the intention of the parties. They have agreed together for a certain purpose. If the purpose was the formation of an associated body, different from the individual parties, for which they were thereafter to act, they have formed a partnership." *T. Pars. Partn.* § 54. There need not necessarily be a formal agreement of partnership, but it must appear that the parties intended to enter into that relation which the law denominates a partnership. Without trying to define what would constitute such a relation, it

is sufficient to say that the elements of one do not exist here. There was no such association of the individuals, either intentional or unintentional, as would constitute a firm. In fact, there seems to have been no association of them, whatever. The only relation was the accidental one that they owned undivided portions of the same property. There was no agreement to do business jointly, and no community of interest. Each represented his own interest; and no one of them, nor even a majority, had any right to dispose of the property, nor even to make any contract concerning any portion but his own. In *Dwinel v. Stone*, 30 Me. 384, the court says: "One essential element of a partnership is a community of interest in the subject-matter of it. 'Tenet totum in communet nihil separatim per se,' has been the keystone of the arch since the days of Bracton. From this arises the right of each partner to make contracts, to incur liabilities, manage the whole business, and dispose of the whole property of the partnership, for its purposes, in the same manner, and with the same power, as all the partners could when acting together." No such power over the common property existed here, and there was no mutual agency between the parties. It follows that there was no partnership.

There is some conflict in the evidence as to whether defendants were to pay plaintiff 50 per cent. of the net proceeds of the ore. The defendants deny that they so agreed; but, as they do not state what the agreement was, and it is beyond controversy, upon the showing made, that plaintiff had some interest in the ore, their testimony is not very satisfactory. However, the trial court having, upon conflicting evidence, found for the plaintiff, that finding becomes conclusive upon appeal. The same must be said concerning the percentage of the assay value for which the defendants were to account. The evidence was conflicting, and we are controlled by the finding that it was 85 per cent.

The defendants contend that, as it appeared that the agreement was in writing, parol evidence of its contents, which is all that was offered, was incompetent, and should not now be considered. The ground, however, upon which parol evidence of the contents of a writing is rejected is that it is not the best evidence. If the instrument has been destroyed, or the party offering it is, under certain other circumstances, unable to produce it, parol evidence of its terms may be the best and only evidence obtainable, and then it becomes strictly admissible. If the defendants were not satisfied with the parol proof, they should have objected, and had the writing produced or accounted for. Not having done so, they are concluded now from objecting that the evidence is incompetent to establish what the agreement was. "It is settled that if a party permits his adversary to prove his case by secondary evidence,

he cannot afterwards object that better evidence should have been produced. The secondary evidence is, under such circumstances, sufficient." *Wright v. Roseberry*, 81 Cal. 87, 91, 22 Pac. 336. "If evidence secondary or hearsay in its character be admitted without objection, no advantage can be taken of that fact afterwards; and the jury may—indeed, should—accept it as if it were admissible under the strictest rules of evidence." *Sherwood v. Sissa*, 5 Nev. 349, 355.

One question in the case was the amount of moisture which should be deducted from the gross weight of the ore, the plaintiff admitting 8 per cent., and defendants contending for 8 per cent. The court allowed 5 per cent.; and, again recalling the rule where the evidence is in conflict, we certainly cannot say that any error was committed. As one method of determining the amount of moisture, evidence was admitted, over defendants' objections, as to the amount contained in ore taken from the same ore body, and near where the ore in question came from, but in an adjoining mine, and shipped and worked under somewhat similar circumstances. We think this was some evidence upon the question in this case, and, consequently, that it was admissible. Defendants' criticisms upon it go more to its weight than to its relevancy. The same ruling applies also to the evidence concerning the assays of the battery samples taken by the plaintiff. His evidence tended to show that they had been carefully preserved, and had not been tampered with. The fact that they were not assayed until some months after they were taken might reflect upon their reliability, but, certainly, under the proofs, would not have justified their rejection.

Apparently as a part of the agreement, or, at least, with the consent of all parties, the defendants had converted the bullion, which was gold, into money. They contend that the bullion, where produced, was of the value of only \$19 per ounce, whereas judgment has been rendered against them upon a valuation of \$20.6718 per ounce, which we understand to be the standard assay value of gold. As defendants do not claim that they did not receive that amount for it, and as they were allowed the expense of marketing, no injustice seems to have been done, and the valuation appears to be strictly in accordance with the agreement. As the ore was gold ore, when the contract called for a certain per cent. of assay value, some standard by which to estimate the value of the gold must have been understood, and this seems to be the only standard recognized anywhere. It was not shown that "assay value" is not the same in one place as in another. Or, if the term was intended to mean only the number of ounces of gold found in the rock, and the defendants saw fit to convert it into money instead of returning it in kind, in the absence of an agreement to the contrary no reason is sug-

gested why they should not return to its owners the amount of money received by them, less the expense of the conversion.

Included in the judgment is a direction that the sum for which it is rendered shall draw interest from August 1, 1894, to the rendition of the judgment, on March 20, 1895. We are of the opinion that this item is erroneous. If interest was permissible at all, it should have been computed and included in the judgment when entered (*Bibend v. Insurance Co.*, 30 Cal. 79); but, without stopping to inquire whether, as this was not done, it ever became a part of the judgment, and assuming that it did, we think no interest should have been allowed prior to the time judgment was rendered. At common law, no interest was allowed, and it is only permissible now when authorized by statute. 11 Am. & Eng. Enc. Law, tit. "Interest," p. 379. Although interest is frequently allowed in actions involving torts to property, it is simply by way of damages, and in actions where the amount of damages is more or less in the discretion of the court or jury. In such cases, in the absence of special circumstances of fraud or oppression, the legal rate of interest from the time of the commission of the wrong is a safe and uniform measure of damages. *Glass Factory v. Reid*, 5 Cow. 587, 609. But this is not that kind of a case, and interest was not included as a part of the plaintiff's damages, but as an incident to the amount due him under the contract, and allowed as a matter of law. As such, it does not come within the terms of our statute (Gen. St. § 4903, as amended, St. 1887, p. 82), and consequently was improper. But, as this mistake would doubtless have been corrected, upon motion, in the court below, we do not think it should affect the question of costs upon this appeal.

Some other points are made by appellants' counsel; but what we have said above sufficiently indicates our views concerning them. No error appearing except that concerning interest, the judgment will be modified by striking that out; and, as thus modified, it will be affirmed, respondent to recover his costs of appeal. It is so ordered.

BONNIFIELD and BELKNAP, JJ., concur.

RADER v. ALLEN et al.

(Supreme Court of Oregon. July 20, 1895.)
EJECTMENT—SUFFICIENCY OF COMPLAINT—TITLE
UNDER PATENT CERTIFICATE—LIMITA-
TION OF ACTION.

1. Under an allegation in ejectment that plaintiff is the owner in fee and entitled to the possession of mining lands, subject only to the paramount title of the United States, it may be inferred that plaintiff claims under a patent certificate from the United States, after performing all the requirements to entitle him to a patent to the mine.

2. Where one is entitled to possession of a mine under a patent certificate from the United States, he has an estate in the mine, and his right to maintain ejectment therefor is not subject to Hill's Ann. Laws, § 2178, providing that one year's adverse possession of a mine is a bar to an action for its possession.

Appeal from circuit court, Grant county; James A. Fee, Judge.

Action of ejectment by George Rader against Ed. C. Allen and another. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

This case comes here on appeal from the decisions of the court below sustaining a demurrer to the complaint. The complaint is as follows: "(1) That on February 25, 1892, he [plaintiff] was, and ever since has been, and now is, the owner in fee and entitled to the possession of the following described mining property, subject only to the paramount title of the government of the United States, to wit: The undivided one-seventh of a certain placer mine, known as the 'Dunlap Mine,' which said mine is situated on the west fork of Bagley creek, in Fox valley, Grant county, Oregon, together with the undivided one-seventh of all flumes, sluice boxes, tools, and pipe connected therewith and belonging thereto; said mining property having been on the said 25th day of February, 1892, acquired by this plaintiff by purchase from one James Dunlap, who was, at and prior to said time, the owner of and in possession thereof, and which said Dunlap mine is more particularly described as follows, to wit: Commencing at the southwest corner of section six in Tp. 12 S., R. 30 E. W. M., running thence north ten chains, thence east twenty chains, thence north sixty chains, thence west twenty chains to township line, thence south on township line fifty chains, thence west ten chains, thence south twenty chains, thence east twenty chains to the place of beginning, there being a post at each corner of the claim, and the lines blazed on the trees throughout the whole thereof. (2) That, while plaintiff was the owner and in possession, and entitled to the possession of said premises, to wit, on the 10th day of March, 1893, the said defendants Ed. C. Allen and Walter Brown did, without right or title, enter into and upon the same, and oust and eject the plaintiff therefrom. And plaintiff avers that said defendants are now in the actual possession thereof, and they have, ever since said time, wrongfully withheld the possession of the same from the plaintiff, to his damage in the sum of one thousand dollars. (3) That the value of the rents, issues, and profits of said premises, from the said 10th day of March, 1893, and while the plaintiff has been excluded therefrom by the defendants, is \$1,000." The demurrer specifies the following grounds of objection to the complaint: "First, the action has not been commenced within the time limited by the Code of Civil Procedure of Oregon or by law; second, the court has no jurisdiction of the subject of the action; and, third, the complaint

does not state facts sufficient to constitute a cause of action."

Stephen A. Lowell, for appellant. J. J. Balleray, for respondents.

WOLVERTON, J. (after stating the facts). So far as this court is advised by the record, the plaintiff may be holding by mesne conveyances under a certificate from the United States, issued after the performance of all the requirements of the laws and regulations for the acquirement of a patent to such mine, and the premises upon which the same is located. If such is the case, the paramount title may be said to be in the government of the United States, and the right to maintain the action rests with the plaintiff at the same time. *Aurora Hill Con. Min. Co. v. 85 Min. Co.*, 34 Fed. 515, 15 Morr. Mines, 581; *People v. Shearer*, 30 Cal. 647 et seq.; *Barney v. Dolph*, 97 U. S. 652; *Wilson v. Fine*, 38 Fed. 789. The rule is that, when the contract of purchase is completed by payment of the purchase money and the issuance of the patent certificate by the authorized agent of the government, the purchaser acquires a vested right in the land, of which he cannot be subsequently deprived, if he has complied with the law prior to entry. It then ceases to be a part of the public domain, and is no longer subject to the laws governing the disposition of public lands. Under such a state of facts, the limitations prescribed by the Justices' Code (section 2178, Hill's Ann. Laws Or.)¹ can have no application. Such an interest is a legal estate in lands, and can be recovered by an action of ejectment. With the question as to what estate in lands, whether legal or otherwise, a person may have who has simply located a mine, or who has performed acts thereon for the purpose of acquiring title thereto, short of the acquirement of a certificate from the government, we have nothing to do in this case, and therefore do not now attempt to decide. "Sufficient unto the day is the evil thereof." The cause will be remanded, with directions to the court below to overrule the demurrer.

BUSH v. MITCHELL et al.

(Supreme Court of Oregon. Aug. 5, 1895.)

APPEAL—ACCEPTANCE OF PART OF JUDGMENT—WAIVER.

Where the complaint, in an action on a note, alleged that a certain amount was a reasonable attorney's fee, and the answer put in issue all the allegations of the complaint, and plaintiff's offer to prove the reasonableness of the fee was refused, and judgment was rendered for him for the amount of the note but not the fee, by receiving a payment on the judgment he waived his right to appeal from the denial of the counsel fee.

Appeal from circuit court, Marion county; George H. Burnett, Judge.

¹ Hill's Ann. Laws, § 2178, provides that one year's adverse possession of a mine is a bar to an action for its possession.

Action by A. Bush against S. Z. Mitchell and others on a note. Judgment was rendered for plaintiff for the amount of the note, but an attorney's fee claimed by him was denied. He received a payment on the judgment, and appealed from the denial of the attorney's fee, and defendant moves to dismiss the appeal. Motion granted.

H. J. Bigger and Tilmon Ford, for appellant. O. F. Paxton, for respondents.

PER CURIAM. This is a motion to dismiss an appeal. The facts are that on February 24, 1894, the plaintiff, having commenced an action against the defendants, obtained a judgment therein for \$24,556.50, the amount due on a promissory note, containing a provision for reasonable attorney's fees in case suit was instituted for its collection; that the complaint in said action, in addition to the usual averments, also alleged that \$1,200 was a reasonable sum as attorney's fees, all of which having been put in issue by the answer, the plaintiff at the trial offered evidence tending to prove the said allegation, to the introduction of which the defendants objected, and, their objection having been sustained, an exception was saved; that, on May 28, 1894, the judgment, interest, and costs amounted to \$23,318.80, and the defendants, claiming to have a cross demand of \$2,938.83, which they desired to offset, paid to the plaintiff, who received and receipted for the same, the sum of \$22,379.97 on account of the judgment; that, on August 24, 1894, the plaintiff served and filed a notice of appeal and gave an undertaking therefor, and, the transcript having been filed in this court, the defendants move to dismiss the attempted appeal, and contend that the plaintiff, having accepted a part of the judgment, has waived his right of appeal, while the plaintiff insists that the claim for attorney's fees and the demand for the amount due on the note are severable, and that, if the error complained of be manifest, the judgment should be reversed, and the cause remanded to try the claim for attorney's fee only. The rule is universal that a party will not, without the consent of his adversary, be permitted to split up his demand and maintain separate actions on the several parts. *Little v. Portland (Or.)* 37 Pac. 911. So, too, it is equally well settled that a party will not be permitted to maintain separate appeals from parts of a judgment or decree. *Elliott, App. Proc.* § 18. "There is a class of cases," says the same learned author (section 99), "which apparently form an exception to the general rule that an appeal will not lie from part of a case; but the cases forming this class will be found on investigation to be apparent, rather than actual, exceptions. The class to which we refer is composed of cases wherein an issue, distinct, entire, and complete, is formed between some of the parties, and upon which issue a final judgment is given affecting only the interests and rights of the parties to that issue." In

prescribing the form of a notice of appeal, the statute provides that: "Such notice shall state that the appellant appeals from the judgment or decree of the circuit court, or some specified part thereof, and in case the judgment be one rendered in an action at law, shall specify the grounds of error with reasonable certainty, upon which the appellant intends to rely upon the appeal." Hill's Code, § 537, subd. 1. It also provides that: "Upon an appeal, the appellate court may affirm, reverse, or modify the judgment or decree appealed from, in the respect mentioned in the notice, and not otherwise, as to any or all of the parties joining in the appeal, and may include in such decision any or all of the parties not joining in the appeal, except a co-defendant of the appellant against whom a several judgment or decree might have been given in the court below; and may, if necessary and proper, order a new trial." Id. § 544. The section of the statute last quoted, when interpreted by the apparent exception to the general rule applicable to appeals (Elliott, App. Proc. § 99), would seem to refer to some of the parties between whom a distinct issue is formed, and who would be permitted to appeal from so much of the judgment or decree given in the whole case as may determine such particular issue,—for example, the parties to a foreclosure proceeding who seek to establish among themselves a priority of lien. From the example given it can readily be seen that, under the statute, separate appeals may be maintained from distinct parts of a decree in equity, but it may well be doubted if such appeals lie from judgments in actions at law. Thayer, J., in construing these sections of the statute, says: "These two provisions, taken together, seem to restrict the review to the part of the decree specified in the notice, although the latter portion of section 533 of the Code (Hill's Code, § 543) provides that, upon an appeal from a decree given in any court, the suit shall be tried anew upon the transcript and evidence accompanying it. This would seem to imply that the whole case would be before the appellate court for trial *de novo*, though it might be sufficient answer to repel the inference that an appeal from a part of a decree is not 'an appeal from a decree,' within the meaning of the above provision, that said provision was only intended to apply to an appeal from an entire decree. Still, I think a more satisfactory construction can be given to the provision, and make it harmonize with the view I have indicated, by construing the several provisions together, and giving effect to all of them. Under such construction, the conclusion would necessarily follow that the trial of the suit anew would be confined to a trial of the case affecting the part of the decree specified in the notice of appeal." Shook v. Colohan, 12 Or. 242, 6 Pac. 503. The case of *Inverarity v. Stowell*, 10 Or. 261, was a controversy between a mortgagee and subsequent lien claimants,

and it was there held that the decree, as to the lien claimants, being severable, the plaintiff could appeal from that part of it. "The party appealing," says Wade, C. J., in *Barkley v. Logan*, 2 Mont. 296, in construing a similar statute, "must bring the whole decree before the appellate court (otherwise it has no jurisdiction to hear the case), and may specify in his notice of appeal the portion of the decree he wishes to reverse. He cannot sever the decree, and leave that portion of it favorable to himself in force in the district court, and appeal from that portion adverse to him." So, too, in *Construction Co. v. O'Neill*, 24 Or. 58, 32 Pac. 764, it was held that the appellant could not have a decree in the lower court for a given amount and here for an additional sum. An appeal from a part of a decree must necessarily bring to the appellate court the whole decree, and while the part appealed from may be affirmed, modified, or reversed, the portion not reviewed will be affirmed. The whole cause being tried here *de novo*, a complete decree must be rendered in this court. In actions at law this court can review judgments only as to questions of law appearing upon the record; and, when error is discovered, the cause must be remanded to the court below for further proceedings. The reversal of a judgment necessarily opens it; and, if opened for one, it must be for all purposes. Otherwise litigation would be interminable, and actions tried and appeals taken by piecemeal,—a result which would be contrary to the policy of the law. Appeals in actions at law must bring up for review the issues tried in the court below, and, the answer in the case at bar having denied all the material allegations of the complaint, the judgment rendered thereon is not severable, and the plaintiff's acceptance of a part of its fruits is an acquiescence therein which bars his right of appeal. *Moore v. Floyd*, 4 Or. 260; *Construction Co. v. O'Neill*, 24 Or. 54, 32 Pac. 764; *Ehrman v. Railway Co. (Or.)* 38 Pac. 306; *Lyons v. Bain*, 1 Wash. T. 482; 2 Beach, Mod. Eq. Prac. § 926; 2 End. Pl. & Prac. 174, and notes. It follows that the appeal must be dismissed, and it is so ordered.

EDDY v. KINCAID.¹

(Supreme Court of Oregon. Aug. 5, 1895.)

CONSTITUTIONAL LAW—LEGISLATIVE POWERS—APPOINTMENT OF RAILROAD COMMISSIONERS—ELECTION BY LEGISLATURE.

1. Hill's Ann. Laws, § 4003, vesting in the legislature the power to appoint railroad commissioners, is constitutional.

2. Under Hill's Ann. Laws, § 4003, a railroad commissioner is entitled to hold his office for two years, and until his successor is "duly elected and qualified"; and failure of the legislature to elect his successor at the expiration of his term does not create a vacancy in the office.

3. Where a railroad commissioner holds over because of the failure of the legislature to elect his successor, the fact that he does not re-

¹ Rehearing denied. See 41 Pac. 655.

new his official bond neither forfeits the office nor releases the sureties on such bond.

4. The Australian ballot law of 1891, section 1 of which fixes the date of the general election at which certain named officers and "all other state, district, county or precinct officers provided by law" shall be elected, does not repeal by implication Hill's Ann. Laws, § 4003, providing for the election of railroad commissioners by the legislature.

Appeal from circuit court, Marion county; H. H. Hewitt, Judge.

Mandamus by James B. Eddy against H. R. Kincaid, secretary of the state, to compel the defendant to issue a warrant on the state treasurer for plaintiff's salary as railroad commissioner. From a judgment granting the writ, defendant appeals. Affirmed.

Frank V. Drake, for appellant. J. C. Moreland and R. Mallory, for respondent.

BEAN, C. J. This is a proceeding by mandamus to compel the secretary of state to draw a warrant on the state treasurer for the balance of salary alleged to be due plaintiff as railroad commissioner for the quarter ending March 31, 1895. The act creating the board of railroad commissioners provides that the persons constituting such board shall be chosen biennially by the legislative assembly, and "shall hold their office for and during the term of two years and until their successors are elected and qualified as in this act provided, and if a vacancy occurs by resignation, death or otherwise, the governor shall appoint a commissioner to fill such vacancy for the residue of the term." Hill's Ann. Laws, § 4003. In compliance with the provisions of this statute, the legislature of 1893 regularly elected plaintiff as one of the commissioners, and he immediately thereafter qualified and entered upon the discharge of his duties, and has continued so to act. The legislature of 1895, although making the necessary appropriation to pay the salary and expenses of the commissioners, failed and neglected to choose a successor to plaintiff, and by reason thereof and the provisions of the law under which he was chosen he now claims the right to hold the office, and receive its emoluments, until a successor shall be regularly chosen in the manner provided by law. The defendant, the secretary of state, however, being in doubt as to the plaintiff's right to the office, refuses to draw a warrant in payment of his salary as such commissioner, and suggests as reasons for his refusal: (1) That so much of the act creating the commission as provides for the election of the members thereof by the legislature is unconstitutional and void, and therefore plaintiff was never legally elected to such office; (2) that, if plaintiff was legally elected in 1893, the failure of the legislature to elect his successor in 1895 created a vacancy in the office, which must be filled by appointment by the governor; (3) if he is in error in both of these positions he claims that the failure of plaintiff to renew his official bond ipso facto

worked a forfeiture of the office; and (4) that so much of the act as provides for the election of railroad commissioners by the legislature is repealed by implication by the act known as the "Australian Ballot Law."

It will be observed that this is not a contest between the plaintiff, claiming to hold over after the expiration of his original term, and an appointee of the governor, made on the assumption that a vacancy existed in the office. Nor does the case involve the existence of the office itself, but the real question here is whether the plaintiff shall hold the office and receive its emoluments by virtue of his election in 1893, or whether it is vacant, and must be filled by an appointment by the governor. We proceed to state briefly our views of the objections made by the secretary of state to the payment of plaintiff's salary.

1. In view of the former decisions of this court and the practical exposition of the constitution from almost the organization of the state to the present time it is in our opinion now too late to question the right of the legislature to appoint the class of public officers to which the plaintiff belongs. It is admitted that there is no direct inhibition in the constitution against the exercise of such a power by the legislature, and it has been the long-continued practice of that body to create a certain class of public offices, and to appoint the incumbents thereof. The state librarian, fish and pilot commissioners, food commissioner, game and fish warden, boatmen at Astoria, and the railroad commissioners have always been elected by the legislature in joint convention, and the right to do so has never been questioned, except in the case of *Biggs v. McBride*, hereafter referred to. We have thus for a series of years concurrent legislative exposition of the constitution to which the court ought to yield unless satisfied that it is repugnant to its plain words. Of course, the plain provisions of the constitution cannot be broken down by practical exposition; but when, as here, such a practice is in violation of none of its express provisions, such an exposition is a very persuasive argument, and often of controlling force. In speaking of the effect of practical exposition, it was said by an able court that "it has always been regarded by the courts as equivalent to a positive law." *Bruce v. Schuyler*, 4 Gilman, 267. And in *Rogers v. Goodwin*, 2 Mass. 477, in giving a reason for adhering to long-continued exposition, it is said: "We cannot shake a principle which in practice has so long and extensively prevailed." Indeed, harmony prevails throughout the whole scope of judicial opinion on this question. *Cline v. Greenwood*, 10 Or. 230; *Hovey v. State* (Ind. Sup.) 21 N. E. 890, and authorities there cited. Independently, then, of judicial authority, we should hesitate to declare the act in question unconstitutional because of the practical exposition given to the constitution by the legislature, and acquiesced in by the other departments

of government and the people. But we are not without authority on the question. In *Biggs v. McBride*, 17 Or. 640, 21 Pac. 878, the right of the legislature to appoint railroad commissioners under the act now before us was called in question, and, while the case might have been decided on another point, it nevertheless received much consideration at the argument, and was one of the principal questions discussed by the court in its opinion, and the conclusion reached presumably met with the approval of the then members of the court. In that case it was contended, as here, that the right to appoint to public office belongs exclusively to the executive, and that the assumption of the legislature to fill the office of railroad commissioner by persons of their own selection is a usurpation by that department of government of powers that are vested by the constitution in the executive. Answering this argument, Mr. Justice Strahan said: "It was not claimed at the argument that there is any express provision of the constitution which authorizes the governor in direct terms to make the appointment in question, but that it is included in the grant contained in section 1, article 5, of the constitution. That section declares, 'The chief executive power of the state shall be vested in a governor.' Now, if it could be shown that the power to appoint all officers which are not expressly made elective by the people is a part of 'the chief executive power of the state,' the appellant's contention would be sustained. But no authority whatever has been cited to sustain this view, nor is it believed that any exists. On the contrary, the provisions of the fifth article of the constitution, which relates to the executive department, all seem at variance with this view. The framers of this instrument evidently designed that no prerogative powers should be left lurking in any of its provisions. No doubt they remembered something of the history of the conflicts with prerogatives in that country from which we inherited the common law. They therefore defined the powers of the chief executive of the state so clearly and distinctly that there ought to be no controversy concerning the method of filling, or, in some cases, of changing the method of filling, an existing office." And, after referring to the several offices which have been uniformly filled by appointment by the legislature, the learned judge continued: "The power exercised by the legislature in the appointment of some of these officers is almost coeval with the constitution. The power thus exercised has never been called in question, but has ever been acquiesced in by every department of the government, and is in itself a contemporaneous construction of the constitution, which, if the question were doubtful, might be sufficient to turn the scale in its favor. Under any view, such construction is entitled to great weight, and could not be lightly regarded." And in *State v. George*, 22 Or.

152, 29 Pac. 356, which involved the right of the legislature to appoint, or provide for the appointment by some authority other than the executive, of the bridge commissioners of the city of Portland, Mr. Justice Lord said: "Except as limited by constitutional restrictions, it is agreed that the legislature may exercise all governmental powers. It is the lawmaking power of the state. While our constitution separates the powers of government into three distinct departments, and prohibits any of them from exercising any powers confided to the other. It does not undertake to declare what shall be considered legislative, executive, or judicial acts." And he quotes from Walker, J., in *People v. Morgan*, 90 Ill. 558, that such "provision declares only in general terms that each department of the government shall be confined to the exercise of the functions of its own department. It does not undertake to define in any specific manner what are legislative, executive, or judicial powers or acts. Like most other provisions of that instrument, the terms employed are of the most general and comprehensive character. * * * The executive power in a state is understood to be that power, wherever lodged, which compels the laws to be enforced and obeyed. And the instrumentalities employed for that purpose are officers, elected or appointed, who are charged with the enforcement of the laws. But the power to appoint is by no means an executive function, unless made so by organic law or legislative enactment. And in this case it is not so unless the power is thus conferred." In view of these judicial expressions by our predecessors, and the long-continued practical exposition of the constitution, to which we have already referred, we feel constrained to hold the act in question constitutional, although, if the question was one of first impression, the court, as at present organized, might probably hold otherwise.

2. It is next contended that the failure of the legislature of 1895 to elect plaintiff's successor operated to create a vacancy in the office, and that plaintiff was not entitled to hold over; but it seems to us this question is settled by the express declaration of the constitution of this state and of the law under which he was elected. Section 1 of article 15 of the constitution provides that "all officers, except members of the legislative assembly, shall hold their offices until their successors are elected and qualified," and the act creating the board of railroad commissioners provides that such officers "shall hold their office for and during the term of two years and until their successors are elected and qualified as in this act provided." It is thus declared both in the constitution and the act itself that the incumbent of the office shall hold until his successor is elected and qualified. The legislature having failed to elect plaintiff's successor, it necessarily follows, if we are to give force and effect to the

plain and express provisions of the constitution and the law, that he is entitled to hold the office, and to receive its emoluments, until such time as his successor shall be duly elected. And to this effect are the authorities under similar provisions of law. *State v. Simon*, 20 Or. 365, 26 Pac. 170; *Gosman v. State*, 106 Ind. 203, 6 N. E. 349; *State v. Harrison*, 113 Ind. 435, 16 N. E. 384; *State v. Howe*, 25 Ohio St. 588; *People v. Tilton*, 37 Cal. 614; *Badger v. U. S.*, 93 U. S. 599.

3. It is next claimed that the sureties on plaintiff's official bond would not be liable for any breach thereof occurring after the expiration of the two-years term provided by law, and that, therefore, his failure to renew the bond after the expiration of such term of itself worked a forfeiture of the office. There is a line of authorities which hold that, where one is elected to an office under a law which provides that he shall hold the office for a fixed term, and until his successor is elected and qualified, and he is either re-elected at the expiration of the term, but fails to give a new bond, or a successor is regularly elected, but fails to qualify, and he is permitted to hold over, the sureties on his bond are not liable for a defalcation occurring after the expiration of the fixed term. But these authorities seem to proceed generally upon the theory that his holding over is wrongful, because his own re-election, or that of his successor, and a failure to qualify, terminated his right to the office, and created a vacancy which should have been filled by the proper appointing power. *Scott Co. v. Ring*, 29 Minn. 398, 13 N. W. 181. But, whatever may be the true rule in the character of cases above suggested, "the weight of American authority sustains the proposition," says Mr. Throop, "that where an officer holds over rightfully,—that is, pursuant to a statute providing that he shall hold over until his successor shall be chosen, or shall be chosen and shall qualify,—this constitutes one of the exceptions to the rule that the liability of the sureties in an official bond does not extend beyond the principal's term, and that the sureties are liable for his defaults during the additional time." Throop, Pub. Off. § 213. The author cites in support of this position, *Akers v. State*, 8 Ind. 484; *Thompson v. State*, 37 Miss. 518; *State v. Wells*, 8 Nev. 105; *U. S. v. Jameson*, 3 McCrary, 620; *Mayor, etc., v. Horn*, 2 Har. (Del.) 190; to which may be added *State v. Kurtzeborn*, 78 Mo. 98; *Chairman v. Daniel*, 6 Jones (N. C.) 444. It would seem from this rule that, since plaintiff is rightfully holding over by virtue of the express provisions of the law creating the office, and his successor has never been chosen, that the sureties on his official bond continue liable, and no new bond is necessary. But, however this may be, it seems to us clear that the mere failure by plaintiff to renew his bond, if it was necessary, did not of itself work a forfeiture of the office, but, under any view, could be nothing more than a

ground of forfeiture in a proper proceeding for that purpose. As no such proceeding has been taken, and as there is no law of which we are aware authorizing the secretary of state to declare a public office forfeited, it follows from either view of the question that plaintiff is entitled to the office and its emoluments, notwithstanding the fact that he has failed to renew his official oath or bond.

4. And, finally, it is claimed that so much of the act creating the board of railroad commissioners as provides for the election of such officers by the legislative assembly was repealed by implication by the act of 1891 known as the "Australian Ballot Law," the first section of which declares "that a general election shall be held in the several election precincts in this state on the first Monday in June, 1892, and biennially thereafter, at which there shall be chosen so many of the following officers as are to be elected in such year [naming several state officers, the railroad commissioners, however, not being among the number], and all other state, district, county or precinct officers provided by law." The contention for defendant is that, the office of railroad commissioner having been created prior to the passage of this act, the latter clause of the section quoted repealed by implication the then existing provisions authorizing the legislature to elect such commissioners. But a sufficient answer to this contention is that the section of the Australian ballot law relied upon by the defendant is not a new legislative declaration, but is merely a re-enactment of the provisions of the law as it existed long prior to the creation of the board of railroad commissioners, and therefore does not repeal by implication any provision of that act, even if it is in conflict therewith. *Endl. Interp. St. § 195*. We conclude, therefore, after a careful examination of this case and all the questions involved in it, that the judgment of the court below was right, and must be affirmed.

DEKUM et al. v. DEKUM.

(Supreme Court of Oregon. Aug. 5, 1895.)

ALLOWANCE TO WIDOW.

1. Under Hill's Code, § 1128, authorizing, where the property of a decedent exempt from execution is insufficient to support the widow for one year after filing of the inventory, an allowance, provided the other estate is sufficient to pay all the liabilities of the estate and costs of administration, the court can, on a showing that testator devised all his property exempt from execution to his children, and that the income of the estate exceeds what is necessary to pay all debts and the expenses of administration, order a monthly allowance to the widow.

2. The fact that a widow, prior to the obtaining by executors of an order of court for a monthly allowance, agreed, for a valuable consideration, that it should be in lieu of dower, does not justify the executors in refusing to pay such monthly allowance, unless she re-

ceipts for the same as in lieu of dower, where the order contains no provision that it shall be so received.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Petition by Phoebe M. Dekum against Edward Dekum and another, executors, to compel defendants to pay her the monthly allowance in accordance with an order of court. From a decree for petitioner, the executors appeal. Affirmed.

M. W. Smith, for appellants. Seneca Smith, for respondent.

PER CURIAM. This is an appeal from the decree of the circuit court affirming an order of the county court of Multnomah county. The facts are: That on October 19, 1894, Frank Dekum died testate in said county, and, his last will having been admitted to probate, Edward Dekum and Adolph Dekum, who were named therein as executors thereof, duly qualified as such, and on November 16th of that year filed in said county court their petition, from which it appears that an inventory had been taken, and that the appraised value of the estate, over and above all probable indebtedness, amounted to \$548,082.71; that the net monthly income therefrom after paying expenses, taxes, and interest, was about \$1,000; that the deceased had devised and bequeathed all his property exempt from execution to his children,—and upon this showing prayed for an order directing them to pay to Phoebe M. Dekum, the widow of the deceased, such sum as the court should find her entitled to receive for her support from the estate, pending the administration thereof; and on the 27th of that month an order was made directing them to pay her \$300 per month for that purpose for the term of one year from the death of her husband, or until the further order of the court. That the executors paid the monthly installment which became due November 19th, but, having made default in the payment of the allowance for the following month, upon the petition of the widow they were cited to appear and show why they had not complied with the terms of the order, to which petition they filed an answer, alleging, in substance, that they were ready and willing and offered to pay her the allowance awarded upon receiving from her a receipt showing that she accepted the same in lieu of her dower interest in the estate for the month ending December 19, 1894; that the petition for her allowance, and the order made thereon, were prepared and obtained by them in pursuance of an express agreement with the widow that the monthly allowance was to be paid her in lieu of any and all dower or claim of dower during the continuance of such allowance. This answer was, upon motion, struck out, and an order made requiring the executors forthwith to pay to the widow the installment due December 19, 1894, from which order the executors appealed to the circuit court of said

county, and, being there affirmed, they appeal to this court.

The property of the estate exempt from execution having been devised and bequeathed by the testator to his children, and the estate being sufficient to satisfy all the debts and liabilities of the deceased, and pay the expenses of the administration, together with such allowance, the right of the county court to make the order cannot be successfully controverted. Hill's Code, § 1128.¹ But it is contended that the court erred in striking out the executors' answer to the widow's petition. The order requiring the executors to pay the allowance contains no proviso or condition that the amount awarded to the widow for her support should be received by her in lieu of dower. If, upon sufficient consideration, she made the agreement alleged in their answer, the proper time to plead it, if available as a defense, is when she makes a claim of dower during any portion of the time embraced in the order making the allowance. Under such circumstances the widow was entitled to the monthly installment upon giving an ordinary receipt therefor, and, not having made any claim of dower, the answer of the executors to her petition was frivolous, and in striking it out the county court committed no error.

The decree is affirmed.

CAMERON v. WASCO COUNTY.

(Supreme Court of Oregon. July 20, 1895.)

APPEAL—SUFFICIENCY OF NOTICE—COUNTY ROADS—LOCATION—NOTICE—RECORD—SUFFICIENCY.

1. Where the notice of appeal from the judgment of a circuit court on review of proceedings for location of a road shows on its face that the jurisdiction of the county court over the proceedings is involved, it need not specify the alleged errors of the circuit court as required by Hill's Code, §§ 537, 591, in order to give the supreme court jurisdiction.

2. The recital in the record of the county court that it satisfactorily appeared that due notice of the pendency of a proceeding to locate a road was given as required by law, was not a sufficient showing that the notice was posted in three public places in the vicinity of the proposed road, as required by Hill's Code, § 4063, in the absence of an averment of that fact in the proof of advertising the notice, so that the county court failed to acquire jurisdiction of the proceeding.

Appeal from circuit court, Wasco county; W. L. Bradshaw, Judge.

Proceeding by James Cameron against Wasco county. From a judgment for defendant, plaintiff appeals. Reversed.

A. J. Dufur, for appellant. W. H. Wilson, for respondent.

¹ Hill's Code, § 1128, authorizes the court, when the property of a decedent exempt from execution is insufficient to support the widow for one year after filing of the inventory, to order the executors or administrators to make her an allowance, provided the other estate is sufficient to pay all the liabilities of the estate and costs of administration in addition to such allowance.

MOORE, J. This is an appeal from the judgment of the circuit court upon review of the proceedings of the county court of Wasco county in the location and establishment of a county road therein. It appears from the record that the circuit court sustained the action of the county court, and dismissed the writ of review. The transcript having been filed in this court, the respondents move to dismiss the appeal for the following reasons: (1) That the notice of appeal does not specify the errors upon which the appellant relies; (2) that the notice does not describe any judgment or decision with sufficient certainty to give this court jurisdiction; and (3) that there is a misdescription of the judgment, consisting of a variance between the description of the judgment given in the notice and that shown in the transcript. The notice, so far as material here, omitting title, is as follows: "You and each of you will please take notice that the above-named plaintiff, James Cameron, hereby appeals to the supreme court of the state of Oregon from all that certain decision and judgment made and rendered in the above-entitled cause by Honorable W. L. Bradshaw, judge of the above-named court, at chambers, at Dalles City, Wasco county, Oregon, on the 26th day of January, 1895, and entered of record on page 96 and 97 of Journal J of Records of said court, and to which record you are hereby referred as the decision and judgment hereby appealed from. Appellant will in this appeal rely upon each and all of the errors committed by the county court of Wasco county as appears by the files and records of said court in the matter of laying out or attempting to lay out the county road, or pretended county road, mentioned and described in the decision and judgment hereby appealed from; and the said county court erroneously exercised its judicial functions and exceeded its jurisdiction in the matter of laying out, or attempting to lay out and establish said county road, or pretended county road, and in the following particulars: [Here follow five alleged errors of the county court, after which the notice proceeds as follows]: And said circuit court, acting by and through its judge, said Honorable W. L. Bradshaw, erred in deciding and adjudging that said county court committed no errors in the matter of its proceedings relating to its attempted location and establishment of said proposed county road, and in affirming all said acts or any of said acts of said county court relating thereto, and in deciding said pretended road a public highway, and in dismissing the writ of review issued upon plaintiff's petition, for the reason that said county court acted without jurisdiction in the matter mentioned in plaintiff's petition and appearing in the return of said writ." The statute provides that an appeal may be taken from a judgment of the circuit court on review in like manner and with like effect as from a judgment rendered in said court in

an action at law (Hill's Code, § 591); that is, the notice of appeal in such cases must specify the grounds of error with reasonable certainty upon which the appellant intends to rely upon the appeal (Id. § 587), and, the notice in this case not having specified any grounds of error with reasonable certainty, the respondent contends that this court should not examine the record on appeal, while the appellant insists that on an appeal from a judgment of the circuit court on review involving a question of the jurisdiction of the county court no specification of the alleged errors is necessary in order to give this court jurisdiction of the appeal. Thayer, C. J., in *Woodruff v. Douglas Co.*, 17 Or. 314, 21 Pac. 49, in commenting upon a motion to dismiss an appeal for the same reason as here assigned, said: "The dismissal of an appeal by the appellate court for the cause mentioned is not upon the grounds that the court has no jurisdiction of the appeal, but for the reason that the appellant failed to inform the adverse party as to the grounds of error upon which he intended to rely upon the appeal, as the Code requires him to do. But it does not follow that because the court may dismiss the appeal in such case it will do so when the record discloses an inherent infirmity in the judgment or other determination appealed from." In the matter of laying out and establishing roads, county courts are of inferior and limited jurisdiction (*Thompson v. Multnomah Co.*, 2 Or. 34; *Johns v. Marion Co.*, 4 Or. 46; *State v. Officer*, Id. 180; *Canyonville & G. Road Co. v. Douglas Co.*, 5 Or. 284); but when the record of their proceedings shows that jurisdiction has been obtained of the subject-matter and of the parties interested in locating and establishing a county road, the same intendments obtain in favor of the regularity of their proceedings as prevail in courts of general jurisdiction (*State v. Myers*, 20 Or. 442, 26 Pac. 307; *Bewley v. Graves*, 17 Or. 274, 20 Pac. 322). It would seem from these decisions that upon an appeal from the judgment of a circuit court on review of proceedings for the location of a road, when the question of a want of jurisdiction of the county court is involved, that the notice of appeal need not specify the alleged errors of the circuit court, but that when it appears that jurisdiction had been acquired by the county court of the subject-matter and persons of the interested parties, and any intermediate orders of the county court were reviewed by the circuit court, a statement of the alleged errors is necessary in the notice of appeal.

The jurisdiction of the circuit court to affirm the proceedings of the county court depends upon the question of jurisdiction of the latter court; for, if the county court assumed to act without jurisdiction in the matter of laying out a county road, the circuit court is powerless to affirm its acts. *Woodruff v. Douglas Co.*, supra. And the notice of appeal in the case at bar having challenged

the jurisdiction of the county court, and this fact being apparent from an inspection thereof, it follows that this court acquires jurisdiction of the cause upon the record without any assignment of errors. The notice refers to the judgment as having been recorded at certain pages of the journal of the circuit court. In *Neppach v. Jordan*, 13 Or. 246, 10 Pac. 341, the court, in discussing the sufficiency of the description of a judgment in a notice of appeal, said: "That is certain which can be made certain by reference to some paper in the case of which the court can take judicial notice." But, conceding that the description of the judgment must appear upon the face of the notice of appeal (*Luse v. Luse*, 9 Or. 149), it is manifest that the concluding part of the notice in question intelligibly refers to the action, and sufficiently shows that the circuit court affirmed the acts of the county court, and dismissed the writ of review. It is contended that the notice shows the appeal to have been taken from the decision of the judge, and not from a judgment of the circuit court. But the concluding part of the notice conclusively shows that it is the judgment of the circuit court of which the appellant complains, and hence it follows that the motion to dismiss the appeal must be denied.

The record also shows: That the proof of the posting of the notices was made by the following affidavit:

"State of Oregon, County of Wasco—ss.: I, G. Segul, being first duly sworn, on oath say that I posted four notices (a copy of which is hereunto annexed) of the proposed road in the following places, to wit: One at the beginning of proposed road, viz. 7.10 ch's S. and 7.15 ch's E. of N. E. cor. of Lafayette Colwell D. L. C. No. 38, Not. 54; one at about midway en route of said road, at a point 9.00 ch's E. and 4 ch's N. of the S. W. cor. of the E. ½ of said Lafayette Colwell D. L. claim; one at the terminus of said road, viz. a point 3 ch's N. of cor. to secs. 22, 23, 26, and 27, T. 1 N., R. 12 E.; and one at the place of holding county court in Dallas City, in said Wasco county, and state of Oregon,—thirty days prior to the presentation of petition herein, and that all of said petitioners are householders residing in the vicinity of said proposed road, in said Wasco county, and state of Oregon. [Signed] G. Segul.

"Subscribed and sworn to before me this 30 day of December, A. D. 1893. J. B. Crossen, County Clerk. [Signed] E. Martin, Deputy."

—That on Saturday, January 6, 1894, the county court of Wasco county made an order continuing the matter of the petition for said road until the March term thereof, and on March 10th of that year made the following order: "On this day comes on to be heard the petition of John Mesple and others, praying for the location of a county road, which said matter was continued from the January term of this court. And it satisfactorily ap-

pearing from the proof filed herein that due notice of the pendency of this proceeding has been given as by law required; that more than twelve of said petitioners are legal householders, residing in the vicinity of said proposed road; and that a good and sufficient bond has been filed; and there being no objections or remonstrance filed at the time,—it is ordered by the court that T. H. Wakefield, George Ruch, and S. B. Adams be, and they are hereby, appointed viewers, and E. F. Sharp surveyor, to view, survey, and report upon said proposed county road, and that they meet at the commencement thereof on the 7th day of April, 1894, and report their findings thereon to this court, in writing, at the next regular term thereof." That the said viewers and surveyor having complied with the order of their appointment, the county court, on May 12, 1894, made an order, which, after describing the proposed road, contained the following: "And there being no remonstrance filed against the opening of said proposed road, and no claim for damages, and the court being satisfied from the report of the viewers that said proposed road would be of public utility, and the report of the viewers and surveyor having been read in open court on two different days of this term, and there being no objection, it is therefore hereby ordered that the prayer of the petitioners be granted, and that the report of the viewers and surveyor be recorded in the road records of this county, and from thenceforth said road shall be considered and hereby is declared to be a public highway and county road, and the supervisor of road district No. 9 is hereby directed to open the same." The proof of advertising the road notices falling to show that they were posted in public places, and the record of the county court being silent on that subject, the appellant contends that the county court failed to acquire jurisdiction of the proceedings. The statute (Hill's Code, § 4063) in substance requires that when any petition shall be presented to the county court for laying out a county road it shall be accompanied by satisfactory proof that notice has been given by advertisement posted at the place of holding the county court, and also in three public places in the vicinity of the proposed road. Had the journal entry of the county court recited that satisfactory proof had been given by advertisement posted at the place of holding the county court, and also in three public places in the vicinity of the proposed road, it would be presumed that jurisdiction had been acquired, though the affidavit of posting was ambiguous in its statement of facts. *Latimer v. Tillamook Co.*, 22 Or. 291, 29 Pac. 734. It is true the journal entry contains the following: "And it satisfactorily appearing from the proofs filed herein that due notice of the pendency of this proceeding has been given as by law required;" but this is not a recital of the necessary facts from which the ultimate fact

is established, but rather the statement of a legal conclusion, deducible from the presumptive proof of facts not stated in the record. If the county court, in the matter of locating county roads, was a court of general jurisdiction, and entitled to have every intendment construed in its favor, the rule might be otherwise; but, in view of its limited powers, we do not feel like extending the rule beyond that announced in *Latimer v. Tillamook Co.*, supra. The proof shows that the notices were posted in the vicinity of the proposed road, but it nowhere appears that the places at which they were posted were public. Such service is constructive, and in all cases rests upon the presumption that the party affected thereby has seen the notice (*Wade, Notice*, § 1029); but this presumption cannot be invoked unless the proof shows that the notices have been posted in public places, and in such manner as to afford the parties affected thereby an opportunity of seeing and reading them. There is nothing to show that these notices were posted in such a manner as to be seen and read by the public, and thus presumptively bring the knowledge of their contents home to the parties affected thereby. So far as the proof is concerned, they may have been, like the laws of *Calligula*, written in very small characters, and hung upon high pillars, the more effectually to ensnare the people. 1 Bl. Comm. 46. The due publication of these notices was the only means by which the county court could acquire jurisdiction of the matter, and, the record failing to show that the method prescribed by the statute had been pursued, it never acquired jurisdiction to make the order declaring the proposed road a public highway, for which reason the judgment is reversed, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

BURGTORF v. BENTLEY.

(Supreme Court of Oregon. July 20, 1895.)

APPEAL—FAILURE TO INCLUDE TESTIMONY OR BILL OF PARTICULARS IN THE RECORD—MANDAMUS AGAINST PUBLIC OFFICERS—FINE—COSTS.

1. Where there is no bill of exceptions or testimony in the record, the court will consider only whether, under the findings, appellant is entitled to the relief asked.

2. Hill's Ann. Laws, § 603, provides that whenever a peremptory mandamus is directed to a public officer, commanding him to perform a public duty, if his refusal to do so was without just excuse, the court may impose a fine. *Held*, that where a trial court, in granting a mandamus requiring a justice of the peace to allow an appeal and stay of proceedings, finds that the justice's refusal to allow the same was without excuse, but fails to impose a fine, it will be presumed that the court found that the justice's conduct was caused by ignorance of law, and was not prompted by bad faith or a disregard of duty.

3. Where, on mandamus to compel a justice to allow an appeal and stay of proceedings, defendant interposed every legal obstacle and ap-

pealed from the judgment of the trial court, he should, if the application is granted, be charged with the costs of both courts.

Appeal from circuit court, Baker county; Morton D. Clifford, Judge.

Mandamus by Herman Burtorf to compel W. H. Bentley, a justice of the peace, to allow an appeal and stay of proceedings. From a judgment granting the application, with one dollar damages, both parties appealed, but defendant abandoned his appeal. Affirmed.

J. L. Rand, for appellant. T. H. Crawford, for respondent.

BEAN, C. J. This is a mandamus proceeding instituted for the purpose of compelling the defendant, as justice of the peace for Baker City precinct, in Baker county, to allow an appeal and stay of proceedings in a certain action tried before him in August, 1894. An alternative writ was issued and served, and upon the return of the defendant thereto the cause was tried by the court below, without the intervention of a jury, and from its findings the facts appear to be that on August 13, 1894, a judgment was rendered by the defendant, as justice of the peace, in an action of forcible entry and detainer pending before him, in which one Eliza Geiser was plaintiff, and the petitioner here defendant, in favor of the plaintiff for the restitution of the premises in controversy and cost of action. That as soon as the judgment was announced, and before it was entered in the record, an execution which had been previously prepared was signed by the defendant, and placed in the hands of the constable for service, although the petitioner was present by his counsel, protesting and notifying the justice and the prevailing party that he desired to appeal from such judgment immediately, and would do so as soon as the papers could possibly be prepared. But, notwithstanding the protest of the petitioner, within an hour after the judgment was announced, and before it was entered of record, and before the papers for an appeal could possibly be prepared, the constable proceeded to comply with the commands of the execution, and forcibly ejected the petitioner from the premises, and delivered the possession thereof to the said Eliza Geiser, although the petitioner had in fact been in the quiet possession for nine years prior thereto, and had set that fact up in his answer to her complaint. That while the constable was engaged in the execution of the writ, and before the return thereof, Burtorf duly perfected an appeal by giving notice and filing the necessary undertakings on appeal, and for a stay of execution, required by law, and demanded of the defendant that he allow the appeal and recall the execution, which, without lawful excuse, he neglected and refused to do. That after the appeal had been perfected the constable returned the writ, with his proceedings indorsed thereon, showing

that he had ejected the petitioner, and put Eliza Geiser in possession of the premises. The court found that the petitioner was damaged by reason of the premises in the sum of one dollar, and as conclusions of law that he was entitled to a peremptory mandamus to compel the defendant to allow the appeal and recall the execution as of the 13th of August, 1894; to one dollar damages; and costs and disbursements of the proceedings. A judgment to that effect was rendered on November 27, 1894, and the defendant, without complying therewith, and for the purpose of staying its execution, on the 3d day of December perfected an appeal to this court. On the 27th of April, 1895, the petitioner also appealed. The defendant abandoned his appeal by failing to file a transcript, but the petitioner brings the transcript here, and now asks this court to award him damages, to which he claims to be entitled, and impose a fine upon the defendant under the provisions of section 603 of Hill's Ann. Laws. This section provides that whenever a peremptory mandamus is directed to a public officer, commanding the performance of any public duty specially enjoined by law, if it appears to the court or judge thereof that such officer has, without just excuse, refused or neglected to perform the duty so enjoined, the court may impose a fine not exceeding \$500.

The proceedings by the justice were unquestionably in violation of a statutory right of the petitioner, but if it be conceded that the section quoted applies to a judicial officer acting in a judicial capacity in determining the rights of a private individual, and that the refusal of the trial court to enforce its provisions can be reviewed on appeal, there is not enough in this record to enable us to do so. There is no bill of exceptions or testimony in the record, and the only question it presents is whether, under the findings of the court below, the petitioner is entitled to the relief he asks for at the hands of this court. The amount of damages sustained by him is conclusively fixed by the judgment, and cannot be inquired into here.

Upon the other question the finding is to the effect that defendant's refusal to allow the appeal and stay of execution was without excuse, which finding, in view of the action of the trial court in refusing to impose a fine as provided in the section referred to, must necessarily be understood as meaning that he thus acted without authority of law, but not in bad faith; and we must therefore assume that this conduct was either from ignorance of the law or timidity, and not from a desire to favor one party to the litigation, or to harass the other, or from a willful or intentional disregard of duty. So that, although the defendant's conduct apparently merits the severest condemnation, there is nothing in the record which would justify us in imposing a fine upon the defendant, even if it be conceded that, under the proper circumstances, we would have a right to do so.

But having espoused the cause of one of the parties by vigorously contesting this case, and putting every possible legal obstacle in the way of an appeal from the judgment rendered by him, even to the extent of appeal from the judgment of the circuit court directing the performance of a plain duty enjoined by statute, he should be mulcted with the costs and expenses, not only of this appeal, but of the court below. The judgment will therefore be affirmed, and the costs taxed against him.

BALFOUR et al. v. BAKER CITY GAS & ELECTRIC LIGHT CO. et al.

(Supreme Court of Oregon. July 20, 1895.)

CORPORATIONS—WITHDRAWAL OF PROMOTER—EVIDENCE—SUFFICIENCY.

1. A promoter of a corporation cannot, after the formation of the corporation, as contemplated in the preliminary subscription, revoke his subscription, as against a creditor of the corporation, though the other stockholders consent.

2. On an issue whether defendant, a promoter of a corporation, withdrew his subscription before the formation of the corporation, it appeared that the articles were filed in August, and that, soon after, part of the original subscribers, with the written consent of defendant, and others who were absent, elected directors, and completed the organization. Defendant claimed that his original subscription and his consent to the stockholders' meeting were signed the previous May, and that he withdrew before the meeting was held. Others testified that the papers were signed a few days before the articles were filed, and the records of the organization showed, first, a copy of the articles; immediately following, the consent to the stockholders' meeting, reciting that the signers were subscribers to the capital stock, and fixing the exact time and place of meeting; and, following that, a list of stockholders, and the minutes of the meeting. It also appeared that without defendant's subscription the company could not have been legally organized, for want of a sufficient subscription to its capital stock, and that defendant's name was entered on the stock books after the meeting by those whom he alleged consented to his previous withdrawal. *Held*, that he did not withdraw before the corporation was organized.

Appeal from circuit court, Baker county; Morton D. Clifford, Judge.

Action by Stephen Williamson and others, doing business as Balfour, Guthrie & Co., against the Baker City Gas & Electric Light Company and others, to enforce a stockholder's liability. From a judgment for plaintiffs, defendant I. Bloch appeals. Affirmed.

M. L. Olmsted, for appellant. W. F. Butcher, for respondents.

BEAN, C. J. This is a suit by a judgment creditor of the Baker City Gas & Electric Light Company, a corporation, against certain stockholders, to reach their unpaid subscription to its capital stock, and have the same applied to the satisfaction of plaintiffs' judgment. The only question here is whether the defendant I. Bloch is liable as a stockholder to the creditors of the corporation. The facts are that prior to August,

1888, certain citizens of Baker City, desiring to organize a corporation to furnish the city and its inhabitants with light, circulated a subscription for stock in a corporation thereafter to be formed for that purpose, and Bloch signed the same for 20 shares of the par value of \$50 each. After one-half of the capital stock of the proposed corporation had been thus subscribed, and on the 16th day of August, 1888, articles of incorporation were regularly executed and filed. No formal stock books were ever opened or stock subscribed other than as above mentioned, but on the 25th of August, 1888, a portion of the signers to the preliminary stock subscription held a meeting by the written consent of the others, and elected a board of directors for the corporation, and completed its organization. Bloch was not present at this meeting, but was one of the consenting parties. Subsequently his name and those of all the other subscribers to the preliminary agreement were entered as stockholders upon the stock journal and ledger of the company by its officers, and on the 21st of November, 1888, a certificate of stock in favor of Bloch was made out and signed by the president and secretary of the corporation. If these were all the facts in the case, defendant's liability would be clear, for it may now be accepted as established by the overwhelming weight of authority that an unconditional subscription to the stock of a proposed corporation takes effect and becomes irrevocable upon the birth of the corporation, unless sooner revoked. "Each subscription, when made," says Judge Davis, "becomes a conditional contract with every other person who may subscribe that the amount subscribed shall, upon the formation of the company, be paid in accordance with the terms of the subscription; and when the requisite stock is subscribed, and the company is duly organized, it becomes the offer or basis of credit to the public, or to all who may deal with it, and every subscriber participating in the organization thereby makes his subscription absolute, and is bound to pay it according to the terms of the charter and by-laws of the company, and he can discharge his liability in no other way." *Foundry Co. v. Killian* (N. C.) 6 S. E. 682. And in *Machine Co. v. Davis* (Minn.) 41 N. W. 1027, it is held that a subscription by a number of persons to the stock of a corporation thereafter to be formed by them has in law a twofold character. It is—First, a contract between the subscribers themselves to become stockholders, without further act on their part, immediately on the formation of the corporation; and, second, it is in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes, as to each subscriber, a contract between him and the corporation. And the authorities generally seem to be to the same effect. 1 Cook, Stock, Stockh. & Corp. Law (3d Ed.) §§ 72, 73; 1 Thomp. Corp. § 1170. And this is the better

rule, although the statute may provide for the opening of stock books by designated persons after articles are filed. 1 Cook, Stock, Stockh. & Corp. Law, § 57; 1 Thomp. Corp. § 1166; *Railway Co. v. Duncan*, 28 Mich. 130; *Railroad Co. v. Gifford*, 87 N. Y. 204. From an extended examination of the authorities we take the law to be that when the proposed corporation is formed as contemplated in the preliminary subscription, and within a reasonable time thereafter, the subscription, unless revoked in the manner authorized by law, becomes irrevocable; the subscriber a shareholder, and liable as such, without any further act on his part. *Power Co. v. Johnson* (Cal.) 29 Pac. 126; *Road Co. v. Lancaster*, 79 Ky. 532; *Real-Estate Co. v. Tower*, 136 Mass. 82, 30 N. E. 465; *Machine Co. v. Davis* (Minn.) 41 N. W. 1026. But it is said for the defendant that the preliminary subscription and his consent to a meeting of the stockholders for the election of directors were each signed by him some months before the articles of incorporation were executed or filed, and that before the formation of the corporation he notified Messrs. Parker and Hyde, the promoters thereof, that he could and would not take any stock in the proposed corporation. It seems to be agreed that Bloch did seek to be relieved from his subscription a short time after it was made, and that the two principal promoters of the enterprise, who afterwards became president and secretary of the corporation, consented thereto, and agreed to divide his stock among the other shareholders, and for that reason no call was ever made upon him by the company for the payment of his stock. But the main question is whether his attempted withdrawal was before or after the organization of the corporation. If it was after such organization, it was of no force or effect whatever as to the creditors of the company, because his contract or liability as a stockholder became binding and irrevocable, as to them, when the company was formed. Nor could the agents of the corporation, by their consent to his withdrawal, relieve him from such liability. 1 Mor. Priv. Corp. § 109. In *Hawley v. Upton*, 102 U. S. 316, the rule is thus stated by Mr. Chief Justice Waite: "It cannot be doubted that one who has become bound as a subscriber to the capital stock of a corporation must pay his subscription if required to meet the obligations of the corporation. A certificate in his favor for the stock is not necessary to make him a subscriber. All that need be done, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock of the corporation represents. If such an obligation exists the courts can enforce the contribution when required. After having bound himself to contribute, he cannot be discharged from the obligation he has assumed until the contribution has actually been made, or the obligation in some lawful way extinguished." The orig-

inal stock subscription was not produced on the trial, having been lost or mislaid; and hence we do not have its date, if it was dated, to aid us in determining the time at which it was signed, but must determine this question, as well as the time of Bloch's attempted withdrawal, from the indefinite and shadowy recollection of witnesses, and the admitted facts and probabilities of the case. The defendant testifies quite positively that he signed both it and the consent to the stockholders' meeting in May or June before the organization of the corporation, but the weight of testimony is against him on this point, and it seems to us his recollection is at fault. The great weight of the oral testimony is that the preliminary subscription was signed a few days before the articles were filed, and in contemplation of the immediate organization of the company; and we have no doubt the consent to the stockholders' meeting was signed by Bloch after the articles were filed, and copied in the record of the company. The records of the organization of the company is of itself such persuasive evidence on this point as to prevail over the mere indistinct recollection of witnesses testifying from memory to transactions occurring five or six years before. The first entry in this record is a copy of the articles of incorporation, immediately following which, and commencing at the top of the succeeding page, is the consent to the stockholders' meeting, signed by Bloch and others, and which recites that the parties signing are subscribers to the capital stock of the corporation. Following this is a list of stockholders, and the minutes of the meeting of August 25th. The original consent to the stockholders' meeting being in the record book immediately following the copy of the articles of incorporation and preceding the minutes of the meeting, is almost conclusive proof that it was written in the book and signed by the parties after the articles of incorporation were not only executed and filed, but copied in the record. And, besides, this written consent is for a stockholders' meeting to be held on the 25th of August, 1888, and at a particular place. If the preliminary subscription for stock and consent to the stockholders' meeting had been signed at the time claimed by the defendant, it is highly improbable that one would have been on a loose sheet of paper and the other in a record book; and it is still more improbable that the consent to the stockholders' meeting of a corporation thereafter to be formed, signed in May or June, would have fixed the date of such meeting on the 25th of August following. For this reason, as well as the place at which it appears in the records of the company, we think it must be taken as one of the established facts in this case that defendant gave his written consent as a stockholder to the first meeting of the shareholders of the company for the purpose of organization, after the articles of incorporation were filed, and that, therefore, he was

acting as a shareholder, and to that extent participated in the organization of the company. And, besides, without his subscription, the company could not have been legally organized, for want of a sufficient subscription to its capital stock.

The undisputed facts in the case, as well as the great preponderance of evidence and the general probabilities, clearly indicate to our minds that defendant's attempted withdrawal must have been after the organization of the corporation, otherwise the company could not have been organized, his signature would not appear to the consent for a stockholders' meeting, nor is it likely that his name would have been entered on the books of the company as a stockholder by one of the very parties who he claims consented to his release; nor would a certificate of stock have been made out in his name three months after the organization, signed by all the parties whom he claims consented to his withdrawal. Assuming, therefore,—but without deciding,—that a subscriber to the stock of a proposed corporation may withdraw his subscription before the formation of the corporation without the consent of all the other subscribers, we are clear that from this record the facts do not justify the application of the rule, and the decree must be affirmed.

BENJAMIN v. PUGET SOUND COMMERCIAL CO. et al.

(Supreme Court of Washington. July 30, 1895.)

CONTRACT TO FLOAT STRANDED SHIP—BREACH—DAMAGES—POSSIBLE PROFITS.

Where the captains of two tugs agreed with the owner of a stranded ship to try, for a certain sum, to float her, but did not guaranty to do so, and they made an unsuccessful attempt, wherein each tug broke its hawser, and, before other tugs could be secured, a storm arose which drove the ship so far ashore that it was impossible to float her, they are not liable to the shipowner for the difference in value of the wreck and the ship if floated.

Appeal from superior court, King county; R. Osborn, Judge.

Action by A. O. Benjamin against the Puget Sound Commercial Company and another for damages for breach of contract. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Greene & Turner, for appellant. Struve, Allen, Hughes & McMicken, for respondents.

SCOTT, J. This is an appeal from a judgment of nonsuit. In July, 1890, the bark Savona was wrecked on Dungeness Spit. About two weeks after that, the appellant entered into an oral contract with respondents, each of whom owned a tug boat, providing that said tugs should, at a certain time, proceed to where said bark was wrecked, and, at a time and in a manner specified, pull upon her, for the purpose of moving her into

deep water. The question to be determined is whether the appellant had introduced any testimony entitling him to recover. The facts are substantially as follows: The bark had been condemned as a wreck by the underwriters, and sold as such at public auction to one Bartlett, about a week prior to the making of the contract. The appellant purchased the wreck from Bartlett for \$1,000, and put men at work in the hold, and removed a large portion of the ballast. This work, and all other done upon the bark, to prepare her for being pulled out of her bed and put afloat, was done prior to the making of the contract. In order to engage the services of the tugs, appellant went to Port Townsend, where he first approached Captain Gove, of the tug Tyee. After talking with him, the two saw Captain Struve of the tug Wanderer. As to what was said relating to the contract, appellant testified as follows: "I asked Captain Gove if he would agree to pull her off, provided the Wanderer would; if I could make a contract with them to pull her off for so much money, or in case they failed of course they got nothing. He said they would not pull in that way, but that they would go down and give me a pull, both vessels pulling at the same time—pulling together—for five hundred dollars, and if I was sure about taking her off of course that was something I knew better about than they did, but that they would render me the best service that they had. They would pull their very best, in a good and seamanlike manner, for the sum of five hundred dollars. It was specially agreed that they were to be there an hour before the tide was high." And on cross-examination the witness testified as follows: "He [Gove] stated he would see Captain Struve, and see what he could do about it. I says, 'I would like to have you make the bargain to have you pull her off for so much.' Q. You asked him to name the figures, what he would pull her off for,—so much if he pulled her off, and so much if he did not? A. Yes, I did, in the course of the conversation, I think, say that I would give them five hundred dollars each if they would agree to pull her off. * * * He said he would not agree to any such thing. He would not agree to pull her off there. He would agree to go there and give me a pull, with both boats together, for two hundred and fifty dollars apiece. Q. Now, Captain Gove declined to take a proposition to go down there and pull and get paid five hundred dollars if they succeeded? A. Captain Gove says, 'I have got my hawser under the deck.' He says, 'It is more bother to me to take it up than it would be worth.' He says, 'I would not take it out for one hundred dollars.' He says, 'We will go and pull for two hundred and fifty dollars apiece.' Q. He refused to accept your proposition to go and pull for five hundred dollars if he succeeded? A. Yes. Q. And finally he said he would go and pull for two hundred and fifty dollars apiece, and you take

your chances? A. Yes, sir. Q. Now, in that connection, I understood you when you testified before, you stated that he said he would take two hundred and fifty dollars, and both pull together on the vessel, and you take your chances of their getting it off, but that he would not go and pull for five hundred dollars contingent upon their getting off. Is that right? A. He would not take any chances on pulling it off. He didn't know anything about it. He says, 'You know all about it; you can take the chances.' He says, 'We will go and pull upon her for two hundred and fifty dollars apiece, pull all together, and give you a good pull.' Q. And you take the chances? A. Yes; take the chances of being able to pull her off,—of the boats being able to pull her off." The witness then testified that an arrangement was made with the two captains substantially on the terms above stated; that they were to go to Dungeness Spit on the afternoon of that day, before high tide, and that they were to attach their hawsers to said bark and pull together at extreme high tide. He testified that they were from half an hour to an hour late in arriving, and that they did not pull together or pull properly, and that each of the tugs broke its hawser. It appears that the wreck was lying in several feet of water, upon a sand and clay bottom, in which it had formed a bed. The depth and character of this bed were not described by any of the witnesses, and it does not appear that any examination was made with respect thereto. Appellant further testified that if the tugs had pulled according to agreement he thought the bark could have been floated, and that, before he could secure the services of other tug boats, the tide, accompanied by heavy ground swells, drove the bark upon the shore, with her stern upon the rocks, in such a manner that it was impossible to thereafter float or save her; also, that if she had been floated she would have been worth about \$30,000, and that was the amount he sought to recover in this action. No proof was offered of any other element of damages, and the sole questions presented on this appeal are, were the damages which appellant sought to recover within the contemplation of the parties, and were said damages certain as the consequence of a breach of the contract?

A great many cases have been cited by appellant to support his contention that the value of the vessel afloat was the measure of his damages, but after an examination thereof we do not think they sustain his contention. The general rule is that the injured party is entitled to recover all his damages, including gains prevented and losses sustained; but the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from

which they proceed. *Griffin v. Colver*, 16 N. Y. 489; 1 *Suth. Dam.* pp. 93, 94. We think it appears by the testimony of appellant that the damages sought to be recovered in this action were not within the reasonable contemplation of the contracting parties, as a consequence of a breach of the contract, but were in fact expressly excluded therefrom. His own testimony shows that the masters of the tug boats positively refused to make a contract to pull off the wreck, and that they would not take any chances on pulling her off, and it thus appears that they meant to exclude from the agreement every contingency respecting the ability of the tugs to pull off the wreck. They were not willing to even risk their compensation upon such an uncertain result; much less can it be said that they intended to assume a liability to pay for the value of the vessel afloat, in case of a breach of the contract on their part. It is well known that for such salvage service the compensation usually awarded is a large portion of the value of the property saved. It is unreasonable to suppose that the respondents would contract with reference to such a liability, unless they believed that the wrecked vessel was in such a condition and so situated that she could be pulled from her bed with the combined power of the two tugs applied at the proper time and in the proper manner. That they at least had grave doubts of this is apparent from the language employed by the parties. Under the contract in question, the only proximate damages within the contemplation of the parties which could arise from a breach of the contract would be the expenses incurred by the plaintiff upon the faith thereof, and possibly the difference, if any, in the value of the wreck immediately before and after the time fixed for the performance. But the evidence shows that all labor and expense incurred by the plaintiff was prior to the making of the contract in question, and that no further expenses were incurred upon the faith of such contract. Indeed, plaintiff does not seek to recover any damages, except the difference between the value of the wreck and the value of the vessel afloat, and makes no contention that he has offered proof to sustain any other measure of damages. The action upon the part of the appellant is substantially one to recover his expected profits from the transaction, and if it had proven successful the difference between the value of the vessel afloat and her cost as a wreck, with the expense incurred for her removal, would have represented his profit. In certain cases, anticipated profits may be recovered in case of a breach of contract, but we have not been able to find any case where such expected profits were allowed where they were as uncertain and speculative as in this case. Of course, the power of the tugs may be said to have been known to the respondents, but it did not appear that any of the parties knew anything as to the character of the resistance to be

overcome. The depth of the bed or cradle in which the bark lay was not shown, or the character of the earth, or its lateral thickness. The law on this subject is aptly expressed by the supreme court of the United States in the case of *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 *Sup. Ct.* 500, in the following language: "The grounds upon which the general rule of excluding profits, in estimating damages, rests, are: (1) That in the greater number of cases such unexpected profits are too dependent upon numerous, uncertain, and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote, and not, as a matter of course, the direct and immediate result of the nonfulfillment of the contract; (3) and because, most frequently, the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms." We are of the opinion that the court rightly held, when appellant rested, that there was no evidence which would warrant a recovery. Consequently the motion for a nonsuit was well taken. Affirmed.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

SLATER v. STEVENS COUNTY BANK et al.

(Supreme Court of Washington. July 30, 1895.)

APPEALABLE ORDERS—ASSIGNEE FOR CREDITORS—
COMPENSATION—DEDUCTION OF DEBT
TO ASSIGNOR.

1. An order fixing a trustee's compensation, made in a suit brought by him to determine the rights of creditors, is appealable, though no appeal is taken from the decision in the main case.
2. The objection that respondent's exceptions to a referee's report were not sufficient to entitle the trial court to pass on it cannot be raised for the first time on appeal.
3. In fixing the compensation of a trustee for creditors, the attention which he gave to his duties should be considered.
4. In fixing the compensation of a trustee of a bank for the benefit of its creditors, it is error to deduct therefrom the amount of his note to the bank without giving him a chance to prove that he has a defense thereto.

Appeal from superior court, Stevens county; Jesse Arthur, Judge.

Action by John B. Slater, trustee, against the Stevens County Bank and others to determine the respective rights of the creditors of defendant bank. Pending the suit, plaintiff resigned as trustee, and from an order fixing his compensation he appeals. Reversed.

Turner, Graves & McKinstry, for appellant. Wm. J. Galbraith and H. G. Kirkpatrick, for respondents.

SCOTT, J. The appeal in this case involves the right to and amount of compensation to the appellant for his services as assignee of the Stevens County Bank. The respondents move to dismiss the appeal on the

ground that this court has no jurisdiction, the matter of the compensation of the assignee being involved in and a part of the main cause, and therefore not separately appealable. This point was decided by the court contrary to respondents' contention in *Thompson v. Lumber Co.*, 5 Wash. 527, 32 Pac. 536. The motion is denied.

On the application of appellant for compensation for his services, the court appointed a referee to take testimony and make findings with reference thereto. A hearing was had, and the referee found that he was entitled to \$2,500 as compensation. An order was made reopening the matter for the purpose of taking further testimony, and upon the taking of such testimony, the referee found that appellant was entitled to not less than \$2,000. Exceptions were taken to this report, and upon a hearing before the court the material findings of the referee were in part reversed, and the remainder modified, and the court found that a certain note for \$500 and interest, executed to the bank by appellant and one other party, was sufficient compensation for his services, and this appeal was prosecuted from such decision. It is contended by appellant that there were no sufficient exceptions taken by the respondents to the report of the referee to entitle the lower court to pass upon the same, but it does not appear that any objection was made upon this ground at the hearing, and for this reason the point is not available here.

This leaves to be determined only a question of fact, and has involved a consideration of all the testimony and the various findings of the referee and court thereon. After reading and considering the same, we are not satisfied with the conclusion reached in either instance. A good deal of testimony was introduced, pro and con, as to the value of such services, and it was contended on the part of respondents that appellant had been so negligent in attending to the duties of his trust that he should not be allowed any compensation. The referee found that he had not been negligent and the court in effect found that he had been grossly negligent. We are inclined to think that appellant had not given that attention to his duties which the creditors of the concern had a right to demand, and this should be taken into consideration in fixing his compensation. It would serve no good purpose to set forth the various contentions, and the testimony bearing thereon necessary to a complete understanding of the matter, in detail. We do not think it appears that appellant was culpably negligent in the premises. If he was, of course, he should not be allowed any compensation. We are also of the opinion that \$1,250, one-half of the original sum fixed by the referee, should be allowed him.

It is further claimed by appellant that he had a defense to the note in question, and it does not appear that he had any opportunity to try the question as to his liability thereon.

Such being the case, the note should not be deducted from the amount allowed him without a hearing, and the cause is remanded for the purpose of permitting the respective parties to form an issue as to this matter and have the same tried and determined, if the appellant shall so elect, and whatever amount he is called upon to pay thereon may be deducted from the \$1,250 allowed him as compensation, and payment thereof may be withheld until the matter of his liability on said note is disposed of. Reversed and remanded accordingly.

HOYT, C. J., and DUNBAR, ANDERS,
and GORDON, JJ., concur.

WILLIAMS v. SHOUDY, County Treasurer.
(Supreme Court of Washington. July 20, 1895.)

INJUNCTION—PAYMENT OF COUNTY WARRANTS—
VALIDATION BY SUBSEQUENT ELECTION.

1. A decree enjoining the payment of county warrants as issued in excess of the authorized indebtedness, without a vote of the people, becomes ineffectual, on the warrants being validated by a subsequent vote.

2. In an election to validate warrants issued by a county for current expenses, the ballots need not give the date of the warrants, where the time during which they were issued was set out in the resolution directing, and the notice of, the election.

3. In an election to validate county indebtedness, the resolution directing the election required the polls to be kept open from 9 a. m. to 7 p. m. The notice of the election specified from 9 a. m. to 6 p. m. The polls were, in fact, kept open until 7 p. m. *Held*, that the election would not be deemed invalid, in the absence of a showing that the election would have been different but for the discrepancy between the notice and the resolution.

4. Illegal county warrants, subsequently ratified and validated by a vote of the people, bear interest as though they were valid at their inception.

Appeal from superior court, Kittitas county;
Carroll B. Graves, Judge.

Application for a writ of mandamus by F. A. Williams against Dexter Shoudy, treasurer of Kittitas county. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Wager & Graves, for appellant. Alfred E. Buell, R. E. Moody, and Burke, Shepard & Woods, for respondent.

GORDON, J. The appellant is treasurer of Kittitas county, Wash. The respondent, being the owner and holder of certain warrants of said county, aggregating the sum of \$375, drawn on the general fund and issued for the current expenses of the county during the years 1890 and 1891, all of which had, prior to October 24, 1891, been presented for payment and indorsed, "not paid for want of funds," made an application in the lower court for a writ of mandate against the appellant, requiring him to pay said warrants, together with interest thereon at 10 per cent. from

the several dates of presentation and indorsement. His affidavit in support of said application, in addition to what has been already stated, sets forth that, at the time of the issuance of said warrants, the valid indebtedness of said county was equal to $1\frac{1}{2}$ per cent. of the taxable property therein, as shown by the last assessment for state and county purposes made previous to such assessment; that the indebtedness for which said warrants were issued was attempted to be incurred without the assent of three-fifths of the voters of said county voting at an election held for that purpose, but that otherwise said warrants would be valid claims against said county. The affidavit further sets out that the board of county commissioners of the county had passed a resolution, for the purpose of submitting to the voters of the county the question of the ratification of certain indebtedness attempted to be incurred by said county by issuing warrants on the general fund for the current running expenses, to the amount of \$81,004.25, between the 24th of February, 1890, and the 8th of December, 1891,—which resolution of the board is set out in full in said affidavit. Said affidavit further shows that notice of the election was given as provided by law, and an election was duly had, whereat, by more than three-fifths of the votes cast, the attempted incurring of said indebtedness by said county, as aforesaid, was ratified; and that respondent's warrants were among the number validated at said election; that they thereby became valid claims against the county; that the same had been presented to the appellant, as treasurer, and payment thereof demanded; that, although appellant, at the time of such presentation and demand, had, and at all times has had, as treasurer, sufficient funds to pay the same, applicable to such payment, appellant neglects and refuses to cause the same to be paid. An alternative writ issued as prayed for. For a return, appellant admitted all of the allegations contained in the affidavit herein referred to, except that respondent's warrants were validated; and affirmatively set up as a reason for not paying said warrants: (1) That his predecessor had been enjoined, at the suit of one S. T. Packwood, from paying certain warrants issued by said county, among which respondent's warrants were included; (2) that the warrants were invalid at the time of their issuance, and were not validated at said election, for the reason that the dates between which the warrants sought to be validated were issued were not set forth in the ballots voted at said election; (3) that said warrants were not validated at said election, for the reason that the resolution of the board of commissioners providing for the election required that the polls should be kept open from 9 a. m. until 7 p. m., while the notice of election as published provided that the polls should be kept open from 9 a. m. until 6 p. m. (appellant admitted in his return, however, that the polls at said election

were actually kept open until 7 p. m.); (4) that, even if respondent is entitled to have said warrants paid, he is entitled only to the face of the warrants, and not to interest thereon at the rate of 10 per cent. per annum from the several dates of presentation until paid. The court below sustained respondent's demurrer to said return, and, appellant refusing to plead further, the writ was made peremptory; and from said order and judgment this appeal is taken.

Proceeding to examine the questions involved, in the order in which they are raised in the return, we will first consider the effect of the order enjoining appellant's predecessor from paying these warrants. It is incorporated in full in the return, and appears to have been granted for the reason that the indebtedness for which the warrants were issued had been attempted to be incurred at a time when the debt of the county had reached the $1\frac{1}{2}$ per cent. limit, and without the assent of three-fifths of the voters, as provided by law. But we think that the effect of the election subsequently held, as set forth in the affidavit, and admitted by appellant, rendered the injunction inoperative. The grounds upon and reasons for which it issued no longer existed after said warrants were validated, and by reason of the changed conditions it became ineffectual. *State v. Wheeling & B. Bridge Co.*, 18 How. 421; *Mowrer v. State*, 107 Ind. 539, 8 N. E. 561.

As to the second proposition involved, viz. that the warrants were not validated at said election, for the reason that the dates between which the warrants sought to be validated were issued were not set forth in the ballots voted at said election, it appears from the affidavit already referred to, upon which the writ is based, that both the resolutions of the board of commissioners providing for the election and the election notice specified the dates between which the several items of indebtedness were attempted to be incurred. It also appears that there was only one class of indebtedness to be ratified, viz. "current expenses of the county," between said specified dates. This, we think, constituted a compliance with the requirements of section 2 of the act of March 9, 1893, under which the election was held, and it was not necessary that the ballots should contain the dates between which the debt was incurred. It is the resolution and notice provided for by the act which furnish the information to the voter, and we think the form of the ballot submitted at said election was legally sufficient.

Third. Does the election fail because the resolution calling the election specified that the hours during which the polls should be kept open should be between 9 a. m. and 7 p. m., while the notice of election as published specified from 9 a. m. to 6 p. m.? We think not. This question received the consideration of this court in *State v. Smith*, 4 Wash. 661, 30 Pac. 1064, in which it was

said: "In all such cases, there must appear some substantial reason why courts should interfere to overthrow an election, in the absence of any allegation of fraud, to the effect that, had there been a larger number of votes cast, the result would have been different." Upon this point, the present case is much stronger than the one just referred to, in this: that here it is conceded that the polls were actually kept open until 7 o'clock, as prescribed by the resolution; and there is no contention that the result was in any wise affected, or that any voter was misled by the discrepancy between the notice and the resolution. The case of *Seymour v. City of Tacoma*, 6 Wash. 427, 33 Pac. 1059, presents a question very similar in principle to the one that we are now considering. In that case, the ordinance under which the election was held required the clerk to publish the election notice in the official newspaper of the city for 30 days next preceding such election, and to post the same for the like period at all of the places designated as voting places. It appeared that the notices were posted only 26 days next preceding the day of election, and the court said: "Certain rules as to notice of elections have become well settled, and none of them are better settled than that the formalities of giving notice, although prescribed by statute, are directory merely, unless there is a declaration that unless the formalities are observed the election shall be void." In note 3, § 197, of *Dillon on Municipal Corporations*, the learned author says: "It is a canon of election law that an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election." It is very clear, in this case, that the mistake of the clerk in the preparation of the election notice did not operate in any way to prevent a free and fair expression of the voters of Kittitas county upon the question submitted at said election, and constituted, at the most, merely an irregularity not affecting the result; hence, immaterial.

Fourth. Did the election ratify only the principal or face of the warrants, and not the interest? The contention of the respondent is that the ratification in this case should be construed the same as the court would construe ratification by any principal of the unauthorized act of his agent. "It is, therefore, the general rule that one may ratify the previous unauthorized doing by another, in his behalf, of any act which he might then and could still lawfully do himself." *Mech. Ag.* § 112. The indebtedness submitted for ratification in this case was all evidenced by warrants of the county upon its general fund. Such warrants, when legally issued, bear 10 per cent. interest from the date of their presentation for payment until payment is made. *Trust Co. v. Gelbach*, 8 Wash. 497, 36 Pac. 467. We think the legal effect of the vote validating these warrants is the same as if precedent authority to issue them had been

expressly conferred by the voters. The right of the holder of a warrant legally issued to interest (after proper presentment and indorsement made) is as fixed and certain in law as the right to demand payment of the principal, and the effect of the ratification extended to both principal and interest,—it went to the whole act and validated the entire contract theretofore unauthorized. "The ratification operates upon the act ratified precisely as though authority to do the act had been previously given." *Cook v. Tullis*, 18 Wall. 332. In the present case, the voters of Kittitas county knew that the attempted indebtedness submitted for their ratification or rejection was evidenced by warrants, and that these warrants, by legal implication, bore interest; and, in contemplation of law, we think the effect of their vote entitled the respondent, as a holder of some of the warrants thus validated, to the same interest which he would be entitled to demand and receive if said warrants had in the first instance been legally issued, and does not restrict his right to receive interest only from the date of ratification. The judgment appealed from will be affirmed.

HOYT, C. J., and ANDERS and DUNBAR, JJ., concur.

WEST v. CITY OF CHEHALIS et al.

(Supreme Court of Washington. July 22, 1895.)
MUNICIPAL CORPORATIONS—LIMIT OF INDEBTEDNESS—HOW CALCULATED—VALIDATING WARRANTS.

Under Const. art. 8, § 6, prohibiting a municipal corporation from becoming indebted to an amount exceeding 5 per cent. on the value of its taxable property, such value to be ascertained by the last assessment, and also prohibiting it from becoming indebted in an amount exceeding $1\frac{1}{2}$ per cent. of such assessment without the assent of three-fifths of its voters, where a city, without an election, issued warrants which did not increase its debt above 5 per cent. on the amount of the last assessment, and an election was held at which the bonds were validated, the fact that, when figured on the assessment made just previous to the election, the warrants would make the debt exceed 5 per cent. thereof, is immaterial, as the election related back to the time the warrants were issued.

Appeal from superior court, Lewis county; W. W. Langhorne, Judge.

Action by William West against the city of Chehalis and others to restrain the issuing of bonds to fund city warrants. Plaintiff demurred to defendants' answer, and, the demurrer being overruled, judgment was rendered for defendants, and plaintiff appeals. Affirmed.

W. A. Reynolds, for appellant. M. Yoder, A. E. Buell, and Crowley, Sullivan & Grosscup, for respondents.

GORDON, J. Appellant, as a taxpayer of the city of Chehalis, commenced this action

in the lower court for the purpose of restraining the officers of said city from issuing bonds to fund certain warrants theretofore issued. The complaint shows that the city council, on August 20, 1894, passed an ordinance providing for an election, to be held on October 2, 1894, at which election there was submitted to the voters of the city three propositions,—two to validate certain warrants, and the third to issue bonds to fund these warrants, if validated; that at the said election all the propositions submitted carried, more than three-fifths of the voters voting therefor. The complaint further alleges that all the warrants so sought to be validated were void, for the sole reason that the same were issued when the valid indebtedness of said city incurred for general municipal purposes equaled $1\frac{1}{2}$ per cent. of the assessment roll, and without the assent of three-fifths of the voters of said city voting at an election held for that purpose. It further alleges that, on October 2, 1894, the date of said election, the assessment roll of the city was \$594,910, and the valid indebtedness of the city was \$10,500, and that this valid indebtedness, together with the indebtedness sought to be validated, exceeded the constitutional limit of 5 per cent. The respondents answered, admitting all of the material allegations in the complaint, but setting up that all the warrants sought to be validated were issued between June 13, 1892, and January 23, 1893; that during said period the assessment roll of said city was \$698,447, and that these validated warrants, together with the valid indebtedness outstanding during that period, did not exceed 5 per cent. of the assessment roll in force at that time. To this answer appellant filed a general demurrer, which was overruled, and, electing to stand thereon, final judgment was entered dismissing his complaint, from which judgment he appeals. Section 6, art. 8, of the constitution of Washington, is as follows: "No county, city, town, school district or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes; provided, that no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district or other municipal purposes; provided further, that any city or town with such assent may be allowed to become in-

debted to a larger amount, but not exceeding five per centum additional, for supplying such city or town with water, artificial light and sewers when the works for supplying such water, light and sewers shall be owned and controlled by the municipality." At the time of their issuance, the warrants which were sought to be validated at this election, together with the valid outstanding indebtedness of said city, did not exceed 5 per cent. of the value of the taxable property in said city, as ascertained by the last assessment for state and county purposes previous to the issuing of said warrants so sought to be validated. But it appears that, at the date of said election, the amount of said warrants, added to the valid outstanding indebtedness of said city, exceeded, in the aggregate, 5 per cent. of the value of the taxable property of said city, as ascertained by the last assessment previous to said election. It is conceded that, if the election is to be considered as relating back and giving force to the warrants as of the dates they were issued, so that the debt can be said to have been incurred at such dates, then the demurrer was properly overruled, and the judgment must be affirmed. The act of February 6, 1893 (Laws 1893, p. 10), under authority of which the election in this case was held, is a substantial re-enactment of the act of March 7, 1891 (Laws 1891, p. 267); and this court held, in *Baker v. City of Seattle*, 2 Wash. 576, 27 Pac. 462, that the act of 1891 was not obnoxious to the provisions of section 6, art. 8, of the constitution, and that the assent of the voters might be given to the creation of indebtedness after, as well as before, the attempted creation thereof. Upon the undisputed facts here, it is clear that it would have been competent and legal for the voters of the city to have given their consent to the incurring of the indebtedness for which these warrants were issued, provided such assent had preceded the incurring of the debt. In other words, the city authorities, with the assent of the voters, would have had a lawful right to issue these warrants, and in that event the warrants would have been absolutely legal and valid. Now, it seems to be well-settled law that subsequent assent is equivalent to precedent authority, and "operates upon the contract in the same manner as though the authority to make the contract had existed originally." *Zottman v. San Francisco*, 20 Cal. 97; *Mechem, Ag.* § 112; *Cook v. Tullis*, 18 Wall. 332; *Engine Co. v. Davis*, 9 Wash. 600, 38 Pac. 154. This proposition has been recently reaffirmed by this court, in *Williams v. Shoudy*, 41 Pac. 169 (decided July 20, 1895); and the proposition last discussed in that case is so analogous to the sole question here presented that we deem it unnecessary to extend this opinion further. We conclude that the warrants in question, as to both principal and interest, were validated as a result of the election held in the city of Chehalis on October 2, 1894, and

the judgment of the superior court must be affirmed.

HOYT, C. J., and ANDERS and DUNBAR, JJ., concur.

HAUGH et ux. v. CITY OF TACOMA.
(Supreme Court of Washington. July 25, 1895.)
APPEAL—BRIEF.

A brief merely setting out propositions of law, with authorities in support, without showing their applicability to the errors assigned, will be stricken out as in violation of Laws 1893, p. 127, and rule 12 (28 Pac. vi.), requiring briefs to clearly point out errors relied on for reversal. Hoyt, C. J., and Dunbar, J., dissenting.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Thomas Haugh and wife against the city of Tacoma. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

James Wickersham and Stacy W. Gibbs, for appellant. M. L. Clifford and R. F. Laffoon, for respondents.

GORDON, J. Respondents in this case have moved the court to dismiss the appeal and affirm the judgment below for various reasons, only one of which we shall notice. It is that the brief of appellant does not comply with the laws of this state, or with the rules of this court, in that it does not point out the errors relied upon by the appellant for a reversal, nor does it show that any error was committed by the trial court, nor that any of the matters discussed in the brief were ever presented to the trial court for ruling or decision. The act of 1893 requires that the brief of appellant "shall clearly point out each error that the appellant relies on for a reversal, and shall conform to such regulations of its contents in other respects * * * as the supreme court by its rules may have prescribed." Laws 1893, p. 127. Rule 12 of this court, in force at the time this appeal was taken, provided: "No alleged error or mistake of the superior court will be considered by the supreme court, unless the same shall be clearly pointed out in the appellant's brief." 28 Pac. vi. The learned counsel for the appellant has cited many authorities in his brief, supporting propositions of law, which seem to be well grounded, but the brief fails to show wherein these authorities are applicable. So far as appears from his brief, none of the propositions of law to which authorities are cited are involved in this litigation, or were ruled on below, and the brief does not render any assistance to the court in determining what points are here for review. No errors are assigned in the brief, and it cannot be determined therefrom that any of the matters therein discussed were ever brought to the considera-

tion of the trial court. We think that in the preparation of the brief counsel has wholly disregarded the plain provisions of the statute, and the rules of this court. As is said in *Railroad Co. v. Moffitt*, 75 Ill. 524, "counsel operate a drag net, but ask the court to do the sorting;" and in *Railway Co. v. Van Vleck*, 40 Ill. App. 367, "We decline to enter upon the consideration of alleged errors thus bundled upon us." In *Brown v. Tolles*, 7 Cal. 398, the court say: "If a party complains of error, and seeks a reversal, it is due to us that he should show wherein the error consists. We cannot be expected to act in the double capacity of counsel and judges. * * * and we cannot * * * be expected to wade through the record to find argument or invent pretexts for reversing the cause." We do not think that the brief in this case could be entertained under any system of practice governing appellate tribunals. We know of no practice which would sanction it. It is a general and well-settled proposition that "assignments of error which are so vague and indefinite as not to indicate the rulings complained of will be disregarded." *Gregory v. Kaar* (Neb.) 54 N. W. 859; *Lucas v. Brooks*, 18 Wall. 436; *Leatherwood v. Suggs* (Ala.) 11 South. 415; *Cobb v. Taylor* (Ind. Sup.) 32 N. E. 822; *Robinson v. Moore* (Tex. Civ. App.) 20 S. W. 904; *Association v. Oxley* (Iowa) 58 N. W. 1075; *Town of Waukon v. Strouse* (Iowa) 38 N. W. 408; *Land Co. v. Boyd* (Tex. Civ. App.) 22 S. W. 240. Notwithstanding he had ample notice of this motion, the learned counsel for appellant has made no application for leave to file a new brief, upon terms or otherwise, and the brief filed herein must be stricken, and the judgment below affirmed. We feel constrained to add that, if no application therefor had been made by the respondents, the court would, upon its own motion, have stricken the brief and reached the same result. The respondents will recover costs.

ANDERS and SCOTT, JJ., concur.

HOYT, C. J., and DUNBAR, J., dissent.

NEELEY v. DEMOCRATIC PUB. CO. et al.
(Supreme Court of Washington. July 25, 1895.)

EXCEPTIONS TO FINDINGS.

An exception to the findings of the trial court as a whole is insufficient if any of the findings are correct.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by T. B. Neeley against the Democratic Publishing Company and others. There was a judgment for plaintiff, and defendant appeals. Affirmed.

George M. Sinclair and J. J. Gallagher, for appellant. Frank Quinby, for respondent. Democratic Publishing Company. B. B.

Fowle, for respondent Smith. Million & Houser, for respondent Pollock.

PER CURIAM. This action was tried by the court without a jury. Findings of fact were made, and the only exception taken thereto was at the conclusion of the findings and the decree, and was general in form to the whole. Some of the findings were unquestionably correct; and, there being no sufficient exception, the matters sought to be raised upon this appeal cannot be considered, and the judgment is affirmed.

DILLON v. WHATCOM COUNTY.

(Supreme Court of Washington. July 25, 1895.)

COUNTY OFFICERS—EXTRA COMPENSATION—EMPLOYMENT OF DEPUTIES.

Gen. St. § 2973, provides that, in all cases where the duties of any officer are greater than can be performed by him, he may employ, "with the consent of the county commissioners," the necessary help, who shall receive a just compensation. Section 3003 provides that, where the salary of any officer is inadequate for the services required, the board "may allow" such officer a deputy or such number of deputies as "in their judgment" may be required. *Held*, that the power to allow an officer a deputy is solely discretionary with the board of commissioners, and, on their refusal to allow a deputy, the officer cannot employ one himself, and recover from the county a reasonable compensation paid for his services, though the officer cannot personally perform all the duties of his office.

Appeal from superior court, Whatcom county; Jesse A. Frye, Judge.

Action by Asahel Dillon against Whatcom county and others. From a judgment for plaintiff, the county appeals. Reversed.

G. V. Alexander and J. R. Crites, for appellant. Bruce, Brown & Cleveland and Kerr & McCord, for respondent.

DUNBAR, J. Respondent brought this action against appellant, the county of Whatcom, to recover the sum of \$300, alleged to have been paid out by him for clerk hire and salary of deputy in his office as county auditor for the month of April, 1895. He alleges in his complaint that he was compelled to retain in his office three clerks, Dillon, Bateman, and Custer, and the deputy, Brand, in order to dispatch the duties of his said office during said month; that the county commissioners of defendant county had attempted to discharge all the clerks in his office after April 1, 1895, and had reduced the salary of his deputy to \$5 per month; that he made an agreement with his said deputy and clerks to the effect that if the county refused to audit and allow their salaries he would pay them himself; that the county did refuse to pay said claims when presented to it, and that he thereupon, in compliance with his agreement, paid his deputy and clerks, and took an assignment of their said claims; that J. J. Bell, sheriff of Whatcom county, had been com-

pelled, in order to discharge the duties of his office, to retain in his employ as his deputy one W. I. Brisbin, and had made an agreement with him similar to the one made by the auditor with his employes, and that said claim of Brisbin and the sheriff had been assigned to the plaintiff. The said claims were duly presented to the county commissioners, who refused to audit and allow the same, whereupon an action for their recovery was commenced. Defendants interposed a demurrer to plaintiff's complaint, which was overruled. Appellant thereupon answered, denying all the allegations of plaintiff's complaint, except paragraph 1, which was the allegation of the official standing of the plaintiff and of the defendants, and set up affirmatively the order made by the county commissioners wherein it was determined by the commissioners that the clerks hired by respondent were not needed in the auditor's office, nor the one hired by the sheriff in his said office, and they refused their consent to the employment of any clerks in said offices after the 1st day of April, 1895; said order being also based upon the additional ground that the defendant county had reached its limit of indebtedness under the constitution, and had no power to contract further indebtedness, particularly for the hire of said clerks. Other affirmative defenses were pleaded, but, as we view the case, their discussion will not be involved in this opinion. A trial was had by a jury, and judgment rendered, in favor of the plaintiff, for the amount demanded.

The first proposition discussed by the appellant would go to the merit of the demurrer to the complaint, and it is insisted that the rule is well settled that where a public officer claims a compensation for official services he must show either a statute authorizing such compensation, or a contract with some one who has authority to bind the county, from which compensation is claimed; that, if he cannot show a contract with some one authorized to bind the county, then he must show—First, a statute authorizing him to receive such compensation for such services, and fixing the amount thereof; and, second, a statute authorizing the county commissioners to pay for such services out of the county treasury. This contention seems to be directly sustained in *State v. Roach* (Ind. Sup.) 24 N. E. 106. This was a suit instituted to compel the auditor of a county to draw his warrant on the county treasurer for certain moneys alleged in the complaint to be due the appellant as surveyor of said county. The complaint set up the necessity for the work done by his deputies and the necessity for their employment; and while the court held in that case that, under the statutes, he was compelled to do the work himself for the compensation provided, it announced the rule formulated above as having been the rule uniformly adopted by that court, and closed with the statement that "it is believed to be the universal rule that, where the law fixes

no compensation for deputies, they must be paid by the officer who employs them, and not out of the public treasury." In *Severin v. Board* (Ind. Sup.) 4 N. E. 680, the same rule is substantially announced, and the court, in closing the opinion, says: "The auditor had no right to proceed, granting the soundness of his own theory, without consultation with the commissioners. It was not for him to decide for himself that the work ought to have been done by his predecessor, and that the county must pay him for doing it. The county auditor's power is hardly so autocratic as to permit him to make and enforce such a decision." In the case of *Board v. Harman*, 101 Ind. 551, the court again announced the rule that an officer could not successfully claim compensation for services unless there was a statute providing that he should receive remuneration. To the same effect is *Bynum v. Board*, 100 Ind. 90. *Mechem on Public Officers*, in section 855, declares the doctrine to be that the relation between an officer and the public is not the creature of contract, nor is the office itself a contract, so that the right to compensation is not the creature of contract; that it exists, if it exists at all, as the creation of law, and, when it so exists, it belongs to the officer, "not by force of any contract, but because the law attaches it to the office"; and that the most that can be said is that there is a contract to pay him such compensation as from time to time may be by law attached to the office. And as a deduction from this it is asserted by the author that "unless, therefore, compensation is by law attached to the office, none can be recovered"; that "a person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously," and that "he cannot recover anything upon the ground of an implied contract to pay what the service is worth,"—making distinction between the compensation of an officer and of a person other than an officer who undertakes to render services for a municipal corporation as its private agent, in which case he can recover the reasonable value of the services. But, whether or not the demurrer should have been sustained, we are satisfied that upon the complaint and answer no judgment should have been granted to the plaintiff, for it appears from the answer that the county commissioners had exercised their discretion, and had decided that the services of these employes were not necessary.

Before proceeding further with this argument, it would be well, perhaps, to revert to the law governing this discretion, and see wherein it is lodged. Section 2973 of the General Statutes, after providing for the election of county officers and establishing their salaries, provides, further, that, "in all cases where the duties of any office are greater than can be performed by the person elected to fill the same, said officer may employ, with the consent of the county commissioners, the necessary help, who shall re-

ceive a just and reasonable pay for services"; further providing that "the officer appointing such deputies or clerks shall be responsible for the acts of such appointees upon his official bond." It is contended by the respondent that this section vests the discretion in the officer to appoint, and that in fact it becomes his duty to appoint, the permissive language of the act under the circumstances to be construed as mandatory. Were there no other section of the law governing appointments of deputies and hiring of other help, there might be some plausibility in this contention; but section 3003 seems to vest the discretion in, and throw the burden of determining the necessity of such appointments entirely upon, the board of county commissioners, for it provides that "in case the salaries herein provided for are, in the judgment of the board of county commissioners, inadequate for the services required of the officers named herein, then the said board of county commissioners may allow such officer a deputy, or such number of deputies as, in their judgment, may be required to do the business of such office in connection with the principal, for such time as may be necessary, and at such salary as they may designate." It is contended by the respondent that these two sections should be construed in pari materia; but, even construing them thus, it would seem that the statute went no further than to allow the officer to name the employe, when it had been determined by the board of commissioners that such employment was necessary. Inasmuch as the officer is responsible on his bond for the delinquencies of the appointee, this is no more than a fair provision of the law. But we think that it cannot go beyond this. The whole question of employment outside of the person of the employe seems to be submitted to the judgment of the board of county commissioners by language which is inconsistent with any other thought than that of direction by the commissioners. In the first place, it provides that if the salary, "in the judgment of the board," is inadequate; and as indicating the vesting of discretion no stronger words could be used. Again, "the said board of county commissioners may allow such officer a deputy." The word "allow" naturally conveys the idea of permission upon the part of the county commissioners; not of consultation or agreement or a division of responsibility, but purely a permission. Again, the law provides further that as to the number of these deputies the judgment of the board of county commissioners is to be exercised, and it specially provides that the salary of such help shall be such a salary as the board may designate. It would seem that absolute discretion could not be vested in a tribunal if it has not been vested in the board of county commissioners by this section, so far as the hiring of extra help for county officers is

concerned; and, outside of the construction which we would be compelled to place upon it from the language of the law itself, the authorities, it seems to us, are uniform on this proposition. Before proceeding to their investigation, in view of some authorities which have been cited by the respondent, it is well to notice this distinction, which we think is frequently lost sight of in the discussion of such cases, viz. that the courts will interfere to compel inferior tribunals to act or to exercise their discretion in proper cases, when such tribunals claim that under the law they have no right to act, the question of whether or not they have a right to act being a legal question which the courts will solve for the tribunals; but this must be distinguished from a case where the legislature has empowered the tribunal with discretion, and such tribunal has exercised that discretion. In such a case the courts have no right to substitute their judgment for the judgment of the tribunal in which the discretion has been vested; and we think an investigation of the authorities will show that in all well-considered cases this distinction has been steadily kept in view. In this case, this discretion having been vested by the legislature in the board of county commissioners, and the question as to the necessity of this extra help having been submitted especially to their judgment, and, as shown by the answer, they having exercised their judgment and arrived at a conclusion, such a conclusion is final, and not subject to review by the courts. As was said by the court in *Board v. Barnes* (Ind. Sup.) 24 N. E. 137, "the source of their power is the statute, and the standard by which it is to be measured is that supplied by the legislative enactments." Measured by this standard, it is the duty of the commissioners to employ extra help for these officers when, in their judgment, it becomes necessary so to do.

The Revised Statutes of Indiana provide that when, in the opinion of the county commissioners, the public convenience shall require a bridge over any water course, they shall cause the same to be erected; and place the time and manner of constructing such bridges in the discretion of the board. In *State v. Board* (Ind. Sup.) 25 N. E. 286, it was held that the statute conferred such discretion on the board of county commissioners that it was not within the power of the court to control the same. In *State v. Board of Com'rs* (Ind. Sup.) 21 N. E. 1097, it was held that the question whether to rebuild a bridge or to devise some other means of crossing a stream is within the discretion of the board, under a section of the statute which provides that the board shall repair or build bridges over any water course whenever, in their opinion, the public convenience demands it; and the court, in commenting on the case, says: "How can it be said that

the county commissioners may only cause a bridge to be repaired in case, in their opinion, the public convenience requires it, if it is within the province of the courts to compel them by mandate to repair, even though in their opinion the public convenience does not require it? * * * There is no proposition more firmly settled than that, where official action depends upon the exercise of the judgment and discretion of the officer, courts cannot interfere to dictate how the officer shall act, or what judgment he shall give." In *Board v. Davis* (Ind. Sup.) 26 N. E. 141, under an act which fixed the salaries of the judges of the circuit and superior courts, providing that in certain circuits, on certain representations, the salary of the judge should be increased in a sum specified, such board should consider such petition and hear evidence thereon, and that "such board 'may' allow a certain sum as an increase of salary of such judge, and that any such allowance, and the proceedings in relation thereto, if in compliance with the act, shall be final and conclusive," it was held that the power of the board to increase such salary was discretionary, and an appeal would not lie from its action. It is true that the language used there, "that such proceedings * * * shall be final and conclusive," does not appear in our statute; but the language of our statute, it seems to us, renders the action as final and conclusive as though the specific words were used. In *City of Richmond v. Davis* (Ind. Sup.) 3 N. E. 130, it was held that a taxpayer could maintain an injunction to restrain the corporate officers from making an investment that would surely result in the loss of the money invested, but that an injunction could not lie to restrain the exercise of discretionary powers. The rule is thus laid down by Mechem, Pub. Off. § 968: "The same principles apply to official boards and bodies as to individual officers,—the performance of clear and definite duties of a ministerial nature will be compelled, but discretion will not be interfered with, nor will doubtful or uncertain duties be required." In discussing the question of when the writ of mandamus would issue the author says: But the writ will not be granted to control the lawful judgment or discretion of such boards or bodies in fixing the compensation of officers, in passing upon claims against the political bodies which they represent, in passing upon the sufficiency of bonds, or in letting contracts." The supreme court of Michigan, in the case of *Cicotte v. County of Wayne*, 59 Mich. 509, 26 N. W. 686, in an opinion rendered by Judge Campbell in construing an article in the constitution substantially like our statute in regard to the discretion of the board of supervisors and the board of auditors, held that, where the said board had exercised their discretion, such discretion was conclusive. In the case of *Jacobs v. Board* (Cal.) 34 Pac. 630, the

supreme court of California decided that the provision of the constitution providing that water rates should be fixed annually by the board of supervisors or other governing body of said city and county, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by said body, "grants to the board of supervisors of the city and county of San Francisco the sole power to fix the water rates in such city and county"; and as the fixing of water rates requires the exercise of discretion and judgment, and as the board has exercised its discretion, it cannot be compelled to change its judgment or to take further action. In the case of *Hovey v. Mayo*, 43 Me. 322, it was held that a corporation having power to determine what repairs should be made in its roads and streets may, through its officers, acting within the scope of their authority, exercise its own judgment, which cannot be set aside by a jury in a suit at law; and in *Danielly v. Cabaniss*, 52 Ga. 211, that "when a town council is authorized by law to do a particular act at its discretion, the courts will not control this discretion, and inquire into the propriety, economy, and general wisdom of the undertaking." And so in this case, while it might appear to the court, as a matter of public policy, that great evil and inconvenience would result from an injudicious or mean policy on the part of the county commissioners, yet the discretion having been vested in them, and the business interests of the county, which also involve personal interests, having been submitted to them, by a vote of the people constituting them their agents to do this business for them, reposing confidence in their judgment and integrity, the people must abide by their own action in selecting these agents, and the courts are powerless to relieve them from the results of their own bad judgment in such selections.

It is contended by the respondent that, these statutes being enacted for the benefit of the public, in which third parties have an interest and the rights of individuals are involved, the legislature, to guard these interests, and recognizing or foreseeing the evils consequent upon the inability of the officer elect to discharge all the duties of the office, clothed such officer with the authority to employ help, but, in an abundance of caution lest such officer might be remiss in that regard, they clothed the commissioners with the power, if the officer failed to exercise it when necessary, to employ this necessary help; and it is insisted that where a power is thus granted, and the necessity arises, it must be exercised. We think the general rule goes to the extent that in the construction of public statutes the word "may" is to be construed "must" in all cases where the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power; and the intention of the

legislature must be gathered, in an enactment of this kind, as in any other case, from the language used in the whole act. To sustain the contention that in this case the word "may" is used in an imperative sense, respondent cites *Mechem*, Pub. Off. § 593. There the author says: "Authority to perform acts of public concern is often conferred in language which, in form, seems to be permissive only, leaving it to the option of the officer whether he will act or not; and the question arises whether the imposition of the authority creates an implied duty to exercise it." And the rule is there announced, as laid down in *King v. Barlow*, 2 Salk. 609, that, "where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, though the phraseology of the statute be permissive merely, and not peremptory." An examination of the cases cited by the author, however, to sustain the text, shows conclusively that they do not apply to statutes like ours. Thus, in *Mayor, etc., v. Furze*, 3 Hill, 612, the act of the legislature had made it lawful for a municipal corporation to make and repair sewers, and the corporation had appointed an officer to attend to this matter. A person injured by a defective sewer brought an action against the corporation, and the court held that the language used in the statute in that case should be construed to be imperative, and that the corporation was not at liberty arbitrarily to withhold it. Another case was where an indictment was found against the inhabitants for refusing to meet and make a rate to pay the constable's tax, the statute saying that they "may meet," etc.; and the case of *King v. Barlow*, supra, where churchwardens were indicted for not making a rate or assessment under a statute where the language was that they shall have power and authority to make a rate; and similar cases where there was no fact to be ascertained, the ascertainment of which was left by the statute to the judgment of the tribunals. *Suth. St. Const.* § 461, also cited by respondent, is to the same effect. The author there cites the same cases, with others of a like character.

We think that the ordinary meaning of the language must be presumed to be intended unless such construction would manifestly defeat the object of the provision. It will be conceded, of course, that the word "may" is ordinarily used in a permissive sense; in fact, outside of legal language, it is universally used in the potential mood, signifying liberty or permission; and, outside of the fact that it is a most excellent idea by courts to give to words employed by the legislature their ordinary lay meaning,—for it is such meaning that is comprehended by and acted on by the ordinary legislator in the performance of his official duties,—there is nothing in the statute in question to indicate that the legis-

lature meant to impose a positive and absolute duty, or that it meant to do anything more than to submit this question to the best judgment of the commissioners, not only by the permissive word "may," but by the use of the phrase "in their judgment," and other qualifying permissive words and phrases. A case relied upon by the respondent, and one that is cited by Sutherland in the section noted above, is that of *Supervisors v. U. S.*, 4 Wall. 435, where it was decided that, where power is given by statute to public officers in permissive language,—as that they may, if deemed advisable, do a certain thing,—the language used will be regarded as peremptory where a public interest or individual rights require that it should be. The statute in question was as follows: "The board of supervisors under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, may, if deemed advisable, levy a special tax * * * to be assessed and collected," etc., and applied "in liquidation of such indebtedness." And the supreme court of the United States held that such statute was intended to be imperative. But from the cases cited by the court, and referred to by the attorneys in their arguments and briefs, we conclude that this case is not opposed to the conclusion which we have reached,—that in cases where a fact is to be ascertained by the board the court will not interfere with its discretion in the ascertainment of such fact, and its action based upon such ascertainment. The attorney who was urging the mandamus in that case insisted that the argument for the plaintiff was based on the mistaken idea of what discretion was. "An examination of authorities," said he, "will show that disputed facts are necessary to found a 'discretion' or a 'deliberative judgment,'"—citing the distinguishing case of *People v. Superior Court*, 5 Wend. 114. So that this case was considered by the court in the announcement of its decision, and was evidently one of the cases referred to by the court in its closing remark that "the line which separates this class of cases from those which involve the exercise of that discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This case clearly does not fall within the latter category,"—and the reporter, by star citation, refers to *People v. Superior Court*, supra; *People v. Superior Court*, 10 Wend. 284; *People v. Vermilyea*, 7 Cow. 393; and *Hull v. Supervisors*, 19 Johns. 260. An investigation of these cases will show clearly that the United States supreme court evidently distinguished the case which they had under consideration from the cases cited and from the case at bar. In the case of *People v. Superior Court*, 5 Wend. 114, it was decided that the discretion, the exercise of which by inferior tribunals or officers that court would not regulate or coerce, was that discretion which was not and could not be gov-

erned by any fixed principles or rules, viz. that the court would not interfere to regulate the question of compensation of certain public officers where a board of supervisors was authorized by law to allow such amount as it should judge reasonable (citing many cases); and the court said: "We will not set up our judgment in opposition to the judgment of a board of supervisors as to what is a reasonable compensation for services performed by a constable for the public, no sum having been fixed by law. It is their judgment and discretion, and not ours, to which the legislature have left the decision of that matter." It will be hard to find a case that is more clearly in point than this particular one. But, continuing, the court says: "But if they refuse to allow anything, either on the ground that they have no discretion upon the subject or that the officer has no right to compensation, then we will interfere, and determine whether they have the power to make an allowance, or whether the officer is entitled to be paid. The powers of the supervisors and the rights of the officer are questions of law. They are legal powers and rights if they exist at all,"—citing *Bright v. Supervisors*, 18 Johns. 242, and *Hull v. Supervisors*, 19 Johns. 259. This confirms the rule that was outlined by us above, that a distinction must be drawn between cases where officers refuse to act, and where they do act, but such action is deemed to be wrong. In *Com. v. County Com'rs*, 5 Bin. 536, the statute provides that the officer shall make out a certain account, which account, after being examined or revised, he shall present to the county commissioners, who, if they approve thereof, shall draw their order on the county treasurer for the amount, which he is directed to pay out of any moneys in the treasury; and the court in that case (a case against the commissioners) said: "The law has vested the commissioners with the power of approving or disapproving of the account, and we cannot take it away from them." And in *People v. Supervisors*, 12 Johns. 414, the statute directed the supervisors to allow a constable for certain services so much money as the supervisors shall judge he reasonably deserves to have. On motion for mandamus to allow a certain sum claimed, the court said: "Should we grant a temporary mandamus, what would be its command? Certainly not to allow any specific sum. That would be taking upon ourselves a discretion which the court had vested in the supervisors. We could only command them to examine the applicant's accounts, and, in the words of the statute, allow him, for his services, such sum as they shall judge he reasonably deserves to have; and this has been already done. Wherever a discretionary power is vested in officers, and they have exercised that discretion, this court ought not to interfere, because they cannot control, and ought not to coerce, that discretion. * * * This may be a hard case, and the party may be remedi-

less; but that consideration cannot induce us to grant an unfit, and, as I believe, a nugatory, remedy." And so we think, without further citation, that all the authorities, when they are properly discriminated, will hold that where a question of fact has been submitted to an inferior tribunal, and that tribunal has exercised its discretion in determining such fact, such determination would be held conclusive by the courts.

Counsel for the respondent relies very largely upon the case of *Carr v. State* (decided by the supreme court of Indiana, May 23, 1887) 12 N. E. 107. There it was held (under a section of the Revised Statutes of Indiana providing that the clerical duties of the bureau of vital and sanitary statistics should be provided for by the secretary of state, by the appointment or employment of a suitable clerk for that purpose, upon requisition of the state board of health, approved by the president thereof) that the secretary of state could not remove an appointee made by a previous secretary of state; the court holding that under the particular provisions of that statute, after he had been selected, designated, or named by the secretary of state, he had no further connection with such secretary in any way, was not subordinate to him, rendered no services in his office, and was not dependent upon him for his salary, wages, or compensation; the statute declaring that the secretary of the state board of health, and not the secretary of state, should be the superintendent, and that he must agree with the state board of health for his salary, wages, or compensation for his services, to which board alone he was authorized by law to look for his compensation,—altogether a different proposition from the one announced in our statute, which provides: First, that the deputy or additional help shall only be employed if, in the judgment of the board of county commissioners, it is necessary; and, second, that they shall be paid such salary as the county commissioners may designate. It is contended by the respondent that in any event the officers might employ and recover of the county, and that, when such employment was made, the county was liable for the moneys thus expended; and a number of cases are cited to sustain this contention. The first is *Harris v. Chickasaw Co. (Iowa)* 42 N. W. 313. This is an Iowa case, and the Code of that state provides that, when a county officer receiving a salary is compelled by the pressure of the business of his office to employ a deputy, the board of supervisors may make a reasonable allowance to such deputy. It was held that a county treasurer may employ a clerk to assist him temporarily without the authority of the supervisors, and they may be compelled to make a reasonable allowance for such clerk. This is an altogether different statute from the one under consideration. The discretion as to the neces-

sity for employing the deputy seems, by the language of that statute, to have been vested in the officer, and, under the general rule, no discretion having been vested in the supervisors as to the necessity for such employment, the word "may" is construed to be imperative. The case of *Gamble v. Marion Co. (Iowa)* 52 N. W. 556, is also an Iowa case, and the action arose under the same statute, and was based upon the particular language of that statute, and simply follows the case of *Harris v. Chickasaw Co.*, supra. The spirit of the decision in *Roberts v. People*, 13 Pac. (Colo. Sup.) 630, it seems to us, is rather against the contention of the respondent. There the question raised was whether or not the claim constituted a legal charge against the county. The court said that the rule governing the allowance of claims by the board of county commissioners was that the authority must be found in the statute, either in express words or by fair implication; in other words, in order to bind the county, the county commissioners must act within the scope of their authority. In this case it was claimed that the county commissioners had exercised their discretion wrongfully in allowing the claims in question, and the court said: "But the compensation for every legitimate charge against a county is not fixed by statute, nor even expressly provided for. It is therefore within the functions of the board of county commissioners, in such cases, to allow reasonable compensation. The county commissioners represent the county and have charge of its property and the management of its business concerns. They are necessarily vested with reasonable discretion in the administration of county affairs." And all that was really decided in that case was that the services upon which the claim was based were beneficial to the county, that the county commissioners had so found, and that it was a proper charge against the county.

The determination of the question whether a charge is a proper charge against the county is a legal proposition, and that of whether the employment of the service is necessary as a fact is entirely another proposition. The courts will determine the first, but will not enter upon the investigation of the latter, when the discretion has been submitted to another tribunal. This distinction has been observed and maintained by the courts ever since the establishment of the judiciary, and was clearly and distinctly stated by Lord Ellenborough in *King v. Justice of Kent*, 14 East, 395. There a petition was presented to the justices of Kent at their general quarter sessions, from certain persons stating themselves to be millers in that county, and within the description of millers mentioned in a statute which provided in substance that the justices, upon petition, should regulate their wages; and the sessions refused to act upon the petition, not upon the theory that these

millers should not have their wages raised under the circumstances, but upon the theory that they had no jurisdiction to interfere in the case of these petitioners, for the reason that they apprehended that the statute was confined, not in the terms of it, yet by construction and in practice, to the wages of laborers in husbandry, and did not comprehend millers. Lord Ellenborough, in rendering the opinion, said that, if the justices had rejected the application in the exercise of the discretion vested in them by the legislature, the court would not interfere, but, if they had rejected it on the ground stated,—that they had no power to grant it,—the court would interfere so far as to set the jurisdiction of the magistrates in motion, by directing them to hear and determine upon the application; and he observed that it was evident that the magistrates had never exercised their discretion at all upon the question whether the application was fit to be granted or not, but appeared to have considered that they had no jurisdiction to hear it. In conclusion, he said: "We do not, however, by granting this mandamus, at all interfere with the exercise of that discretion which the legislature meant to confide to the justices of the peace in sessions. We only say that they have a discretion to exercise, and therefore they must hear the application; but, having heard it, it rests entirely with them to act or not upon it, as they think fit." Now, if the language of our statute were that the commissioners may determine upon application whether the necessity for this extra employment existed, and they should refuse, upon such application, to enter upon an investigation of that question, then the rule invoked by the respondent would be applicable. But here not only such is not the statute, but it affirmatively appears by the answer of the board that they did enter upon the investigation of the question presented, and affirmatively found that the employment was unnecessary on account of the small amount of business being transacted in the county.

Other questions are involved in this answer, viz. the right of the commissioners to employ under any circumstances, on account of the alleged indebtedness of the county beyond its constitutional limitation; and, if this were the only question involved, then, under many of the authorities cited by respondent, the findings or conclusions of the commissioners might be reviewed by this court, because they are questions of law and not of fact. The same principle was announced in *Hull v. Supervisors*, 19 Johns. 259, where it was held that the question of jurisdiction could not be reviewed, but that if subordinate public agents refused to act or entertain the question for their discretion, in cases where the law enjoined upon them to do the act required, the court would enforce obedience to the law by writ of mandamus, where no other legal remedy existed; and

the distinction laid down by Lord Ellenborough, in the case above cited, was noticed by the court. "The question," said the court, "now presented, is whether the supervisors were bound to audit and allow the account as a county charge. If it be a legal claim, then we have no doubt of our jurisdiction to instruct and guide the supervisors, in the execution of their duty, by mandamus; not to control their discretion in judging what is a reasonable compensation for such services, but to compel them to admit the claim as a county charge, and to exercise their discretion as to the amount; or, in the language of Lord Ellenborough, * * * 'this court would interfere so far as to set the inferior jurisdiction in motion.' " On the same principle it was held in *Bright v. Supervisors*, 18 Johns. 242, that a mandamus would lie to the supervisors of a county to compel them to allow the account of the clerk of the county for advances made by him in purchasing books for recording deeds and mortgages, upon the same theory that the question of whether or not the price of these books was a proper charge against the county was a question of law which the court had power to review. The next citation by the respondent is to page 541, 19 Am. & Eng. Enc. Law. The author there simply lays down the general proposition that "public officers acting faithfully and without fault, and pursuant to authority, are entitled to be reimbursed for anything reasonably and necessarily disbursed by them in executing the duties of their office," and that "the public or a public corporation have power to indemnify their officers and agents against any charge or liability they may incur in the bona fide discharge of their duty, even though their acts were illegal." The first citation under this announcement is a case we have just noticed, viz. *Bright v. Supervisors*, supra; and the cases cited generally to sustain that text are in no way in conflict with the doctrine which we have announced above, and none of them comprehends a case where the officer has acted upon a question which has been submitted by law to the discretion of another tribunal. All that is decided in *U. S. v. Flinders*, 112 U. S. 88, 5 Sup. Ct. 67, is that a collector of internal revenue, in a suit against him on a bond, brought to recover public money collected by him and not paid over, should be allowed, as a set-off, money paid by him for publishing advertisements required to be made by certain sections of the statutes, if the amount was found to be reasonable and proper. It seems that the real question at issue in this case was not a question of discretion, but whether or not the claim of the collector was a proper claim under the statute. The court, in closing the case, says: "In the present case the statute required the advertisements to be made, and there is nothing in it which implies that they are to be paid for out of the compensation to be allowed, or that they are not to be reimbursed

because they are not named with stationery and blank books, or because 'advertising' was first inserted in the act of 1865." So that this case falls with the other cases which we have mentioned, where the courts held that they have a right to pass upon the legality of a claim. The cases, cited by respondent, of *Morris v. Stull*, 96 Mo. 597, U. S. v. *Smith*, 39 Fed. 490, and *Doggett v. Fur Co.*, 99 Ind. 334, seem to be miscitations, not being in the volumes cited, and we have been unable to find them.¹ The case of *County of Schuyler v. Bogue*, 38 Ill. App. 48, decides what was decided by this court in the case of *Nelson v. Troy*, 39 Pac. 974, viz. that a statute which fixed the compensation of a county clerk did not include within the compensation the expenses of the office; and *County of Schuyler v. Wells*, 38 Ill. App. 51, is decided upon the same theory. The case of *Washington County v. Jones*, 45 Iowa, 260, was based upon a statute which provided that, "when a county officer receiving a salary is compelled by the pressure of the business of his office to employ a deputy, the county court may make a reasonable allowance to such deputy." This statute superseded the statute which provided that the clerk should furnish, at his own expense, all necessary deputies. In this case the clerk was called upon to transact probate business, and the real question before the court was whether he could be legally held to transact the additional probate business under the salary provided by law for his services as clerk; and the court held that he could not; that they were additional services which were not contemplated by the law fixing his salary; and that he was entitled to them. *Bradley v. Jefferson County*, 4 G. Greene, 300, does not disclose the statute upon which the case was decided. This much, however, is quoted by the court. It says: "Section 417 of the Code contemplates precisely such a case as this, and provides 'that the county court may make a reasonable allowance to the deputy.' The court below probably construed this section so as to leave the question of payment discretionary with the county court. In this we think it erred." It appears from the opinion in this case that the statute provided for the appointment of the deputy outside of any action of the county court. At all events, the opinion is so brief that, the provisions of the statute not being disclosed, it cannot be cited as authority for or against the contention of the respondent in this case. A late case, however, decided by the supreme court of Wyoming, reported in 40 Pac. 304, viz. *Griggs v. Board*, seems to us to be in point on the contention that the commissioners, having consented to the appointment of these assistants, had no power to remove them. The statute of Wy-

oming provides that county clerks in counties of the third class may, with the consent of the board of county commissioners, appoint one deputy (it will be observed that this is substantially the provision of section 2973 of our statutes relied upon by the respondent); and the court in that case held that, where the deputy had been appointed with the consent of the board, such consent could at any time be withdrawn, and the deputy removed, whenever, in the judgment of the board, the public interest required it, or when the revenues of the county were insufficient to warrant the continuance of such an officer.

The conclusion which we have reached, not only from the authorities investigated, but from the plain language of the statute, which it seems to us is hardly susceptible of construction, is that the legislature has made provision for the payment of the salary of the auditor and sheriff on the supposition that such salary would ordinarily be a sufficient compensation for the work done in those departments of the county; but that, in case there should be a question as to the necessity for further assistance, that question of necessity has been submitted to the discretion of the board of county commissioners; and that in this case the record shows that the board has exercised its discretion, and has found, as a matter of fact, that such extra assistance was not necessary to the carrying on of the business of the county; and that such finding is conclusive upon the courts. If it eventuates that the board has not exercised its discretion in a sensible way, or in such a way as to subserve the best interest of the county, the only remedy that the people have is the exercise of an intelligent choice at the polls. There is another construction of these statutes which is plausible, and that is that the provision of section 2973 applies to cases where the duties are greater than can be performed by the officer, in which case he may appoint a deputy whose services shall be paid for out of the salary of the officer appointing him, while section 3003 applies to a different character of cases. It is not required, under this section, that the duties of the office shall be greater than can be performed by the officer, but under its provisions, when, in the judgment of the commissioners, the salary is inadequate for the services required of the officer, a deputy may be appointed, whose salary may be fixed by the board and paid by the county. In counties where the salary of an officer is so small that he could not afford to hire a deputy it might frequently happen that a rush of business would necessitate extra help, and in such case the commissioners, under the provisions of section 3003, would allow for such services out of the county fund; while, in a case where the salary fixed by law is a larger one, the officer might not be able to do the work, and yet, in the judgment of the board, the salary might be sufficient to pay for all the work done. But this construction would

¹ The following are the correct citations: *Morris v. State*, 96 Ind. 597; U. S. v. *Smith*, 35 Fed. 490; and *Daggett v. Ford Co.*, 99 Ill. 334.—[Ed. Nat. Reporter System.]

be equally fatal to respondent's case. The judgment will be reversed, and the cause dismissed, at the respondent's cost.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

STATE v. WHITE.

(Supreme Court of Washington. July 26, 1895.)

INDICTMENT—VERIFICATION BY DEPUTY CLERK—LARCENY—FALSE PERSONATION.

1. The fact that a deputy clerk of court signs the jurat to the verification of an information in the name of the clerk, by himself as deputy, does not render the information insufficient.

2. A sewing machine is a subject of larceny, under Pen. Code, § 53, making it larceny for one falsely personating another to receive, in such assumed character, "any money or other property whatever," with intent to convert it to his own use.

Appeal from superior court, King county; T. J. Humes, Judge.

Dolveney V. White was accused, under Pen. Code, § 53, of the larceny of a sewing machine. The information was quashed, on motion, on the ground that the property was not a subject of larceny under the section named, and the state appeals. Reversed.

John F. Miller, Pros. Atty., and Daniel W. Bass, for the State.

ANDERS, J. The respondent, Dolveney V. White, was informed against by the prosecuting attorney of King county, for larceny, alleged to have been committed in receiving a certain sewing machine by fraudulently representing himself to be the agent of the owner thereof.

The information, omitting the caption and indorsement, is as follows:

"Dolveney V. White is accused by the prosecuting attorney of King county, state of Washington, by this information, of the crime of larceny, committed as follows: He, the said Dolveney V. White, in King county, state of Washington, on the 23d day of March, 1893, unlawfully and falsely did represent himself to one Sam Steve, an Indian; that he, the said Dolveney V. White, was then and there a duly-authorized agent of the Singer Sewing-Machine Company, the same being a corporation duly organized and existing under and by virtue of the laws of the state of New Jersey, and duly and legally doing business and having a place of business in said King county, state of Washington; and the said Dolveney V. White, not then and there being the agent of the said Singer Sewing-Machine Company, and in said assumed character, did then and there receive from the said Sam Steve one sewing machine, of the value of \$70 in lawful money, the property of the said Singer Sewing-Machine Company, with the intent then and there and thereby to convert the said sewing machine to his own use, the said Sam Steve

intending then and there to deliver the said sewing machine to the said Singer Sewing-Machine Company, the agent of whom was misrepresented, as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington. Dated at Seattle, in county and state aforesaid, this 12th day of January, 1894. John F. Miller, Prosecuting Attorney.

"State of Washington, County of King, ss. John F. Miller, being first duly sworn, upon oath deposes and states that he is prosecuting attorney for King county, state of Washington; that he has read the foregoing information, and knows the contents thereof; that the statements and allegations made and contained therein are true, as alleged. John F. Miller.

"Subscribed and sworn to before me this 13th day of January, 1894. T. W. Gordon, Clerk of the Superior Court. By P. D. Hughes, Deputy."

The respondent, by his attorneys, moved to quash and set aside the information on the alleged grounds: (1) That it did not state facts and circumstances sufficient to constitute the crime of larceny; and (2) that it was not properly verified. The motion was sustained by the court, upon the ground, as stated by counsel for the state, that a sewing machine was not a subject of larceny, under section 53 of the Penal Code, and the defendant was discharged.

That the information was not insufficient by reason of the form or substance of the verification will be seen by reference to previous decisions of this court. See *State v. Devine*, 6 Wash. 587, 34 Pac. 154, and *State v. Rosener*, 8 Wash. 42, 35 Pac. 357. This information was based upon section 53 of the Penal Code, which reads as follows: "Every person who shall falsely represent or personate another, and in such assumed character shall receive any money or other property whatever intended to be delivered to the party so personated, with intent to convert the same to his own use, shall be deemed guilty of larceny, and shall, on conviction thereof, be imprisoned in the penitentiary not more than fourteen years nor less than one year, or imprisoned in the county jail any length of time not exceeding one year." It closely follows the language of the statute; and, if it fails to state facts sufficient to constitute the crime of larceny, as therein defined, it is because the property mentioned is not designated by the statute. We are aware of no rule or principle of statutory construction which would exclude a sewing machine from the meaning of the words "other property whatever." All rules of construction are but aids to determine the legislative intent, and the primary rule is that the intention of the legislature is to be found in the ordinary and usual meaning of the words used in the statute. The legislature has said that: "Every person who shall falsely represent or per-

sonate another and in such assumed character shall receive any money, or property whatever * * * shall be deemed guilty of larceny." And, when it used the word "money," it not only designated a class or genus of property, but included therein every kind or species of that class, and therefore the words "other property" cannot be said to refer to property of the same class. End. St. § 409. Considering the mischief to be remedied, as well as the language used, it seems plain that the legislature intended to make it a crime for any person to receive any kind or description of property of value, by the means specified in the statute. To hold otherwise would be equivalent to saying that the words "other property whatever" have no force or meaning whatever. The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

HOYT, C. J., and DUNBAR, SCOTT, and GORDON, JJ., concur.

STATE ex rel. KING et al. v. TRIMBELL et al.

(Supreme Court of Washington. July 26, 1895.)

MANDAMUS—SECOND WRIT—SUMMONING JURY.

1. Where the alternative writ of mandamus is quashed, the issue of a second writ, though termed an amended or alias writ, is proper.

2. But, if such procedure is irregular, the error is immaterial, as the only change, in case of the beginning of a complete new action, would be the filing of an affidavit similar to that already filed, and the placing of a new number on the file and records of the court.

3. Where, in mandamus, defendant demands a jury for trial of issues formed, he cannot complain that the jury was summoned under a special venire.

4. Where the verdict is directed by the court, error in summoning the jury is immaterial.

5. The canvassing board cannot go behind the returns of the election officers to determine the result of an election.

6. The fact that the canvassing board has improperly issued a certificate of election to a person does not prevent its being required to make a proper canvass and issue a certificate to the person entitled thereto.

7. A common council, acting as the canvassing board, may by mandamus be compelled to canvass the returns, and issue the proper certificates of election to the persons to constitute its successor, as the issuance of such certificates, which are prima facie evidence of the holders' right to office, is necessary to the final determination by the new council as to the qualification of its members.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Mandamus proceedings, on the relation of Joseph King and another, against E. Trimbell and others, as composing the council of the town of Sumas. There was a judgment for relators, and defendants appeal. Affirmed.

Black & Leaming, for appellants. Bruce, Brown & Cleveland and Newman & Howard, for respondents.

HOYT, C. J. By this proceeding it was sought to compel the defendants, the common council of the town of Sumas, to canvass the returns of the election held on December 4, 1894, as returned to them by the officers of election, and from the face of such returns ascertain and declare the persons elected, and issue to them certificates of such election. The result was a judgment substantially as prayed for by the plaintiffs, to reverse which the defendants have prosecuted this appeal.

The first assignments of error which we shall notice were founded upon alleged irregularities in the proceedings which led up to the trial of the cause upon the merits. The first alternative writ of mandate was quashed upon motion of the defendants, who appeared specially for the purpose of making such motion. Thereupon, upon motion of plaintiffs, an amended or alias alternative writ was issued; and it is contended that the issue of this second writ was unauthorized, for the reason that the suit was terminated by the quashing of the first one. It is no doubt true that the quashing of the first writ so far terminated the proceeding that the defendants would not have been bound by anything further that might have been done therein without having been again served with process. But the service upon them of the amended or alias writ was such process, and by such service they were brought into the case as fully as they would have been had this second writ been the original one. One of the objects of the service of the alternative writ of mandate was to give the court jurisdiction of the persons of the defendants, and if the first writ for any reason failed to confer such jurisdiction, and was for that reason quashed, the situation of the parties to the action and of the court to the parties would be substantially the same as though no alternative writ had issued. This being so, the second alternative writ which was served upon the defendants was of the same force as though it had not been preceded by the attempted service of the first one. The fact that it was termed an "alias" or "amended" writ could in no manner affect the rights of the defendants. For these reasons, we hold that the second writ rightfully issued in the original proceeding. But, however that may be, the only thing that could have been required would have been to have had an affidavit, the same as the one filed in the original action, filed in another one, to authorize a writ which would have had the same effect as was given to the one in question; and the proceedings authorized thereunder would have been the same in all respects, excepting that they would have been under a new number upon the files and records of the superior court. The effect upon the defendants' rights would have been the same, whether the writ had as its foundation the affidavit filed in the old case, or one of the same tenor filed in a new one. Hence, they were not in-

jured by the irregularity, if irregularity it was.

There is an attempt to found error upon the fact that the alternative writ did not recite all the facts relied upon by the plaintiffs; but, in our opinion, the substantial facts were sufficiently recited. Besides, under our statute, we doubt whether it is necessary to recite any of the facts in the writ if the affidavit upon which it is founded is referred to therein and served therewith.

Upon the answer of the defendants and the reply of plaintiffs certain issues of fact were presented which the defendants demanded should be submitted to a jury. In order to comply with this demand, the court issued a special venire to the sheriff of the county, commanding him to summon enough persons qualified to serve as jurors to constitute a jury for the trial of the cause. To this defendants excepted, and they here claim that by the issue of such venire the court committed such error as should reverse the judgment. The proceeding was a summary one, and the court was not required to await a regular panel of jurors before proceeding with the trial; and, a jury trial having been demanded by the defendants, they cannot complain at the action of the court in taking the only course by which it could procure a jury within a reasonable time. But, even if the action of the court in calling the jury was erroneous, the judgment should not be reversed on that account. The verdict finally rendered was a directed one, and for that reason the constitution of the jury had no effect upon the rights of the parties.

On the trial upon the merits, the facts as disclosed by the bill of exceptions were substantially agreed to. Therefrom it appeared that upon the face of the returns returned to the common council the plaintiffs were entitled to certificates of election, and that those to whom certificates were given were not so entitled; that in making the canvass the common council went behind the returns of the election officers, and from an inspection of the ballots cast by the electors determined the result, and issued their certificates in accordance with the result so found. From this it will appear that but a single question was presented for decision upon the merits of the case, and that was as to whether or not the common council, as a board for the canvassing of the election returns, was bound by the face of the returns. The trial court was of the opinion that it was, and that upon the agreed facts the board had never made a canvass of the election returns as required by law. In this opinion we concur. That the duty of canvassing boards is purely ministerial, and confined to tabulating and ascertaining the result of an election as shown by the face of the returns, properly made out by the election officers, is well established upon both reason and authority. The election laws place the responsibility of determining the result at each election precinct upon

the election officers, and leave to the canvassing board only the duty of ascertaining the result from the returns made by such officers. An examination of section 226 of McCrary on Elections, and the authorities therein cited, will be sufficient to show that nearly or quite all of the courts have so held. Nor does the fact that upon some erroneous rule a certificate of election had been issued to other than the persons entitled thereto relieve the canvassing board from the duty of making a proper canvass and issuing the necessary certificates. See *People v. Hilliard*, 29 Ill. 413.

One other reason is suggested why the judgment should be reversed. It is claimed that, since the common council was the sole judge of the election and qualification of its members, the court has no jurisdiction to control its action in determining the result of the election. The common council which assumed to act as the board of canvassers of the election was not the common council which would finally determine as to the election and qualification of the members chosen at said election. The new council to which they were elected was the one which would finally pass upon that question, and the fact that the result as certified by the canvassing board would be subject to revision by such common council could have no effect upon the duty of the canvassing board in determining the result of the election. Certificates issued by such board prima facie entitled those to whom they were granted to sit as members of the new council, and their issuance was as necessary to determine this prima facie right as it would have been if such rights would have been finally determined by such certificates. We find no error in the record of which the appellants can complain, and the judgment will be affirmed.

ANDERS, SCOTT, DUNBAR, and GORDON, JJ., concur.

SMYTHE, Treasurer, v. NEW ENGLAND LOAN & TRUST CO.

(Supreme Court of Washington. July 26, 1895.)

APPLICATION OF PAYMENTS—SECURED DEBTS.

On foreclosure of a mortgage securing a note, the interest on which is guaranteed by a third person, the mortgagee is entitled to have proceeds of the sale applied in payment of the principal of the notes before the interest.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by R. E. Smythe, treasurer, against the New England Loan & Trust Company, to recover interest guaranteed. From a judgment for plaintiff, defendant appeals. Affirmed.

Doolittle & Fogg, for appellant. Clise & King, for respondent.

DUNBAR, J. This suit was brought by plaintiff and respondent against defendant

and appellant for the amount of interest alleged to be due on a certain promissory note for \$5,000, secured by a mortgage made by Dougherty and wife in favor of appellant, and by appellant assigned to the respondent herein for \$5,000. The assignment of the note was in the following words: "For value received, this bond for \$5,000, signed by Thomas A. Dougherty and Eliza A. Dougherty, his wife, is hereby assigned by the New England Loan & Trust Company unto R. E. Smythe, Treas., or order, without recourse, save that it guaranties—First, the prompt payment of interest thereon at eight per cent. per annum, payable semiannually until the principal is fully paid; second, the payment of the principal within two years from maturity," etc. The remaining portion of the second provision is not of importance in the discussion of this case. In the complaint in this action, the respondent alleged that the interest coupon note due March 22, 1893, and certain other coupon notes, were unpaid; that, under the terms of the mortgage, the holder was entitled to declare the principal note due on the default of any interest coupon, and that, exercising his option, he had done so, duly serving notice upon the New England Loan & Trust Company, Thomas A. Dougherty, and Eliza A. Dougherty, and had demanded of the said Thomas A. Dougherty and Eliza A. Dougherty and the New England Loan & Trust Company the payment of the whole principal sum and the interest accrued at the time of the demand. The said demand not being complied with, the respondent proceeded to foreclose said mortgage, and the mortgaged property was duly sold under such foreclosure proceedings for the sum of \$3,500, and the sum of \$3,483.90 was credited on the judgment in said action. The respondent further alleges that there was still due to him upon the said judgment the sum of \$2,405.50, with interest. He sued the appellant, the New England Loan & Trust Company, thereafter, as guarantor, for the amount of interest claimed to be due. An answer was filed by defendant, placing at issue the material allegations of the complaint, alleging, as an affirmative defense, the payment of certain insurance money. The reply was a denial of the affirmative defense. The case went to trial on these pleadings, and judgment was rendered in favor of the respondent for the sum of \$435. From this judgment an appeal was taken to this court.

The only questions involved in this case arise from the law of the application of payments. It is the contention of the appellant that the money made upon the foreclosure proceedings should have been applied first to the extinguishment of the interest coupon notes. As a matter of fact, it was applied upon the original notes, and the judgment in the present case is for the interest. Many cases are cited by the appellant the propositions of law announced in which cannot be disputed. It is primary law that the debtor

may direct the application of a payment to any account he sees fit; that, if the debtor makes no application of the payment, then the creditor may apply it to any liquidated demand due and payable. This is so far as voluntary payments are concerned. It is equally well-settled that, in a case of involuntary payment, the court will make an equitable application of the payment; and it seems to be undisputed, as a general proposition, that the law will impute the payment to interest before principal. But the respondent invokes another principle in this case, and one that was acted upon by the court, viz. that the debt having the more precarious security will be extinguished in preference to another. This principle is announced in the 5th volume of Am. & Eng. Enc. Law, at page 200; also, in Johnson's Appeal, 37 Pa. St. 268; Field v. Holland, 6 Cranch, 8; Hanford v. Robertson, 47 Mich. 100, 10 N. W. 125. Under the guaranties in this case, the prompt payment of interest was contracted for, while the original debt was not to be paid for two years; and it is urged by the respondent that the security for the original debt was not as safe, by reason of the long lapse of time, as the security for the interest. While, theoretically, it might be hard to draw this distinction, yet, as a practical effect, considering the liability of corporations to dissolve or to become insolvent, we think we should not interfere with the discretion of the court in making this application. But, outside of this proposition, it is doubtful if the appellant could raise an objection to the application of these payments under any circumstances. All the cases cited are with reference to the payor and payee. For instance, the law announcing the fact that the court shall make an equitable application also announces the rule that the court must base it, so far as possible, upon the ascertainment of what the real intention of the parties was, the parties being the parties paying and receiving the payment. In this case, it was the defendant, in the first instance, that had a right to make the application of this payment,—not the appellant here, who had nothing to do with the payment of the money. The appellant was notified of the fact that this interest was not paid at the time it became due. It thereby violated its contract by not paying it, and it cannot assume to control the direction of Dougherty and wife, who, in contemplation of law, made the payment which was applied upon the principal note in the mortgage foreclosure suit. It would have been competent for Dougherty and wife, if they had paid that amount voluntarily, to have directed the payment to apply upon the note, instead of the interest, and the appellant here could have raised no legal objection to such application. It would even have been competent, under the authorities, in case no application had been made by Dougherty and his wife, for the respondent to have made the application himself, and he may have even made it in prej-

notice of the rights of this guarantor. Daniel, Neg. Inst. § 1250, and cases cited. This being the case, then the appellant in this case, it seems to us, has no grounds for complaint. The judgment will therefore be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

KRIESCHEL v. BOARD OF COM'RS OF SNOHOMISH COUNTY et al.

(Supreme Court of Washington. July 26, 1895.)
INJUNCTION—COUNTY-SEAT ELECTION—FRAUD OF COMMISSIONERS.

1. Gen. St. tit. 38, c. 3, provides that the county commissioners shall canvass the votes at an election for the removal of a county seat, ascertain the results, and declare that the requisite number of votes has been cast; and the place selected shall be the county seat. *Held*, that equity could enjoin the removal of a county seat for fraud of the board of commissioners in canvassing the votes and declaring the result of the election. *Parmeter v. Bourne*, 35 Pac. 586, 757, 8 Wash. 45, distinguished.

2. Equity may enjoin the illegal removal of a county seat, at the instance of a resident taxpayer of the county.

Dunbar, J., dissenting.

Appeal from superior court, Snohomish county; R. A. Ballinger, Judge.

Action by John Krieschel against the board of county commissioners of Snohomish county and others, to enjoin the removal of the county seat of said county. From a judgment granting a temporary injunction, the board of commissioners and others appeal. Affirmed.

P. C. Sullivan, Francis H. Brownell, and Crowley, Sullivan & Grosscup, for appellants. S. H. Piles and Sapp & Lysons, for respondent.

ANDERS, J. In response to a petition purporting to be signed by the requisite number of qualified electors of Snohomish county, the board of county commissioners of that county caused to be submitted to the electors of the county, at the general election held in November, 1894, a proposition to remove the county seat from the city of Snohomish to the city of Everett. After the election had been held, and on December 18, 1894, the commissioners caused to be spread upon their records a statement, in substance, that a meeting of the board of county commissioners of Snohomish county was duly and regularly called to assemble at the courthouse in the city of Snohomish, in said county, on December 16, 1894; that, the returns of the general election held in said county on the 6th day of November, 1894, having been received, the board duly proceeded to canvass and compare the same, and to ascertain the result of said election on the question of the removal of the county seat, and continued in session, for the purpose of such canvass, comparison, and as-

certainment, continuously, adjourning from time to time as necessary; that said board, having duly canvassed, compared, and ascertained the result of said election, as shown by the returns from the voting precincts of the county, upon the question whether the county seat should be removed from the city of Snohomish to the city of Everett, do find, as the result of said canvass, comparison, and ascertainment, that 2,890 votes were cast for, and 1,906 against, removal, and that the total number of votes cast upon the proposition was 4,796,—necessary to removal, 2,878. Their record further states that the board thereupon declared the city of Everett to be the county seat of Snohomish county from and after January 21, 1895; that notice of the result of said election be given by posting notices thereof in all the election precincts of said county, and that the county officers whose offices are required by law to be kept at the county seat remove their respective offices, files, records, office fixtures and furniture, and all public property pertaining to their respective offices to the city of Everett, from, on, and after said January 21, 1895. It also appears from their records that, after examining the certificate of the county canvassing board, the county commissioners, by a majority vote (Mr. Evans voting contra), refused to consider, and rejected, the returns from the precincts of Port Gardner and South Snohomish, on the ground that the returns from those precincts bore evidence of erasures and alterations on their face, and appeared to be forgeries, and that the returns of those precincts were in such a condition that it was impossible to determine the correct vote cast in said precincts from said returns. The respondent, who became one of the commissioners of Snohomish county on or about January 15, 1895, and who theretofore was, and still is, a resident and taxpayer of said county, brought this action to restrain and enjoin the defendants, who were county officers, from removing their respective offices, or the files, papers, and property pertaining thereto, from the city of Snohomish to the city of Everett, in pursuance of the declaration and order of the board of county commissioners. The grounds upon which he asked the interposition of the court were that the petition upon which the county commissioners submitted the proposition of removal to the electors of the county was not signed by the requisite number of the qualified electors, and was fraudulent and illegal; that the question of removal was not properly submitted, for the reason that no separate ballots or ballot boxes were prepared for the votes upon the question of removing the county seat; that the board of commissioners never canvassed the votes cast on the question of removal, and never ascertained the result of the election on that question from the returns from the various election

precincts, but fraudulently, and in violation of law, and contrary to their knowledge of the fact, declared that more than three-fifths of the votes cast upon the proposition were in favor of removing the county seat from Snohomish to Everett; that the law concerning the removal of county seats, under and by virtue of which the commissioners submitted the proposition to the voters of the county, is unconstitutional, inoperative, and void; and that the removal of the county offices to the city of Everett will result in an unnecessary and illegal expenditure of the public moneys, and illegally and unjustly cause the respondent and all other taxpayers of the county to pay a larger amount of taxes than they justly ought to pay. Upon the filing of the complaint a temporary restraining order was issued, and thereafter the cause was set down for hearing upon plaintiff's motion for a temporary injunction. On the day fixed for the hearing, the defendants appeared and objected to the proceeding on several grounds, among which were that the court had no jurisdiction of the subject-matter of this action, that the complaint failed to state sufficient facts to entitle the plaintiff to the relief demanded, and that the plaintiff had no legal right or capacity to maintain the action. These objections were overruled by the court, and the application for a preliminary injunction was heard upon affidavits submitted by the respective parties. After argument by the respective counsel, and due consideration by the court, a temporary injunction was ordered, to reverse which order this appeal is prosecuted.

It is claimed by the learned counsel for appellants that, under the law of this state as announced in *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757, the court below had no jurisdiction of the subject-matter of this controversy, and that it was therefore error to entertain and consider plaintiff's complaint. The case of *Parmeter v. Bourne* involved the removal of the county seat of Pacific county, and it was therein sought to restrain a transfer of the county offices from Oysterville to South Bend, on the alleged ground that fraud had been committed in the counting of the votes by the judges of election, and in the issuing of returns of the election to the board of county commissioners. It was not claimed or pretended that the commissioners themselves did not honestly and faithfully discharge the trust imposed upon them by law. From the returns of the election and the poll books of the several precincts of the county they ascertained and declared the result of the election on the proposition of removal, and this court was constrained to hold, under the circumstances, that their determination of the result of the election was final, and could not be set aside by the courts. The conclusion arrived at in that case was the result of a careful consideration of the authorities applicable to the questions presented by the

record, and we are not now disposed to challenge its correctness. But it must not be understood from that decision that, in no case, can any action of a board of county commissioners respecting the removal of a county seat be called in question, as might perhaps be inferred from some general observations made in the course of the opinion, if considered apart and disconnected from the real questions under consideration. While it was said generally that the removal of a county seat is a political question, it was not intimated that such removal could be effected at the mere will or caprice of the county commissioners, regardless of the law and the constitution of the state. Although a political question, it is nevertheless one over which even the legislature has not absolute and unlimited control, for its power is plainly limited by our constitution. In some of the states the legislature seems to possess practically unrestricted power as to the removal and location of county seats, and, under such circumstances, the courts hold, and not without reason, that where it has designated some body or tribunal to determine the question of removal, the determination of such tribunal is final and conclusive. But we have been referred to no case, and have found none, in which it has been held that a board of county commissioners, to whom the law confides the duty of ascertaining and declaring the result of an election upon a proposition to remove a county seat, can finally and conclusively determine the question in a manner contrary to or different from that prescribed by law. In this state, it is the will of the qualified electors of a county, as expressed by their ballots, and that only, which authorizes the removal or relocation of a county seat. Neither the legislature, nor the county commissioners, who are its agents, can effect a removal in any other way than by submission to a popular vote. The only power the commissioners have with respect to the matter is the power to submit the question to a vote of the people, and to ascertain, declare, and publish the result of the election thereon. When they have submitted the proposition to the electors, and have ascertained from the returns that three-fifths of all the votes cast upon the proposition are in favor of removal, it is their duty to give the proper notice and declare the county seat to be at the place so selected from and after a specified date, not more than 90 days after the election. See Gen. St., tit. 38, c. 3.

An examination of the law concerning the removal of county seats will disclose the fact that the legislature did not intend to clothe the several boards of county commissioners in this state with arbitrary power to determine this question, for it provided that, "when the returns have been received and compared, and the results ascertained by the board, if three-fifths of the legal votes cast by those voting on the proposition are in favor of any particular place, the board must give notice of

the result by posting notice thereof in all the election precincts in the county." The statute also provides that the place selected to be the county seat of the county must be so declared in the notice mentioned in the section which we have just quoted, but this language evidently does not mean that the place selected by the board shall be the county seat, but the place selected by the people of the county and declared so selected by the board. The statute upon the subject is in perfect accord with the constitution, for that instrument declares that "no county seat shall be removed unless three-fifths of the qualified electors of the county voting on the proposition at a general election, shall vote in favor of such removal, and three-fifths of all the votes cast on the proposition shall be required to relocate a county seat." Const. art. 11, § 2. While the removal of a county seat necessarily involves the exercise of political or legislative power, it is thus seen that the people, the source of all political power, have not seen fit to leave the matter of removal to the unrestricted will of the legislature. And, although the legislature has delegated certain powers to the county commissioners, it has taken care to designate the character of their duties and the manner of discharging them. What, then, would be the consequence should a board of county commissioners in a given case declare a county seat removed without first ascertaining whether or not the legal and constitutional number of votes had been cast in favor of such removal? Would such a declaration effect a removal in spite of the contrary declaration of the constitution and the law? The contention of appellants is, in effect, that it would, but we think their position is untenable. If the county commissioners can cause the removal of a county seat by a mere declaration, unwarranted by the law or the facts of the case, then it was the extreme of folly on the part of the framers of the constitution to incorporate into the fundamental law the provision above quoted, and the legislature did a vain and useless thing when it enacted a law for their guidance. If there is no legal remedy for such a wrong, it were far better if this question had been left to their uncontrolled discretion.

But, since the law is otherwise, it becomes necessary to determine whether, upon the facts presented by the record, the court below was warranted in awarding the preliminary injunction of which appellants complain. We think it may be stated as a general proposition that every citizen has a right to be protected against the consequences of the illegal acts of all persons. If, therefore, the board of commissioners were not authorized, in this instance, by the facts and the law, to declare that the city of Everett had been selected as the county seat of Snohomish county, we must conclude that the respondent was entitled to be relieved, in some manner or form of action, from any injurious consequences which would result to him from the removal

of the county seat to that place. In *Rickey v. Williams*, 8 Wash. 479, 36 Pac. 480, this court affirmed the judgment of the lower court enjoining the removal of the county seat of Stevens county, on the ground that the board of county commissioners acted upon an insufficient petition in submitting the question to a popular vote, and it was also held in that case that a county officer whose office was required by law to be kept at the county seat might maintain an action to enjoin an illegal removal thereof,—that is, a removal attempted to be consummated by an illegal and void election. In this case, the petition upon which the commissioners acted seems to have been sufficient. At least, the trial court so concluded, and we see nothing in the record indicating error in that regard.

But it is alleged, in effect, in the complaint and proved by the evidence, that the board of county commissioners never received, compared, or canvassed the returns of the election upon the question of the removal of the county seat. The proof fairly shows that neither the returns nor the poll books were ever in the possession of the board of commissioners. It is claimed, however, that a majority of the board were present at the canvass of the election returns made by the county canvassing board, of which the chairman of the board of county commissioners was, *ex officio*, a member, and by that means ascertained the result of the election on the proposition of removal. But there was no session of the board of commissioners during the time the county canvassing board was in session, and no such meeting could have been held unless the chairman of the board of commissioners was capable of acting as a member of two boards and discharging distinct duties at one and the same time, which we hardly think was possible. Mr. Evans, one of the county commissioners, knew nothing of any meeting of the board between the 16th and 18th days of December, and on the latter date the board were not in session to exceed 15 minutes. The orders we have mentioned, and which were entered upon the records, were prepared in advance of this meeting by a majority of the board, and were adopted as expeditiously as possible, evidently with the intention that no one should interfere to prevent the removal of the county seat to Everett. In the absence of the returns and the poll books, and without considering the returns from the precincts of Port Gardner and South Snohomish, the correct number of votes in which precincts they say they were unable to ascertain, two members of the board declared that the city of Everett had received more than three-fifths of all the legal votes cast upon the question of removal and thereby became the county seat of Snohomish county. The records of the board itself, as well as the evidence adduced at the trial, conclusively show that the number of legal votes cast upon the proposition was not ascertained by the board of county commis-

sioners. And in that matter they were vested with no arbitrary, or even discretionary, power. They were commanded by the law to ascertain, from the returns, whether a sufficient number of votes had been cast to authorize the removal of the county seat, and not simply to declare that the required number had been cast.

The result of the election not having been ascertained, the pretended canvass and ascertainment by the board was not merely irregular, but absolutely void, and constituted no foundation or authority whatever for the order and declaration entered upon the records. So far as the location of the county seat is concerned, the effect of the election is neither greater nor less than if no election whatever had been held upon the proposition; and it follows, for aught that appears to the contrary, that the city of Snohomish is still the county seat of Snohomish county. And that being so, the question is: "Can a county officer and a taxpayer maintain an action to enjoin its removal and prevent the consequent illegal expenditure of public money? That he may do so, was determined by this court in *Rickey v. Williams*, supra. In *Crampton v. Zabriskie*, 101 U. S. 601, the court said: "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property holders of a county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases, and from the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders."

Upon the authority of these cases, and many others which might be cited, as well as upon considerations of right and justice, we conclude that the court below properly interfered to prevent the consummation of a wrong which would otherwise have resulted from the unwarranted and illegal acts of the majority of the board of county commissioners. Moreover, it must be conceded that there is much force in the suggestion of counsel for respondent that section 6 of article 4 of the state constitution conferred jurisdiction upon the superior court to hear and determine this action. It is there provided that "the superior court shall have original jurisdiction * * * of such special cases and proceedings as are not otherwise provided for." This provision of the constitution was not pressed upon the attention of this court or passed upon in either of the county seat cases above mentioned. The language there used is certainly

very broad and comprehensive, and might well be said to apply to cases of this character, as they are "not otherwise provided for," and, if contemplated at all, fall within the purview of this provision. At all events, it is manifest that it was not the intention of the framers of this section 6 to exclude any sort or manner of causes from the jurisdiction of the superior court. As what we have already said disposes of this case, it becomes unnecessary to enter upon a discussion of other points made in the briefs of the learned counsel for the respective parties. The judgment is affirmed.

HOYT, C. J., and SCOTT, J., concur.

DUNBAR, J. (dissenting). I am unable to distinguish this case from that of *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757, and *State v. Jones*, 6 Wash. 452, 34 Pac. 201, and as, in my opinion, this court in those cases decided the principles involved in this case in favor of the appellant, it follows that the judgment should be reversed.

STATE ex rel. SWERDFIGER v. WHITNEY et al.

(Supreme Court of Washington. July 26, 1895.)

REMOVAL OF COUNTY SEAT—CANVASSING VOTE—ESTOPPEL.

1. Gen. St. tit. 38, c. 3, providing that the county commissioners shall receive and compare the returns on an election for the removal of county seats, was not repealed by Act March 10, 1893 (Laws 1893, p. 271), creating a county canvassing board of election returns for all special and general county and state elections.

2. A canvassing board of election returns is not estopped, by having assumed to canvass the returns for vote on change of a county seat, from subsequently denying that they had authority to canvass such returns.

Appeal from superior court. Snohomish county; James G. McClinton, Judge.

Application on relation of D. S. Swerdfiger against L. C. Whitney, prosecuting attorney, and others, for writ of mandamus to compel defendants to canvass election returns for change of a county seat. From a judgment for issuance of the writ, defendants appeal. Reversed.

Crowley, Sullivan & Grosscup and Brown & Brownell, for appellants. Sapp & Lysons and S. H. Piles, for respondent.

ANDERS, J. The respondent and the appellants constituted the county canvassing board of election returns in and for Snohomish county, for the general election held therein on November 6, 1894. At that election there was submitted, among others, the question whether the county seat of Snohomish county should be removed from the city of Snohomish to the city of Everett. The board met and proceeded to canvass the returns from the various election precincts of the county, including those upon the

proposition to remove the county seat. After canvassing the returns upon that proposition from all the precincts, except five, the appellants, who were a majority of the board, refused to canvass or consider the returns from South Snohomish, whereupon the respondent sued out an alternative writ of mandate to compel them to count the votes returned from that precinct, or to show cause why they had not done so. The defendants interposed a demurrer to the writ, on the grounds (1) that the plaintiff had no capacity to sue; (2) that the alternative writ did not state facts sufficient to constitute a cause of action; and (3) that there was a defect of parties defendant. The demurrer was overruled, and the defendants excepted. An answer was then filed, setting up several affirmative defenses, to which the plaintiff duly replied. A trial was had upon the issues raised by the pleadings, and, after the introduction of the evidence, the court made and filed its findings of fact and conclusions of law, upon which a peremptory writ of mandate was issued, commanding the defendants to canvass and count the votes of the precinct of South Snohomish, as they appeared upon the face of the official returns. When the cause came on for hearing in this court, it appeared that no exceptions had been taken to the findings of fact or conclusions of law made by the court below, and thereupon the court refused to consider any of the facts upon which such findings were based. In the present posture of the case, therefore, there is but one question which it is necessary to determine, and that is whether the court erred in overruling the defendants' demurrer.

The point is made by the appellants that, under the law, they had no right or authority, as members of the county canvassing board of election returns, to canvass the votes cast upon the question of removing the county seat, and that it was error on the part of the court to undertake to compel them to do so. Their position is that the board of county commissioners were alone charged with the duty of ascertaining the result of the election upon the question of removal, and we think it is well taken. Under the law concerning the removal of county seats, it is made the duty of the board of county commissioners, upon the presentation of a properly signed petition, to submit the question of removal to the electors of the county at a general election to be held therein, and to receive and compare the returns, and ascertain therefrom the result of the election, and, if they find that three-fifths of the legal votes cast by those voting on the proposition are in favor of a particular place, to give notice thereof in all the election precincts in the county. Gen. St. tit. 38, c. 3. At the time this law was enacted the county canvassing board consisted of the county auditor and two other county officers, one of whom was a judge of

probate. Gen. St. § 417. On the taking effect of the constitution of the state, the office of probate judge was abolished, and it became necessary to create a new board of county canvassers, which was done by the act of March 10, 1893 (Laws 1893, p. 271). By virtue of that act, the county auditor, the chairman of the board of county commissioners, and the prosecuting attorney now compose the county canvassing board of election returns for all special and general county and state elections in such county. As the duties of this new board of canvassers are not specifically pointed out in the statute, it would seem that it was the intention of the legislature that it should simply possess the powers and discharge the duties of the board as formerly constituted.

The law authorizing the board of county commissioners to ascertain the result of elections in reference to the removal of county seats is not expressly repealed by this late act creating the board of county canvassers, and we fail to perceive any such conflict between the two acts that both may not stand. Nor do we think that the members of the county canvassing board were estopped from denying that they had authority to proceed with the canvass of the vote on the county-seat question by the fact that they had assumed to act in that matter. That they attempted, either ignorantly or knowingly, to exercise a power not conferred upon them by law, affords no reason why they should be compelled to continue in wrongdoing. The judgment is reversed, and the cause remanded, with directions to dismiss this proceeding.

HOYT, C. J., and SCOTT DUNBAR, and GORDON, JJ., concur.

LAWRY v. BOARD OF COM'RS OF SNOHOMISH CO. et al.

(Supreme Court of Washington. July 26, 1895.)

APPEAL—REMOVAL OF COUNTY SEAT.

Act 1893, March 11 (Laws 1893, p. 291), providing that "any person may appeal from any decision or order of the county commissioners to the superior court," does not authorize an appeal from an order directing the removal of the county seat.

Appeal from superior court, Snohomish county; R. A. Ballinger, Judge.

Appeal by Charles L. Lawry from the order of the board of county commissioners of Snohomish county and others, directing the removal of the county seat. Affirmed.

Sapp & Lysons and S. H. Piles, for appellant. P. C. Sullivan and Francis H. Brownell, for respondents.

ANDERS, J. As stated in the brief of appellant, the only question for discussion and determination in this case is, will an appeal lie from a decision or order of the board of

county commissioners with respect to the removal of the county seat? The appellant is a resident and taxpayer of Snohomish county, and, as such, undertook to prosecute an appeal from an order of the board of county commissioners of that county declaring the result of an election to remove the county seat, and from an order requiring the removal of the county offices to the place designated by the board. The superior court dismissed the appeal, on motion of the defendants, on the ground that the resolution and order complained of were not appealable. In so doing the appellant contends the court erred. He insists that he had an unquestionable right to appeal, under the act of March 11, 1893 (Laws 1893, p. 291), which provides that "any person may appeal from any decision or order of the county commissioners to the superior court of the proper county." This language is very broad and general; and, if it must be literally construed, his contention must necessarily prevail. But we do not think it should be so construed. If any person may appeal from any decision or order, every person may appeal, and we think there must be a limit somewhere. In reference to this provision, it was said by this court, in *Morath v. Gorham*, 11 Wash. —, 40 Pac. 129, that: "A literal construction of this part of our statute would compel us to hold that any man or woman in the county or state, or elsewhere, may appeal, * * * regardless of his or her relation to the matter in controversy; and we do not think the legislature intended, for a moment, to confer such an unlimited and universal right of appeal. It is a generally understood proposition of law, and presumably within the knowledge of the legislature when they enacted this section, that no one but a party to an action or proceeding can prosecute an appeal from a judgment or decision therein. *Haynes*, New Trials & App. c. 31. And we must presume that, when the legislature said 'any person may appeal,' they meant any person who has properly presented a matter before the board for their determination, and who is dissatisfied with their decision." This whole statute must be read together, in order to ascertain the legislative intention; and, when so read, it will be manifest that it was only intended to give the right of appeal to parties to ordinary proceedings before the board, or to persons directly interested therein. The words, "party appealing," are used several times in that portion of the act prescribing the manner of taking the appeal, which strongly tends to show that it was the intention that the person who appeals must be, in some way, a party to the matter in controversy. But, in this case, there are special reasons for holding that no appeal will lie from the order complained of. By the statute relating to the removal of county seats, duties are cast upon the board of county commissioners

which are separate and distinct from their ordinary and usual duties. In discharging them, it acts as the representative or agent of the legislature, by virtue of a special statute enacted for the sole purpose of clothing it with special powers, and which provides for no appeal. We think the general appeal act refers only to the usual proceedings of the board, and not to special proceedings under a special statute for a special purpose. The right of appeal is a statutory right, and, not having been given by the statute in this instance, we are of the opinion that it was the intention of the legislature that there should be no appeal from the proceedings of the board of county commissioners in the matter of the removal of a county seat. And the same doctrine has been announced by other courts in cases like this, and in others involving similar questions. *Bosley v. Ackelmire*, 39 Ind. 536; *Board of Com'rs v. Smith*, 40 Ind. 61; *Ex parte Towles*, 48 Tex. 413; *Bowersox v. Watson*, 20 Ohio St. 496; *Fulkerson v. Stevens* (Kan. Sup.) 1 Pac. 261. The judgment is affirmed.

HOYT, C. J., and DUNBAR, SCOTT, and GORDON, JJ., concur.

(12 Wash. 465)

THOMAS & CO. v. CITY OF OLYMPIA.

(Supreme Court of Washington. July 27, 1895.)

CITY WARRANTS—PAYMENT FROM SPECIAL FUND
—PROVISIONS IN CITY CONTRACT
—CONSTRUCTION.

1. Where the contract for a city improvement calls for payment from a special fund, and the city officials in good faith and with care attempt to create such fund, the contractor cannot compel payment from the general fund of the city, on its failure to create the special fund.

2. Where the contract recites that in consideration of the issuance of warrants on a special fund, to be raised by assessment, the contractor waives his right to demand payment in any other way, the contractor waives his right to recover from the municipality for the negligence of its officers in failing to create the special fund.

Appeal from superior court, Thurston county; T. M. Reed, Judge.

Action by Thomas & Company, a corporation, against the City of Olympia, a municipal corporation. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Frank D. Nash, for appellant. A. J. Falknor and Preston M. Troy, for respondent.

HOYT, C. J. The object of this action was to establish a liability against the respondent for certain warrants issued to the contractor in payment for work done upon a contract for the grading of a street. These warrants were primarily payable out of a special fund which, it was provided by ordinance, should be created by an assessment to be levied upon the property to be benefited by the work, and it was claimed that, by reason of the negligence of the officers of the city in failing to create such fund, the city had become lia-

ble to pay the warrants out of its general fund. The respondent, after denying certain allegations in the complaint, set up, by way of affirmative defense, the alleged facts: (1) That at the time the contract for the work was entered into it could not have made a legal contract for the doing of the work at the expense of its general fund, for the reason that its indebtedness at the time exceeded the limit of debt which it was authorized to incur under the constitution of the state; and (2) that the assessment, upon the property benefited, of the cost of the improvement, had been made with care, and in perfect good faith, and that the failure to collect such assessment was owing to a decision of the supreme court of the state, and certain decisions of the superior court of Thurston county, which made such collection impossible; that on account of such decisions the city was proceeding at the time the answer was filed to make a new assessment upon the property benefited, for the purpose of collecting money to be placed in the special fund out of which the warrants could be paid. To these affirmative defenses the plaintiff demurred, and, upon its demurrer being overruled, elected to stand thereon, and suffered judgment to be entered against it.

The sufficiency of these defenses is the principal question involved in the appeal. The facts alleged therein are so similar to those which we held, in the case of *Soule v. City of Seattle*, 6 Wash. 315, 33 Pac. 384, 1080, to have been sufficient to relieve the city of liability, that we do not feel called upon to further discuss the question than to say that, in our opinion, it comes clearly within the principles decided in that case. The appellant attempts, in its brief, to distinguish that case from the one at bar, but we are unable to see any substantial difference between the facts therein presented and those presented by the affirmative defenses pleaded. It is true that that was a suit in equity, while this is one at law, but the character of the suit could have no influence in determining the question as to whether or not a given state of facts was sufficient to create a liability against a city for an alleged failure on the part of its officers to do their duty. It is claimed by the appellant that this court, in the case of *Stephens v. City of Spokane* (Wash.) 39 Pac. 266, in effect qualified the decision in the case of *Soule v. City of Seattle*. In our opinion such is not the effect of that case. All that the court there decided was that, under certain circumstances, the city would be liable for the negligence of its officers in failing to take any steps towards the creation of a special fund out of which certain warrants were to be paid. The special facts relied upon in the case of *Soule v. City of Seattle*, and set up in the affirmative defenses in the case at bar, were not before the court, and its decision could have no effect upon a case in which such facts were made to appear.

From the pleadings in the case at bar, it appears that in the contract for the doing of the work for which the warrants in question were issued there was a provision to the effect that in consideration of the issuing of such warrants for the work the contractor agreed that he would waive the right to demand and receive payment from the city in any other way; and it is contended on the part of the respondent that plaintiff is bound by such waiver, and that for that reason, if for no other, the judgment of the superior court was right. With this contention we must agree. If the city had a right to enter into a contract at all, it had a right to enter into one with such limitations as to its liability as the other party saw fit to agree to, and, if the contractor agreed that he would take his chances as to whether or not the warrants would be paid out of the special fund, there is no good reason why he should not be bound by such agreement. This provision in the contract could have been inserted for no other purpose than to relieve the city of the liability which in this action is sought to be asserted against it, and in the absence of a showing to the contrary it must be presumed that its insertion was agreed upon by the parties to the contract, and if it was it should be given force. The judgment must be affirmed.

SCOTT, ANDERS, and GORDON, JJ.,
concur.

DUNBAR, J. I concur in the result on the last ground mentioned in the opinion.

GURNEY v. MORRISON et al.
(Supreme Court of Washington. July 27, 1895.)
PAROL EVIDENCE—ADMISSIBILITY—TO VARY LIABILITY ON NOTE.

Where purchase-price notes are given under a written contract that the seller shall deliver the property to a corporation to be composed of the makers, parol evidence is inadmissible to show a contemporaneous agreement that the notes should not be binding on the makers after the corporation was formed.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by J. Theodore Gurney against A. H. Morrison and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Dorr, Hadley & Hadley, for appellants. J. W. Rayburn, for respondent.

HOYT, C. J. Respondent brought this action to recover the amount due upon five promissory notes alleged to have been executed by the appellants. The execution of the notes was admitted by the answer, and by way of affirmative defense said answer set up the alleged fact that the notes were given for the purchase price of certain goods, and

that thereafter, with the consent of all parties, the goods were delivered to another party, to whom the respondent agreed to look for his pay. From the undisputed testimony introduced at the trial, it appeared that, at the time the notes were executed and delivered to the respondent, and as a part of the same transaction, a contract was entered into between the respondent and the appellants in which it was agreed that, in consideration of the sum of \$1,600 in cash and the future payment of the further sum of \$4,800, to be secured by the execution of the notes in question, and other considerations, the respondent agreed to deliver to the Gurney Cab & Transfer Company of Bellingham Bay, composed of the appellants, certain personal property described in said contract. It further appeared from the undisputed proofs that, in pursuance of such contract, the property therein described was delivered by the respondent to said Gurney Cab & Transfer Company. A prima facie case on the part of the respondent against the appellants was thus fully established. This prima facie case was sought to be overcome by proof of an alleged understanding, at the time of the execution of the notes and contract, to the effect that the transaction was for the benefit of, and to be carried into effect by, the Gurney Cab & Transfer Company of Bellingham Bay, a corporation to be thereafter organized; that the notes were given by the appellants only for the purpose of securing their co-operation in the organization of such corporation, and were to have no binding effect against them after it had been so organized. Some testimony tending to establish this claim was introduced over the objection of respondent. Other testimony offered for that purpose was excluded, and its exclusion is one of the errors relied upon by the appellants. It was abundantly shown by the proofs, and in fact is admitted in the brief of the appellants, that the making of the notes and the contract above referred to constituted but a single transaction. This being so, it must be presumed that all the negotiations between the parties, up to and including the making of said notes and of the entering into said contract, were merged therein, and proof of any oral understanding or agreement between the parties which would in any manner alter or affect the force of such notes or contract was, under well-settled rules, inadmissible, unless upon the face of said papers there was some ambiguity, to explain which it was necessary to understand the state of the negotiations between the parties at the time of their execution. The notes were in the usual form, and in no way ambiguous. It is in the contract that such ambiguity must be found, if found at all. We have carefully examined its terms, and are unable to find therein anything in the least degree uncertain or ambiguous. By its terms it is agreed upon the part of the respondent that, for certain considerations therein named, he will

assign certain franchises and deliver certain articles of personal property therein fully described, and its terms are so direct and certain that it would not have been easy to have drawn a contract which would have more clearly set forth the obligations of the respective parties. From the brief of appellants, it is not clear just what part of the contract is claimed to have been ambiguous, but we gather therefrom that such claim grows out of the fact that the respondent did not agree to deliver the goods to them, but to the Gurney Cab & Transfer Company of Bellingham Bay. It appeared upon the face of the contract that said Gurney Cab & Transfer Company was composed of the defendants, and therefore the agreement was to deliver the goods to the defendants under a certain partnership or corporate name. But, even if the agreement had been to deliver the goods to a third party having no connection whatever with the defendants, that fact would not tend in any degree to make the language of the contract ambiguous. In our opinion, it was not competent for the appellants to introduce oral testimony as to any understanding or agreement, which would in any manner affect their liability as the makers of the notes in question or upon the contract executed between them and the respondent, before or at the time the notes and contract were made and delivered. For that reason the court rightfully instructed the jury to find a verdict for the respondent unless there was proof tending to show an agreement between the respondent and the appellants, subsequent to the making of the notes, by which they were released therefrom. We have examined all the proof contained in the record upon this question, and are satisfied that the trial court was right when it held that it was not sufficient to authorize the question to be submitted to the jury. The proof of any such agreement, even between the respondent and the appellants, was of such a vague and uncertain character that it might rightfully have been entirely disregarded. But, even if it had sufficiently established the fact that there was such an understanding as between the respondent and the appellants, such agreement or understanding would have been of no effect for the reason that there was no consideration therefor.

It is contended in the brief of appellants that there was proof tending to show that the corporation known as the Gurney Cab & Transfer Company of Bellingham Bay, at the time of the alleged agreement, assumed the payment of the notes, and that such assumption furnished a good consideration for the release of appellants, but we are unable to find anything in the evidence which warrants any such contention. Not only was there an absence of competent proof to establish the affirmative defense set up in the answer of appellants, but, on the contrary, all of the circumstances surrounding the transaction,

together with the testimony of respondent, tended directly to disprove such defense. If the security had been given only for the purpose stated by appellants, it would have been natural that the entire amount should have been put in one note due at a certain time. Instead of that we find several notes, each falling due upon a different day, which would be the usual course where part of the consideration to be paid for goods furnished was to be in cash and part in deferred payments. In our opinion, all the testimony introduced which in any degree tended to show any other agreement than that evidenced by the notes and written contract should have been excluded. It follows that there was nothing to go to the jury upon the questions raised by such affirmative defense. The respondent was therefore entitled to a directed verdict, and the judgment rendered thereon must be affirmed.

SCOTT, DUNBAR, ANDERS, and GORDON, JJ., concur.

STATE ex rel. BARTLETT v. FORREST
et al.

(Supreme Court of Washington. July 30, 1895.)

PURCHASE BY PLAT—ESTOPPEL—STREET OVER TIDE LANDS—RECOGNITION BY STATE—RIGHT TO PURCHASE TIDE LANDS—EXTENSION OF STREET OVER TIDE LANDS.

1. One who purchases a lot by a plat is estopped to claim, as an upland owner, tide lands beyond the lines of the lot.

2. 1 Hill's Code, § 746, provides that, whenever any city has been surveyed, and a plat thereof showing streets has been filed, such streets shall be public highways. *Held* that, where a landowner files a plat on which there is shown a street on tide lands outside the limits of his donation claim, and the state board of appraisers afterwards recognizes the street by refusing to appraise the same as tide lands, and the legislature approves the action of the appraisers, the street becomes a public one.

3. 1 Hill's Code, § 2172, providing for the purchase of tide lands by persons who had made improvements thereon, confers only a privilege, and does not bind the state to sell all portions of tide lands on which improvements had been made.

4. A city has the right to extend a street over tide lands. *Columbia & P. S. Ry. Co. v. City of Seattle*, 33 Pac. 824, 34 Pac. 725, and 6 Wash. 332, followed.

Appeal from superior court, Jefferson county; R. A. Ballinger, Judge.

Mandamus, on the relation of Frank A. Bartlett, executor of the estate of C. C. Bartlett, to compel W. T. Forrest and others to survey and appraise certain tide lands. From a judgment for defendants, relator appeals. Affirmed.

W. F. Rupert, for appellant. James A. Haight, Asst. Atty. Gen., for respondents.

SCOTT, J. This is an appeal from a judgment of the superior court of Jefferson county, refusing to make peremptory an alternative writ of mandamus directed to the mem-

bers of the board of appraisers (then in existence) of shore and tide lands in and for Jefferson county, commanding them to examine, survey, and appraise a certain tract of tide lands of the first class at Port Townsend, which the relator claimed the right to purchase. It is claimed, upon the part of the state, that the land in controversy lies within the limits of a certain street known as Front street, and, such being the case, that it was not subject to sale. The tract in question was embraced within the original plat of the city of Port Townsend, as laid out by A. A. Plummer, F. W. Pettigrove, and L. B. Hastings; said town being located upon their donation claims, and the upland abutting upon the particular tract in controversy falling within Plummer's claim. This plat was filed for record on August 2, 1856. Streets and alleys are shown thereon, but there was no formal dedication when the plat was recorded. The most southerly named street was designated as Water street. A single tier of blocks was laid out to the south of Water street, which, either in whole or in part, extended below the meander line of the beach. The relator claims to be the owner of lot 6 and lot 5 of block 8, by direct and mesne conveyances, respectively, from Plummer. This was one of the blocks lying south of Water street, and all of said lots were tide lands, except the northerly part of lot 6. Lot 5 was laid off to the south of lot 6, and south of the block, extending along the tract dedicated and distant therefrom the width of a street, appears a line which might indicate an intention to dedicate a street extending along the south side of said block and the plat, although such street was not named on the plat. Subsequently, in 1881, Bartlett erected a building on lot 6, and on lot 5 constructed for the full width of the lot a wharf, and extended the same to the south upon the tide lands and into Port Townsend Bay, a distance of 120 feet, and he erected a warehouse upon this wharf which lies partly upon the tract claimed as a street. Only that part of said tract is in controversy which lies within or upon the tract claimed as a street. In 1884 Hastings filed for record a plat designated as "Hastings' Second Addition to Port Townsend," which also covered a portion of the tide lands below the meander line. Upon this plat a street called Front street was dedicated. In November, 1890, the city of Port Townsend adopted an ordinance which purported to establish Front street. This street was wholly upon the tide lands, and included that part formerly dedicated by Hastings, and extended the same along in front of block 8 so as to include the tract of land in controversy by taking in the original street south of Water street, if it was one, which, however, we are not called upon to decide. It is contended that this cannot be considered as an extension of a street, on

the ground that Hastings' dedication thereof was invalid, it being outside the limits of his donation claim, and that the city had no power to lay out a street no part of which touched the upland. One of the contentions upon the part of the state is that that part of the street so dedicated by Hastings was a street by virtue of section 746, vol. 1, of the Code,¹ and also that the whole became a lawful street by the ordinance aforesaid, including and extending the same, and by the recognition and adoption of it as such afterwards by the state. The tide land appraisers refused to appraise this tract claimed, which was included within the street, and the superior court, upon the trial of said matter, sustained them therein. Subsequent thereto, on March 13, 1895, an act was passed, which was approved March 26, 1895, confirming such action. Laws 1895, p. 555, § 64.

The rights claimed by the relator in this action are based upon his being the owner of a small part of the upland, viz. the northerly part of lot 6 in block 8, and by reason of his improvements as aforesaid he claims the right to purchase the tide lands lying in front of and adjacent thereto. But we are of the opinion that, having purchased by the plat, he was estopped from claiming anything as an upland owner beyond the lines of the lots conveyed to him in consequence of such purchase, and when he erected his improvements to the southward of lot 5, upon that part of the tract now claimed as a street, he had fair notice that it was the intention of the parties to bound said tract upon the southerly side by a street, whether the same was lawfully laid out and dedicated or not. See *Kenyon v. Knipe*, 2 Wash. 394, 27 Pac. 227. Furthermore, we are of the opinion that, by the dedication of that part of Front street within Hastings' Second addition to the city of Port Townsend, and by virtue of the law then in force relating thereto (section 746, supra), and of the recognition of such street by the state afterwards in refusing to appraise the same as tide lands and offer them for sale, and the approval of the action of the board of appraisers by the legislature, the same became a valid street, notwithstanding no part of it touched the upland. The ordinance enacted by the city was for an extension of this street, although it was widened as well as extended.

We are also of the opinion that the act of the legislature relating to the rights of various parties as to purchasing tide lands (section 2172, vol. 1, of the Code)² conferred no more than a privilege to the upland own-

ers and improvers to purchase such of the tide lands as should be offered for sale, and in no sense bound the state to appraise and offer for sale all portions of the tide lands upon which improvements had theretofore been erected. No contractual right was created. *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971.

As to the authority or right of the city to extend the street in question, see *Columbia & P. S. Ry. Co. v. City of Seattle*, 6 Wash. 332, 33 Pac. 824, and 34 Pac. 725. While this case related to cities of the first class, it is conceded that it would apply, under the law as it now stands, to all incorporated cities. Affirmed.

HOYT, C. J., and ANDERS and GORDON, JJ., concur.

(12 Wash. 475)

SCHOONOVER v. CONDON et al. (two cases). (Supreme Court of Washington. July 30, 1895.)

APPEAL—SUFFICIENCY OF EXCEPTION—FORECLOSURE OF CHATTEL MORTGAGE—INJUNCTION AGAINST DISPOSAL OF PROPERTY.

1. An exception, "To which findings and conclusions, and each of them, defendant G. excepts," does not entitle appellant to have the evidence considered.

2. In an action to foreclose a mortgage on a crop of hay and potatoes, where plaintiff showed that defendant had fed a large quantity of the hay to her cattle, and that the remainder of the property was not sufficient to pay plaintiff's claim, it was proper to enjoin defendant from disposing of the property pending the suit.

Appeal from superior court, Jefferson county; R. A. Ballinger, Judge.

Action by J. H. Schoonover against H. J. Condon and Kittle Grady to foreclose a chattel mortgage. From a judgment for defendants, and an order enjoining defendants from disposing of the property pending the suit, defendant Grady appeals. Affirmed.

A. W. Buddress, for appellant. Trumbull & Trumbull, for respondent.

SCOTT, J. The respondent instituted this action to foreclose a chattel mortgage on a certain crop, consisting of hay and potatoes, and joined Grady as one of the defendants on the ground that she had, or claimed to have, some interest in the property. Two appeals have been taken by her, which were heard and submitted at the same time. In the main action, judgment was rendered in favor of the respondent, decreeing a foreclosure of the mortgage, and, preliminary thereto, a number of findings of fact were duly made by the court. Some of the findings are not questioned. Appellant excepted to the whole, as follows: "To which findings and conclusions, and each of them, defendant Kitty Grady excepts." The only questions sought to be raised upon this appeal relate to the evidence, and respondent contends that we cannot consider the same because no sufficient exceptions were taken to the findings. This

¹ 1 Hill's Code, § 746, provides that whenever any city has been surveyed, and a plat thereof showing streets has been filed, such streets shall be public highways.

² 1 Hill's Code, § 2172, provides for the purchase of tide lands by persons who had made improvements thereon.

objection is well taken, and the judgment is affirmed.

The other appeal was from an interlocutory order restraining appellant from disposing of the property pending the litigation; and it is contended that the court had no authority to grant the same. We think, however, that the showing therefor was sufficient. It was, in substance, that the defendant had already fed a large quantity of the hay to her cattle, and that the remainder of the mortgaged property was not sufficient to pay plaintiff's claim, and that, if she continued to consume and dispose of the property, the plaintiff would suffer irreparable injury, etc. It is a well-settled proposition that, pending proceedings to foreclose a mortgage, the court, upon a proper application by the plaintiff, has authority to restrain the destruction of the property. Otherwise, the results of the litigation might become entirely lost to the plaintiff. Affirmed.

HOYT, C. J., and DUNBAR, GORDON, and ANDERS, JJ., concur.

(1 Kan. A. 518)

RICHARDS v. GRIFFITH.¹

(Court of Appeals of Kansas, Southern Department, C. D. Aug. 8, 1895.)

DIRECTING VERDICT—STATEMENT OF CASE—STATE LANDS—QUIETING TITLE—WAIVER OF ERRORS—FINDINGS BY COURT.

1. Where counsel for plaintiff, in his opening statement of the case to the jury, reads the petition and answer to show the jury what matters are involved in the issues, and then makes a brief statement of the evidence by which plaintiff expects to establish his cause; and the petition contains facts sufficient to constitute a cause of action, and the statements of counsel that the proofs will substantially sustain the petition, and also states what the defendant claims, and that in some mysterious manner he turned up with a patent to the land in dispute; and the defendant moves the court to require the jury to return a verdict for the defendant on such statement,—the motion was properly overruled.

2. A patent issued by the governor of the state to school lands, where the lands have previously been sold to another party, who has paid the entire purchase price, with interest and taxes thereon, confers no title to the patentee, and is void; and where the purchaser or his assignees have paid the full purchase price of the lands, with interest and taxes, and have in all things complied with the requirements of the law in relation to the sale of school lands, and is in the actual peaceable possession of the same, he can maintain an action to quiet his title thereto against the party claiming title by virtue of a patent issued by the governor for the same lands.

3. Where a trial has been commenced before the court and a jury, and during the trial before the jury exceptions are taken to the admission of evidence, and exceptions to the rulings of the court in refusing to admit certain evidence, and after the evidence has been entirely concluded on both sides the parties then stipulate in writing that the jury shall be discharged, and the case decided by the court without further evidence, the court to make separate findings of fact and conclusions of law thereon, and the jury is accordingly discharged, and the court makes separate findings of fact and con-

clusions of law, *add*, that the parties waive all irregularities or errors committed during the trial before the jury.

4. Where the court has heard all the evidence on the trial, and had the witnesses and parties before it, and makes special findings of fact, and there is some evidence tending to support each finding of fact, this court cannot disturb such findings.

(Syllabus by the Court.)

Error from district court, Sumner county; James A. Ray, Judge.

This suit was commenced by J. R. Griffith, as plaintiff, against Albert A. Richards, in the district court of Sumner county, Kan. On the 13th day of September, 1889, the plaintiff filed his petition to quiet his title to the E. ½ of the N. W. ¼ section 36, township 24, range 3, in Sumner county, Kan., alleging that he was the owner in fee simple and in the actual and peaceable possession of said land at the time of filing said petition, and had been such owner and in peaceable possession for five years continuously, and alleging that the defendant claimed an estate or interest in said land, the particular nature and ground of which claim were unknown to the plaintiff, except that he based his claim upon a certain instrument which purported to be a patent signed by the governor of Kansas, but for the issuance of which there is not and never has been any power, authority, or ground whatever; and plaintiff averred that, at the date of the pretended patent and issuance thereof, the title to said real estate was not in the state of Kansas, nor in the governor of the state of Kansas, and said instrument always has been null and void, and asks to have the claim of the defendant adjudged to be unfounded, without right, and to quiet the title in the said plaintiff. On the 13th day of November, 1889, the defendant, Richards, filed an answer and cross petition containing three separate paragraphs. The first was a general denial that Griffith was the legal and equitable owner of the real property in controversy; the second paragraph alleges that Richards is the legal and equitable owner in fee simple of the land; and the third paragraph alleges that Griffith unlawfully keeps him out of possession of all of said land, and that said defendant has so unlawfully kept him out of the possession of said land ever since the 14th day of June, 1889, and that the net annual rents and issues of the land have been and now are \$200, which said Griffith has wrongfully converted to his own use and benefit, and demands judgment against the plaintiff for the possession and recovery of the real property in dispute and for the value of the rents, issues, and profits thereof. Afterwards, on the 26th of November, 1889, Griffith replied to the answer of Richards, denying all new matters set up in the answer of the said Richards. At the April term, 1890, this case was tried before the court and a jury. At the conclusion of the evidence, by mutual agreement, the jury was discharged under stipulation

¹ Rehearing denied.

that the court make separate findings of fact and conclusions of law, and decide the case. The court thereupon made findings of fact and conclusions of law. As conclusions of law, the court held: That Griffith is the equitable owner of the land in controversy. That he is entitled to have such equitable title to said premises in fee simple adjudged to be in him, and have the same quieted and established in him forever as against the defendant; and rendered a judgment forever enjoining the defendant from asserting or claiming any right, title, or interest in and to the premises, and judgment against the defendant for cost. That the defendant is not the owner of any right, title, or interest in or to said premises, or any part thereof, and is not entitled to recover the possession of said premises, or any part thereof. Motion for new trial was filed by Richards, overruled, and case made, and comes into this court on petition in error, in which the plaintiff in error assigns 47 different grounds of error. Affirmed.

James Lawrence and A. A. Richards, for plaintiff in error. C. Everest Elliott, for defendant in error.

JOHNSON, P. J. (after stating the facts as above). There are 47 assignments of error in the petition of the plaintiff, many of which are frivolous and are unnecessary to be noticed; but we will proceed to consider such of the assignments of error as we deem necessary to a full determination of this case.

The first error complained of in brief of counsel for plaintiff in error is the refusal of the court to direct the jury, upon the statement of counsel for plaintiff below in making the opening statement of the case to the jury, to return a verdict for the defendant below. Counsel for the plaintiff below, in his statement of the issues to be tried and the evidence relied upon to prove the issues on behalf of the plaintiff in the lower court, after reading the petition, answer, and reply, set up to the affirmative part of this answer and cross petition: "The plaintiff files a general denial. This presents the issue that you will be called upon to try. I will say that there will be very little for you to decide in this case. The facts of this case will, as they appear in evidence, be that in 1879 J. T. Richmond bought this property. This was school land belonging to the state of Kansas until 1879, when J. T. Richmond became the purchaser of the land, and made the payment required by law, and the certificate was issued to J. T. Richmond. J. T. Richmond then assigned the certificate to a man by the name of Danford, and Danford made a deed of conveyance to the land, conveying all the title that he had in the land to S. S. Richmond. S. S. Richmond assigned the certificate to Peter W. Arnold, and Peter W. Arnold assigned it to a man by the name of Walter Lee Thompson, and Thompson surrendered

the old certificate, and took a new certificate, and sold the certificate to Mr. Griffith and his partner, Swatzel; and after that Swatzel assigned his interest in the certificate to Mr. Griffith, who ever since that time has been the owner of the certificate. We expect to show that Mr. Griffith has made his payments as the law requires. We also expect to show that he has been in the peaceable possession of this property ever since he became the owner of it, and now is. Of course, we rely upon this certificate and the payments made under it as the foundation of our claim of title. The evidence will show that Mr. Richards, about the last of June, 1889, in some kind of mysterious way, turns up with a patent issued by the governor of the state, describing this same land, and that he makes a claim by virtue of that patent. He claims that he is the owner of the property. That will be about the evidence on the part of the plaintiff; and when we prove this fact we shall ask a verdict, unless Mr. Richards can show a better title." The claim of plaintiff is that the mere naked fact that he held a patent from the governor of Kansas for this tract of land is conclusive of his title to the same. We do not think this position can be maintained as the law. It was stated by counsel for plaintiff below, in his opening statement to the jury, as is admitted in the claim of both parties, that this land was a part of the lands granted by the congress of the United States to the state of Kansas for school purposes; that it was what is commonly known as "school lands," and subject to sale by the state through the proper officers designated by the law. Gen. St. 1889, c. 92, art. 14. This act provides for the appraisal of lands, and for the sale of the same, and for the issuance of a certificate to the purchaser, for the assignment of the same, and for the issuance of a renewal certificate, as follows: "Any person having heretofore purchased such land, and made partial payments on the purchase money, and the purchase money not being due on the same, and who has not made default in the payment of interest due upon such purchase or taxes due upon the land, may, upon surrendering the certificate of purchase to the county clerk in a county in which the said land is situate, take out a new certificate of purchase under the provision aforesaid, and upon presenting a new bond in double the amount of purchase money remaining unpaid." If Griffith could prove all the facts stated in his petition, and those stated by counsel in the opening statement to the jury, he certainly would have established a good title in equity to the land in controversy, and, unless Richards could show a better title, he ought to sustain his action. A patent to lands, either from the state or the United States, is not always conclusive of title to the lands described in the patent itself. If the party who purchased this land at the sale of the school lands, and his assignees, have made all the payments re-

quired by the law, and done and performed all that was required of the purchaser and his assignees, then the title to the land, in equity, would vest in the assignee of the certificate of purchase, and any patent from the governor for the land would be null and void, and the title to the same would vest in the party who was entitled to the patent under the law. Patents are sometimes issued unadvisedly or by mistake, sometimes where the officer has no authority in law to issue them, or where some other party is entitled to the land, having purchased it from the proper officers and complied with all the conditions under the law to entitle them to a deed for the same. A patent is but evidence of a grant, and the officer who issues it acts ministerially, and not judicially. If he issues a patent for land where he has no authority, the patent is void. *U. S. v. Stone*, 2 Wall. 535; *Railway Co. v. Pracht*, 30 Kan. 67, 1 Pac. 319; *Stark v. Starr*, 6 Wall. 409; *Railway Co. v. Gordon*, 41 Mich. 423, 2 N. W. 648. The court properly overruled the motion to require the jury to return a verdict in favor of the defendant below.

The second error complained of by plaintiff is the overruling of objections of the defendant below to the introduction of evidence because the petition failed to state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. This action was brought under section 504, c. 80, Gen. St. 1868. The petition alleges: That the plaintiff is the legal and equitable owner in fee simple, and in the actual and peaceable possession, of the following described real estate, situated in Sumner county, in the state of Kansas, to wit, the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ section 36, township 34, range 3 W. of the sixth P. M., and that he has been such owner and in such possession for five years last past continuously. Defendant claims an estate and interest in said real estate, to wit, the title thereto in fee simple, and claims and pretends that he is the owner thereof in fee simple, the particular nature and grounds of which said claim are unknown to the plaintiff, except that the said claim is based upon a certain instrument which purports to be a patent signed by the governor of the state of Kansas, but for the issuance of which there was not and never has been any proper authority or grounds whatever. And plaintiff avers that at the date of said pretended patent and the issuance thereof the title to said real estate was not in the state of Kansas, nor in the governor of the state, and that said instrument is and has always been utterly null and void; that said claim of the defendant is adverse to this plaintiff, and adverse to his title; that the claim of the defendant is unfounded, and without right, and the defendant has no right, title, estate, or interest in said real estate, nor in any part thereof, and that said claim is a cloud on plaintiff's title; and

concludes with the prayer that defendant, Richards, be required to set forth the nature of his claim to said premises, and for judgment and decree quieting and establishing in plaintiff his title to said premises in fee simple, and adjudging his title and claim to be valid and perfect, and that defendant's claim is null and void, and that defendant be forever barred and enjoined from asserting any claim to said premises. The petition states facts constituting a cause of action in plain and concise language, and the facts as thus stated, if true, entitle him to the relief demanded; and if he had the legal and equitable title to this land, and was in the peaceable and quiet possession thereof, and the defendant was claiming an adverse estate to the land in the manner stated in this petition, the action was properly brought under the Code of Civil Procedure to determine the estate claimed to be adverse to his title; and it was proper in the petition to set out just what the adverse estate claimed was, and to state wherein it was adverse, and why it was null and void as against the title and estate of the plaintiff, which is fully and plainly stated in this petition. The plaintiff is only required to state the facts that go to make up his cause of action and the relief sought. He is not required to state the evidence by which these facts are to be established on the trial of the case. Counsel for the plaintiff, in his brief, says: "The transaction was between the state and the plaintiff, which has received its price for the land, and executed its conveyance, and no stranger to this prosecution can question its validity,"—and relies on the case of *Baker v. Newland*, 25 Kan. 26, as authority to establish his position; but that is not a parallel case. In that case Newland had forfeited his right to claim under his purchase of the land. He failed in making his payments, and refused and neglected to pay the taxes assessed against the land. The land was sold for nonpayment of taxes, and the certificate duly transferred to the purchaser of the land for taxes. Baker, being the purchaser of the land for taxes, paid the unpaid installments of principal and interest remaining against the land; and on his presenting the certificate of purchase, and the proper certificate that he had paid all the installments of principal and interest, and that the law had been fully complied with, a patent was issued to him. Newland made no claim to have complied with the law in the purchase of the lands from the state as school lands, but asserted that, under the law of congress and by the treaties with the Osage Indians, the land was no part of the school lands of the state of Kansas, and claimed the right to hold the land as a part of the lands of the United States, and claimed the right to obtain title to it from the United States land office, and had made two ineffectual efforts to obtain title from the United States land office. But in this case

Griffith was the assignee of the original purchaser; was in the actual possession under said certificate of purchase. All the installments of principal and interest had been fully paid, and the purchaser and his mesne assignees had in all things complied with the law, and had, by reason of the purchase and payment of the purchase price, with interest, acquired the legal title to the property, and at the time the governor of the state executed the patent there was no title to the lands in the state or in the governor, and hence the patent was absolutely void. While Griffith was not a party to the issuing of the patent, he was a party in interest to the land described in the patent, and he had a right to bring and maintain his action to determine the title to this land. *U. S. v. Stone, supra; Stark v. Starr, supra; Railway Co. v. Gordon, supra.* Richards relies on the mere naked fact that in some mysterious manner he obtained a patent to this land from the governor of Kansas, without offering any fact in explanation as to what state of facts the same was founded on. When Griffith set up and established his claim of title to this land, and alleged that he procured it by purchase, the assignment of the certificate of purchase, payment of the purchase price, with interest, and the possession thereof, it established his title to the land; and if there was any fact that would tend to defeat his title, such as the nonpayment of taxes, or the failure to comply with any other requirements of the law by which the land would be forfeited, it called upon Richards to show it,—to set up and prove on what he based a right to the patent. The law does not presume a forfeiture of estate, but it must be established by some evidence. If the purchaser of school lands and his assignees of a certificate pay all the installments of the purchase price, and the interest, according to law, the presumption is that the holder of the certificate is the owner of the land, and entitled to the patent; and if it is thereafter issued to some other person, who claims title under it, he will be called upon to prove that in some way under the law he was entitled to receive it.

The assignments of error in the brief of counsel from 3 to 10, both inclusive, are relative to what are claimed as errors in the admission of evidence and overruling of objections to certain evidence, which are unnecessary for us to consider in the determination of this case, for the reason that at the conclusion of all the evidence for both parties, by mutual agreement, the jury was discharged under a stipulation that the court should make special findings of fact and conclusions of law and decide the case. By this stipulation the parties waived any error that might have been committed in the admission of evidence on the trial of the case before the jury, and when the parties stipulated that the court should decide

the case they thereby waived all errors in the proceedings upon the trial up to that time, and agreed that the court should determine the case upon the evidence that was then before it.

The eleventh assignment of error is that the court erred in overruling the demurrer to the plaintiff's evidence. The demurrer was properly overruled. As the plaintiff proved the sale of this land and issuing of the certificate of purchase by the county clerk, and mesne transfers of the certificate of purchase and renewal certificate, and the payment of the purchase price of the land, and the installments of interest thereon, as the same fell due, and the actual possession of the land, we think he had proved a *prima facie* case; but if the court erred in overruling the demurrer to the evidence the whole matter was waived by the stipulation, after the conclusion of the evidence, to discharge the jury and to submit the decision of the case to the court.

Complaint is made in the remaining assignments in brief of counsel that the court erred in the refusal to find certain facts, and that certain facts found by the court were not in accordance with the evidence, and that they were not sustained by the evidence, and in overruling the motion for judgment on the pleadings and findings of fact, and in the conclusions of law, and also in overruling the motion for a new trial. The court heard all of the evidence, had the witnesses and parties before it, and there was some evidence on all of the facts found by the court, and where the court has found the facts from the evidence we cannot disturb its findings unless there was a clear want of evidence to support some of the facts so found. The court has fully stated the facts as found, and given his conclusions of law on the facts as found, and we think the conclusions of law are correct. We have examined the record in this case with great care, and have been unable to find any error in the proceedings of the court on the trial of this case that was prejudicial to the plaintiff in error. The judgment of the district court is affirmed, with costs. All the judges concurring.

(1 Kan.A. 306)

ALDRIDGE v. ELERICK.

(Court of Appeals of Kansas, Southern Department, E. D. Aug. 6, 1895.)

MORTGAGE OF ONE PARTNER'S INTEREST—FRAUD—DISCRETION OF COURT—CONTINUANCE.

1. A mortgagee takes no greater right or interest than the mortgagor had, and, as one partner cannot take possession of the partnership property, neither can his mortgagee do so.

2. When the question of fraud is fairly considered by the jury, under proper instructions and with sufficient evidence, their finding will not be disturbed by this court.

3. The trial court has large discretion in the matter of granting a continuance, which was not abused in this case.

(Syllabus by the Court.)

Error from district court, Montgomery county; J. D. McCue, Judge.

Action by C. F. Elerick against W. M. Aldridge. Judgment for plaintiff, and defendant brings error. Affirmed.

About November 15, 1888, one Albert Clymer and Lee were the owners of a stock of merchandise, and doing business in Elk county, Kan.; and at that time this defendant in error, C. F. Elerick, purchased or traded for Lee's undivided one-half interest in said stock of goods, and he and said Clymer entered into a partnership for the purpose of carrying on a mercantile business in Elk City, Kan. On November 30, 1888, Albert Clymer gave a note to Ridenour Baker Grocery Company for \$136.10, secured by a chattel mortgage upon a general stock of boots and shoes, hats, caps, clothing, gents' furnishing goods, glassware, queensware, and provisions, being the entire stock of general merchandise had, kept, and possessed by the mortgagor and one C. F. Elerick, and had in a certain brick building on the west side of Main street of Elk City, and owned by Rudolph Meyers. One of the stipulations in the mortgage is as follows: "This mortgage is subject to two others to C. F. Elerick, aggregating about \$800, said mortgagee being now in possession, and selling goods for cash, and applying the proceeds to the payment of said mortgages, and, as soon as they are paid, the proceeds to be applied to this." Shortly afterwards, C. F. Elerick, this defendant in error, purchased said Clymer's interest in said goods, and boxed them up, preparatory to shipping them to McCue, Kan. This plaintiff in error, W. M. Aldridge, as constable in and for the township of Loulsburg, in Montgomery county, Kan., seized said goods, and took them into his possession. Thereupon, on the 18th day of March, 1889, this defendant in error, C. F. Elerick, brought suit in the district court of Montgomery county, Kan., against said Aldridge, and alleges in his petition that he is the owner of the goods; and charges the said Aldridge with having unlawfully converted and disposed of the same to his own use and benefit, and refuses upon demand to deliver up the same; and alleges that the value of the goods was \$3,175.63, and demanded judgment for that amount. In his answer, said Aldridge admits the taking of the goods, but claims they were taken by virtue of a chattel mortgage executed by A. Clymer to Ridenour Baker Grocery Company; alleges that he was duly authorized by said Ridenour Baker Grocery Company, as their agent, to take and hold the said property, and foreclose the same. He also alleges that he held said property as constable, subject to the said mortgage above mentioned, under and by virtue of four separate executions issued by J. P. Swartzel, a justice of the peace of Louisburg township, Montgomery county, Kan., upon judgments duly rendered by said justice,—one of them being against A. Clymer in favor of J. W. Brigham & Co., and one of them

against A. Clymer and one Lee in favor of Goldsteine, Freidman & Co., and one against A. Clymer and Lee in favor of the Consolidated Tank-Line Company, and one against A. Clymer and — Lee and — Lee in favor of M. Wallace. Said Aldridge also alleges that the sale of Lee to Elerick and of Clymer to Elerick were both fraudulent, and made with intent to cheat, defraud, and delay the creditors of the said Clymer and the Lees, and that said goods were liable for and subject to the demand of the above-mentioned claims. The mortgage and the four executions are in the case made as part of the record in the case. The execution of the Consolidated Tank-Line Company, and of Goldsteine, Friedman & Co., and of M. Wallace, were each of them returned unsatisfied on January 14, 1889. All of said goods were sold by said Aldridge, and \$157.34 was paid on the chattel mortgage, and \$279.36 credited upon the execution of J. W. Brigham & Co. against Clymer. This is the account made of the proceeds of said sale.

Fuller & Randolph, for plaintiff in error.
A. B. Clark, for defendant in error.

DENNISON, J. (after stating the facts). If this plaintiff in error had any authority for seizing and disposing of the goods in controversy, it was by virtue of the chattel mortgage given by A. Clymer to Ridenour Baker Grocery Company and the execution of J. W. Brigham & Co. against Clymer. The executions which were returned unsatisfied on the 14th day of January, 1889, were certainly no defense which could have been set up by said Aldridge to a suit begun on the 18th day of March, 1889. Therefore, unless said Aldridge has authority by virtue of said mortgage and said execution of Brigham & Co., he had none. Elerick, this defendant in error, had purchased Lee's undivided one-half interest in said goods, and was a partner with said Clymer at the time Clymer gave said mortgage, and said Elerick had purchased Clymer's interest in said goods prior to the time of the levy of the execution of Brigham against Clymer. "A mortgage by an individual partner, for his own purpose, of all his right, title, and interest in and to its real estate, and other property of the firm, imposes no actual lien upon the property itself, or upon any part of it. The corpus is joint property. The interest of an individual partner consists only of his share in the surplus remaining after the payment of the debts and settlement of the accounts of the firm. It is not until that interest is ascertained definitely, and set apart as the share of the mortgagor, that his mortgage is available against any specific property." Jones, Chat. Mortg. § 45. A mortgagee takes no greater right or interest than the mortgagor had, and, as one partner cannot take possession of the partnership property, neither can his mortgagee do so.

As to the rights of said Aldridge to hold

said goods, under the execution of Brigham & Co., against Clymer, the court properly and fully instructed the jury as to the question of fraud in the transactions between said Clymer and said Elerick, and the jury found a general verdict in favor of this defendant in error, and there was sufficient evidence to sustain said verdict. It is not the province of this court to disturb that finding. But, suppose the jury had held the sale from Clymer, as to his undivided one-half interest, fraudulent, and the officer had a right to sell Clymer's one-half interest. In that event, Elerick was entitled to recover, because Aldridge sold all the goods instead of the one-half of them. "Where the officer sells the whole, when entitled to sell only the interest of the execution debtor, the other owners may treat him as a trespasser ab initio, and maintain their individual action against him." *Spaulding v. Black*, 22 Kan. 55, and cases therein cited.

This plaintiff in error claims that the trial court erred in not granting a new trial because of the absence of the witness T. J. White. T. J. White was served with a subpoena duces tecum, to bring with him certain papers and records, and said White afterwards appeared in court and testified, and all the papers and records that he was required to bring, or which were desired by this plaintiff in error, appeared in the records of this case, and have been treated as though they had been duly offered in evidence. Therefore, this plaintiff in error has not been prejudiced by the refusal of the court to grant a continuance in the case, and the court did not abuse the discretion given him in the matter of granting a new trial. No prejudicial error appearing in the record in this case, the judgment of the district court will be affirmed. All the judges concurring.

(1 Kan.A. 23)

UNION PAC. RY. CO. v. BARNARD & LEAS MANUF'G CO.

(Court of Appeals of Kansas, Northern Department, C. D. July 6, 1895.)

SPECIFIC PERFORMANCE—DOWER—CONTRACT OF SALE OF LAND.

In this state, a wife, during the life of her husband, has an inchoate interest in all the real estate in which her husband has a legal or equitable interest, including real estate which her husband holds under a contract of sale; and an assignment of such contract by the husband alone, when the wife, at the time of such assignment, is a resident of this state, does not divest her of such interest; and the assignee of such contract so assigned cannot maintain an action against the vendor to compel the specific performance of such contract, by the execution of a warranty deed conveying to such assignee the absolute fee-simple title to the land contracted to be conveyed.

(Syllabus by the Court.)

Error from district court, Clay county; R. B. Spilman, Judge.

Action by the Barnard & Leas Manufacturing Company against the Union Pacific

Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. L. Williams and N. H. Loomis, for plaintiff in error. Harkness & Godard, for defendant in error.

CLARK, J. The record in this case discloses that on December 4, 1883, the plaintiff in error entered into a written contract with one Harry E. Jaeckel, whereby it agreed to cause to be made and executed unto the said Jaeckel, his heirs or assigns, a deed conveying certain real estate therein described, with the ordinary covenants of warranty, upon the payment of the purchase price thereof, to wit, the sum of \$864, payable, \$172.80 cash in hand, and the balance in six equal annual payments. At the time the contract was executed, the cash payment thereunder was made by Jaeckel, and subsequently all the right, title, interest, and claim in and to the contract, and the land therein described, was successively sold, assigned, and transferred from Jaeckel to J. L. Brandt, from Brandt to Christ Kotha, from Kotha to F. A. Head, and from Head to the Barnard & Leas Manufacturing Company, their respective heirs and assigns. In each of these transactions the assignment was in writing, indorsed upon the original contract, duly acknowledged, and the contract, with the assignment thereon, delivered to the assignee. On or about the 4th day of December, 1889, the Barnard & Leas Manufacturing Company made the last payment due upon the contract, and tendered and offered to surrender the contract to the railway company, and demanded a conveyance of the premises to it according to the terms of the contract, but the railway company refused to execute and deliver such conveyance; whereupon the defendant in error, on the 31st day of July, 1890, brought this action in the district court of Clay county, making the plaintiff in error the only defendant, and asked that the railway company be decreed to convey the premises described in the contract to the plaintiff, by a good and sufficient deed, according to its terms. A copy of the original contract, with all of the assignments indorsed thereon, was attached to and made a part of the petition. The defendant filed its motion alleging that the intermediate grantors or assignors, together with their wives, each claimed to have some title to or interest in the land mentioned in the petition, and that they were necessary parties to the suit, and asked the court that they may be made parties defendant in the action. Upon the hearing of the motion, the evidence disclosed the fact that Christ Kotha, one of the intermediate assignors was, at the time of the execution of the assignment of the contract by him, a married man, and that his wife, Christina, refused to convey her contingent interest in the real estate in dispute, without the payment of a money consideration therefor. But

the court overruled the motion. The defendant answered, admitting the making and execution of the contract, as alleged in the petition, and compliance with the terms of the contract as to the payment of all sums of money due thereunder, but alleging, among other things, that the assignment of the original contract by Kotha to Head was irregular, in that the assignment was not executed jointly by Kotha and his wife, Christina, and that she now claims to have an interest in said land. The defendant also disclaimed having any right, title, or interest in the land, and offered to make a deed thereto in accordance with the terms of the contract, as soon as the proper assignments of said contract were proven. To this answer the plaintiff filed a reply, denying each and every allegation therein contained.

The cause was tried before the court, with the consent of the parties to the action, upon the following agreed statement of fact: "It is agreed by the parties hereto, as the facts in this cause, for the purposes of trial, that the contract mentioned in the plaintiff's petition was executed as therein stated; that all the assignments of said contract were made as appears by the copy of the contract attached to plaintiff's petition; that, at the time of the several assignments, the assignors were all unmarried men, except Christ Kotha, who was married, and his wife, Christina, did not join in the execution of the assignment; that said Christina Kotha has refused and does refuse to join in a quitclaim deed or other conveyance or assignment of her right to the said land, as the wife of said Christ Kotha; that said land was not the homestead of any of the assignors, and they had no other or further title thereto than was vested in them by said contract; that defendant has offered and is willing to convey said land at any time a proper assignment is joined in by the wife or wives of each of said assignors in the contract who was married at the time of making the several assignments thereof." The court found for the plaintiff, and rendered judgment, decreeing that the defendant, within 30 days from that date, execute and deliver to the plaintiff a good and sufficient deed, with covenants of general warranty, conveying the premises described in the petition to the plaintiff, in fee simple, and, in default thereof, that the sheriff of the county execute such deed to the plaintiff.

The defendant, as plaintiff in error, alleges error in overruling its motion for a new trial, and overruling its motion to have Mrs. Kotha made a party defendant, and alleges that the finding and judgment of the court are contrary to law and to the evidence; that the finding and judgment should have been for the defendant; and that various errors of law occurred at the trial, which were duly excepted to by the defendant, and these questions are properly presented to this court for review. Paragraph 2500 of the General

Statutes of 1889 reads as follows: "One-half in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executor as her property, in fee simple, upon the death of the husband, if she survives him: Provided, that the wife shall not be entitled to any interest, under the provisions of this section, in any land to which the husband has made a conveyance, when the wife, at the time of the conveyance, is not or never has been a resident of this state." Under the statutes above quoted, the wife, if she survive her husband, is entitled to one-half in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest which had not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife had made no conveyance. That Christ Kotha had, prior to the assignment by him, at least an equitable interest in the land, there can be no question. In *Commissioners of Douglas Co. v. Union Pac. Ry. Co.*, 5 Kan. 615, it is stated that "equity generally considers that when land is sold on credit, and the deed is to be made when the purchase money is paid, the land, at the time the sale is made, becomes the vendee's, and the purchase money the vendor's; that the vendor becomes, at once, the trustee of the vendee with respect to the land, and the vendee the trustee of the vendor with respect to the purchase money." It has also been held that a bond for a deed of land transfers the title in equity to the purchaser, the obligor holding the legal title for the security. *Burkhart v. Howard (Or.)* 12 Pac. 79; *Alpers v. Knight (Cal.)* 8 Pac. 446; *Taylor v. Holmes*, 14 Fed. 498. It was said in *Busenbark v. Busenbark*, 33 Kan. 572, 7 Pac. 245: "While the wife's right and interest in the real estate of her husband, not occupied by the family as a homestead, is inchoate and uncertain, yet it possesses the element of property to such a degree that she may maintain an action during the life of her husband to prevent its wrongful alienation or disposition under fraudulent judgments procured and consented to by the husband, with the object and for the purpose of defeating the wife's right." Our supreme court has also held in *Green v. Green*, 34 Kan. 740, 10 Pac. 156, that deeds executed by the wife, just on the eve of her marriage, to her daughters by a former marriage, without a valuable consideration, and without the knowledge or consent of her intended husband, were in fraud of his rights, and that he might maintain an action during the life of his wife to set such deeds aside and have them declared invalid. In *Munger v. Baldridge*, 41 Kan. 236, 21 Pac. 159, it is said that

"the interest of the wife in the real estate of her husband during marriage is a contingent one, it is true, but it is unquestionably property, and no reason has been advanced why she may not empower the husband to act for her, and in conjunction with himself, convey it away." The court speaking through Johnston, J., says, in *Buffington v. Grosvenor*, 46 Kan. 735, 27 Pac. 137: "If there was an attempt to convey by the husband alone, when his wife was a resident, the title would remain in her because the manner of conveying land prescribed by * * * statute had not been pursued; and if there was no judicial sale of the land and it was not necessary for the payment of debts, a one-half interest would descend to her." Though the wife has, under our statute, no actual estate, during the life of her husband, in real estate belonging to him, yet she has an interest therein, and a right of which she cannot be divested, except in the manner prescribed by the statute. It is such an interest which the law recognizes as the subject of conveyance by deed. She may not survive her husband, or the real estate may be sold on execution or other judicial sale, or it may be necessary for the payment of debts (in which event the estate would never vest in her), yet this interest is a valuable one, and may be sold, conveyed, or released for a valuable consideration, and the law, treating it as valuable, and as an existing incumbrance on the land, has provided the manner in which it may be conveyed or released. Christ Kotha, having at least an equitable interest in the land in controversy, it seems clear, under our statutes and the decisions of our supreme court, that an assignment of the contract by him alone would not carry with it the contingent or inchoate interest of his wife in the real estate which was the subject of the contract. See authorities above cited and *Overman v. Hathaway*, 29 Kan. 434, where Valentine, J., says: "It is true that her interest in such land was only contingent and inchoate, but still it was an interest which might at some time become absolute and complete. Her interest, we think, was undoubtedly sufficient to enable her to sue or be sued with reference thereto."

It appears that Mrs. Kotha is claiming an interest in the subject-matter of the controversy, and that interest was fully disclosed both by the motion and answer of the railway company, and by the agreed statement of facts upon which this case was tried in the court below. As she has an interest therein adverse to the plaintiff below,—the rights of each growing out of the original contract between the railway company and Jaeckel,—she was at least a proper if not a necessary party to the action. There was but one contract entered into by the railway company, and there was but one cause of action under it, and the entire controversy should have been settled in one action, and the rights of all parties interested therein

adjusted in the one proceeding. *Allison v. Shilling*, 27 Tex. 450; *Huffman v. Cartwright*, 44 Tex. 301; *Agard v. Valencia*, 39 Cal. 292; *Pom. Cont.* 545; *Story*, Eq. Pl. §§ 72, 138, 139, 153; *Kimball v. Connor*, 3 Kan. 414; *Scarborough v. Smith*, 18 Kan. 407; *Railroad Co. v. Benton*, 42 Kan. 698, 22 Pac. 698. If the plaintiff below objected to having Mrs. Kotha made a party defendant, and it would have been satisfied with such a title as the railroad company could give, it should have been content with a decree for the conveyance of the premises to it in fee simple by or from the railway company, with covenants of general warranty, subject to the inchoate interest therein of Mrs. Kotha. *Story*, Eq. Pl. § 139. Of such a decree the plaintiff in error could have no cause to complain. The railway company could safely make such a deed without being subjected to the annoyance and expense of litigation, or the possibility of future liability under its covenants of warranty, leaving the parties interested to litigate their respective claims to the premises conveyed in some future action, should Mrs. Kotha outlive her husband.

Defendant in error contends that the railway company did not claim in the court below, nor does it anywhere appear, that Mrs. Kotha was ever a resident of the state of Kansas, and that the railway company did not ask or demand that the rights of Mrs. Kotha be saved by the decree of the court. In answer to this contention, it is only necessary to say that the railway company, both by motion and answer, insisted that she be brought into court, in order that her rights might be ascertained, and the railway company be fully protected from further litigation growing out of this contract of sale. It did not devolve upon the railway company to establish the fact as to whether or not Mrs. Kotha was a resident of this state at the time of the assignment of the contract by her husband, or as to whether or not she had ever been a resident of the state prior thereto. The plaintiff below was demanding all that Jaeckel would have been entitled to had not the contract been assigned by him, and he had complied with all the conditions precedent on his part. Before the railway company can be compelled to execute and deliver to the defendant in error a deed, with covenants of general warranty, conveying the premises in fee simple, the defendant in error must establish its right to such a conveyance. The plaintiff below claimed title through a conveyance from Christ Kotha, and the wife of the latter had not conveyed her interest in the land, hence, the plaintiff below failed in its proof, and was not entitled to the decree that was entered in this case. Specific performance has been defined as "an equitable remedy which compels the performance of a contract in the precise terms agreed upon, or such a substantial performance as will do justice between the parties, under the circumstances of the case."

22 Am. & Eng. Enc. Law, 909. Does the decree in this case do justice between the parties to this action? Was the plaintiff below, under the evidence in this case, entitled to all the rights which Jaeckel had under this contract, notwithstanding the refusal of Mrs. Kotha to convey her interest in the real estate in controversy? This court does not think so.

The judgment of the court below will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. All the judges concurring.

(1 Kan.A. 61)

GROESBECK et al. v. BARGET et al.

(Court of Appeals of Kansas, Northern Department, C. D. July 6, 1895.)

MECHANICS' LIENS—ENFORCEMENT—EFFECT OF REPEAL OF STATUTE.

1. The right to a mechanic's lien for materials becomes, when the materials are furnished, a vested right, which the legislature cannot destroy; but the remedies provided to preserve and enforce such lien may be changed, if a substantial and effective remedy is left or provided, and the change does not substantially impair the value of the contract or security.

2. The right to a mechanic's lien for materials is determined by the law in force at the time the materials are furnished, but the lien must be preserved and enforced in accordance with the requirements of the law in force at the time such proceedings are had. In every case a reasonable time must be given, after the law making a change in the remedy takes effect, within which to comply with its provisions.

(Syllabus by the Court.)

Error from district court, Smith county; Cyrus Heren, Judge.

Action by W. F. Groesbeck and another against E. S. Barget and others to enforce a mechanic's lien. From the judgment rendered, plaintiffs bring error. Affirmed.

Theo. Laing, for plaintiffs in error. J. W. Sheafor, J. M. Tyrrell, L. C. Uhl, and D. G. Sutherland, for defendants in error.

GARVER, J. The plaintiffs in error, W. F. Groesbeck and E. A. Belisle, under a subcontract with the contractors, furnished material for the erection of a building of which defendants, E. S. Barget et al., were owners. The last of the materials was furnished January 15, 1889. On the 20th day of May, 1889, a sworn statement of the lien claimed was made and filed in the office of the clerk of the district court of Smith county, and a written notice of the filing of such lien served on the owners. This action was commenced on the 28th day of December, 1889. The court below gave judgment against the contractors for the amount claimed, but held that the subcontractors had not so complied with the requirements of the mechanic's lien law as to entitle them to a lien as against the owners. The only question in this case is as to the application of the several lien laws of this state to the claimed lien of plain-

tiffs. It is claimed that they, as subcontractors furnishing materials, had a vested right to a lien under the act of March 2, 1872, and that that act governed as to the time within which the statement of the claim should be filed. On the other hand, it is contended that the act of February 26, 1889, which took effect March 1, 1889, repealed the former act with reference to the several steps necessary to be taken to preserve the lien, and must be complied with. That the subcontractors' right to a lien became a vested right as soon as the materials had been furnished, which it was not in the power of the legislature to destroy, must be conceded as no longer open to argument in this state. *Weaver v. Sells*, 10 Kan. 609. The right to the lien must, therefore, be determined in this case by the act of 1872, which was the law in force at the time the materials were furnished. The steps required to be taken, by filing a verified statement within 60 days after the completion of the building and serving a copy on the owners, were not required in order to secure the right to a lien, but were made necessary merely in order to preserve a right already acquired by the furnishing of materials. They were but proceedings provided for preserving and enforcing the lien, and must be classed as mere remedies, to be pursued by the lien claimant for the enforcement of the security given him by the statute. What pertains to the remedy merely is always subject to legislative change and control, subject only to the limitation that there must be left or provided, in place of the old remedies, a substantial and effective remedy, and the change must not have been such as to work a substantial impairment of the value of the contract or security. *Cooley, Const. Lim.* (6th Ed.) 347, 447; *Plow Co. v. Witham*, 52 Kan. 185, 34 Pac. 751. This rule is often applied to changes made in statutes of limitation. *Elliott v. Lochrane*, 1 Kan. 126; *Sohn v. Waterson*, 17 Wall. 596; *Terry v. Anderson*, 95 U. S. 628. The act of 1889 required a subcontractor to file his statement within 60 days after the date upon which material was last furnished, and to give written notice of such filing to the owner, while the act of 1872 provided that such statement should be filed within 60 days after the completion of the building, and that a copy of the statement should be served upon the owner. As affects this case, these were the only changes made by the act of 1889. They were changes in the remedy, which the legislature had a right to make.

We think the law is well settled that the right to a mechanic's lien must be determined by the law in force at the time the right becomes vested, but the lien must be established, or preserved and enforced, by the law in force at the time the necessary proceedings are had for that purpose. *Moore v. Mausert*, 49 N. Y. 332; *Phillips v. Mason*, 7 Helsk. 61; *Tell v. Woodruff*, 45 Minn. 10, 47 N. W. 262; *Hill v. Lovell*, 47 Minn. 293, 50 N. W. 81;

Goodbub v. Estate of Hornung, 127 Ind. 181, 26 N. E. 770; *Templeton v. Horne*, 82 Ill. 491; *Barton v. Steinmizt*, 37 Ill. App. 141; *Paine v. Woodworth*, 15 Wis. 298; *McCrea v. Craig*, 23 Cal. 522; *Forcht v. Short*, 45 Mo. 377; *Osborn v. Wall Paper Co.* (Ala.) 18 South. 776. Judged by these rules, the district court properly held that the statement filed May 29, 134 days after the date when the last material was furnished, was not filed in time, and that plaintiffs had not brought themselves within the requirements of the statute. The plaintiff must, of course, be given a reasonable time after the new act took effect within which to comply with its provisions, but such reasonable time can in no case be for a longer time after the act took effect than that given by the statute after the furnishing of materials. The provisions referred to in the act of 1872, being expressly repealed in 1889, were not continued in force, as to plaintiffs in error, by virtue of paragraph 6687, Gen. St. 1889, which provides that the repeal of a statute does not affect any right which accrued or proceeding commenced under the statute repealed. The proceedings which are questioned in this case had not been commenced when the act of 1889 took effect; hence, not affected by it. Even if the act of 1872 should be held to be in force as to persons furnishing materials prior to its repeal and the taking effect of the subsequent act, as claimed by counsel for plaintiff in error, the result in this case would be the same, because the requirements of neither act have been complied with. This being a right specially conferred by statute, any one claiming the benefit of the statute must bring himself fully within its provisions. The owners were not served with a copy of the statement, as required by the law of 1872. Instead, a simple notice, as required by the law of 1889, was given. Certainly parts of each of such statutes, pertaining to remedies, cannot apply at the same time in the same transaction. One or the other governs. The judgment will be affirmed. All the judges concurring.

GROESBECK et al. v. FIRST NAT. BANK OF SMITH CENTRE et al.

(Court of Appeals of Kansas, Northern Department, C. D. July 6, 1895.)

Error from district court, Smith county; Cyrus Heren, Judge.

Action by W. F. Groesbeck and another against the First National Bank of Smith Centre and others to enforce a mechanic's lien. From the judgment rendered, plaintiffs bring error. Affirmed.

Theo Laing, for plaintiffs in error. A. M. Corn and L. C. Uhl, for defendants in error.

GARVER, J. The questions involved in this case are substantially the same as those just passed upon in the case of *Groesbeck v.*

Barget, 41 Pac. 204, the only difference being that the materials were furnished between the 28th day of January and the 30th day of March, 1889. For the reasons assigned in the opinion filed in that case, the judgment in this case is affirmed. All the judges concur.

(1 Kan.A. 65)

KANOPOLIS LAND CO. v. MORGAN.

(Court of Appeals of Kansas, Northern Department, C. D. July 6, 1895.)

CONSTRUCTION OF CONTRACT—QUESTION OF FACT—TIME OF PERFORMANCE.

1. What constitutes reading matter, as distinguished from advertisements, in a newspaper, is not, under the facts of this case, a question of law to be determined by the court and withdrawn from the consideration of the jury.

2. A contract to pay a certain amount in specific services cannot be converted into a demand for payment in money, without alleging and proving a previous demand and refusal to pay according to the terms of the contract.

3. When time is not made the essence of a contract for payment by the performance of specific services, the party entitled to such services does not absolutely forfeit them by failing to require them within the time named in the contract.

(Syllabus by the Court.)

Error from district court, Ellsworth county; Cyrus Heren, Judge.

Action on a contract by R. V. Morgan against the Kanopolis Land Company. From the judgment rendered, defendant brings error. Reversed.

Ira E. Lloyd, for plaintiff in error. Laferty & Sternberg, for defendant in error.

CLARK, J. The defendant in error, R. V. Morgan, brought this action against the Kanopolis Land Company to recover on an account for printing of various kinds, alleged to have been done for said company between January 31, 1888, and May 24, 1890, on which was a claimed balance due of \$5,534.62. The larger part of the account was for alleged advertisements inserted May 24, 1890, in a weekly newspaper, called the Kanopolis Journal, published by Morgan at Kanopolis. The defendant answered by denying the correctness of plaintiff's account, and setting up numerous items of account on its part against Morgan. A part of the indebtedness from Morgan to the company was alleged to be for the purchase price of the newspaper, printing presses, and outfit, which said company sold to one S. A. Day May 16, 1886, under a written contract which, among other things, provided: "That he [Day] is to pay said company four thousand dollars in printing at Kanopolis, for said company or its order, on reasonable terms, for all job printing, and all sample copies of a paper not less than 22x30 inches in size, to be furnished at 2½ cents per copy, by said Day or assigns in edition of not less than 5,000 copies; the Kanopolis Land Company to furnish wrappers already directed, and their clerks to go to said print-

ing office and wrap or mail said papers; said Day or assigns to furnish ample convenience for said work without charge; said Day or assigns to insert any reading matter desired by the Kanopolis Land Company, in sample copies, in lieu of other matter, without any extra charge, if said matter is standing in type; but, if new or additional reading matter is to be inserted, then the cost of composition is to be paid for extra at the rate of 30 cents per 1,000 ems, the said printing to be done at the rate of at least \$1,000 each year, and any printing done for said company by said Day in excess of that sum shall be at the rates aforesaid, and paid for in cash, at Day's option." Day sold the printing presses and outfit, together with his newspaper, to Morgan, November 8, 1886, Morgan assuming the obligations of the contract between Day and the Kanopolis Land Company, including the payment of the \$4,000. In its answer, said company claimed, as still due and owing to it of said purchase price, the sum of \$1,182.68. The principal contention between the parties upon the trial was as to the meaning of the words, "reading matter," in the part of the written contract above quoted; it being claimed on the part of the defendant below that all the matter inserted in plaintiff's newspaper for which he sought to charge regular advertising rates was merely reading matter, as provided for by said contract, and for which plaintiff was entitled to compensation, as specially stipulated therein. This printed matter was inserted in the Kanopolis Journal issued May 24, 1890, for one week only, and an order was given by the company for 50,000 sample copies of said issue. This order was given May 6, 1890, being within the four years from and after May 16, 1886, for which period of time it was agreed that the contract entered into on said last-named date should be in force, and said Day and his assigns should publish the Kanopolis Journal. In his account attached to the petition in this case, Morgan charged the company for 50,000 sample copies at the rate of 2½ cents per copy, the price stipulated in the contract, and also charged advertising rates for certain printed matter inserted at the request of said company. Testimony was introduced upon the trial showing the circumstances surrounding the parties when the contract of May 16, 1886, was entered into, and various transactions and dealings between the parties from that date up to and including the period of time covered by said account. A copy of the issue of the paper of May 24, 1890, having been introduced in evidence, the court assumed, as a question of law, to decide what parts of the paper consisted the reading matter, and what part should be classed as advertisements, for which the plaintiff was entitled to recover at regular advertising rates. As stated by counsel for defendant in error in

their brief: "The court withdrew from the consideration of the jury of the matter claimed by the plaintiff to be advertisements 958 lines, and submitted to the jury as advertisements 438 lines." This ruling is complained of as erroneous. The instruction itself was as follows: "You are instructed that the articles marked and designated in the copy of the Kanopolis Journal are advertising matter, and are not matters included in the term 'reading matter,' stated in said contract, but are such matters and advertisements for which the plaintiff is entitled to recover pay from defendant, and for which plaintiff is allowed to charge the usual and ordinary charges for such advertising matter." In giving this instruction, we think the court invaded the province of the jury, by assuming to determine a disputed question of fact. What was meant by the parties to the contract by the use of the words, "reading matter," was to be determined by a consideration of the situation of the parties, the circumstances surrounding them at the time the contract was made, and the purposes and objects they had in view to be accomplished by the doing of the things thus provided for. What might be properly considered "reading matter" under some circumstances, under other and different circumstances would not be so classified. No certain or fixed rule can probably be applied to enable a court, from a mere inspection of a newspaper, to say to what particular class of printed matter every insertion should belong. To reach such determination satisfactorily, the court must look beyond the printed page, and gather light from its associations. When it does that, it enters the domain of facts, and finds no settled legal rules. Even if we should be of the opinion that it was proper for the court to thus go through the pages of the newspaper, marking that which was designated as advertisements as distinguished from reading matter, we think the court erred in its judgment, and that some of the articles which the court marked as advertisements are clearly nothing more than local news items.

Again, we think the court erred in its views of the rights of the parties, under the contract, concerning the payment of the \$4,000 purchase money. As stated in the contract, this \$4,000 was to be paid in printing and sample copies of the Kanopolis Journal, "at the rate of at least \$1,000 each year." The court held that this obligated the company to furnish to Morgan at least \$1,000 worth of printing during each of the four years; and, if it failed to do so, it forfeited, absolutely, all claim to payment to that extent. The court therefore instructed to deduct from defendant's claim, for any balance due on the \$4,000 for each of the four years, an amount equal to the difference between the amount of printing actually done for the company in that year and

the sum of \$1,000. The testimony shows that the parties raised no question until on the trial as to the amount of printing that was being done each year; and there is no allegation in any of the pleadings suggestive of a complaint of either party against the other for any failure to comply with this part of the contract. Being a contract for the payment of this sum in specific services, the defendant could not convert it into a debt payable in money, and recover therefor, without an allegation or proof that payment in the stipulated services had been demanded and refused. There being no such allegations or proof, the defendant had no legal claim against the plaintiff for any balance that might be unpaid of the \$4,000. On the other hand, in the light of the evidence, the contract cannot now be enforced as an obligation on the part of the company to furnish Morgan with printing to the amount of \$1,000 each year, and, upon a failure so to do in any one year, to require it to absolutely forfeit a proportionate amount of the purchase money. There is nothing in the language of the contract indicating that time was made so essential a part of it as to work such results; and the conduct of the parties shows that they did not so understand it. Unless it was so intended and understood, the defendant had a right to have any balance due, of the \$4,000 purchase money, credited against the sum it was owing plaintiff for printing and sample copies of paper.

Numerous other errors are complained of in the admission and rejection of testimony, but are, for the most part, not of sufficient importance to be separately considered. The well-settled rules of evidence must control as to the admission of evidence, in any inquiry concerning the value of materials or services. In some instances, these rules were disregarded by the trial court in this case. It is also always competent, for the purpose of arriving at the understanding and intention of the parties to a contract, to admit testimony of their dealings under it when the language of the contract does not itself furnish an infallible guide to such meaning. On another trial, the minor errors complained of will probably not be repeated. There are not sufficient special findings of fact to enable the court to say in what manner the jury arrived at its verdict, or to determine to what extent the errors of the court prejudiced the plaintiff in error. The judgment must be reversed, and a new trial had. All the judges concurring.

ments of fact to the matters in evidence; and if, in his closing argument, he travels outside of the case, and, over the objection of opposing counsel, assert to be facts matters not in evidence, which are prejudicial to the interests of the adverse party, and which would have a tendency to divert the minds of the jury from the real issues in the case, and such statements may have been the controlling influence in arriving at the verdict which was rendered, the interests of justice require that the verdict returned in his client's favor should be set aside on account thereof; and where an appellate court cannot say, as a matter of law, that, had the verdict been rendered in favor of the adverse party, the judgment should be reversed, such fact will have great weight in determining the effect produced by such improper remarks upon the minds of the jury in arriving at a verdict.

(Syllabus by the Court.)

Error from district court, Republic county; F. W. Sturges, Judge.

B. F. Surface, administrator, appealed to the district court from an order of the probate court on submission of final report, and brings error from a judgment on the application of Sarah E. Douglas for trial of questions of fact as to the performance of the duties as administrator. Reversed.

Noble & Surface, for plaintiff in error. W. T. Dillon, for defendant in error.

CLARK, J. At the October term, 1890, of the probate court of Republic county, the plaintiff in error submitted his final report, and asked for his discharge. In the report submitted by the administrator he asked credit for \$563.50, the same being the amount of purchases made by J. M. Jones and James Eyer at the administrator's sale of the personal property belonging to the estate. The widow of the intestate filed written objections to such allowance, and on the examination that was had in the probate court the court refused to allow the credit claimed, and charged the administrator, at such final settlement, with the amount of the sale bill, and ordered a distribution of the estate, including the amount for which plaintiff in error asked credit in his final settlement. The statutes of this state provide that in all sales of personal property by an administrator a credit may be given of not less than three and not more than nine months, when the amount purchased exceeds five dollars; that notes or bonds with one or more approved sureties shall, in all such cases, be taken by the administrator; that the administrator shall be chargeable with the amount of the sale bill, but shall not be responsible for any loss happening by the insolvency of any purchaser at the administrator's sale or his sureties, if satisfactory evidence is adduced that the administrator proceeded with due caution in taking surety, and has used due diligence to collect said notes and bonds. Gen. St. 1889, c. 37, §§ 72-74, 152. From the said order of the probate court the plaintiff in error appealed to the district court of Republic county, where, upon the application of the widow and the minor heirs of the estate,

(1 Kan.A. 78)

SURFACE v. DOUGLAS.

(Court of Appeals of Kansas, Northern Department, C. D. July 6, 1895.)

TRIAL—ARGUMENTS OF COUNSEL.

Counsel, in his argument to the jury, should confine himself in his remarks and state-

the court submitted to the jury the question of fact as to whether or not the administrator, the plaintiff in error in this case, proceeded with due caution in taking the Jones and Eyer notes, and security thereon, and used due diligence in endeavoring to collect the same. The jury returned the following verdict: "We, the jury impaneled and sworn in the above-entitled case, do upon our oath find that Mr. Surface, the administrator, did not use due caution in taking said notes with surety, and due diligence in endeavoring to collect the same." A motion for a new trial was promptly filed by the administrator, alleging, among other things, misconduct of the plaintiff and of the jury, by which the defendant was prevented from having a fair trial. The motion for a new trial was overruled, and judgment rendered confirming the order of the probate court. The ruling and judgment of the court were excepted to, and are assigned as error in this court.

The only issue involved in the trial below was as to whether or not the plaintiff in error proceeded with due caution in taking surety and used due diligence to collect the Jones and Eyer notes, and all the evidence that was offered or introduced at the trial bore solely upon that question. The evidence was conflicting, and the jury found against the administrator. The record also discloses that after the cause was submitted to the jury, and after the jury had retired to consider as to their verdict, one of the jurors was observed talking in a confidential manner with one Jack Frame, who was not a member of the jury; and none of the other jurors were present or in the room with them at the time these two persons were so engaged. Among other instructions given by the court was the following: "Gentlemen, you will now retire in charge of the officer to consider of your verdict. If you do not agree before court adjourns, you may seal your verdict, and give it to your foreman, who will hold it until court convenes, when he will present it to the court in your presence, that is, after you have agreed on your verdict. If you do, you may separate until court again convenes, which will be at 8 o'clock to-morrow morning." The court then admonished the jury as follows: "If you do separate, during the time you are separated you are to say nothing about your verdict, not even that you have agreed upon one." About 4 o'clock of the following morning the jury informed the officer having them in charge, that they had agreed upon a verdict, and thereupon they were allowed to separate, and did separate until 8 o'clock, when court again convened, and the sealed verdict was presented by the foreman, and read by the clerk. Thereupon the attorney for the plaintiff in error demanded a poll of the jury. One of the jurors answered that the verdict read was not his verdict, and the court, over the objection of the plaintiff in error, directed the jury to retire until they could agree upon

such a verdict as they were willing should stand; that when they had done so they might return into court. This was about 8:30 a. m., at which time the court adjourned until afternoon. About one hour and a half after the jury had retired, they again informed the officer having them in charge that they had agreed upon a verdict, and the jury were then allowed by the officer to separate until about 1:30 o'clock p. m. of the same day without being admonished by the court. When the court again convened, the attorney for the plaintiff in error again asked that the jury be discharged from further consideration of the cause, and that no verdict be received from them, alleging their disqualification on account of having been allowed to separate without being admonished by the court, and without any authority from the court or the counsel, which motion was overruled by the court, and the ruling excepted to, and the verdict of the jury was presented and read in the identical language as at first presented. The record shows that at each of these separations the jurors were around on the streets and at different places in the town, mingling with other persons while so separated, and no showing was made or attempted to be made that during said separations nothing occurred to prejudice their minds in relation to the case. As was said in *Ehrhard v. McKee*, 44 Kan. 715, 25 Pac. 193: "The violation of the statutory provisions with reference to separation and admonition gives rise to a prejudice which will vitiate the verdict unless it affirmatively appears that no prejudice was suffered by the losing party." That "where there is a plain violation of statutory requirements enacted for the preservation of the purity of the verdict, * * * it devolves upon the prevailing party to show that the improper conduct did not prejudice the substantial rights of his opponent. In the absence of such a showing by the defendant in error, a new trial should have been granted."

The record discloses that the attorney for the defendant in error, in his closing argument to the jury, referred to the widow and children of the deceased in the following language: "This poor woman is now sick, and at home, with her two helpless children, and unable to attend this trial, and has her living to make, and her helpless children to maintain, and all this administrator wants to return out of an estate of two thousand dollars is one hundred and fifty dollars, and this is all she has left to pay her mortgage with." The attorney for the plaintiff in error objected to such language to the jury, as it was outside of the evidence in the case. The court then directed the attorney for the defendant in error to keep within the record, to which the attorney responded: "All right, that is just what I am doing." During the same argument to the jury the attorney for the defendant in error also used the following language: "This poor woman is sick, and

has her children to maintain, and this administrator has been wasting this estate. Just consider how you would like it, if you were to die, to have the property you have accumulated thus squandered by an administrator, and your helpless family thrown out upon the world without anything." The attorney for the plaintiff in error again interposed an objection as follows: "I object to such language being used to this jury. It is outside of the evidence of this case." The attorney for the defendant in error replied, "Very well." There was no evidence introduced at the trial showing the value of the estate, either personal or real, nor the liabilities of the estate; neither was there any evidence as to the existence of any mortgage on the real estate belonging either to the estate or widow, nor as to the physical or financial condition of the widow, nor that the administrator had been wasting the estate. Upon the hearing of the motion for a new trial, the affidavits of two of the jurors, including the one who dissented from the verdict as first announced, were read, in which it was alleged that language similar to that employed by the attorney for the defendant in error in his closing argument to the jury, to which objection was made at the time, was frequently used by different members of the jury in the discussion, during their deliberations, to influence the affiants in favor of agreeing to a verdict for the defendant in error. In *Winter v. Sass*, 19 Kan. 556, the counsel for the plaintiff, in his closing argument to the jury, stated that a former jury had, on less evidence, found for the plaintiff, and when the other side objected to this statement he reiterated it, and said that the records of the court disclosed this fact. However, he afterwards stated that he recalled the remarks, and wished the jury not to consider the same, and the court instructed the jury that they had no business to consider the fact what the jury on a former trial of the case did; that the case on trial must be determined on the facts of the case as appear by the evidence. The supreme court affirmed the judgment of the court below, holding, however, that "when, in the exercise of a sound discretion, it appears to the court that the jury may have been influenced as to their verdict by such extrinsic matters, however thoughtlessly or innocently uttered, or that the statements were made by counsel in a conscious and defiant disregard of his duty, then the verdict should be set aside." And in *Huckell v. McCoy*, 38 Kan. 53, 15 Pac. 870, the supreme court says: "Where counsel for the plaintiff, in his closing argument to the jury, repeatedly makes improper remarks prejudicial to the interests of the adverse party, and such remarks are permitted to go to the jury over the objections of the adverse party, and the verdict is afterwards rendered in favor of the plaintiff, and may have been procured by reason of such remarks, a new trial should be granted." In this case the remarks made

by the counsel for the defendant in error upon which error is predicated were objected to strenuously by the plaintiff in error, yet they were not withdrawn from the jury either by the court or by the counsel. These objectionable statements had a tendency to divert the minds of the jury from the real issues in the case. They could have been made for no other purpose than to excite the passions and prejudices of the jury against the plaintiff in error, and may have been the controlling influence in arriving at the verdict which was rendered. The court is of the opinion that the errors complained of entitled the plaintiff in error to a new trial. The judgment of the court below is reversed, and a new trial awarded. All the judges concurring.

(1 Kan.A. 71)

CHICAGO, K. & W. RY. CO. v. BELL.

(Court of Appeals of Kansas, Northern Department, C. D. July 6, 1895.)

INJURY TO PASSENGER—NEGLIGENCE—PROXIMATE CAUSE—INSTRUCTIONS.

1. The allegations of the plaintiff's petition control as to the grounds upon which a verdict and judgment in his favor may be based; and an instruction to the jury by the court, which authorizes a verdict on a different ground, is erroneous.

2. In an action brought to recover damages for a personal injury, the allegation in the petition that the injury was caused by the negligent management of a train of cars, whereby the engine and some of the cars were violently backed into the car in which the plaintiff was as a passenger, does not authorize the court to instruct the jury that they may find for the plaintiff if they believe the defendant was guilty of negligence in permitting the plaintiff to remain in the car after it had reached its destination, regardless of the negligent handling of the train.

3. Before an act of negligence can be made the basis for a recovery of damages, it must appear that such act was the natural and proximate cause of the injury, or directly contributed thereto.

(Syllabus by the Court.)

Error from district court, Dickinson county; M. B. Nicholson, Judge.

Action for personal injuries by Henry A. Bell against the Chicago, Kansas & Western Railway Company. Plaintiff had judgment, and defendant brings error. Reversed.

G. R. Peck, A. A. Hurd, and Robt. Dunlap, for plaintiff in error. Burton & Moore, for defendant in error.

GARVER, J. The defendant in error, as plaintiff, instituted this action in the district court of Dickinson county, to recover damages for personal injuries alleged to have been sustained by him while on the train of plaintiff in error, as a passenger, through the negligence of the agents and servants of the railway company. The allegations of the petition as to negligence are as follows: "That the said defendant by its agents and servants so carelessly, negligently, unskillfully, and improperly managed and

conducted said train and cars, and carelessly, negligently, unskillfully, and improperly backed the engine of said train, with great violence, into and against the car in which your petitioner was then riding as a passenger, and carelessly, negligently, unskillfully, and improperly caused the engine and some of the cars of said train to run with great violence into the said car in which your said petitioner was riding as a passenger, as aforesaid, and caused said engine to jerk said car with great violence, and, without any fault on the part of your petitioner, your said petitioner was thereby injured by the said collision and said jerking of the car, and thrown violently to the ground." The answer was a general denial. The record shows that the plaintiff below took passage on a freight train, carrying passengers, at Wells, a station on defendant's road, in Ottawa county, for Abilene; that it was necessary, in traveling between said points, to change cars at Manchester; that either through the failure of the conductor to notify the plaintiff that he must change cars at Manchester, or through his failure to understand such notification, he remained in the caboose of the train on which he had come from Wells, after the rest of the train had been detached therefrom; that while so remaining in the caboose, without understanding that he should leave it and take another train for Abilene, an engine and cars were backed into the caboose with sufficient force to throw the plaintiff, out of the door at which he was standing, violently to the ground.

On the part of the plaintiff below, it was claimed on the trial that the railroad company had failed to notify him that he must leave the car in which he was riding, and take another train in order to reach Abilene; as he had paid for a continuous passage, and was ignorant of the necessity of changing cars at Manchester, that he was still in the car as a passenger, entitled to protection as such; and that the railroad company was liable for a violation of its duty to him as a passenger in carelessly and negligently moving the train in question so as to cause the injury complained of. On the other hand, the railroad company insists that the plaintiff below was in the car by his own fault and negligence, and not as a passenger, at the time of the injury. It also claimed, and introduced evidence tending to prove, that the train was properly handled, and the injury the result of mere accident.

Plaintiff in error contends that material error was committed by the trial court in its instructions to the jury as to the ground upon which a recovery might be had. It is urged that the only issue made by the pleadings upon the question of negligence was as to the handling of the engine and cars in such manner as to cause a violent collision with the car in which was the plaintiff; while the issue presented by the court to the jury in

the instructions, as a basis of recovery, was negligence of the company in not informing the plaintiff of his duty to change cars at Manchester. The particular instruction complained of was as follows: "It was the duty of the railroad company to give the plaintiff such information as was necessary for his guidance in order for him to get from one train to another, and if they failed to do that, and the old gentleman was misled, and remained in the caboose, and got hurt by reason of his having to remain there, the company would be responsible and liable to him for the amount of damage which he has sustained by reason of being hurt." Every company operating a railroad for the carriage of passengers owes to a passenger the duty of so managing and operating its trains as to avoid any injury to him which can be prevented by the exercise of proper care. It also owes to a passenger the duty of giving him such information and direction as the circumstances demand he should have, in order that he may safely and conveniently reach his destination. The failure on the part of the company to discharge its duty in either of these respects makes it liable for all damages sustained which are the natural and proximate result of such neglect. There is a clear and substantial difference between these two classes of duty. The manner in which the engine and cars are moved, and the violence with which they are caused to collide with other cars, are matters usually within the direct control of the engineer and fireman of the train; while the care and oversight exercised towards the passenger are duties discharged through the conductor and brakeman, or porter, of the train. The allegations above, copied from the petition, as to the negligence complained of, limit the issue to be tried, in this particular, to the inquiry whether or not the employees of the railroad company were guilty of negligence in backing the engine and cars into the caboose in which plaintiff below was riding. Any inquiry as to the conduct of the employees of the railroad company in not notifying this passenger that he must change cars was pertinent in the case only for the purpose of showing that, at the time of the injury, he was still a passenger on this car. The allegations of the petition furnish the basis for recovery and are controlling on the trial, not only as to the evidence, but also as to the instructions of the court. The verdict and findings of the jury must be within the issues joined by the pleadings, and should not be influenced by considerations which are foreign to such issues. To authorize the jury, as was done by the instructions in this case, to return a verdict in favor of the plaintiff, upon a ground entirely different from that laid in the petition, is error. *Railway Co. v. Young*, 8 Kan. 443; *Railway Co. v. Dunmyer*, 19 Kan. 539; *Railway Co. v. Fudge*, 39 Kan. 543, 18 Pac. 720; *Newby v. Myers*, 44 Kan. 477, 24 Pac. 971;

Clark v. Railway Co., 48 Kan. 654, 29 Pac. 1138; Railway Co. v. Irwin, 35 Kan. 286, 10 Pac. 820.

The jury returned only a general verdict. There is nothing to indicate whether the verdict was based upon negligence in causing the collision, or upon negligence in failing to notify the plaintiff to change cars. So far as this court is able to know, the verdict may have been based upon the very instruction complained of.

Counsel for defendant in error contends that the evidence as to the conduct of the employes of the company in failing to notify plaintiff to leave the train was introduced without objection; that the case was actually tried upon the theory that that was an act of negligence relied upon for recovery, and that the issues were, by consent, thus broadened. Outside of the mere admission of such testimony, however, there is nothing in the record to indicate that it was introduced for any purpose other than that for which we have said it was competent, viz. to show that Bell, at the time of the injury, was rightfully on the car as a passenger, and in a position to demand the exercise of proper care towards him as such. Exceptions were properly taken at the time by plaintiff in error to the instructions of the court. In this condition of the record, this court cannot say that there was any waiver of the error.

The correctness of the instructions of the court might also be questioned on another ground. It is not every act of negligence that furnishes a basis for recovery of damages for an injury sustained. Before a recovery can be had on the ground of negligence it must appear that the injuries were the natural and proximate result of the negligent act. *Railway Co. v. Kellogg*, 94 U. S. 469; *Scheffer v. Railroad Co.*, 105 U. S. 249; *Lewis v. Railway Co.*, 54 Mich. 55, 19 N. W. 744; *Daniels v. Ballantine*, 23 Ohio St. 532; *Henry v. Railway Co.*, 76 Mo. 288; *Lannen v. Gas Light Co.*, 44 N. Y. 459. In these and kindred cases, where two causes contributed to some extent in causing an injury, the rule is well settled that where there is an intervening and direct cause a prior and remote cause cannot be made a basis for recovery of damages, when such prior cause did no more than furnish the condition or occasion by which the injury was made possible. Commenting upon this principle in *Railway Co. v. Kellogg*, Mr. Justice Strong said: "But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

* * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be charged to the misfeasance or nonfeasance. They are

not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate sufficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

Under the instructions of the court the jury were justified in finding a verdict for the plaintiff because of negligence in permitting him to remain on the train, even though the injury may not have been the natural and direct result of such act. The evidence in the case tends to show that the backing of the train into the caboose in which the plaintiff was standing was the direct cause of his fall and injury. This question, with that of negligence, were, at least, matters to be submitted to, and found by, the jury before it could be said that the defendant was liable. For the reasons above given the judgment is reversed, and a new trial ordered. All the judges concurring.

(1 Kan.A. 320)

WHETSTONE et al. v. CRANE BROS.
MANUF'G CO.

(Court of Appeals of Kansas, Southern Department, E. D. Aug. 6, 1895.)

PROMOTERS OF CORPORATION—LIABILITY FOR
GOODS SOLD—PLEADING.

1. The petition in this case examined, and held that said petition states facts sufficient to constitute a cause of action against the defendants, and states but one cause of action.

2. Where certain persons procure a charter, and are named therein as the directors of a corporation for the first year, and, as such directors, elect themselves as officers of such organization, but no bona fide subscription of stock is ever made, and no arrangements made for the payment of debts or liabilities which may be incurred by such organization, the organization cannot be said to have such a corporate existence as would authorize its directors to incur any liability in the name of the corporation, and the persons so engaged in the enterprise are liable personally, as promoters thereof, for a debt incurred for material purchased by one elected by them as superintendent and general manager, and needed in carrying on the business for which such organization was formed.

(Syllabus by the Court.)

Error from district court, Miami county; J. T. Burris, Judge.

This was an action brought in the district court of Miami county, by Crane Bros. Manufacturing Co., as plaintiff, against J. H. Whetstone, J. J. Whetstone, W. M. Mills, W. G. Bryson, J. P. Harris, and W. T. Pickrell upon an account for merchandise sold to the Kansas Mineral Development Company. The petition charges that the defendants entered into an agreement to form a corporation known as the "Kansas Mineral Development

Company," but the said corporation was never fully formed; that a charter was obtained and an agreement made by the defendants to subscribe to the capital stock of said corporation, and that J. H. Whetstone was elected president, J. J. Whetstone secretary, W. T. Pickerell treasurer, J. P. Harris vice president, and W. M. Mills superintendent and general manager thereof. The petition further alleges that no book for the subscription of capital stock was ever opened, and no bona fide subscription of stock ever made, but that the defendant W. M. Mills, acting for himself and the other defendants, purchased the goods in question by representations made to plaintiff below to the effect that the said corporation was solvent and responsible, and its officers and stockholders were solvent and responsible men; and the petition further alleges that these representations were not true, in that the said corporation was never fully organized, was not solvent, and had made no arrangements for the payment of its debts; and for these reasons asks judgment against said defendants personally as promoters of the enterprise. There was a verdict and judgment against all the defendants except J. J. Whetstone, and the defendants J. H. Whetstone, W. T. Pickerell, and J. P. Harris bring the case here for review. Affirmed.

Mechem & Smart, for plaintiffs in error.
Sperry Baker, for defendant in error.

COLE, J. The record in this case is quite peculiar, and presents a method for the trial of a case somewhat new to this court. On the 15th day of April, 1880, this cause being at issue, the defendants failed to appear, and the plaintiff submitted its case to the court and obtained a judgment. On the 17th of April, 1880, the defendants filed a motion for a new trial. At the time the judgment of April 15th was rendered there was an agreement between counsel, which was afterwards reduced to writing and made part of the record, that such judgment had been rendered in the cause without actual trial, and that the issues between the parties should be fully tried at a future date, and that the judgment of April 15th should depend wholly for its validity upon the results of such trial upon the merits; that upon such trial either party should have the right to except to any action or decision adverse to him in the same manner and with the same force and effect as in any other trial. It was further agreed that if such trial upon the merits should result adversely to the defendants, or either of them, the assessment of damages should be the amount of such judgment with accrued interest; that the defendants or either of them should have the right to file a motion for a new trial, to be filed and take effect as if filed actually within three days after the rendition of the judgment aforesaid. On June 18, 1890, a trial was had before the court and a jury, resulting in a verdict for the plaintiff and

against all the defendants but J. J. Whetstone. No further motions for a new trial were filed by any of the defendants, but argument was had upon the motions which had been filed on April 17, 1880, and the same were overruled, except as to the defendant J. J. Whetstone. With the record in this condition, counsel for defendant in error claims that the plaintiffs in error cannot be heard to complain of the rulings of the court, on the ground that the verdict rendered in June, 1890, was not attacked in the trial court, and if the judge committed any errors upon the trial he was never called upon to correct them. It seems to us, however, that, although the proceedings were quite peculiar, the court and all the parties treated the motions for a new trial as an attack upon all the proceedings, and it would seem from the agreement that such was the intention at the time of the filing of said motions. This is shown by the fact that each of said motions attacked the verdict as well as the judgment, whereas the first trial of the cause was had to the court without a jury, and by the further fact that each of said motions was regularly taken up and passed upon without objection after the trial of the cause in June, 1890. While we cannot commend this method of practice, we feel in this case that the agreement of counsel, and their subsequent action under such agreement, compels us to examine into the alleged errors for which the plaintiff in error claims that a reversal of the judgment should be had.

The first assignment of error is the overruling of the demurrer of the plaintiff in error to the petition on the ground that there were several causes of action improperly joined. We think the demurrer was properly overruled. The petition stated but one cause of action, and that was against each and all of the defendants as promoters of the corporation. It is true that the pleader alleged different acts upon the part of each of the several defendants, which acts were claimed by him as establishing the liability of said defendant in conjunction with the other defendants named. It is claimed by the plaintiff in error that the petition, besides alleging joint liability on the part of all the defendants, seeks further to charge the defendant J. H. Whetstone alone upon the promise made by him to his codefendant Mills, but we do not so read or understand the pleadings. The petition recites the fact of such agreement, but only as one of the several facts relied upon to establish the liability of each and all said defendants.

The second assignment of error is that the petition did not state facts sufficient to constitute a cause of action against the defendants, this being one of the grounds urged in the demurrer to the petition. Under this heading counsel for plaintiff in error argues that, while it is true that parties who are promoters in a supposed corporation are liable for the debts contracted by that corporation, in cases where no stock is subscribed and no

funds placed in the treasury for the purpose of meeting its obligations, yet this petition discloses the fact that this corporation was solvent, and that its stock had been sold, and this, we presume, raises the most important question in this case, which is, whether a bona fide corporation had been fully formed when the goods in question were purchased, or whether the action of the defendants (plaintiffs in error here) were such as to leave them personally liable as promoters of the enterprise, for the reason that a corporation had not been actually and legally completed. The evidence shows plaintiffs in error subscribed articles of incorporation of the Kansas Mineral Development Company, and obtained a charter for such company, and that after obtaining such charter the directors named therein met and elected J. H. Whetstone president, J. J. Whetstone as secretary, W. T. Pickerell as treasurer, J. P. Harris as vice president, and W. M. Mills as superintendent and general manager of said corporation; that the capital stock of said company was placed at \$500,000; and that the various incorporators of said company, with the possible exception of J. P. Harris, agreed that they would subscribe for the capital stock of said company in various amounts from \$25,000 to \$200,000. But the evidence further shows that no part of this agreement for the subscription of the stock was ever carried out, that no stock book was ever opened, and no stock in fact was subscribed, and the petition alleged all these facts. The evidence further shows that the plaintiff in error Mills was given entire charge of the management of the affairs of the plaintiffs in error, in connection with the business transacted under the charter which had been procured. The general plan, as shown by the evidence, was that the Kansas Mineral Development Company should obtain control of the stock of a corporation known as the Pennsylvania Gas & Mining Company, and thereby obtain control of the tools and leases which were owned and held by the last-named company; and without waiting to perfect arrangements, Mills, with the consent of all the plaintiffs in error, proceeded to prospect upon the grounds covered by the leases of the Pennsylvania Gas & Mining Company, using the tools of said company. In the carrying out of these developments it became necessary to purchase a certain amount of piping and similar material, and this material was obtained by Mills from the defendant in error upon representations as to the financial standing of the company and the persons interested therein. The evidence shows clearly that no provision had been made for the payment of the debts of the Kansas Mineral Development Company, except as the results of the work itself might pay them. The promoters of this enterprise expected to gain control of the leases and tools of the Pennsylvania Gas & Mining Company by the foreclosure of the chattel mort-

gage which had been given by the Pennsylvania Gas & Mining Company to Carter Bros., and this mortgage was obtained by the giving of the notes of Mills and Bryson, indorsed by plaintiff in error J. H. Whetstone. In fact, the full scope of the scheme was that the Kansas Mineral Development Company was organized for the purpose of buying out the Pennsylvania Gas & Mining Company and taking the property of the Pennsylvania Gas & Mining Company as a basis for the stock of the Kansas Mineral Development Company, and the only provision which was made for the payment of the indebtedness necessarily incurred for making the purchase, and for labor and material to carry on the work, was the erection of a mountain of delusive hope as to the result of the prospecting to be done. The plaintiff in error J. H. Whetstone knew when the goods in question were purchased. He was present while they were still upon the cars at the point of destination. He paid the freight at the request of Mills. He was present at various times while the work was in progress under direction of Mills, and authorized Mills to procure what was necessary to carry on the work. The plaintiff in error Pickerell was present at nearly all the meetings of the directors, and took part therein. The plaintiff in error Harris subscribed to the charter, and permitted his name to be used in the general scheme, and there was sufficient evidence to support the claim that he was to receive as compensation for the use of his name \$1,000 of the stock of said company. The plaintiff in error Whetstone procured letter heads to be printed which set forth the officers of the Kansas Mineral Development Company, and these were used by both Whetstone and Mills, with the knowledge of Pickerell, in their correspondence, and were used by Mills in corresponding with the defendant in error in regard to the goods in question. And, finally, when the promoters of this enterprise found themselves confronted with debts for material and labor which they were unable to pay, a meeting of the directors was called, and a motion carried that, of the 5,000 shares of capital stock, 4,855⁸/₁₂ were to be issued to W. M. Mills, who the evidence shows was insolvent, a small part of the other shares to parties who were in no way connected with the enterprise, and who, so far as the evidence shows, never agreed to or had any knowledge of the issuance of such shares, and one share each to Bryson, Pickerell, Harris, J. H. Whetstone, and J. J. Whetstone; but none of such shares were actually issued or delivered to the parties named, and all of them remained in the stock book, and under the charge and control of J. H. Whetstone, for the purpose, as the evidence discloses, of securing him for advances made in carrying on the work. It surely cannot be held that this was a bona fide subscription of stock. In Mining

Co. v. Settle, 54 Kan. 424, 38 Pac. 483, it is held that, "while the existence of a corporation dates from the time of filing of charter, it cannot be regarded as a complete organization, authorized to transact business, when the subscription books of the corporation have not yet been opened, and no stock has been subscribed." And this, we take it, means a bona fide subscription. There can be but one conclusion from the evidence in this case, and that is, however honest in intention plaintiffs in error may have been, they entered into a speculation, trusting that the profits would be large enough to repay them for the chances which they took. They advertised themselves to the business world and to the defendant in error as being the responsible parties in the venture, for certainly the complete authority which was given to Mills made his statements in the transaction of the business in which they were engaged the statements of each of them, and the plaintiffs in error ought not now to be allowed to escape liability as individuals upon an indebtedness created under such circumstances. In his work on Private Corporations, Mr. Beach makes a distinction between a case where the plea of null corporation is set up, in a suit between a corporation and a stockholder, to defeat an alleged liability, and the case of a suit against individuals who claim exemption from individual liability on the ground of having become a corporation under the provisions of a general statute, and he there lays down this rule: "In the latter case a stricter measure of compliance with statutory provisions will be required than in the former. It is immaterial that the persons attempting incorporation have acted in good faith, and have actually carried on business under their supposed authority to act as a body corporate." Beach, Priv. Corp. § 16. And see, also, Kaiser v. Bank, 56 Iowa, 104, 8 N. W. 772.

The plaintiffs in error also complain of the ruling of the court permitting the deposition of J. H. Whetstone, with its exhibits, to be read as a written statement of a party to the suit. The statement of a party to an action is always competent to be given in evidence against him, and it was for this purpose only that the deposition was offered and admitted. The exhibits were letters written by J. H. Whetstone, and were sufficiently identified. The same objection was made to the introduction of the deposition of J. J. Whetstone, and the same reasoning applies thereto. It is true that, as shown by the depositions, the signatures of J. H. Whetstone and J. J. Whetstone did not appear upon the deposition; but the record shows that this omission was by agreement of counsel, and that the depositions were admitted to be what they purported to be.

Further objection was made to several of the instructions given by the court to the jury. We do not deem it necessary to give

these instructions in full, but an examination of them convinces us that they were properly given. Plaintiffs in error complain of the refusal of the court to give the eighth instruction requested by them. We think the instruction was properly refused. Perceiving no error in this case, the judgment is affirmed. All the justices concurring.

(1 Kan. A. 245)

CLARK et al. v. GOIT.

(Court of Appeals of Kansas, Southern Department, E. D. Aug. 6, 1895.)

ACTION ON AWARD—DEFENSES.

In defense of an action on an award, or for not performing an award, the defendant may avail himself of any material error or defect apparent upon the face of the award,—such as excess of power by the arbitrators, or defect of execution of power, as by omitting to consider the matter submitted.

(Syllabus by the Court.)

Error from district court, Anderson county; A. W. Benson, Judge.

Action by Edson Golt against Lin J. Clark and Agnes M. Clark, executrices of W. P. Clark. Judgment for plaintiff, and defendants bring error. Reversed.

J. G. Johnson, for plaintiffs in error. Kirk & Bowman and Jones & Mason, for defendant in error.

COLE, J. This was an action brought by the defendant in error, Edson Golt, against plaintiffs in error, Lin J. Clark and Agnes M. Clark, executrices of W. P. Clark, deceased, in the district court of Anderson county, upon an award of arbitrators. The district court gave judgment in favor of Golt for a portion of the award made, and the said Lin J. Clark and Agnes M. Clark, executrices, bring the case here for review. A number of errors are alleged, but all refer practically to the same point, namely, that the arbitration was void, for the reason that the arbitrators did not pass upon the questions referred to them, and for the further reason that said arbitrators considered matters which were not referred to them; and the rulings of the court complained of were adverse to the plaintiffs in error at each successive stage in the case, where they sought to raise these questions. For this reason, we think these alleged errors may all be considered together. It is a well-known rule that arbitrations are favored by the courts, and that every intendment will be made in favor of sustaining an award. The very fact, however, that with the vast amount of litigation of these latter days this rule has come to obtain so strongly, should cause courts to see that parties who do submit their controversies to a tribunal of this character may feel that they are to be bound by a decision of the question or questions submitted to such tribunal, and no further.

In this case, the submission made by the decedent of plaintiffs in error was as follows:

"Exhibit A.

"Submission.

"Know all men that, in the matter of controversy between W. P. Clark and Edson Goit, concerning the amount of corn sold by Parmella Hamilton, by her attorney, J. R. Ahlfeld, at Le Roy, Kas., to the said W. P. Clark, the same being the amount of corn raised on the farm of Edson Goit, in Rich township, Anderson county, during the year 1887, being also the $\frac{1}{2}$ part of the crop raised by John Shawver, William Bingham, Wieland, Wallace, and Griffin, and more particularly described in a certified copy of a bill of sale, made and executed on the 11th day of March, 1887, by said Edson Goit to Parmella Hamilton, hereto attached, marked 'A,' said corn was sold by said Parmella Hamilton to said Clark, according to the terms of a certain contract, executed on the 12th day of September, 1887, by said W. P. Clark and Parmella Hamilton, and hereto attached, marked 'B.' That said W. P. Clark and Edson Goit hereby submit said controversy to the arbitration of George Sinclair, J. W. Garrison, and Jonathan Davis. The said award shall be in writing, under the hands of the said arbitrators, ready to be delivered to said parties on or before the first day of April next. And it is further stipulated that the said parties shall each pay his own witnesses, and that the money paid to the arbitrators and the justice of the peace shall be equally divided, or paid by said W. P. Clark and Edson Goit, each one-half. That said award shall in all things, by us, and each of us, be well and faithfully kept, observed, and performed. Edson Goit. W. P. Clark.

"In presence of B. R. Porter, J. P.

"The claims submitted by the parties are as follows—First, as to the validity of the sale to Parmella Hamilton by Edson Goit; second, the amount of corn to be accounted for by W. P. Clark; third, damages to the farm by reason of pasturing on stalk fields. Edson Goit. W. P. Clark."

And such part of Exhibit A, referred to in said submission, as is applicable herein, was as follows:

"A.

"Know all men by these presents that I, Edson Goit, of Anderson county, Kansas, have this day sold, and by these presents do sell and convey, unto Parmella Hamilton, of Le Roy, Coffey county, Kansas, the following personal property, to wit, one bay horse (gelding), six years old, about fifteen hands high; one bay horse (gelding), eight years old, about sixteen hands high; also one bay mare, seven years old, about fifteen and a half hands high; also one-third of the corn, and all my share of the millet, to be grown the coming season upon the north half of section 4, Tp. 23, range 21, in said Anderson county, Kansas, known as the 'Edson Goit Farm.' The consideration of this transfer being the sum of one hundred and fifty dollars. Now, if the said Goit shall pay, or cause the said sum of one hundred

and fifty dollars to be paid, on or before the 11th day of September, 1887, and the interest thereon, then this sale shall be null and void; otherwise to be in full force and effect. Witness my hand, this 11th day of March, 1888. Edson Goit.

"Witness: J. P. Shively. Victor Parsley."

Exhibit B, referred to in said submission, was as follows:

"B.

"Contract entered into this day between J. R. Ahlfeld, attorney for Mrs. Parmella Hamilton, of Le Roy, and W. P. Clark, of Kincaid, Kansas, as follows, to wit: That said J. R. Ahlfeld, attorney, has sold and conveyed, by bill of sale, to said Clark the right, title, and interest of Edson Goit in the crops of corn and millet raised this year of 1887 on the farm of said Goit, in Rich township, Anderson county, Kansas, said interest being the landlord's part, or the one-third part, of the crops raised by Bingham, Wallace, Griffin, Shawver, and Wieland, renters on said farm. That the corn shall be estimated as follows, by a disinterested person, selected by the parties, to select shocks of corn in different parts of the field, according to his judgment; the corn so selected to be husked and weighed, which number of bushels shall be taken as an average of the whole number of bushels sold to said Clark; the price paid being 25 cents per bushel. The millet to be \$2 per ton if in good condition, the average to be made by Davidson Wood, of Rich township. The said Parmella Hamilton guarantees the peaceable possession of said crops of corn and millet to said W. P. Clark, as per the conditions of this contract. The payments to be made as follows: Three hundred and seventy-eight and $\frac{46}{100}$ dollars, cash in hand; the balance to be paid when estimate is made; and, further, the estimate is to be made on or before the first day of December, 1887. Parmella Hamilton (by her attorney, J. R. Ahlfeld). W. P. Clark."

The petition of plaintiff alleged that the parties to such submission submitted the dispute therein named to three arbitrators, who are named in said petition; and alleged that an award was made in favor of Goit by said arbitrators, and a refusal upon the part of the decedent Clark to perform such award; and prays for judgment upon such award. There was attached to the amended petition upon which this cause was tried copies of the submission, together with the exhibits therein referred to, and also copies of the bond executed by the parties to such submission, and of the award made by the arbitrators, which award was as follows:

"To whom all these presents shall come. That the matter in controversy existing between W. P. Clark and Edson Goit, as by their submission in writing, bearing date of the 26th day of March, A. D. 1888, more fully appears, was submitted to George Sinclair, J. W. Garrison, and Jonathan Davis, as arbit-

trators. The said arbitrators, being duly sworn, according to law, and having heard the proofs and allegations of the parties, and examined the matter in controversy by them submitted, do make this, their award: First. We find that E. Golt sold to W. P. Clark all of his corn, including sod corn and corn grown by renters, grown on his (Golt's) farm, in Rich township, Anderson county, Kansas, in the year 1887, for 30 cents per bushel, except 300 bushels, as by letter of said Golt to Clark dated September 5, 1887. We further find that said Golt had 3,145 bushels of corn, of which amount said Clark accounts for 2,831 bushels, leaving 314 bushels unaccounted for to Golt, 14 bushels of which is to be accounted for at 30 cents per bushel, and 300 bushels in corn or its equivalent,—making in all, to be accounted for by Clark to Golt, 2,845 bushels, at 30 cents per bushel; amount, \$853.50. We further find Clark had of Golt 16 and $\frac{2}{3}$ tons of millet hay, valued at \$2.50 per ton, amounting to forty-one and $\frac{66}{100}$ (\$41.66). Second. We find due from Clark to Golt rebate on money paid by said W. P. Clark, on order of said E. Golt, to Parmelia Hamilton,—paid, \$373.45; less rebate, \$35. Third. We find the amount had of Golt by Clark to be \$930.16. Fourth. Paid by W. P. Clark to Parmelia Hamilton, by order of E. Golt, \$378.45. Amount paid Roy Sargent by Clark, on Golt's order, \$26. Total paid Golt by Clark, \$404.45—930.16, leaving W. P. Clark debtor to E. Golt in the sum of five hundred and twenty-five and $\frac{71}{100}$ dollars (\$525.71), and the above-mentioned three hundred (300) bushels of corn, or its equivalent. Signed, this 28th day of March, 1888. J. H. Davis, Chairman Board of Arbitrators. J. W. Garrison. George Sinclair."

A motion to make such petition more definite and certain, and a general demurrer to said petition, were successively overruled, whereupon an answer was filed, setting forth in substance that the only matters submitted to said arbitration were the dispute concerning the amount of corn which had been sold by Edson Golt to Parmelia Hamilton, and then sold by Parmelia Hamilton to W. P. Clark, and as to the damage done Golt's farm by reason of the same having been pastured; and alleging that the arbitrators appointed by said submission wholly disregarded the articles of submission so made, that the said Clark had at all times dissented from the award, and that the said Golt ought not to be permitted to maintain his action, for the reason that the amended petition of said Golt did not state facts sufficient to constitute a cause of action. And, a reply having been filed, containing a general denial of the allegations contained in the answer which were inconsistent with the allegations in the petition, the cause came on for hearing before the court, the parties having waived a jury; whereupon the plaintiffs in error filed a

motion for judgment on the pleadings, which was by the court overruled, as well as an objection then made by said plaintiffs in error to the introduction of any evidence by the defendant in error; and thereupon the said Golt introduced his evidence, as follows: the award, submission, and bond,—and rested his case. And, a demurrer to the evidence filed by the plaintiffs in error having been overruled, judgment was rendered in favor of the defendant in error, upon said award, for the sum of \$484.05. A motion for a new trial, setting forth all the statutory grounds applicable, was duly filed, and upon the hearing thereof was overruled.

The one question for decision is whether the trial court erred in overruling the several objections made to the award of the arbitrators; and the first point which claims our attention in the decision of that question is, what differences were submitted to the arbitrators, as shown by the record of such submission? It appears, plainly, from the submission, that a controversy existed between Clark and Golt concerning the amount of corn sold by one Parmelia Hamilton to said Clark, and this corn is particularly described as being the amount of corn raised on the farm of Golt in Rich township, Anderson county, in 1887, and further described as the one-third part of the crop raised by certain tenants named in said submission and, more particularly described in Exhibit A, attached to such submission, as one-third of the corn grown on the north half of section 4, township 23, range 21, in Anderson county. So far as the record shows this corn was transferred by bill of sale by Golt to Parmelia Hamilton, to secure an indebtedness of \$150, and whatever interest Parmelia Hamilton had was afterwards transferred to Clark; and the claims submitted by the parties to the arbitration were—First, as to the validity of the sale to Hamilton by Golt; and, second, the amount of corn to be accounted for by Clark. Obviously, this "amount of corn to be accounted for by Clark" was that referred to in the transfer of Golt to Hamilton, and Hamilton to Clark; and it certainly must be held that the two questions with regard to the corn stated at the close of the submission were but succinct statements of that which had been more fully set forth in the articles of submission; and, when the arbitrators had determined, from the evidence adduced before them, what the amount of corn was which had been transferred from Golt to Hamilton and from Hamilton to Clark, their powers ceased upon that subject; for that was the only dispute concerning corn which the parties agreed they might settle. Nowhere in the submission does it appear that the arbitrators were delegated the power to compute any amount of money due from one party to the submission to the other, nor to hear evidence in regard to, or fix the price to be paid by,

either party to the submission for the property named therein; nor were they given any permission to settle the accounts existing between said parties. They were simply to decide two questions, so far as relates to any matter here in dispute—First, as to the validity of a certain sale; and, second, the amount of corn transferred by such sale, and to be accounted for by Clark. The counsel for defendant in error argues that the real question for decision was: "How much does Clark owe Goit for corn?" But this, we take it, is not a proper deduction from the articles of submission. Price or money is nowhere mentioned, and it is reasonable to presume that, while Clark might have been perfectly willing for arbitrators to decide the one disputed question, he was not willing to submit all the existing accounts between himself and Goit to such a tribunal; for, if he had been, the articles of submission would have been general, and not specifically confined to the one question as they were. It is plain, from the record, that the real question in dispute between the parties was not passed upon at all; for the award specifically sets forth that the corn for which Goit was permitted to recover was sold by Goit direct to Clark, by letter dated September 5, 1887. In defense to an action on an award, or for not performing an award, the defendant may avail himself of any material error or defect apparent on the face of the award, such as excess of power by the arbitrators, defect of execution of power, as by omitting to consider a matter submitted. 2 Greenl. Ev. § 78. In *Morse, Arb.* 345, it is laid down that the rule undoubtedly is that the failure to pass upon all the matters submitted is fatal to the whole award, rendering it void; and this doctrine not only existed in the earlier cases, but has been held to be the correct one by the more modern decisions. See *Canfield v. Insurance Co.*, 55 Wis. 419, 13 N. W. 252; *Amos v. Buck*, 75 Iowa, 651, 37 N. W. 118. It is further urged by counsel for defendant in error that, at the time the answer was filed in the trial court, it was neither the time nor place to object to an award on the grounds that the arbitrators had wholly disregarded the matter submitted to them and had refused to consider matters submitted to them for their consideration; and, in support of this position, counsel cites *Anderson v. Beebe*, 22 Kan. 768, and *Weir v. West*, 27 Kan. 650, where the doctrine is laid down that the award stands as the verdict of a jury, and that, if the defeated party has objections, he must file them as he would file a motion for a new trial after verdict. The opinions in both these cases were written by Justice Brewer, and we fully agree with counsel that they were entitled to much weight at the hands of this court. Both cases lay down the same doctrine, and both were cases where the articles of submission contained an

agreement that the award should be made a rule of court. A careful examination clearly convinces us that the doctrine there announced was never intended to apply to a case like the one at bar; for, in the latter case, after stating the facts and announcing the rule above quoted, Justice Brewer says, at page 653: "In this, of course, we refer to these arbitrations in which it is expressly stipulated that the submission shall be made a rule of the court. For it appears, from section 1 of said chapter, two kinds of arbitrations are provided for,—one, in which the submission is to be made a rule of court; and the other, in which no such judicial proceeding is contemplated." And again, at page 655, in the same opinion, the following language is used: "We desire to repeat, in conclusion, that the remarks we have made in reference to these objections apply only to a case in which, by express stipulation, the submission is to be made a rule of court, and in which the arbitration is had, the award made and filed in the court, in pursuance to the stipulation, and in which one of the parties thereto, instead of seeking a direct review in the court, seeks to challenge it in a collateral way and have it declared absolutely void. The proceedings, where they have advanced so far as the filing of an award, in a court of general jurisdiction, in accordance with the terms of the stipulation, have become the proceedings of the court. The parties, by signing the submission, have submitted themselves to the jurisdiction of the court; and, if the controversy is one of which the court can take jurisdiction, it had jurisdiction both of the parties and the subject-matter. Then, notwithstanding errors appear in the progress of those proceedings, they cannot in any collateral action be held absolutely void."

Whatever errors may have transpired can be reviewed and corrected only by direct proceedings in error. In the case at bar, there was no agreement that the award should be made a rule of court, and therefore it was impossible for the court to obtain jurisdiction, either of the persons or the subject-matter. It was only through an action brought upon the award, and the service of summons in that action, that the court obtained jurisdiction. It is plain, from the above decisions, that the rule contended for by counsel for defendant in error has no force in this case. It follows, from the above reasoning, that the award made in this case was void, and that the district court erred in sustaining the same. The judgment of the trial court is reversed, and the cause remanded, with instructions to the district court to render judgment upon the pleadings in favor of the plaintiffs in error.

DENNISON, J., concurring. JOHNSON, P. J., having been of counsel, took no part in this case.

(1 Kan.A. 311)

REESE v. RICE.

(Court of Appeals of Kansas, Southern Department, E. D. Aug. 6, 1895.)

SUFFICIENCY OF CASE MADE—AMERCEMENT OF SHERIFF.

1. Where a case made contains in chronological order the pleadings, motions, evidence, judgment, and at the conclusion of the case thus made contains the following statement: "And these are all the processes, pleadings, motions, proceedings, evidence, rulings, decisions, decrees, orders, judgment, exceptions, journal entries, and constitute and complete the entire record," and the judge allows, settles, and signs the same, it implies that all the statements therein are true, and it presents the entire proceedings of the court below, so that it is reviewable in the appellate court.

2. The provisions of section 472, c. 80, Gen. St. 1889, for amercement of a sheriff for failure to return an execution within 60 days, is highly penal in its character, and he who would avail himself of the remedy by amercement must bring himself strictly both within the letter and spirit of the law.

3. The execution must conform strictly to the judgment rendered. When the execution commands the sheriff to collect a sum in excess of that named in the judgment, the sheriff, in a proceeding to amerce him for a failure to return the same within 60 days, as required by law, will be relieved from the penalty or from a judgment of amercement.

4. Where an execution is directed to the sheriff of any county in this state other than the one in which it is issued, the same may be returned through the United States mail; and if the sheriff, after having performed all that is required of him, in an attempt to execute the same makes out a certificate of his doings thereunder, dates the same, and has the clerk of the district court of his county enter the return on his execution docket, and he then deposited the same in the United States post office, addressed to the clerk of the court where it is issued, a sufficient time before the return day for it to reach the office of the clerk issuing the same, and it fails to reach the office of the clerk who issued it on or before the return day thereof, the sheriff is not liable for amercement or penalty.

(Syllabus by the Court.)

Error from district court, Osage county; William Thompson, Judge.

Proceedings by motion for amercement by J. W. Rice against Simon Reese, sheriff. From a judgment for movant, defendant brings error. Reversed.

On the 2d day of December, 1889, J. W. Rice recovered a judgment in the district court of Osage county, Kan., against O. D. Couch, F. H. Jenness, and S. M. Land for the sum of \$1,527.70 debt, and the further sum of \$118.63 as costs of said action; that said judgment of \$1,527.70 draw interest at the rate of 7 per cent. per annum from the date of said judgment. On the 7th day of April, 1890, the clerk of the district court of Osage county issued an execution on said judgment directed to Simon Reese, the sheriff of Bourbon county, Kan., returnable in 60 days from the date of its issue, and was received at the office of said clerk of the court on the 12th day of June, 1890. On the 4th day of February, 1891, J. W. Rice filed a motion in the office of the district clerk of Osage county, Kan., to amerce Si-

mon Reese, sheriff of Bourbon county, Kan., and notice was duly served on said Simon Reese of the filing of said motion and the pendency of the proceedings for his amercement. At the March term, 1891, said motion was heard, and the motion was sustained, and judgment was rendered against the sheriff for \$1,963.24, to which judgment Simon Reese duly excepted, and files his motion for a new trial, which was overruled, and Reese duly excepted, and brings the matter to this court for a review.

C. E. Cory, for plaintiff in error. Bradford & Huron, for defendant in error.

JOHNSON, P. J. (after stating the facts). Defendant in error contends that the record in this case does not contain sufficient facts for this court to review the proceedings of the court below. The case made contains the motion to amerce the sheriff, the service on him of said motion, the motion of the sheriff and affidavit to dismiss, the evidence on the hearing of the motion, the order of the court sustaining the motion to amerce, judgment for amercement, motion for a new trial, the order of the court overruling the same, concluding with the following statement: "These are all the processes, pleadings, motions, proceedings, evidence, rulings, decisions, decrees, orders, judgment, exception, journal entries, and constitute and complete the entire record," and the certificate of the judge shows that the attorneys for both parties were present at the settlement, allowance, and signing of the case, and the certificate of the judge, *inter alia*, contains the following: "The within and foregoing is by me settled and allowed and signed as a full and correct case made so far as the same is necessary to present the errors complained of by Simon Reese, defendant, and the same is a true and correct history of said case for the purposes aforesaid." This case was made within the time allowed by the court, and served on the defendant in error, and was settled, allowed, and signed by the judge in the presence of attorneys for both parties, and we think that it contains all that is necessary to enable this court to review the proceedings of the court below. The criticism of counsel is that the certificate of the judge does not contain the statement that the case made contains all the evidence and rulings and judgment of the trial court. Where the case made contains what purports to be the pleadings, evidence, and proceedings on the trial of the case, and at the conclusion contains a statement that it does contain all of the evidence and all other proceedings had on the trial of the case, and the judge settles, allows, and signs the same, it imports the truthfulness of the statements contained therein, and does not require the certificate of the judge that it does contain the proceedings on the trial. It is also insisted that the record is not attested by the clerk of the

court with the seal attached. The attestation of the clerk is as follows: "The foregoing case made is hereby attested and authenticated by the clerk of said court under the seal thereof, in accordance with the foregoing order of the judge of said court who tried said cause. Witness my hand and seal of said court this 2d day of June, 1891. W. D. Wells, Clerk of the District Court, Osage County, Kansas;" and the seal of the court is attached thereto. This is a sufficient attestation of the case. The particular objection of the counsel in his argument in the case is that the seal of the court is not attached to the attestation of the clerk, but upon an inspection of the record we find that the impression of the seal is plainly visible upon the paper.

This was a proceeding in the court below to amerce Simon Reese, sheriff of Bourbon county, for his failure to return an execution issued on the 7th day of April, 1890, returnable in 60 days from the date of its issue. The sheriff indorsed his return upon the execution as follows: "Received this writ this 8th day of April, A. D. 1890, and pursuant to the command thereof I made diligent search and inquiry for property belonging to the within-named defendants in my county, but did not find any such property in my county on which to levy to make the within judgment and costs. I therefore return this execution not satisfied for want of such property on which to levy. Witness my hand this 4th day of June, 1890." There is also indorsed on the execution the following: "Filed, April 8th, 1890. J. B. Bayless, Clerk Bourbon County. Ex foreign Doc. A., page 34." "Filed and returned. Entered this 4th day of June. J. B. Bayless, Clerk Bourbon County, Kansas." Section 475, c. 80, Gen. St. 1889, reads: "When an execution is issued to the sheriff of any county other than that in which judgment was rendered, the sheriff after indorsing the date of its receipt thereon shall deliver the same to the clerk of the district court of his county, who shall thereupon enter the same in the execution docket in the same manner as if it had issued from the court of which he is clerk; and before the sheriff shall return any such writ he shall cause his return to be entered in like manner." Section 476: "When execution shall be issued in any county in this state, and directed to the sheriff or coroner of another county, it shall be lawful for such sheriff or coroner having the execution, after having discharged all the duties required of him by law, to enclose such execution, by mail, to the clerk of the court who issued the same. On proof being made by such sheriff or coroner, that the execution was mailed soon enough to have reached the office where it was issued within the time prescribed by law, the sheriff or coroner shall not be liable for an amercement or penalty if it do not reach the office in due time." The return indorsed on this writ by the sheriff, and the entry

made by the clerk of the district court of Bourbon county, and the affidavit of Simon Reese establish prima facie that this writ was returned within 60 days from its date, so the burden of showing that it was not returned within the time stated in the writ was thrown upon J. W. Rice, and the only evidence offered to prove that fact was that of the clerk of the district court of Osage county, in which he states that he did not receive it at his office until the 12th day of June, but when it was received it had the indorsement written thereon, showing just what the sheriff had done under the execution. Also a certain envelope was introduced in evidence, over the objection of the attorney for Reese, in which the execution was returned, having the postmark that it was posted in the United States post office at Ft. Scott, Kan., on the 11th day of June, but this cannot overcome the return indorsed on the writ, the indorsement of the return of the clerk of the district court of Bourbon county, and the sworn statement of Reese that it was mailed on the same day that the return was indorsed on the execution, and that the return was made on the day it bears date. While it is ordinarily true that, where the trial court has found a matter of fact from testimony before it, a reviewing court will seldom reverse the case where it depends upon the fact found by the court on evidence; but this proceeding is not in the nature of a trial in the court where the party is entitled to a trial by a jury, but is a summary proceeding under the statute for an official delinquency. Section 472, c. 80, reads: "If any sheriff * * * shall neglect to return any writ of execution to the proper court on or before the return day thereof * * * such sheriff * * * shall on motion in court and two days notice thereof in writing be amerced in the amount of said debt, damages and costs, with ten per cent. thereon to and for the use of the said plaintiff or defendant, as the case may be." This statute is highly penal in its provisions. It is therefore to be strictly complied with; and it is incumbent on the party seeking to enforce its provisions to make a case clearly within the letter and spirit of the statute, which we do not think was done in this case. The only delinquency complained of against the sheriff was a failure to return the execution issued by the clerk of the district court of Osage county, Kan., dated the 7th day of April, 1890, returnable in 60 days from its date. This execution was issued on a judgment rendered by the district court of Osage county on the 2d day of December, 1889, in a case in which J. W. Rice was plaintiff and J. B. Gamble, S. M. Land, Samuel Embell, L. F. Cochran, F. H. Jenness, O. D. Couch, O. D. Couch and F. H. Jenness, under the firm name and style of O. D. Couch & Co., were defendants, and judgment rendered against O. D. Couch

F. H. Jenness, and S. M. Land for the sum of \$1,527.70 and the costs of the action, taxed at \$118.63, and that the judgment for \$1,527.70 bear interest from date at the rate of 7 per cent. per annum, the execution issued and placed in the hands of Simon Reese as sheriff to execute it, as follows: "Whereas, J. W. Rice on the 2d day of December, 1889, recovered a judgment before the district court within and for the county of Osage, in the 35th judicial district of the state of Kansas, against O. D. Couch, F. H. Jenness, and S. M. Land in a certain cause then pending in said court, No. 4,180, wherein J. W. Rice was plaintiff and O. D. Couch, F. H. Jenness, and S. M. Land were defendants, for the sum of \$1,527.70 debt, and for the further sum of \$118.63 cost in this behalf expended, together with the interest on said debt and cost at the rate of seven per cent. per annum from the date of the judgment until paid: These are therefore to command you that of the goods and chattels of the said O. D. Couch, F. H. Jenness, and S. M. Land you cause to be made the debt and cost aforesaid, together with $\$3^{50}/_{100}$ cost accrued in this behalf, and for want of goods and chattels cause the same to be made out of the lands and tenements of the said O. D. Couch, F. H. Jenness, and S. M. Land; and that you have the same before the court aforesaid in sixty days from this date in said Osage county, and state of Kansas, aforesaid, and that you then and there certify how you have executed this writ. Witness my hand and the seal of said court, affixed at my office in Lyndon, this 7th day of April, A. D. 1890. George Weber, Clerk of the District Court." To sustain this execution and show its validity the said J. W. Rice introduced in evidence page 374 of Journal L., being a journal entry in case No. 4,180, entitled "J. W. Rice, Plaintiff, vs. J. B. Gamble, S. M. Land, Samuel E. Embell, I. F. Cochran, O. D. Couch, F. H. Jenness, O. D. Couch and F. H. Jenness, under the firm name and style of O. D. Couch & Co., Defendant," which reads as follows: "It is therefore ordered and adjudged by the court that said plaintiff, J. W. Rice, do have and recover of and from the said defendants O. D. Couch, F. H. Jenness, and S. M. Land, the sum of \$1,527.70 and the costs of this action, taxed at \$118.63, and that said judgment of \$1,527.70 bear interest at seven per cent. per annum." It is claimed that there is such a variance between the judgment and the recitals in the execution as were sufficient to excuse the sheriff for not returning the execution within the 60 days, as required by law. The right of J. W. Rice to demand a judgment of amercement in this case has no equitable basis, for the neglect of official duty of which he complains has resulted in no injury to him. The execution debtors were

absolutely insolvent when the execution was issued against them, and have continued to be so ever since. His rights, then, are purely statutory; but, if he makes a clear case for amercement under the statute, it is no defense against his claim that he had not been injured. The statute under which he proceeds is a highly penal one. It affords a summary remedy without trial by jury for official delinquency. Such being the character of the statute, it has been repeatedly held that he who would avail himself of the remedy by amercement must bring himself both within the letter and spirit of the law. The execution set out in the notice and motion to amerce the sheriff recites: "That whereas, J. W. Rice, on the 2d day of December, 1889, recovered a judgment before the district court within and for the county of Osage in the 35th judicial district of the state of Kansas, * * * wherein J. W. Rice was plaintiff and O. D. Couch, F. H. Jenness, and S. M. Land were defendants, for the sum of * * *" while the judgment given in evidence to support said execution was in a case wherein J. W. Rice was plaintiff and J. B. Gamble, S. M. Land, Samuel E. Embell, F. H. Cochran, O. D. Couch, F. H. Jenness, O. D. Couch and F. H. Jenness, under the firm name and style of O. D. Couch & Co., were defendants. We do not think the execution conforms to the judgment proven. There was no evidence to prove a judgment in the case entitled in the execution set out in the motion and notice. It was incumbent upon the party seeking to amerce the sheriff to show a valid judgment in which the execution issued, and the execution should follow the judgment. A variance between the judgment given in evidence and the execution is also found in the recitals of the judgment and the execution in the following respect: The judgment in the case of Rice v. Gamble et al. adjudged that the plaintiff recover the sum of \$1,527.70 and costs of this action, taxed at \$118.63, and that the judgment for \$1,527.70 bear interest from this date at the rate of 7 per cent. per annum; while the execution upon which the amercement is sought commands the sheriff to collect the sum of \$1,527.70 debt, and for the further sum of \$118.63 cost in this behalf expended, together with interest on said debt and cost at the rate of 7 per cent. per annum from the date of judgment until paid. The execution did not conform strictly to the judgment rendered. It stated interest on a part of the judgment not authorized by the judgment, and was in excess of the judgment. The judgment of the district court is reversed, and the case remanded, with direction to the district court to overrule and deny said motion to amerce the sheriff, and for costs against J. W. Rice. All the judges concurring.

(1 Kan. A. 414)

CITY OF BURLINGTON v. STOCKWELL.

(Court of Appeals of Kansas, Southern Department, E. D. Aug. 6, 1895.)

VIOLATION OF ORDINANCE—MISDEMEANOR.

The violation of a penal city ordinance is not a misdemeanor, as defined by the statutes of Kansas.

(Syllabus by the Court.)

Error from district court, Coffey county.

John Stockwell was convicted of the violation of a city ordinance, and brings error. Transferred to supreme court.

S. D. Weaver and E. J. Crego, for plaintiff in error. G. E. Manchester, for defendant in error.

DENNISON, J. In this case, the defendant John Stockwell was convicted and adjudged to pay a fine for the violation of a penal city ordinance, before the police court of the city of Burlington, and appealed to the district court of Coffey county, Kan. He was convicted and sentenced in the district court, and appealed the case to the supreme court, and the case was by the supreme court certified down to this court.

Before proceeding to an examination of the merits of this case, we must consider the question of jurisdiction. Whatever jurisdiction this court has was conferred upon it by section 9 of chapter 96 of the Session Laws of 1895. The only criminal jurisdiction conferred upon this court by that section is contained in the following sentence: "They shall also have exclusive jurisdiction as now allowed by law in all cases of appeal from convictions for misdemeanor in the district and other courts of record." Except for the peculiar wording of our statute defining a public offense and a misdemeanor, a violation of a penal city ordinance would be a public offense, and embraced in the definition of misdemeanors.

The General Statutes of 1889 define public offenses and misdemeanors as follows:

Par. 5065. "A public offense within the meaning of this or any other statute, is an act or omission for which the laws of this state prescribe a punishment."

Par. 5066. "Public offenses are divided into felonies and misdemeanors."

Par. 5067. "Felony is an offense punishable by death, or fine and hard labor in the penitentiary."

Par. 5068. "All other public offenses are misdemeanors."

Par. 5069. "Any person charged with the commission of a public offense shall be liable to be arrested and proceeded against in the manner hereinafter provided."

Applying these definitions to the violation of a penal city ordinance, it seems clear that the violation is not a misdemeanor. The laws of this state provide for the creation of cities, empower the authorities to pass ordinances and to provide punishment for their

violation; but the laws of this state do not prescribe a punishment for the violation of a city ordinance, and hence it does not come under the statutory definition of a public offense. Neither is a person, charged with the violation of a penal city ordinance, liable to be arrested and proceeded against, as provided in paragraph 5069, *supra*.

This case is an appeal from the district court of Coffey county, Kan., and, through the instrumentality of the supreme court, or the clerk thereof, has been sent to this court for review. Section 10 of chapter 96 of the Session Laws of 1895 directs this court, when a case is improperly sent from a lower court to the court of appeals, to order the transfer of the same to the supreme court by its clerk, "who shall at once send the same to the clerk of the supreme court accompanied by a copy of said order."

For the reasons above stated, this court holds that the violation of a penal city ordinance is not a misdemeanor, as defined by the statutes of Kansas, and hence this court has no jurisdiction in this appeal, and, being without jurisdiction, must decline to consider the questions raised; and the clerk of this court is hereby ordered to transfer this case to the supreme court. All the judges concurring.

(1 Kan. A. 263)

LEE v. RYDER et al.

(Court of Appeals of Kansas, Southern Department, E. D. Aug. 6, 1895.)

CONSIDERATION OF NOTE AND MORTGAGE—BURDEN OF PROOF—DURESS.

1. Where the plaintiff brings an action on a note and mortgage, and the defendant, in answer thereto, alleges that they were given without consideration, and the execution thereof was procured by threats and intimidation, the burden of proof to establish their invalidity is thrown on the defendant; and on the conclusion of the evidence for the defense, when the defendant has rested her defense, it is error for the court to sustain a demurrer to the evidence, and withdraw the case from the jury, where the evidence tends strongly to prove the facts set up in the defendant's answer.

2. Where a note and mortgage are procured by threats and intimidation, they are absolutely void; and where the payee named in the note, after having procured its execution and delivery by means of threats, without any valuable or good consideration, and then voluntarily leaves another note and chattel mortgage in the hands of the party so executing the note and mortgage, as a pretended consideration therefor, and the note and chattel mortgage formed no part of the consideration for the note and mortgage, and the party received no benefit from said note and chattel mortgage, and claims no right under them, the defendant is not bound to surrender or offer to surrender the note and chattel mortgage before she can maintain her defense to the action on the note and foreclosure of the mortgage.

(Syllabus by the Court.)

Error from district court, Miami county; John T. Burris, Judge.

Action by Isaac Ryder and others, partners under the name of Ryder, Shane & Hyman,

¹ Reversed in 42 Pac. 826.

against Hanna Lee. Plaintiffs had judgment, and defendant brings error. Reversed.

Crossan & Lane, for plaintiff in error.
Scroggs & McFadden, for defendants in error.

JOHNSON, P. J. (after stating the facts). This is a suit on a note and mortgage. The plaintiffs below, in their petition, allege that on the 20th day of January, 1890, Hanna Lee, at Louisburg, Kan., made her certain promissory note of that date, and delivered it to Joseph Johnson, and thereby promised to pay to the said Joseph Johnson the sum of \$193.25 in monthly installments of \$10 each month on the 20th day of each month, beginning the 20th day of February, with interest at the rate of 10 per cent. per annum until paid, and for the purpose of securing the payment of the money in said note at the times therein specified executed and delivered to Joseph Johnson a mortgage deed bearing date January 20, 1890, and thereby granted, conveyed, and mortgaged to said Johnson, his heirs and assigns, the undivided one-half of the northeast fractional quarter of section one, township sixteen, range twenty-four, containing 179.40 acres, in Miami county, Kan.; that said note and mortgage was duly indorsed and transferred by Johnson to said Ryder, Shane & Hyman, before due, and was duly recorded in the office of the register of deeds of Miami county, Kan.; and allege that there was paid upon said note at the time of its execution \$20, leaving a balance due of the sum of \$173.25, for which they ask judgment and decree of foreclosure of the mortgage. To this petition the defendant below filed her answer, setting out three separate answers or defenses to said action. The first was a general denial of all material allegations. For a second answer the defendant admitted the execution of the note and mortgage set out in plaintiffs' petition to Joseph Johnson, and that Joseph Johnson was the agent and attorney for Ryder, Shane & Hyman, and that Joseph Johnson took the note and mortgage in his own name in trust for said plaintiffs and as their agent and attorney. That Joseph Johnson, as agent and attorney for said Ryder, Shane & Hyman, before and at the time of the execution of the note and mortgage represented to Hanna Lee that one George W. Lee, son of hers, had made a debt with Ryder, Shane & Hyman, and had secured the same by chattel mortgage executed in the state of Missouri on certain household goods included in said mortgage, and had removed them out of the state of Missouri, and now refused to pay the debt. That said George W. Lee had violated the criminal laws of the state of Missouri by selling and removing said goods, and that Ryder, Shane & Hyman, and himself, as agent and attorney for them, were now going to prosecute George W. Lee for the felony committed in selling and removing said goods, and cause the said George W.

Lee to be sent to the penitentiary of the state of Missouri, and by many like threats so worked upon the fears of the defendant so that she was influenced and coerced to give said note and mortgage; and her actions were further influenced by said Johnson promising that if she would pay or secure said debt made by said George W. Lee that then the said Ryder, Shane & Hyman, nor himself, as agent and attorney for them, would not prosecute or cause or permit to be prosecuted the said George W. Lee for the crime committed by him in the violation of the laws of the state of Missouri; and the defendant, Hanna Lee, being greatly moved by her fears and love for George W. Lee, who was her son, executed and delivered said note and mortgage as aforesaid, in order to keep said Ryder, Shane & Hyman or said Joseph Johnson, as their agent and attorney, from carrying out said menaces and threats, and for no other purpose whatever. That said note and mortgage were given without any valuable or good consideration, and that said Hanna Lee is not now, and never has been, indebted to the said Ryder, Shane & Hyman in any sum whatever, and that she has not at any time received of them, or any one of them, any valuable or other consideration for the execution and delivery of said note and mortgage. The third paragraph of the answer of the said Hanna Lee alleges that the said Ryder, Shane & Hyman are indebted to her in the sum of \$20, and interest thereon at the rate of 7 per cent. per annum from the 20th day of January, 1890, for money paid and advanced on the note described in the plaintiffs' petition; that the note is void, and without consideration, having been obtained by fright and coercion, as described in the second cause of defense of her answer; and asks judgment against the plaintiffs below for the sum of \$20 and interest thereon, and that said note and mortgage may be held to be void and of no effect, and for costs of her suit. To this answer the plaintiffs below filed a reply, denying generally each and every allegation in the answer of the defendant below. Upon these issues the parties proceeded to trial at the February term, 1891, before a jury, the court holding that the burden of the issue was on the defendant below, and thereupon she proceeded to the introduction of testimony in support of her defense, and, after the defendant had introduced all of her evidence, and rested her defense, the plaintiffs demurred to the evidence on the ground that no defense to plaintiffs' action had been proved, and the district court sustained the demurrer, and took the case from the jury, and rendered judgment for the plaintiffs against the defendant, as prayed for in their petition, and decreed a sale of the mortgaged property, and the defendant below excepted, and brings the case into this court for review.

The defense to the plaintiffs' action below was that the note and mortgage sued upon

were executed by Hanna Lee to Joseph Johnson, who was the agent and attorney for Ryder, Shane & Hyman, and the note and mortgage were simply taken in the name of Johnson in trust for his clients, and that no valuable or good consideration was given for the note and mortgage, and that the note and mortgage were absolutely void. Whether there was any consideration for this note and mortgage, and whether the same were procured by fraud and through fear produced by the threats of Johnson, were the main questions to be tried, and, if there was any evidence tending to prove these facts, the question should have been submitted to the jury. *Simpson v. Kimberlin*, 12 Kan. 579; *Jansen v. City of Atchison*, 16 Kan. 358; *Railroad Co. v. Dryden*, 17 Kan. 278; *Railroad Co. v. Couse*, Id. 571; *Railroad Co. v. Doyle*, 18 Kan. 62; *Schafer v. Weaver*, 20 Kan. 296; *Waterson v. Rogers*, 21 Kan. 529; *Brown v. Railroad Co.*, 31 Kan. 1, 1 Pac. 605; *Christie v. Barnes*, 33 Kan. 317, 6 Pac. 599; *Railroad Co. v. Adams*, 33 Kan. 427, 6 Pac. 529; *Lowe v. Higginbotham*, 36 Kan. 765, 15 Pac. 151; *Kiff v. Railway Co.*, 32 Kan. 263, 4 Pac. 401. Therefore, if the evidence on the part of Hanna Lee was prima facie that this note and mortgage was executed by her to Joseph Johnson, and that he was at the time the attorney of Ryder, Shane & Hyman, and the note was simply taken in his name in trust for his clients, and that there was no valuable consideration moving from them to her, and she executed the same through fear, produced by threats of Johnson that if she did not give the mortgage he would send her and her family to the penitentiary, then the note and mortgage were absolutely void. There were a number of witnesses examined on behalf of the defendant below, and their testimony all goes to prove that this note and mortgage was given to Joseph Johnson, who was at the time the attorney and agent of the plaintiffs below; that the same was given without any valuable or good consideration whatever; that the execution of the note and mortgage was procured by threats and intimidation on the part of the said Johnson. Florence J. Lee, the daughter-in-law of the defendant below, testified as follows: "That on the 20th day of January, 1890, when I came home, I came through the kitchen; and when I went in there they told me that the lawyer was there, Mr. Johnson of Kansas City, and I went to the door, and heard him say to Mrs. Lee, 'You have got to fix this up, either money or mortgage, or I will penitentiary you and your whole family.'" Mrs. Ella Pratt, daughter of the defendant, testified as follows: "I heard the conversation between Joseph Johnson and defendant on January 19, 1890. He came down there, and wanted her to give him a mortgage on the farm, and she told him she wasn't able to do it, and told him to go away, and let her alone; and he came up to her and shook his finger

at her, and said, 'You will settle this;' and this is all I heard on Sunday, and I left the room. I was present the next day, on Monday. He came down there, and mother was very sick with la grippe. He said he was down there on the same business he was there on Sunday, and he said he had papers from the governor of Kansas to take her to Kansas City if she didn't settle that debt by money or mortgage, and that the papers would cost her four hundred dollars." Sally Lee, daughter of the defendant, testified as follows: "I remember Mr. Johnson coming to mother's on Sunday, the 19th of January, 1890. Didn't hear the conversation between them. I heard the conversation between them on Monday, the 20th. He said he came down there for the same purpose that he did on yesterday. He says, 'Now you have to settle this business.' He says, 'I have got papers from the governor to take you back to Kansas City, and put you in jail, and hold you there until the day of trial, and penitentiary you and the whole outfit, if you don't settle this business.' He patted his pocket, and says, 'I have the papers in my pocket.'" David Patten testified that on the 19th and 20th of January, 1890, he was boarding at the house of Hanna Lee; that he heard the conversation between Johnson and Mrs. Lee on Monday, the 20th of January. "Mr. Johnson came there, and says, 'I came to see you in regard to the same business I was here on yesterday.' He said: 'I don't like the way of the business, and if you don't settle this I have got papers from the governor of the state of Kansas to take you back to Missouri for trial,' and he said, 'That will cost you four hundred dollars.' He swore in the house, and used bad language." Hanna Lee testified in her own behalf, and said: "Reside in Miami county, Kansas; northeast part of the county. Have resided there fifteen years. Am a widow, and have three children. I have a half interest in the farm of one hundred and sixty acres. Live on the farm. Met Mr. Johnson at my residence on Sunday, the 19th of January, 1890. I suppose he came in on the noon train. He stayed there about one hour and a half or two hours. I was very sick with la grippe. Had been in bed one week and was confined to my bed two weeks afterwards. He sat down right by my bed, and talked to me. He came there, and introduced himself to me as Mr. Johnson, of Kansas City, a lawyer. He said he came down there to see George W. Lee about some furniture he got. I told him he wasn't at home, and he wanted to know if he didn't have eighty dollars. I told him, 'No, sir.' He says, 'If he hasn't got nothing to pay this,' he said, 'I have.' 'I can't,' I says, 'I cannot. My little home has two mortgages on now.' He says, 'I will have to take the third one; nobody will ever know the difference.' I says, 'No, sir; I will not,' and I said, 'Go away, and let me alone. I am a sick woman,' and he stood

there and shook his finger at me, and says, 'If he hasn't got nothing, you have got to settle.' That was the conversation on Sunday. That is all that I recollect of the conversation, for I was very sick. On Monday he returned. I suppose he came on the noon train. And he came in, and come in my room, and he says: 'Now, madam, I am back here on the same business I was here on yesterday, and you have got to settle.' I says, 'I will not.' He says, 'You shall,' and I says, 'I wont,' and he says: 'Watch out, old lady, how you talk. I will show you.' He says: 'I have got papers right here from the governor of Kansas to arrest you, and hold you until I get an officer, and take you back to Kansas City, and put you in prison, and keep you there until the day of trial, and then I will penitentiary you and your whole family;' and then went on, and wanted to know if I would not be ashamed of myself and family to go to penitentiary. I said, 'George Lee's business and my business is just as separate as strangers.' He says: 'That don't make any difference. He is your son, and you have got it to pay. You have got to give me the money or a mortgage or go to the penitentiary.' He said he would send the whole family to the penitentiary. He went on all afternoon with threats, different threats. He didn't use very nice language with me. Most of his talk was threats. I got up out of my bed and went into the kitchen, and stayed in there a little while, and by this time Mr. Crossan came and went to the room, and as Mr. Crossan came in he met him at the door, pulled out some papers from his pocket, and says, 'Mr. Crossan, I have got her scared up in a hell of a shape;' and Mr. Crossan was very cold, as it was very cold weather, and he went to the stove, and warmed himself; and by this time supper was ready, and they went in to supper, and after that the business took place, but I couldn't state how it was done. I was in a very critical condition, very sick. Then, after the papers were fixed up, Mr. Crossan says, 'If you have any papers turn them over to Mrs. Lee.' Fanny A. Walker testified: "I accompanied Mr. Johnson from Kansas City to Mrs. Hanna Lee's house, and on the way down he said if she didn't pay it he would penitentiary her and the whole clique. He said he had the power to take them right from there to Kansas City, and he was going to take them. On the way back to the depot Mr. Joseph Johnson says, 'Didn't I have the old woman scared?' he says. 'I knew I would bring her to time.' W. B. Crossan was also examined as a witness, and in his examination it was developed that he was an attorney acting for Ryder, Shane & Hyman, and had been to see George W. Lee about the claim these parties held against him. His testimony, so far as it relates to the examination there on the 20th of January, fully corroborates the testimony of Mrs. Lee. The defense proves that the claim that John-

son was seeking to collect was one against George W. Lee, a married son of Hanna Lee, and was for the purchase of certain furniture sold by Ryder, Shane & Hyman to George W. Lee while he was living in Kansas City, Mo.; that his mother knew nothing about the purchase of the same, or that there was a chattel mortgage given by her son on the property, until Johnson came to her house on Sunday, the 19th day of January. It was the first time that she had ever seen Johnson, or had any knowledge of him. He approached her in the sick chamber, introduced himself as a lawyer from Kansas City, and in a very rough manner demanded of her a settlement of the debt against her son; threatened, if she refused to settle, that he would send her and her family to the penitentiary, and, after making threats to her on Sunday, went away and returned again the next day, and informed her that he had procured the necessary papers from the governor of Kansas to take her to Kansas City, Mo., and there imprison her until he could have a trial, and then send her and her whole family to the penitentiary. And after spending the entire afternoon in terrorizing the woman in her sick chamber, and when Crossan, who was the attorney for whom he had sent after to Paola, arrived, he informed him that he had her scared badly, and after this the note and mortgage were executed, the same being acknowledged by Crossan as notary public. With all this testimony before the court, it was error to sustain the demurrer to the evidence, as a more high-handed outrage could scarcely be conceived than the evidence shows was perpetrated on Hanna Lee by the attorney and representative of the defendants in error.

It is claimed by counsel for defendants in error that the note and chattel mortgage given by George W. Lee to them were delivered to the plaintiff in error as a consideration for the note and mortgage, and, the plaintiff in error not having returned them to defendants, her defense must fail; that it was an indispensable prerequisite to her defense that she surrender them, or offer to surrender them; that the contract was not void, but voidable only, and she must surrender all benefits she received under the voidable contract. We do not so understand the law as applied to the facts in this case. The evidence contained in the record shows that there was nothing said about the transfer of the note and chattel mortgage, or no mention of them until after the note and mortgage of Hanna Lee had been procured; and then Crossan, one of the attorneys for Ryder, Shane & Hyman said to Johnson, the other attorney of theirs, that if he had papers he had better turn them over to Mrs. Lee. This is the only thing that was said in relation to turning over any papers to her, and she supposed at the time that Crossan referred to the papers Johnson had represented that he had procured from the governor for her ar-

rest and deportation to Kansas City for trial on some criminal charge, as he had told her that, if she would give a note and mortgage in settlement of this charge, neither Ryder, Shane & Hyman, nor himself as their attorney, would prosecute them on the criminal charge, nor allow the prosecution of the same; and this representation and promise on his part was the consideration for the giving of the note and mortgage, and Hanna Lee never received any benefit from the note and chattel mortgage. When Johnson handed them to Crossan they were laid on the table, and remained there. Hanna Lee never examined the papers; only took them from the table after Johnson and Crossan left, and stuck them in the drawer, and afterwards gave them over to Crossan, never having examined them to see what they contained; and at the trial it was shown that they were in the possession of Crossan. The defendant below was under no obligation to return these papers, or account for their absence, as they were voluntarily left on the table. She had never agreed to receive them in consideration of the note and mortgage, and had no claim whatever upon them. The judgment of the court is reversed, and the case remanded to the district court to set aside the judgment and grant a new trial. All the judges concurring.

(1 Kan. A. 330)

MISSOURI, K. & T. RY. CO. v. GREENWOOD.¹

(Court of Appeals of Kansas, Southern Department, E. D. Aug. 6, 1895.)

RECORD ON APPEAL—CASE MADE—SETTLEMENT—NOTICE.

1. A case made must contain a complete record, or so much of the proceedings on the trial of the case as will fully show the errors complained of, and the case so made must show affirmatively that all the prerequisites of the law have been complied with in the making, serving, suggesting amendments, and certificate thereto, and that each of the parties were either present at the signing and settling of the case made, or had notice thereof, or waived notice. All these facts must appear in the record, and a reviewing court cannot consider or notice any matters which do not appear in the record.

2. Where a case made was duly served on the adverse party within the time fixed by the order of the court in extending time to make and serve a case for a higher court, and the same was afterwards signed and settled by the judge who tried the case, in the absence of the adverse party, and the record does not show that notice was given him of the time and place that such case would be presented for signing and settlement, and no waiver of notice is shown, there is not a sufficient showing that the necessary prerequisites have been complied with to make it a valid case made.

(Syllabus by the Court.)

Error from district court, Neosho county; L. Stilwell, Judge.

Action by Mary E. Greenwood against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Dismissed.

¹ Rehearing denied.

On the 4th day of April, 1892, Mary E. Greenwood, as administratrix of Benjamin L. Greenwood, deceased, filed her petition in the district court of Neosho county, Kan., against the Missouri, Kansas & Texas Railway Company. The action was for carelessness and negligence in causing the death of the said Benjamin L. Greenwood, in the yards of the railway company, at Parsons, Kan., on the 6th day of November, 1891. On November 7, 1892, the case was tried before the court and jury, and the jury returned a verdict in favor of the plaintiff against the railway company for the sum of \$2,000, and judgment was thereupon rendered on said verdict against the railway company for said sum, and the railway company excepted thereto, and filed its motion for a new trial, which was, on the 5th day of December, 1892, overruled. Exceptions were saved thereto, and 60 days' time was given the railway company to make and serve a case for the supreme court, and the plaintiff below was given 20 days thereafter to suggest amendments thereto, and the case to be settled on 3 days' notice. The case was made and served on the attorney for plaintiff below on the 1st day of February, 1893. On the 9th day of February, 1893, the attorney for the plaintiff below returned the case made to the attorney for the railway company without suggesting any amendments thereto. On the 20th day of February, 1893, the case so made was, by the attorney for the railway company, presented to Judge Stilwell, who tried the case, for his signature and settlement, and, owing to pressure of other official duties, the judge was unable at that time to examine the case, and deferred the settlement until some other convenient time, and afterwards, on the 25th day of February, he signed and settled the case and attached the following certificate thereto:

"The State of Kansas, County of Neosho—**ss.**: And now, on this 20th day of February, 1893, comes the defendant, and presents the above and foregoing as its case made, and asks to have the same signed, settled, and allowed as such. Owing to the pressure of other official duties, I could not examine said case made on said 20th day of February, and I therefore deferred the matter until a more convenient time. And now, on this 25th day of February, 1893, having carefully examined said case made, and it appearing that the same was duly served on the attorney of the plaintiff for suggestion of amendment in due time, and that said attorney returned it without suggesting any amendments, and I finding that said case made is true and correct, that it contains all the pleadings, evidence, instructions asked and refused, instructions given by the court, all orders made by the court and all the proceedings had in said cause, it is therefore considered and ordered that the above and foregoing case made be, and the same hereby

is, settled, allowed, and signed by me; that the same be attested by the clerk of this court, and that he attach thereto the seal of the court, and that the same be filed with the papers in said cause. I further certify that neither the plaintiff nor her attorney was present when said case made was presented on February 20, 1893, nor at any time since, and that no notice was given to either of the settlement of said case, so far as has been shown to me, except such as may be gathered or inferred from the letter of Mr. Byrne, plaintiff's attorney, to me, which letter is hereto attached, marked 'A,' and is hereby referred to. L. Stillwell, Judge.

"Attest: John F. Rowe, Clerk District Court.

"A.

"Parsons, Kansas, February 25th, 1893. Hon. L. Stillwell, Erie, Kansas—Dear Sir: In the Greenwood Case, Mr. Sedgwick called upon me and informed me that you wished me to write you in relation to notice I may have had of the settling of the case made. The facts are these: I received the case made from Mr. Sedgwick on February 1st, as my acknowledgment thereon shows. I returned it to him on the 9th of the same month, without suggestion of amendments. Mr. Sedgwick then said that you were at Fredonia, and that he did not suppose either of us wanted to go there, and that he would wait until you returned to Erie, and, as soon as he ascertained that fact, he would notify me, and we could both go up to Erie and have the case made settled. On Saturday, February 18, about five minutes before train time, Mr. Sedgwick's assistant, Mr. Scott, called at my office, and informed me that he was going to Erie on the incoming train to have the case settled, to which I did not agree, and did not go, as the notice was too short. On last Monday, Mr. Scott informed me that he had gone to Erie, but did not find you there, and had left the case made with Mr. Dennison. On Tuesday, February 21, Mr. Sedgwick handed me an agreement waiving service of notice, and 'stipulating that case made might be signed by you on your return to Neosho county without notice to me.' I took this agreement, and have it now, but did not sign it. I presume it was for the purpose of being dated back and waiving service of legal notice. I was under the impression that I had filed an amended petition in this action, as my office copy does not correspond with the one incorporated in the case made; but I did not wish to make a suggestion of an amendment to that effect, for the reason that the record would show just what was filed, and could be corrected at time of settlement. Now, in relation to this matter, I do not wish to give away any legal rights I may have on the question of notice of time of settlement, or to assist the plaintiff in error in any oversight they may have made. I am of the opinion that the

railroad company have got all, and in fact more, than they were entitled to, and are simply taking the case to the supreme court for the purpose of delay and to discourage other litigants in similar actions. This, in effect, Mr. Sedgwick admitted to me, and Mr. Dennison said, immediately after the verdict, that the railway company ought to be satisfied, and that he would advise them to pay it. I write thus fully in order that you may understand that I am not at all inclined to any 'sharp practice,' but, under the circumstances of the case, I do not think I ought to waive any laches on the part of the plaintiff in error, if any have been made by them. I leave the matter in this condition, for you to act in the matter, saying, in advance, that what you do will be satisfactory to me. Remaining, respectfully, yours, M. Byrne."

On the 12th day of September, 1893, the railway company filed its petition in error with the case made attached, in the supreme court of Kansas, as case No. 9,298. On the 5th day of March, 1895, by order of the supreme court, the case, with all papers therein, were duly certified down to the appellate court of the Southern department, Eastern division, for decision. On the 5th day of April, 1895, Mary E. Greenwood, administratrix of Benjamin L. Greenwood, deceased, filed her motion to dismiss the petition in error, for the following reasons: (1) That the pretended case made was never legally presented for signing and settlement; (2) said pretended case made was never legally settled, nor signed by the judge of the court below; (3) that said case made was not presented for settlement in due time; (4) the certificate of the judge to said case made is illegal and insufficient in law; (5) the said pretended case made does not contain a complete record of the proceedings in the court below, nor a sufficient part thereof to present error.

There were three affidavits made and filed in this case relative to agreement and notice of the settlement of the case, as follows:

"T. N. Sedgwick, of lawful age, being first duly sworn, deposes and says: That he is the general attorney of the Missouri, Kansas & Texas Railway Company in the state of Kansas. That he had the active control and management of the defense of said company in the above-entitled cause in the district court of Neosho county, Kansas. That, after the judgment had been rendered in said cause, the court gave the plaintiff in error time in which to make and serve a case made, and also gave the defendant in error time in which to suggest amendments thereto. Affiant says that the case made was prepared and served, within the time given by the court, upon M. Byrne, the attorney for the defendant in error. That the said M. Byrne did not return the case made within the time given him by the court to suggest amendments; and, when he did return it, he made no suggestions of amendment of any kind

whatever. That this affiant prepared a notice of presentation of the case to the Hon. L. Stillwell, judge of the district court of Neosho county, Kansas, at his chambers in Fredonia, Kansas, where he was then holding court. That, after service of notice of presentation of said case to said Stillwell for allowance and settlement, as a true and correct case made, the said M. Byrne requested this affiant not to present the case to Judge Stillwell at Fredonia, but to wait until said Stillwell should return to Erie, stating that he had made no suggestions of amendment; yet he did not believe the petition incorporated in the case made was correct, and desired to be present when the case made was settled and signed, for the purpose of presenting that objection to Judge Stillwell. Affiant told said Byrne he would do so, provided Judge Stillwell would return within the time the case was to be signed and settled. Mr. Byrne said he would waive both time and place if affiant would wait until Judge Stillwell returned to Erie from Fredonia, stating that he was poor, and did not have the necessary money to pay his expenses to Fredonia and back, and that the railroad company ought not to go there. Affiant told Mr. Byrne that he would do anything in the world to accommodate him, and asked him to waive notice of time of settlement, whereupon said Byrne sat down and commenced to write a waiver, but then stated that, as he was going to be present when the case was settled and signed, there was no necessity of any waiver, as his presence would be a waiver, and that affiant need have no fear of his attempting to take any advantage of said affiant, because he was satisfied the case made was correct, except that he thought he had filed an amended petition, and the one set out in the case made was not an amended petition. Affiant then informed said Byrne that he (affiant) was going away and might not return as soon as Judge Stillwell returned, but that affiant would leave the case made with affiant's assistant, Mr. Scott, who would give Mr. Byrne all the notice it was possible to give of Judge Stillwell's return. Mr. Byrne said that all the notice he required was simply to be informed in time to get to the train, and that he would go up with Mr. Scott; or, if affiant did not desire to send Mr. Scott, that he (Byrne) would take the case made up to Erie and present it for affiant, as a matter of accommodation, provided affiant would consent that if the petition incorporated in the case made was not correct that he (Byrne) might attach a correct copy, to which affiant consented, and left the case with Mr. Scott, to be taken to Erie, where Judge Stillwell resides, at such time as Judge Stillwell should return. As to what took place between Mr. Scott and Mr. Byrne, affiant is not informed further than is set forth in the affidavit of Mr. Scott, on file in this matter. A few days after the case had been presented, affiant received a letter from Judge Stil-

well, asking for waiver of notice from Byrne. Affiant prepared a waiver, and met Mr. Byrne at Oswego, in attendance upon the district court, and presented him with waiver. Mr. Byrne said he would sign waiver, except that he thought the time had expired in which to settle case, and if it had he desired to take advantage of it. Affiant told him it had not expired, and requested him to sign and return the waiver. Mr. Byrne told affiant that he (Byrne) had a memorandum at his office, and that he was going up to Parsons at noon that day and would consult his memorandum, and, if the time had not expired, would sign the waiver, and forward it to Judge Stilwell, himself, for affiant. Affiant says that he saw Mr. Byrne the next day, and asked him if he had sent the waiver to Judge Stilwell, as he promised. Mr. Byrne replied that he had not, that he had mislaid it among his papers, but that he had written Judge Stilwell a letter, in which he had said to him that if the case made was all right, and the time had not expired, he (Byrne) had no objections to his (Judge Stilwell's) signing the same at any time. Affiant immediately wired to Judge Stilwell to know if Mr. Byrne had forwarded a waiver, or letter amounting to a waiver, and received in reply the case made, duly signed, with Mr. Byrne's letter attached, and a letter from Judge Stilwell to affiant, stating that he had received a letter from Mr. Byrne which he regarded and treated as a waiver. Affiant says that he is unable to find said letter from Judge Stilwell among his papers in the case, or among his letter files, and supposes it has been lost, as he did not regard it of any importance after the case made had been signed and settled, as Mr. Byrne having frequently stated that, as Judge Stilwell had signed the case, he did not desire to question it further. Affiant further states that the letter attached to the case made, as affiant believes, is the letter written to Judge Stilwell, in which said Byrne claimed, in conversation with affiant, he had told Judge Stilwell he waived notice of presentation and signing of the case. Further affiant saith not. T. N. Sedgwick."

"State of Kansas, County of Labette—ss.: M. Byrne, being duly sworn, says: That he is the attorney of record in the case of Mary E. Greenwood, widow of Benjamin L. Greenwood, deceased, plaintiff, against the Missouri, Kansas & Texas Railway Company, defendant, in the district court of Neosho county, Kansas, the same case in the supreme court of this state being entitled the Missouri, Kansas & Texas Railway Company, plaintiff in error, against Mary E. Greenwood, widow of Benjamin L. Greenwood, defendant in error. That, in the pretended settlement of the case made before L. Stillwell, judge of the district court of Neosho county, Kansas, there was made a verbal agreement between Mr. Sedgwick, attorney for defendant below, and myself, whereby

we agreed to go together to Erie, the county seat of Neosho county, which is some twenty or thirty miles distant from the residence of Mr. Sedgwick and myself, for the purpose of making such settlement of case made within the time given for settlement, amendments, etc., by law and the court, and that Mr. Sedgwick would give me reasonable notice of a time when we could both conveniently go to Erie as aforesaid. This agreement was made a few days after time given for making a case for the supreme court. Mr. Scott, an assistant attorney to Mr. Sedgwick in his office, afterwards called upon me, being about twenty minutes to train time, one Saturday, requesting me to accompany him or Mr. Sedgwick to Erie for the purpose of settling the case made, as above. I did not go, as the notice was not in accordance with our agreement and understanding, and being too short. I was, some time afterwards, informed by Mr. Sedgwick that no settlement had been made at the time or place, by reason of the absence of Judge Stilwell. Meanwhile, and about this time, Mr. Sedgwick, of his own motion, attempted to settle the case made, without any further notice to me, either verbal or written. As I now understand it, Judge Stilwell refused to make settlement of case made in the manner proposed by Mr. Sedgwick. He, Mr. Sedgwick, thereafter called upon me, and stated that Judge Stilwell desired me to write the letter to him, which is appended to the case made, giving me an outline of what (he said) Judge Stilwell wanted me to write and partially dictating the same. I have since been given to understand and believe that Judge Stilwell did not request any such letter, or, at least, not in the manner indicated by Mr. Sedgwick. I desired and intended, by said letter, to clear myself with Judge Stilwell of any imputation of unfairness towards Mr. Sedgwick in the verbal agreement to go with him (Mr. Sedgwick) or Mr. Scott to Erie. At the time of writing said letter, my recollection is that I was not aware that a settlement had been attempted to be made at another and a different time and place than the one at Erie, and without further notice to me. No waiver, other than as filed with said case made, or as contained in the letter written by me to Judge Stilwell, has been made or intended to be made by me of my rights in said action, nor was any notice served upon me, nor accepted, of time and place of making amendments, etc., to case made, other than as contained in said case made; and at no time or place, and in no manner, did I waive my right to suggest amendments to said case made during the time allowed me by law to make such amendments. My impression at the time was that the copy of the petition, as filed with the case made, did not correspond with my office copy, and that I had amended said petition, which did not appear in the case made, for which reason I intend-

ed to suggest it, with other amendments, to the case made, and for which I distinctly reserved all my legal rights. I hereby append an attempted notice served on me at Oswego, Kan., February 21, 1893, at 9 o'clock a. m., being Tuesday, and which, to the best of my recollection and belief, I did not accept or sign; said pretended notice being handed me by Mr. Scott, above named, and for the purposes of this settlement. M. Byrne."

"State of Kansas, County of Labette—ss.: James R. Scott, being first duly sworn, deposes and says: That he is a resident of Parsons, Labette county, Kansas. That he is employed in the office of T. N. Sedgwick, general attorney for Kansas of the Missouri, Kansas & Texas Railway Company, as stenographer, at Parsons, Kansas. That on the 20th day of February, 1893, pursuant to his instructions, he went to the office of M. Byrne in Parsons, Kansas, and told said Byrne that he (Scott) was going to Erie, Kansas, to present the case made for signature and settlement in the case of Missouri, Kansas & Texas Railway Company, plaintiff in error, against Mary E. Greenwood, defendant in error, to Hon. L. Stilwell, judge of the district court of Neosho county, Kansas, in conformity with the arrangement made between said Byrne and said Sedgwick, at some time prior thereto. That, at the time affiant went to the office of said Byrne, it was about 10 o'clock a. m. That the train on which affiant proposed to go to Erie on said day was due to arrive at Parsons at 11:40, but did not do so until 11:50, and left about 12, noon, or soon thereafter. That said Byrne made no objection whatever to the time, or said anything further than that he did not think it necessary for him (Byrne) to go to Erie, and that he would not go. Affiant says that said Byrne made no statement or complaint to him about the insufficiency of the notice, and said nothing about his being unable to go to Erie because thereof, but simply said that he did not think it necessary for him to be present. Further affiant saith not. James R. Scott."

T. N. Sedgwick, for plaintiff in error.
Welch & Wilson, for defendant in error.

JOHNSON, P. J. (after stating the facts). The only question raised by the motion to dismiss this case is as to the matter of notice of the time and place of signing and settling the case made. The statute in relation to proceeding to review a judgment of the district court provides: "That a party desiring to have any judgment or order of the district court, or a judge thereof, reversed by the supreme court, may make a case, containing a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of to the supreme court,

the case so made, or a copy thereof, shall, within three days after the judgment or order is entered, be served upon the opposite party or his attorney, who may within three days thereafter suggest amendments thereto in writing, and present the same to the party making the case, or his attorney, the case, and the amendments, shall be submitted to the judge who shall settle and sign the same, the court or judge may, upon good cause shown, extend the time for making a case and the time within which the case may be served; and may also direct notice to be given of the time when a case may be presented for settlement, after the same has been made and served, and the amendments suggested, which when so made and presented shall be settled, certified and signed by the judge who tried the cause; and the case so settled and made shall thereupon be filed with the papers in the cause," it then becomes the record of the case for review in the higher court, and the reviewing court cannot consider or notice any matter not contained in the record, the case made should contain so much of the proceedings had as are necessary to present to the court the error complained of from the commencement of the case up to and including the signing, settlement, and certificate of the judge. Gen. St. 1889, pars. 4648-4650. The case made in this case contains a complete statement of all the proceedings, from the filing of the petition to the presentment of the case to the judge, for signing and settlement thereof; but it fails to show that any notice was given to the plaintiff below, or her attorney, of the time at which the case would be presented to the judge for signing and settlement; and the judge, in his certificate, states that "neither the plaintiff nor her attorney was present when the case made was presented, on February 20, 1893, nor at any time since, and that no notice was given to either of them of the settlement of said case, as far as has been shown to me, except such as may be gathered or inferred from the letter of Mr. Byrne, plaintiff's attorney, to me,"—which letter the judge attaches to his certificate, marked "A," and makes it a part of the case made. The question then arises whether the letter shows such notice as would authorize the signing and settlement of the case in the absence of the plaintiff below or her attorney. After reciting certain matters, the letter says: "Now, in relation to this matter, I do not wish to give away any legal rights I may have on the question of notice of the time of settlement, or to assist the plaintiff in error in any oversight they may have made." This is an express refusal to waive the notice of the time of settlement. The letter shows plainly that the attorney for plaintiff below had been informed that the case made was in the hands of the judge for signing and settlement, but he is not informed as to when the matter will be taken for disposition by the judge. We do not think this letter contains

such statements as the judge could infer that notice had been given, such as would authorize the judge to sign and settle the case made, in the absence of the defendant in error or her attorney. The reason that notice is required to be given to the adverse party is that he may be present, and have such amendments inserted in the case made as he may have suggested, and also to object to the signing of the case as prepared by the other party. The attorney for the defendant in error had been duly served with the case made, and had the case in his possession for eight or nine days, and returned it to the plaintiff in error without the suggestion of any amendments thereto; but he stated, in his letter to the judge, that he thought he had filed an amended petition, upon which the case was tried, and the case made did not contain it, and he thought the record would show it and it could be inserted when the case was settled; and that was the reason that he did not make out and suggest any amendments in writing. The attorneys for each party filed affidavits with the court, in relation to notice and verbal agreements between them in relation to the signing and settlement of the case made; but we cannot consider evidence outside of the record in relation to agreements or verbal notice of signing and settlement of the case. We are satisfied that the attorney for plaintiff in error was in good faith attempting to make and present a fair and honest case made, and that he relied upon the promises and statements of attorney for the defendant in error that no advantage would be taken in the matter of signing and settlement of the case, that all formalities in relation thereto would be waived, that he would appear at any time and waive all such matters of time or notice; but in this he seems to have been deceived. It may not have been professional courtesy in an attorney to violate his verbal promises or agreements, and then take advantage of the confidence reposed in his agreements; but then, it was the duty of the plaintiff in error to see that his case was made in all respects according to the requirements of the statute, and that it was certified within the time allowed by the order of the court; and it was the duty of the attorney for defendant in error to suggest amendments in writing and serve them on the attorney for plaintiff in error; and, when there are no amendments suggested in writing, and the case is returned to the attorney for plaintiff in error, then, if he desires the case signed and settled, it is his duty to see to it that the defendant is notified, or else procure his waiver in writing, so that the notice or waiver of notice may be made a part of the record. He should not rely upon the unreliable statements of his adversary. In the case of *Weeks v. Medler*, 18 Kan. 428, Horton, C. J., delivering the opinion of the court, says: "The mere signature of the district judge to a paper, a copy of which is presented to this court, as a case

made, is not a sufficient showing that the prerequisites to make the case a valid one were complied with. The jurisdiction of the judge to settle the case is a special and limited jurisdiction, which only arises at the times, and under the circumstances, specified in the law; and, in the absence of any appearance of the opposite party or a waiver of amendments, it should appear from the record that the case had been duly served, and that amendments had been suggested or waived, or such opposing party had notice of the time and place of the settling of the case. In other words, the record should show affirmatively the previous steps necessary to the settlement of the case, in the absence of the appearance or waiver by the opposing party." This case made having been signed and settled in the absence of the plaintiff below, or her attorney, and no notice of the time and place of signing and settling the same having been given them, the case will be dismissed, at plaintiff's cost. All the judges concurring.

FITZGERALD v. HANSON.

(Supreme Court of Montana. July 29, 1895.)

CONTRACT—CUSTOM.

Where a physician employs another to assist him in a case, evidence is not admissible of a custom prevailing among the physicians of the city and vicinity that, in the absence of a special agreement to the contrary, the assistant is to look to the patient for his pay, it not being shown that it was known to the assistant, or was so general and well established that knowledge and adoption of it might be presumed.

Appeal from district court, Missoula county; F. H. Woody, Judge.

Action by T. A. Fitzgerald against H. H. Hanson for services as a physician. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an appeal from a judgment in favor of the plaintiff, and from an order denying defendant's motion for a new trial. Both parties are physicians of the city of Missoula. The plaintiff sued the defendant for services in assisting defendant in the practice of his profession, the services being principally the administering of an anæsthetic, and assisting in surgical operations. Plaintiff testified that he rendered the services in assisting defendant to perform various surgical operations, as appeared in his complaint filed, and that he rendered the services at the instance and request of the defendant; that defendant sometimes came for him in his buggy, and sometimes called him through the telephone; and that the charges were reasonable, and that he charged the defendant at the time of the rendering of the services. This testimony was not denied by the defendant in his examination. Defendant did state that the patients requested him to call in the services of an assistant, and that he informed the plaintiff of such request by the

patients, but the plaintiff denies that he knew that any such request was made. Upon this testimony the verdict was found in favor of the plaintiff for a portion of the accounts set up in his complaint.

Crouch & Duis, for appellant. Geo. W. Reeves and Smith & Word, for respondent.

DE WITT, J. (after stating the facts). There is no question but the evidence supports the verdict. It stands undenied that the services were rendered at the special instance and request of the defendant, and that they were worth the amount charged. The only point in the case is the exclusion by the court of certain testimony offered by the defendant. The defendant's counsel offered to prove by defendant and one other physician that there was a custom prevailing among physicians and surgeons in Missoula and vicinity that, unless there is a special agreement to the contrary before the services are performed, for which an assistant is called, such as plaintiff, that the "assistant," so called, is to look to the patient, and not to the principal physician or surgeon for his pay. This proffered testimony was rejected by the court, and error in such action is assigned. The contract of the parties stands practically admitted by the testimony to be that the defendant employed the plaintiff to perform the services, and the facts in evidence show a contract between plaintiff and defendant. Defendant was liable for plaintiff's services. The offer was made to prove a custom or usage to the effect that the defendant was not liable at all, either primarily or secondarily. We are of the opinion that this testimony was properly excluded.

It is said by Dixon, C. J., in *Lamb v. Klaus*, 30 Wis. 94, quoting and approving *Foye v. Leighton*, 2 Fost. (N. H.) 75, that: "A usage explains and ascertains the intent of the parties. It cannot be in opposition to any principle of general policy, nor inconsistent with the terms of the agreement between the parties; for it incorporates itself into the terms of the agreement, and becomes a part of it. It must be known and established. It must appear to be so well settled, so uniformly acted upon, and of so long a continuance, as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it and in conformity with it." The supreme court of Maryland uses the following language upon this subject: "The authorities all hold that a usage, to be admissible, must be proved to be known to the parties, or be so general and well established that knowledge and adoption of it may be presumed; and it must be certain and uniform. *Foley v. Mason*, 6 Md. 51; *Second Nat. Bank of Baltimore v. Western Nat. Bank of Baltimore*, 51 Md. 128; *Bank v. Grafflin*, 31 Md. 520; *Patterson v. Crowther*, 70 Md. 125, 16

Atl. 531." *Exhibition Co. v. Pickett* (Md.) 28 Atl. 279. In the case of *Park v. Insurance Co.*, 48 Ga. 601, the offer was to prove a certain usage or custom in the life insurance business. The question propounded to witness was: "Do you know of any usage or custom in the life insurance business as to the commutation of renewals, etc.?" The proper question would have been, "What is the general or universal usage and custom in the life insurance business as to the commutation of renewals, etc.?" The usage or custom, to be binding, must be a general one, and of universal practice, as applicable to that particular business." The court also said: "The contract of the parties in this case was that the defendants should receive for their services twenty per centum on all sums collected by them for first year's premium insurance, and seven and one-half per centum on all sums received by them for continued renewals of policies. This contract is plain and explicit. There is no doubt or ambiguity as to the meaning of it, or as to the intention of the parties; but it is contended the evidence was admissible to annex an incident to the contract by the proof of usage or custom. But in all cases of this sort the rule for admitting the evidence of usage or custom must be taken with this qualification that the evidence be not repugnant to or inconsistent with the contract." We find the following in 1 Rice, Ev. p. 278: "Custom and usage are resorted to only to ascertain and explain the meaning and intention of the parties to a contract when the same could not be ascertained without extrinsic evidence, but never to contravene the express stipulations; and, if there is no uncertainty as to the terms of a contract, usage cannot be proved to contradict or qualify its provisions. *Barnard v. Kellogg*, 10 Wall. 383; *Bradley v. Wheeler*, 44 N. Y. 495; *Wheeler v. New Bould*, 16 N. Y. 392; *Walls v. Bailey*, 49 N. Y. 464. In matters as to which a contract is silent, custom and usage may be resorted to for the purpose of annexing incidents to it. *Hutton v. Warren*, 1 Mees. & W. 466; *Wigglesworth v. Dallison*, 1 Doug. 201. But the incident sought to be imported into the contract must not be inconsistent with its express terms, or any necessary implication from those terms. Note to *Wigglesworth v. Dallison*, Smith, Lead. Cas. (6th Am. Ed.) 677, and cases cited. Usage is sometimes admissible to add to or explain, but never to vary or contradict, either expressly or by implication, the terms of a written instrument, or the fair and legal import of a contract. *Allen v. Dykers*, 3 Hill, 593; *Hinton v. Locke*, 5 Hill, 437; *Magee v. Atkinson*, 2 Mees. & W. 442; *Adams v. Wordley*, 1 Mees. & W. 374, and other cases cited; 1 Smith, Lead. Cas. 680 et seq." "Usage must be uniform. To permit usage to govern and modify the law in relation to dealings of parties, it must be uniform, certain, and sufficiently notorious to

warrant the legal presumption that the parties contracted with reference to it. *Bank v. Graffin*, 31 Md. 507; *Rapp v. Palmer*, 3 Watts, 179; *Barksdale v. Brown*, 1 Nott & McC. 519; *Harper v. Pound*, 10 Ind. 32; *Smith v. Gibbs*, 44 N. H. 335; *Shackelford v. Railroad Co.*, 37 Miss. 202. Evidence of particular usage to add to or in any manner affect the construction of a written contract is admitted only on the principle that the parties who made the contract were both cognizant of the usage, and are presumed to have made the contract in reference to it. See *Kirchner v. Venus*, 12 Moore, P. C. 361; *Meyer v. Dresser*, 16 C. B. (N. S.) 646; *Appleman v. Fisher*, 34 Md. 540; *Cotton-Press Co. v. Stanard*, 44 Mo. 71." We are of the opinion that under the circumstances of this case, where the contract between the parties seems to be plain, and not subject to be misunderstood, the offer of proof of the usage was not sufficient to admit it in testimony. The usage proposed to be proved would set aside what appears to be the contract made between the parties. It does not appear by the offer of proof that the alleged usage was either known to the plaintiff, or that it was "so well settled, so uniformly acted upon, and of so long a continuance as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it and in conformity with it." *Lamb v. Klaus*, 30 Wis. 97. Again using the words in Rice on Evidence, it did not appear that this alleged usage was "uniform, certain, and sufficiently notorious to warrant the legal presumption that the parties contracted with reference to it." It appeared only that the usage prevailed. The usage, as proposed to be proven, falls far short in its nature of such a one as could be considered to be part of such a contract as the one proven and conceded to be the contract in this case. This seems to us to be the only legal conclusion of this case. We are not informed by the record what the ethics and courtesy of the medical profession are in such a matter. If plaintiff has transgressed professional amenities in enforcing this demand as against the defendant, the amount of the judgment and his loss of his brethren's esteem may offset each other. Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 472)

MICHAUD v. FREISCHEIMER.

(Supreme Court of Montana. July 29, 1895.)

NEW TRIAL—VERDICT AGAINST EVIDENCE.

In an action against a vendor for breach of warranty in two of three barrels of paint sold, there was evidence that it was all made by the same company, by the same formula; that the paint in the two barrels, but not that in the third, when put on a roof, curled up, cracked, and blew off; that good paint, when put on a roof in proper condition, will not do this; that

the roofs on which this paint was put were in proper condition. *Held* that, on a verdict for defendant, an order granting plaintiff a new trial was proper.

Appeal from district court, Missoula county; Frank H. Woody, Judge.

Action by Joseph Michaud against George Freischelmer for breach of warranty. There was a verdict for defendant, and from an order granting a new trial he appeals. Affirmed.

Duis & Crouch, for appellant.

PEMBERTON, C. J. This is an action brought by plaintiff to recover of defendant the price paid for certain paint sold by defendant to plaintiff on a warranty that said paint was of first-class quality, and for damages occasioned by the alleged breach of said warranty. The answer admits the warranty as to quality, but denies that the paint was worthless, as alleged in the complaint. The damages are also denied. The case was tried to a jury, who returned a verdict for the defendant. The court, on motion of the plaintiff, set aside the verdict, and granted a new trial. Defendant appeals from this order.

It appears from the evidence that plaintiff purchased of the defendant two half barrels of "slate roof" paint, containing, respectively, 25 and 28 gallons, and one whole barrel of 58 gallons, at the price of 75 cents per gallon; that said paint was warranted to be of first-class quality. This is admitted; also, that the price was paid. The plaintiff used the paint in painting roofs. He commenced his painting by using the paint in the two half barrels first. When that was consumed, he used that in the whole barrel. All the paint was used in painting the same roofs. The roofs were part tin and part cedar shingles. The paint contained in the two half barrels, within four or five days after being put on the roof, "curled up," "cracked," and blew off. That used out of the whole barrel on the same roofs did not do so, but remained. The paint from the two half barrels, used both on the tin and shingle roofs, "curled up," "cracked," and blew off. This did not occur when the paint in the whole barrel was used. All the paint on the roofs used out of the two half barrels, up to the point where the use of the paint in the whole barrel commenced, "curled up," "cracked," and blew off, so that that part of the roofs had to be repainted. That it was worth \$25 to put the paint alleged to be worthless on the roofs; that the roofs were dry and in good condition to receive the paint; and that it was properly put on. There was evidence that all the paint was manufactured at Davenport, Iowa, by the Stearns Paint Manufacturing Company, from the same formula. The evidence of the witnesses for defendant, who were experienced painters, is to the effect that good paint, if properly put on a roof,

when in good condition to receive it, would not curl up, crack, and blow off; but they said, if the roof was in good condition, and the paint properly put on, and did so curl up, crack, and blow away, it would be because the paint was worthless. There is no evidence to contradict the testimony of plaintiff and his witnesses that the roofs were dry and in good condition when the paint was put on, or that the work was properly done. Nor is there any reason given why the paint should curl up and crack on the tin roof, and blow away. It was certainly dry and in good condition to receive the paint. But the evidence shows that the paint did not stick to it any better than to the shingle roof. That the paint taken from the full barrel did not curl up, crack, and blow away is evidence that it was of good quality, and properly put on. All the paint was put on by the same parties. That out of the whole barrel stuck to the roof; that from the half barrels curled up, cracked, and blew off. This seems to be very strong proof to us, tending to impeach the character and quality of the paint contained in the two half barrels. Viewing the evidence in this light, the court granted plaintiff's motion for a new trial. This action of the court is assigned as error. We are unable to discover in the action of the court complained of any abuse of that sound judicial discretion which should govern in such proceedings. The order appealed from is affirmed.

BUTTE, A. & P. RY. CO. v. MONTANA U. RY. CO. et al. (No. 519.)

(Supreme Court of Montana. July 29, 1895.)

RAILROAD COMPANIES—EMINENT DOMAIN—PURPOSE OF ROAD—CONDEMNATION OF RIGHT OF WAY OF ANOTHER COMPANY—RIGHT TO MAKE CROSSING—CONDITIONS IMPOSED—DAMAGES FOR CROSSING—REFERENCE TO COMMISSIONERS—WATCHMAN AT CROSSING—COMPENSATION OF.

1. Under Const. art. 15, § 5, declaring that all railroads shall be public highways and common carriers, the mere fact that a railroad is built by a private corporation, and that its branches and spurs run convenient to private mines, and are largely for the use of the mine owners, does not destroy its character as a public use, so as to deprive it of the right of eminent domain.

2. Plaintiff railway company may condemn part of the right of way of defendant company, where such right of way is 25 feet on each side of the center of defendant's tracks, and runs along the side of a hill in a mining country, and defendant has graded only the space occupied by its roadbed, and the business of both roads is to carry ore from different ore houses on the same level, and, if plaintiff were required to build elsewhere, it would be caused great expense, and its road would interfere with the operation of mines, and would cut through shaft and other houses, and, at points where plaintiff's road would have to cross defendant's, plaintiff would have to build tunnels or bridges.

3. The mere fact that a railroad company may in the future require, for a double track, a portion of its right of way not occupied by its roadbed, will not preclude the condemnation of the unoccupied part by another company.

4. As Const. art. 15, § 5, expressly gives a railroad company the right to cross the tracks of another, the mere fact that the latter may be inconvenienced by the crossing in the operation of its trains will not deprive the other of the right to cross.

5. Under Code Civ. Proc. 1887, § 601, providing that land appropriated to a public use cannot again be so appropriated unless the use to which it is to be applied is a more necessary public use, a railroad company may acquire the part of a right of way of another company not used for its roadbed where such right of way is the most desirable route for the new road, though it might be possible to build it without using the right of way.

6. Comp. St. 1887, p. 218, § 600, providing that all rights of way shall be subject to be connected with, crossed, or intersected by any other right of way, and shall also be subject to a limited use in common with the owner thereof, when necessary, does not restrict the right of one railroad company to condemn lands of another to crossings.

7. Under Code Civ. Proc. 1887, § 601, providing that land appropriated to a public use cannot again be so appropriated, unless the use to which it is to be applied is a more necessary public use, the new use need not be a different one from that for which the land was originally appropriated.

8. Where a spur track on the north side of a railroad is on the proposed line of another road, and at the point where the tracks would cross the grades of the roads are different, and it would be more convenient for the business for which the spur was built that it should be on the south side of the track, the court will order that the crossing company, at its own expense, remove the spur to the south side of the track and provide suitable approaches to it for teams.

9. Where a spur track of a railroad is on the proposed line of another road, and at the point of crossing the grade of the new road is higher than that of the spur, it is proper to order that the company raise the grade of the spur so as to make a feasible crossing, and leave the spur in a reasonable condition for use.

10. Under Comp. St. p. 218, § 607, providing that courts may regulate and determine the place and manner of making crossings, the court may, in a condemnation proceeding, refer to the commissioners the question of damages for crossings.

11. A railroad company which is awarded the right to cross the road of another company should be allowed to select the watchman at the crossing, but required to pay his wages.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by the Butte, Anaconda & Pacific Railway Company against the Montana Union Railway Company and others to condemn certain lands, and for leave to cross defendants' roads. From a judgment rendered in favor of plaintiff, defendants appeal. Judgment modified.

The plaintiff is a railroad corporation, duly incorporated under the laws of Montana. The defendant the Montana Union Railway Company is also incorporated under the laws of Montana. The other defendants are organized under the laws of other states. The plaintiff alleges that it is authorized by its charter to construct, maintain, and operate a line of railway from the city of Butte, Silver Bow county, Mont., beginning at a point near the terminus or depot of the Montana Central or Great Northern Railway, at or

near the city of Butte aforesaid, and running and extending thence in a general westerly direction, by way of the towns of Rocker and Silver Bow, in said county of Silver Bow, and through Silver Bow cañon, to a point near Gregson's Springs, and thence in a general northwesterly direction, skirting the westerly foothills of Deer Lodge valley, to the city of Anaconda, with such connections, branches, and spurs to mines and smelting works and other industries in said counties as may be deemed necessary or proper. That plaintiff is engaged in the construction of said main line of railway between the said cities of Butte and Anaconda, and also the branch and connection intended to connect on the east with the Mountain View spur and Montana Central Railway, and by means of that railway with the main line of plaintiff, at or near the Great Northern depot aforesaid, and also to connect directly with the main line of plaintiff at a point west of Butte City, to wit, at or near Rocker, and to extend to the various mines, mills, and other industries situate along said branch,—all of said branch and the points above mentioned being in Silver Bow county, Mont. That the public interest requires the construction of said railway, and the branch thereof above described, and that the lands proposed by plaintiff to be taken and condemned for the use of said railway are required and necessary for the construction and operation thereof, and for a right of way, tracks, side tracks, and general railway uses of plaintiff. That it is necessary to the construction and operation of said railway that the plaintiff should take, use, and enjoy, for the purpose of a right of way for its branch railway above described, certain portions of land in Silver Bow county, and all being within the limits of the right of way claimed by the defendants herein for a railroad now being operated by the defendant the Montana Union Railway Company. Then follows in the complaint an accurate description of the lands which the plaintiff wishes to use for right of way purposes. The description embraces a strip of land across the Nipper claim, and within the defendants' right of way; also a strip of land in the Last Chance addition to the city of Butte, and a portion of certain blocks of the Belle of Butte addition to the city of Butte; also a strip of land across the Clear Grit mining claim; also a strip of land across the Banker mining claim; also a strip of land across the Autocrat claim; also a strip across the Oro Butte claim; also strips across the Pacific claim, the Poulin claim, the Humboldt claim, the Buffalo claim, the Little Mina claim, the Blackfoot claim, the Alexander claim, the Gambler claim, the Wake Up Jim claim, and the Emma Abbott claim. Plaintiff alleges that the defendants claim or own an interest or right to the property above described, and more particularly set forth by metes and bounds in plaintiff's

complaint, and that the Montana Union Railway Company has no interest in said premises, except an easement for a right of way for railway purposes, and that although the property is within the limits of the right of way claimed by the Montana Union Railway Company, it has never been used by defendants or any of them for any purpose, and is not necessary for their use for railway purposes, or for any public use, and that the use for which plaintiff seeks to condemn said property, and to which said property is to be applied by plaintiff, is a more necessary public use than any use to which defendants could put said lands or any part thereof. The plaintiff further alleges that, in the construction of its said branch line, it is necessary that said branch line should cross and intersect the Montana Union Railway and certain spurs thereof. There are about 12 of these crossings,—one at the Modoc mine; one over the spur leading to the Anaconda ore house, marked B on the map; another crossing over the spur leading to the Anaconda ore house, marked C on the map; a crossing over the spur leading to the Gagnon mining claim, marked D; also a crossing over the Haggin spur, marked E; also a crossing over the Buffalo spur, marked F; also a crossing over the spur leading to the Mountain Consolidated mine, marked G; also a crossing over the spur leading to the Green Mountain and Wake Up Jim ore houses, marked H; also a crossing over the spur leading to the ore house of the High Ore mine, marked I; also a crossing over the Haggin spur, leading to the High Ore Mine ore house, marked J; also a crossing over the spur leading from the Haggin spur to the boiler house of the Anaconda mine, marked K; also a crossing over the Haggin spur, near the timber shop at the Anaconda mine, marked L. It is alleged by plaintiff that these various crossings and intersections proposed, are to be made in the manner most compatible with the greatest public benefit and the least private injury to the defendants, and that, as proposed, the crossings will not in any way interfere with the use, operation, or enjoyment by the defendants of their said railway lines or the spurs thereof. Plaintiff further alleges that it has been unable to agree with the defendants as to the amount of compensation to be paid for the taking of the above-described premises and the construction of the crossings, and that the interest in the premises sought to be condemned for plaintiff's use is only an easement for a right of way for the construction, maintenance, and operation of its railway. The plaintiff's prayer is for a judgment that the use for which plaintiff seeks to appropriate the premises is a public use; that the public interests require the construction of plaintiff's railway, and that the lands and the crossings proposed to be made are necessary for the purpose of said railway and said branch railway, and that the

plaintiff has a right to appropriate the premises and make the crossings; that the court ascertain the interest of said defendants in the premises described and sought to be condemned, and that an order be made appointing three competent and disinterested persons as commissioners to assess the damages by reason of the appropriation of the said property, and that on the coming in of the report of the commissioners, the court make such order in regard to the possession of said property sought to be condemned as may be proper; and that, as to the crossings, the court adjudge, regulate, and determine the place and manner of making the same.

The material points of defendants' answer are a denial that the public necessity requires the construction of plaintiff's railway and the branch thereof, as set forth, or that the lands therein proposed to be taken and condemned are required or necessary for the construction or operation of plaintiff's railway, or for any use connected therewith. Defendants deny that it is necessary to the construction or operation of plaintiff's railway that it should take for right of way purposes any portions of the lands within the limits of the right of way claimed by the defendants, and as set forth in plaintiff's complaint; deny that the property, or any part thereof sought to be condemned, has never been used or that the same is not necessary for railway uses for defendants; deny that the use for which plaintiff seeks to condemn the property is a more necessary public use than any use to which defendants could put the lands or any part thereof. They deny the necessity of the crossings or intersections pleaded by the plaintiff, and deny that such crossings are located in a manner most compatible with the greatest public benefit or least private injury to the defendants; deny that the proposed crossings will not interfere with the enjoyment of defendants' railway privileges. The defendants then allege that the Oregon Short Line & Utah Northern Railway Company is the owner of those various pieces of ground described in the complaint as parts of the various mining claims heretofore referred to, and aver that all of said ground was obtained by grant, or by the exercise of the right of eminent domain, for the purpose of the construction of a railroad over the same, and for the operation of the Montana Union Railway, and that all of said ground became and was, and now is, absolutely necessary to the said defendants for the operation of said railway, and has always been used for such purposes by defendants, and defendants expect to continue to use the same, and that the same is absolutely necessary to defendants for railroad purposes. Defendants further allege that plaintiff could easily, and at a slight increase of expense, construct its railway in a manner to avoid any conflict with or appropriation of any of the parts of the right of way of these defendants, but

that the plaintiff seeks to appropriate a part of the right of way of defendants in order to save cost of acquiring right of way for itself, and not because said right of way is indispensable to the use of said plaintiff. Defendants further aver that if plaintiff's railroad is constructed in accordance with the plan as laid out by plaintiff, great and irreparable damage will be done them, and that, aside from the fact of dispossessing the defendants from their right of way, plaintiff seeks to cross the railway and spurs of defendants at points that will interfere greatly with the operation of the road of defendants, and that defendants' road cannot be economically, profitably, or properly operated, if plaintiff is allowed to construct crossings across its lines or spurs, as proposed by the plaintiff. Defendants further allege that by slight increase of cost, plaintiff could avoid all the crossings, and that it is not necessary that the crossings be laid as plaintiff contemplates. It is further alleged that plaintiff has no right to enter upon the right of way or roadbed of defendants, except for necessary crossings or connections, and therefore has no right of condemnation over the right of way of these defendants.

The replication of plaintiff denies that all or any of the ground became or was or is at all necessary to defendants for railway purposes, or that it has ever been used by them for such purposes, or that the defendants expect to use the same; denies that plaintiff, at slight increase, could so construct its railway as to avoid any conflict with or appropriation of any parts of defendants' right of way, or that plaintiff seeks to appropriate the right of way in question to save cost to itself, or not because the said right of way is indispensable to the use of plaintiff; denies irreparable damage, or any damage; denies that the crossings will materially interfere with the defendants' operation of their railway, or that plaintiff could easily, or at all, avoid such crossings by slight increase of cost of construction; and denies that it is unnecessary that such crossing should be made as proposed by plaintiff; and, finally, denies that plaintiff has no right to enter upon the right of way or roadbed of these defendants, except for necessary crossings or connections, or that plaintiff has no right of condemnation over the right of way of these defendants, or any of them.

The cause was tried before the court, without a jury, in September, 1893. The testimony taken before the court is quite voluminous, and so much of it as is deemed pertinent and necessary to explain the decision of the court is embraced within the opinion following this statement. The judgment and order of the court, after its more formal recitals, sets forth that the judge of the district court, with a civil engineer chosen by each party, inspected the premises before the submission of the case, and thereafter

it was decided "that the use for which the property described in the complaint, and hereinafter described, is sought to be appropriated by the plaintiff, is a public use, within the meaning of the laws of the United States and of the state of Montana; that the entire quantity sought to be appropriated ought so to be taken; that the appropriation thereof will not be detrimental to the public interest or welfare, and is required and necessary for the proper prosecution of the enterprise for which it is sought to be appropriated, and that the public interest requires the prosecution of the plaintiff's said enterprise; that the premises so sought to be appropriated by the plaintiff are not necessary for the use of the defendants' railway, nor for any public use, and is not now in actual use by them, or any of them; that the use for which plaintiff seeks to condemn the same, and to which said property is to be applied by plaintiff, is a more necessary public use than any use to which the defendants have or could put said lands, or any part thereof. And, no sufficient cause having been shown why commissioners should not be appointed herein, it is hereby ordered that Clinton C. Clark, Justin Butler, and C. J. Stevenson, three competent and disinterested persons, residents of the said county of Silver Bow, be and they are hereby appointed commissioners to ascertain and determine the amount to be paid by the plaintiff to the defendants as compensation for their damages by reason of the appropriation of said property. The right sought to be obtained in this proceeding is an easement for railroad purposes, in and over the following described tracts and parcels of land, situate in the county of Silver Bow, state of Montana." The order particularly sets forth the ground embraced within the limits of the right of way of defendants, as described in plaintiff's complaint, and sought to be appropriated by the plaintiff. It was further ordered and adjudged that the crossings and intersections described by plaintiffs were necessary and proper.

After expressly granting the right to cross over the defendants' spur known as the "Gagnon Spur," on the Clear Grit claim, the court made the following proviso: "Provided, however, the defendants may, and if they do, within 10 days after the date hereof, give notice in writing to the plaintiff, that they consent to the plaintiff's taking up their entire Gagnon spur, aforesaid, and placing and rebuilding the same on the south side of the defendants' main track, opposite or about opposite its present position, then, in that case, the plaintiff shall, at its own expense, and within a reasonable time after the giving of said notice, remove and place and rebuild the said spur on the south side of the defendants' main track, opposite or nearly opposite its present position, and make the same convenient to approach by

and for teams and wagons, and provide proper approaches thereto; and provided, further, that, if such consent be not given within the time and in the manner aforesaid, then the plaintiff may and shall extend its road across such spur at the present grade of the plaintiff's road, and the plaintiff shall not be obliged to put in any crossing, and in such case the defendants, if they desire to operate said spur or use the same, shall make the same conform to the grade of plaintiff's road and track, and put in a crossing at the grade of plaintiff's track, and maintain the same, all at their own expense."

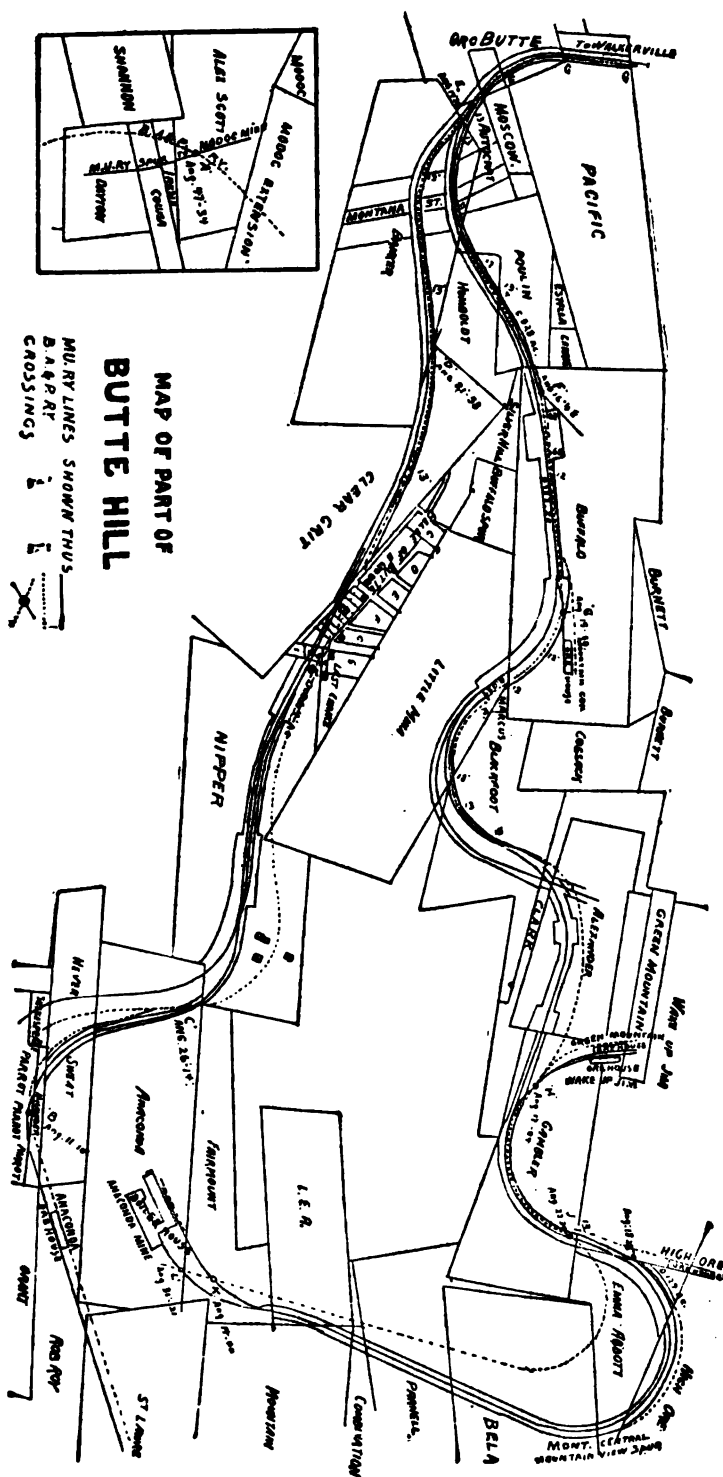
It was also ordered that the plaintiff might cross the defendants' spur known as the "Buffalo Spur" at an angle of 16° 48'. In relation to this spur the court added as follows: "Provided, however, that the defendants may, and if they do within 10 days from the date of this order, notify the plaintiff in writing that they consent to permit the plaintiff to raise the entire grade of the said Buffalo spur so that the plaintiff can cross the same at its own grade, then, in that event, the plaintiff shall, before making said crossing, raise the grade of the whole of said spur, at its own expense, so as to make a feasible crossing with its road, and leave said spur in a reasonable condition for the use of the defendants; and provided, further, that, if the defendants do not give such consent within the said time and in the said manner, the plaintiff shall make said crossing at its own grade, in as reasonably safe manner as the same can be done without raising the grade of the entire Buffalo spur aforesaid."

It was also ordered by the court, in relation to the watching of the crossings, as follows: "That, except as otherwise hereinbefore provided, all said crossings shall be put in by the plaintiff at its own cost and expense, and shall thereafter and forever be kept up, watched, and maintained at the joint expense of the plaintiff and the defendants; that is to say, one-half to be paid by the plaintiff, and one-half to be paid by the defendants, or the successors in interest of said parties or either of them,—that is to say, that each road shall assume and be liable to an equal obligation in these respects. That any improvements or repairs necessary to said crossings, or expense necessary on account of maintaining the same, may be made or incurred by one road at the equal expense of itself and the others, if, after reasonable notice to such other, the latter refuses to join in the same. That defendants shall not interfere with the plaintiff while putting in said crossings, nor in any manner hinder or delay the same. That at the same time the plaintiff shall put the said crossings in place in a manner which shall cause no unreasonable inconvenience or delay to defendants' business. And it is further

ordered and adjudged that the defendants shall be entitled to compensation from plaintiff for the privilege of making said crossings, but that defendants shall not be entitled, on account thereof, to any compensation or damages for the interruption or inconvenience occasioned to their business thereby. * * * That the standard of compensation shall be the reasonable value of the common use by plaintiff with defendants of the portions of the defendants' right of way occupied by said crossings. That the commissioners above named and hereinbefore appointed are hereby directed and authorized to determine and assess the value of said common use, subject to the restrictions above stated, and that, in making such assessment and determination of the amount to be paid by the plaintiff to the defendants on account of said crossings and common use, the said commissioners shall determine the amount to be paid for the common use of each crossing, separately, and shall in their report mention the same distinctly and separately. It is further ordered that the crossings, after being made, shall remain in the common use of both roads, and that both parties shall be required to observe all the laws of the state of Montana relating to the blowing of whistles, ringing of bells, and stopping at crossings. That neither party shall stop its engines, cars, or trains on any of the crossings, or so near thereto as to interfere in any manner with the operation of the other road. That neither party shall have a preference or right of way over the crossings, but that the party whose train first comes to the stop necessary to be made before crossing shall have the right of way of that crossing at that time. That in case trains on the different roads make such stops at the same time, or at or near the same time, or within 20 seconds of each other, the defendants' train shall have the right to make that crossing first. That no engine or train, in switching, shall be entitled to pass over a crossing more than once, if an engine or train on the other road be in waiting to cross, and the switching engine or train shall allow the waiting train or engine to cross before itself crossing again. That all needful signs and signals at and for crossings shall be constructed, erected, maintained, and operated jointly by the plaintiff and defendants, and at their joint cost and expense; provided, however, that in case it be necessary to employ any person or persons expressly for the operation of such signals, or any of them, plaintiff shall have the right to select, hire, and discharge such person or persons."

The defendants moved for a new trial, which was denied, and this appeal is prosecuted both from the judgment and the order overruling the motion for a new trial.

The following is copy of the plat introduced on the trial: [See opposite page.]



Shropshire & Burleigh and Forbis & Forbis, for appellants. W. W. Dixon, M. Kirkpatrick, and Wm. Scallon, for respondent.

HUNT, J. (after stating the facts). By this appeal we are called upon to decide questions of importance, not alone to the community at large, but especially so to railroad corporations, possessed of such powers as may be granted to them under the constitution and laws of the state. The topography of Montana, as characterized by its name, renders it of unusual significance that the laws of eminent domain be correctly expounded at this comparatively early period of the development of the state. The strict limits of all delegated authority to take the property of another must be cautiously and accurately guarded, lest private rights or those conferred be unnecessarily invaded. On the other hand, if the power to take has been delegated, that power must be precisely defined and upheld by the courts, as one vitally affecting the material interests of the state. The ways for railroads to reach remote mining camps, sometimes lying within small areas, upon precipitous mountain sides, at unusual altitudes, and in steep and rocky sections, are often very few, and only feasible at all by skillful engineering and vast outlays of money. Where, therefore, two or more railroads, in their mountainous routes, may seek the same objective mineral districts, in view of their probably necessary juxtaposition, their rights must be carefully established with relation to the law as applied to the physical, as well as other and more general, conditions controlling them in their obligations towards one another and to the public as well. Two main propositions are presented for review: First. Are plaintiff's road and branches public uses? Second. Can the plaintiff company construct its road within the defendants' right of way, and is plaintiff's use of the ground a more necessary use than that of the defendant companies, and is the ground sought to be taken necessary to plaintiff's use, and not necessary to defendants' use?

It is well established that if, in point of law, a use is public, the fact that not very many persons will enjoy the use is not material. *Talbot v. Hudson*, 16 Gray, 417. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small. *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659; *Lewis, Em. Dom. p. 241*; *Shaver v. Starrett*, 4 Ohio St. 496; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461, 43 N. W. 469; *Rand. Em. Dom. § 56*. The circumstance that the plaintiff road was built by a private corporation, and that its branches run within convenient contiguity of private mines or

ore houses, does not materially affect the road and give a private character to its use or to the use of its spurs. All termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the tracks is never affected by this. "It may be in such cases that it is expected, or even that it is intended, that such tracks will be used almost entirely by the manufacturer; yet, if there is no exclusion of an equal right of use by others, and the singleness of use is simply the result of location and convenience of access, it cannot affect the question." *Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Railroad Co. v. Porter*, 43 Minn. 527, 46 N. W. 75; *Railway Co. v. Petty*, 57 Ark. 359, 21 S. W. 884. The force of these observations is peculiarly apparent in a new mining state. Frequently, railroads are extended by spurs or lateral connections of main lines, or by independent lines, into mining camps where but a single mine is developed and capable of shipping freight. Such roads or spurs are not infrequently built by the private enterprise of those interested in the one mine to be benefited, and when constructed it is intended that the tracks will be used almost wholly by the mining company which constructed the spur. The supposed barrenness of the country contiguous to the road, or the undeveloped condition of the mountain in which the mine is lying, or, perhaps, the hitherto unrewarded search of the prospector, has encouraged the belief that, apart from the single mine owned by those who have built the railroad, there are no other paying properties upon which a railroad might rely for ores or supplies to transport. Such expected limited uses are but the results of the location of the mine and its inaccessibility. They do not in any way, however, exclude an equal right of use by others, perchance, desiring to ship freight or secure transportation over the road. To better illustrate our meaning, we have only to modify the instance just referred to of the railroad lateral built to a single mine. Suppose that a pioneer prospector has located and represented a claim contiguous to such railroad, but by reason of the impracticability or expense of constructing a wagon road, he has been obliged to simply keep what he believed was a good mine, hoping that in the future railroad facilities would afford him the opportunity to haul his ore to market. Suddenly, by the enterprise of others, and without any expectation on their part of aiding any project other than their own, a railroad is built, and he may attain the fruition of his hopes if he can use the railroad to ship his ore. Could it be contended with any merit that the railroad company, incorporated under the railroad laws of the state, can discriminate against him by saying, "We are a private enterprise, for private use, and are not generally open to the public, and for this reason refuse to haul your ore, or to

bring your machinery and supplies into these hills, and you cannot compel us to act otherwise"? Or, to carry the illustration further, suppose many mines are located close to the new line of road, and a mining district opened of incalculable interest to the state, a town springs up, with its diversified trade relations, and that thus the railroad originally constructed and intended to subserve the single mine, with little or no thought of any greater use, may become a measure of great utility to many people; must this development stop, or be dependent upon the caprices or will or discriminatory orders of the incorporators or owners, based upon a claim that the road was constructed for private purposes, and cannot be made to answer the demands of the public?

We say, after full deliberation, that the express command of section 5 of article 15 of the constitution, that "all railroads shall be public highways, and all railroads, transportation and express companies, shall be common carriers, and subject to legislative control," etc., supplemented by the statute (section 680, p. 809, div. 5, Comp. St. 1887) authorizing the construction of side tracks, branches, etc., has made them instruments of public service as well as private profit, and is sufficiently comprehensive to include, not only the railroad used to illustrate our views, but, by analogy, the particular railroads of appellants and respondent in their main lines, lateral branches, and spurs, to particular mines in and about the numerous mining dumps, shafts, and ore houses described in this suit, and situate upon the hills adjacent to the city of Butte. Getz's Appeal, 3 Am. & Eng. R. Cas. 186. Furthermore, it is expressly provided by section 7, art. 15, of the constitution, that "all individuals, associations and corporations shall have equal rights to have persons or property transported on and over any railroad, transportation or express route in this state. No discrimination in charges or facilities for transportation of freight or passengers * * * shall be made * * * between persons or places within this state. * * * No railroad or transportation company * * * shall give any preference to any individual, association or corporation in furnishing cars or motive power, or for the transportation of money or other express matter." This provision, when considered with the previous one quoted, also demonstrates that the constitution, in its letter, its spirit, and its policy as well, classes all railroads, with their feeders, such as respondent and appellants operate, as public highways, subject to use by the public of right, amenable to the laws governing common carriers forever forbidding all obnoxious favoritisms between any who desire to use such highways. Railroad Co. v. Petty (Ark.) 21 S. W. 884. This stable written policy is doubtless the outgrowth of pernicious systems of discrimination and preference which railroad corporations may have in-

dulged in throughout the land where their powers are unrestrained by constitutional or other restriction. It puts them all on a plane, and under the facts before us, respondent and appellants, as public highways, are alike the beneficiaries of its liberality, subject, nevertheless, to its restrictions and liabilities. Chief Justice Hawley, for the supreme court of Nevada, vigorously discusses a "public use," as meant by the constitution of that state, and concludes that the necessities of the business of mining, milling, smelting, etc., are of direct interest to the people of Nevada, and that a statute of that state is constitutional which authorizes land to be condemned for the necessities of such business. Mining Co. v. Seawell, 11 Nev. 394. This decision was afterwards expressly affirmed in Mining Co. v. Corcoran, 15 Nev. 147, and again recently approved by its learned author, in the United States circuit court for Nevada, where the court upholds a statute authorizing the appropriation of land for a mining tunnel as a proper exercise of eminent domain, on the ground of "great benefit and advantage to the mining industry." Douglass v. Byrnes, 59 Fed. 31. The supreme court of Georgia held, in Mining Co. v. Parker, 59 Ga. 419, that a section of an act of the legislature incorporating a gold placer mining company, and giving it power, under the constitution, to take the private property of the complainants for the use of their ditch for the purpose of extending the same to their own land, on payment of just compensation therefor, was constitutional. "Gold and silver," say the court, "is the constitutional currency of the country, and to facilitate the production of gold from the mines in which it is imbedded, for the use of the public, is for the public good, though done through the medium of a corporation or individual enterprise." In a comparatively recent decision (Oury v. Goodwin [Ariz.] 26 Pac. 376), the court sustained an act of the territorial legislature permitting the condemnation of appellant's real estate for the purpose of an irrigating canal, basing their opinion upon the principle that a state may, in view of its natural advantages and resources and necessities, legislate in such a way, exercising the power of eminent domain, that these advantages and resources may receive the fullest development for the general welfare, the laws being general in their operation. The Nevada and Georgia cases have been disapproved of by Lewis on Eminent Domain (section 184), but the disapprobation is based upon the ground that a law which granted a right of condemnation for a purpose single and essentially private in its nature could not possibly subserve any public use or be of any public benefit, and hence is an invalid attempt to take private property for private use, and not upon the soundness of the argument that the magnitude of the interest of a state may be considered, for which alone we cite them. The reasoning

of these cases, however imperfect the application to particular facts may have been, is well sustained. *Rand. Em. Dom.* p. 50; *Wood, R. R.* p. 822; *Mills, Em. Dom.* § 20; *Cooley, Const. Lim.* 533; *Railroad Co. v. De Camp*, 47 N. J. Law. 518, 4 Atl. 318; 1 *Rorer, R. R.* § 409; *Comp. St. Mont.* 1887, § 1495 et seq.

The public interests are benefited by railroads, and the right of eminent domain may be exercised through the medium of corporate bodies. The public have an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained, if they should refuse to transport an individual, or his property, without any reasonable excuse, upon being paid the usual rate of fare. *Beekman v. Railroad Co.*, 3 Paige, 45; *Lewis, Em. Dom.* § 170; *Dietrich v. Murdock*, 42 Mo. 279. Where the general public advantage is greatly promoted by the improvement of water power in the streams and waters of a country, private property taken for that purpose is taken for a public use, within the meaning of that term. *Hazen v. Essex Co.*, 12 Cush. 475. Indeed, in New England we find the courts very emphatic upon the question. Chief Justice Perley, after speaking of the interests that New Hampshire had in the improvement of her natural water powers, wrote as follows: "No state of the Union is more interested than ours in the improvement of natural advantages for the application of water power to manufacturing purposes. Nature has denied to us the fertile soil and genial climate of other lands, but by way of compensation has endowed us with unrivaled opportunities of turning our streams of water to practical account. The present prosperity of the state is largely due to what has already been done towards developing these natural advantages; and there is no assignable limit to our resources in this respect, if extended and connected enterprises for the improvement of the water power in the state should be successfully prosecuted hereafter. In no part of the world have the public a deeper interest in the success of all undertakings which promise to assist in the development of these great natural advantages. Whether, therefore, we look to the interpretation which has been given in other jurisdictions to the term 'public use,' in reference to the right of taking private property for such a use, to the legislative practice under the provincial and state governments before and at the time when the constitution was adopted, to the language of the constitution itself, to the early and continued legislative practice under the constitution, to the decisions of the courts in this state, or to the character of our business and the natural productions and resources of the state, we are drawn to the conclusion that the legislature have power to authorize a private right that stands in the way of an enterprise set on foot for the improvement of the water power in a

large stream like this river to be taken without the owner's consent, if suitable provision is made for his compensation, and that the act of 1862 is constitutional and valid." *Manufacturing Co. v. Pernald*, 47 N. H. 444; *Olmstead v. Camp*, 33 Conn. 532. See, also, *Scudder v. Falls Co.*, 1 N. J. Eq. 695; *Mills, Em. Dom.* § 183. So vital to the development of the agricultural interests of the state is water for irrigation that, as a part of the bill of rights of the constitution, it is provided: "The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use. Private roads may be opened in a manner to be prescribed by law, but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited." *Const. Mont.* art. 3, § 15. The improvement of Boston harbor by reclamation of a large body of land for commercial purposes was held to be of great public advantage. *Moore v. Sanford*, 151 Mass. 286, 24 N. E. 323. "The ever-varying condition of society is constantly presenting new objects of public importance and utility, and what shall be considered a public use or benefit may depend somewhat on the situation and wants of the community for the time being." But the underlying principle remains, that there must be a public use or benefit. "But what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to general rule." *Scudder v. Falls Co.*, 1 N. J. Eq. 695; *Talbot v. Hudson*, 16 Gray, 417; *Railroad Co. v. Brainard*, 9 N. Y. 109.

In thus ingrafting upon the law of this jurisdiction the doctrine that the magnitude of the interests involved may properly become a determining factor in sustaining the right of a railroad to construct lateral branches, tracks, and spurs to mines and mining works, as public uses, by virtue of the law of eminent domain, we are always duly mindful, not only of the constitutional guaranty of the individual right of possessing and protecting property, but are equally impressed with the declaration that "the good of the whole" is the very foundation of the constitution. Indeed, it may be said that upon this latter axiom of all government by the people rests the principle itself. The force of the principle may vary in different communities. What cogently applies to Montana, with its mountains and quartz, would be an absurd process of reasoning to urge in Louisiana, where scarce an undulation marks the surface, or a

mineral lies beneath it. Therefore, to correctly define what that force is in the case before us, it is eminently reasonable and appropriate that the conditions of the whole people to be affected should be considered. In this state, where, almost wholly through the facilities and advantages of railroads, the quartz mines have been developed to such an extent that the mineral output is only exceeded by that of one or two older mining states, the publicity of the use of railroads into the camps is too obvious to require more extended comment. In the language of the eminent counsel who so lucidly presented respondent's side of the case: "Again, in Montana, mining is the dominant industry. Throughout a large portion of the state, and in the county of Silver Bow especially, it is the all-important pursuit, upon which all other industries are dependent. In the mining, smelting, and reduction of ores the great mass of the population finds employment and support. The prosperity of the state is very largely due to the development of the mines." Having determined that the respondent's railroad and laterals, branches, and spurs are all public highways, within the legal bounds of public uses, it follows that the law of eminent domain was available to them, provided (1) the use to which the respondents have applied the ground taken is a use authorized by law; (2) that the taking was necessary to such use; (3) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use. Code Civ. Proc. § 601.

That a necessity exists which requires property to be taken is obvious. This follows as a conclusion of the determination that the purpose of the plaintiff is a public use. *Moore v. Sanford*, 151 Mass. 286, 24 N. E. 323. But, insist the appellants, although we grant a right of way is necessary, if it is held that the Butte, Anaconda & Pacific Railway is a public use, nevertheless, at the very threshold of this branch of the case we deny the necessity of the particular land for the railroad uses for which respondent seeks to appropriate it. The district court found that the ground included within the defendants' right of way was necessary to the plaintiff for the proper construction and maintenance of its road, that such ground was not necessary for the use of defendants' railway, and was not in actual use by them at the time of the order, and that the use for which the plaintiff sought to condemn the same was a more necessary public use than any use the defendants have or could put the same to. Without more prolixity than we think is essential to make clear our opinion, we will state the concluded facts apparent to us. The country through which the contending railroads run is one of the mountains of the main Rocky Mountain range, and known as the "Butte Hill," above the city of Butte. The railroads about the hill are really great broad-gauge spurs of their respective main

lines. From these great spurs many short ones project, running to ore houses or mining shafts. The principal object of both railroads, in their branches about the "Hill," is to haul ores from and supplies to the several quartz mines indicated upon the map, to wit, the St. Lawrence, Anaconda, Wake Up Jim, Buffalo, Moscow, and others. The Butte, Anaconda & Pacific (respondent) tracks for the most part lie north of the Montana Union tracks. The Montana Union right of way was 25 feet on either side of the center of its tracks. It had, however, graded along the hill only to an extent a little more than necessary for the actual space occupied by its roadbed. In many places the hill is so very steep, or so rocky, or both, that the rails must have laid very close to the bluffs just north of the tracks. There was no actual use of such bluffs or other ground adjacent to the Montana Union tracks, nor could it actually occupy the same without heavy excavation work on the upper side. Commencing at a point on the hill within the limits of the Nipper quartz-mining claim, the Butte, Anaconda & Pacific, with its road, was graded and excavated on the upper side of appellants' roadbed, and is within the right of way of the Montana Union for about a mile and a half. At places the south rails of the Butte, Anaconda & Pacific road are within 10 feet of the northern rails of the Montana Union, but as a rule there is some 17 to 22 feet between the centers,—that is, from the center of the Montana Union tracks to the center of the Butte, Anaconda & Pacific tracks. These distances, excluding the crossings, are sufficient to prevent any interference between the successful operation of the two roads. The strips of ground which the plaintiff would condemn and appropriate vary in width, the variance being evidently based upon what the plaintiff deems necessary for the operation of its road, considering the points to be reached, and the distance which would and must separate the two roads when constructed. Prior to the institution of this action,—that is, in 1893,—various lines and means of getting to the several ore houses marked upon the map were projected. All these ore houses are at the same level as to the grade of the two roads; several of them, however, being below the level of the Montana Union main track. By the abrupt rise in the hill and its rocky character, and because of the necessity of the Butte, Anaconda & Pacific crossing divers spurs of the Montana Union, it is necessary that the right of way of the Butte, Anaconda & Pacific be laid down to the same level as the Montana Union. This necessity could only be obviated by requiring the Butte, Anaconda & Pacific to either cross the spurs of the Montana Union at grade, or construct its road high enough to go overhead or low enough to pass beneath the spurs. To go under them would require the plaintiff to undertake an engineering task so far beyond what is deemed practicable, or reason-

able that it need not be considered at all. To build its line overhead would compel the Butte, Anaconda & Pacific to construct its road at more than 20 feet above the crossings, so that, when it passed the ore houses which the two roads go to, the plaintiff's road would be useless, unless, after running beyond the ore houses, switch backs were constructed down the hill, by which they could reach the objective points. To follow this plan would require the plaintiff to run into the mountain at points beyond the ore houses, at enormous expense of construction, and right of way, probably; and the road, when thus constructed, would be very impracticable to successfully run or operate. If the Butte, Anaconda & Pacific constructed its line above the Montana Union, it follows that the cuts through which it would have to run would be very much heavier than its present line, and at their objective points it would still be necessary for the two roads to be within a few feet of one another. Another objection to running higher up the hill is that such a route would materially interfere with the operation of the mines on the mountain. In such case shaft houses would be cut through, dumping grounds intersected, and quartz-mining operations seriously interfered with. The route chosen was deemed by far the most feasible and practicable one. Other routes could have been selected, according to the engineers' evidence, but any practicable one which might have been chosen would have crossed the main line of the defendants, as well as many of their spurs. The plaintiff, by going upon the right of way of the defendants, widened the cuts which defendants had already made in many places, but when we consider that the hill had remained in its natural state until further excavated by the plaintiff, it is plain that no material damage was done to the defendants by the plaintiff by the mere act of excavating as it did. On the contrary, such excavations are a benefit from a mere standpoint of construction. Upon one part of the right of way, lying within the Belle of Butte addition to the city of Butte, the natural physical obstacles to selecting another route were not so great as higher up the hill; but, in order to conform with the grade necessarily chosen to reach the point higher up the hill, the most practicable route was that selected through the Belle of Butte addition, particularly in view of the fact that, had they kept off of the right of way of the defendants, the plaintiff would have been compelled to pay for a number of dwelling houses and the lots which they were on, and other parts of their line would have been affected. An experienced engineer, Mr. N. C. Ray, testified in behalf of the defendants that he had, at a time long prior to the institution of this suit, and at a time when there were not so many houses about the foot of the hill, and not so many mines developed and ore houses built on the mountain, made a survey for another railroad, with a view of finding a practica-

ble route. His proposed line ran on the south or lower side of the present Montana Union track. It was proposed by this route to make most of the crossings of the Montana Union spurs grade crossings. It appeared also that the Ray route, if followed, would necessitate for a long distance a retaining wall to be put up to maintain the slope of the Montana Union roadbed, and to keep it from falling over on the proposed roadbed. It would require very heavy fills or trestlework; and, withal, a scale of a map made when this projected route was first surveyed showed that there was not 200 feet difference in the longitudinal conflict between the Ray route and the present Butte, Anaconda & Pacific route and the Montana Union right of way, as they appear on the maps. The total length of the present lines is about three miles, or a little less. From certain given points there was, between such proposed route and the actual route of the Butte, Anaconda & Pacific, a difference of three-fourths of a mile, the greater length being the Ray route. The Ray route necessitated five grade crossings of the main track of the Montana Union, all of which, it satisfactorily appears, were more undesirable than an equal number of crossings would be over spurs. Moreover, the Ray line, if run at the time this litigation first arose, would have encountered buildings, shaft houses, and dwelling houses which were not in existence when the line was first proposed. It would have been vastly more expensive, by reason of the enhanced value of the right of way, and we think it only fair to say that, as the conditions existed at the time that the testimony was taken in this cause, his route was impracticable. Moreover, the Ray route was not projected with a view to serving all of the various ore houses touching plaintiff's and defendants' roads; the only branch appearing on the Ray map being to the High Ore house, and a branch to the Anaconda and the Humboldt.

One of the objections interposed by the defendants to the occupancy of their right of way was the difficulty of throwing out switches or side tracks to the north of the Montana Union, but the engineers swear that if they have distances to centers between tracks of 22 feet, there is room between the two tracks for another track, and if the Butte, Anaconda & Pacific elevation is so high that the Montana Union cannot get over by crossing at right angles, a spur can be run at any distance in order to attain the proper elevation. Another objection vigorously urged was the difficulty of handling ties where the roads were very close together. But it appears that some of the greatest railroads in the country, notably the Pennsylvania system, have three tracks abreast, with centers of the two outside tracks $22\frac{1}{2}$ feet apart. Ties are successfully handled on such roads, and we see no reason why they should not be upon the roads of the contending parties at

bar. Besides, the hill, as it stood, was certainly a much greater obstacle to necessary conveniences in this respect than it is as excavated to a level with appellants' roadbed. It was also urged that the right of way taken by the defendants was necessary in case of future double tracks or sidings, but as these needs are mere future possibilities, not based upon reasonably apparent traffic needs, we do not think the showing is strong enough to merit very serious consideration. A great deal of testimony was also taken upon the inconvenience to the defendants in the operation of their trains at various crossings where the construction of plaintiff's road prevented the defendants from handling as many cars at one time as they could handle if the plaintiff's road were not in their way. Eliminating the consideration of the Gagnon, Buffalo, and Haggin spur crossings, which are referred to hereafter, we are constrained to hold that, as the law expressly gives the right of crossing and intersecting (Const. art. 15, § 5), the interference is only such as is essential to any method of operation of two railroads where they cross and intersect one another on the side of a mountain, where their respective ways are necessarily very limited, and where both may have lawful rights of way to their respective but identical objective points.

It is well to bear in mind, in the application of the principles underlying the law of eminent domain, that the state has an inherent political right, pertaining to sovereignty and founded on what has been expressed to be a "common necessity and interest," to appropriate the property of individuals to great necessities of the whole community where suitable provision is made for compensation. *Raleigh v. Davis*, 2 Dev. & B. 451; *Lewis*, Em. Dom. § 3. This right, says the constitution of Montana (section 9, art. 15), "shall never be abridged nor so construed as to prevent the legislative assembly from taking the property and franchises of incorporated companies and subjecting them to public uses, the same as property of individuals." The public welfare is therefore the particular base upon which must be laid the correct application of the doctrine itself. The right of eminent domain may be of the greatest value to the respondent, or to any other corporation which may exercise its privileges, but that is an incident which must be subordinated by the courts to the question of public use, and to the consideration of the benefits to accrue to the public by the construction of the contemplated project. There is, however, a rule of construction, sustained by the great weight of well-considered authority, to the effect that this power to take the property of private citizens or other corporations for public use must be exercised and can be exercised only so far as the authority extends, either in terms expressed by the law

itself, or by implication clear and satisfactory. In *re City of Buffalo*, 68 N. Y. 167; *Suth. St. Const. § 388*; *Mills*, Em. Dom. § 46. In our opinion, the testimony in this case shows that the particular location of respondent's railroad is by far the most practicable which could have been found, and, considering the fact that any other route would have impinged upon the appellants' right of way very nearly as much as the present route does, and that such other route would have affected many mining operations, would have been enormously expensive, and much less convenient or somewhat less safe, and that it is manifestly to the best interests of the public generally that railroads be constructed throughout the mountains over such routes as will enable the public to receive the best and most expeditious service which can be attained, we think that the taking of the portions of the right of way of appellants' road was necessary to the use, which was public, of the respondent's railroad.

Now, however, having advanced to this point of the case, we are met with this argument by the appellants' counsel, namely, that this right of way was already appropriated, and that there was no delegation of power to any corporation under the eminent domain laws of the state to take property already appropriated to a public use, unless, as provided by the last clause of the third subdivision of section 601, Code Civ. Proc. 1897, "the public use to which it is to be applied is a more necessary public use." We have already concluded that this land was necessary to respondent's use, and the question therefore is, is respondent precluded from condemning these necessary lands because they have already been condemned for public use by the appellants? If the question were limited merely to this single inquiry (unless some other statute authorized a taking), doubtless, under rules of construction, we should hold that the respondent could not invade the right of way of the appellants. But our legislature has imposed upon the court the additional responsibility of judicially determining whether the use to which the appellants did or would put the particular lands is a more necessary one to the public than that to which they have already been appropriated by the Montana Union Railway. We therefore find the whole proposition resolves itself, under the facts, to this: A part of the right of way of the Montana Union Railway Company has never been used by it for railroad purposes for the several years during which the road has been constructed and in operation, and is not reasonably requisite for future uses. The Butte, Anaconda & Pacific Railway Company, in the location of its only really practicable route, desires to take parts of such unused portions of the Montana Union right of way; such portions being necessary for their actual use, and un-

necessary for the actual use of the appellants. We have used the word "necessary" advisedly throughout this opinion, although when we say that the route chosen by the Butte, Anaconda & Pacific requires the taking of the lands in question as necessary for public use, we do not mean that there is an absolute necessity of the particular location they seek. But, under the statute, such an absolute necessity is not a prerequisite to the exercise of the law of eminent domain. We are aware of the decision of the supreme court of Pennsylvania (Sharon Railway Co.'s Appeal, 122 Pa. St. at page 545, 17 Atl. 234), that land once appropriated by a railroad company to public use under the right of eminent domain cannot afterwards be appropriated by another company to the same use, except in case of "absolute necessity." There one road sought to take part of the yard of another. The facts warranted a finding by the master that the lands sought to be taken were convenient and necessary to enable the plaintiff company to economically and expeditiously carry on its present and prospective business, and it was upon such a finding that the court held as it did. If the learned judges meant by an absolute necessity to exclude entirely the element of reasonableness in the measure of their words, we are constrained to take a different view of the law in interpreting our statute, and in so doing we find ourselves in thorough accord with three of the justices of the same court in their dissenting opinion, reported in Appeal of Pittsburgh J. R. Co., 122 Pa. St. 511, 6 Atl. 564, and decided just two years before the absolute necessity rule was laid down in the case hereinbefore cited. The appeal in the Pittsburgh Junction Co. Case in its facts was much closer to the case at bar than Sharon Railway Co.'s Appeal, *supra*. The Allegheny Valley Railroad Company claimed to own certain property in the city of Pittsburgh, extending from Forty-Third street to Forty-Seventh street, and from an unnamed street on the south to low-water mark on the Allegheny river on the north, all of which property it claimed to have in constant use in connection with the operation of its railroad. The Pittsburgh Junction Company entered upon a part of this property, and commenced to lay ties and rails thereon, and to tear up the track that had been used by plaintiff for many years, and it was alleged that, if the defendant was permitted to go on, it would seriously interfere with and cripple the operation of the plaintiff's road, and would ruin its roadbed, and render it unable to perform the duties imposed upon it towards the public. The defendant contended that it was authorized to locate its road between certain points, and it was obliged to run along the bank of the Allegheny river, and that it had a right to run where it did, and denied that all of the property used by the plaintiff in connection

with the maintenance and operation of its railroad was used, or that it was all indispensable to plaintiff's use. The supreme court held that the plaintiff road could consider the needs of the future, and that the defendant could not interfere with the present or future use contemplated by the plaintiff, and that no actual encroachments would be allowed. Perhaps the decision turned, in the opinion of the majority of the court, upon the ground that the defendant could have, without any trouble besides expense, constructed its road at another point, as the court say: "We are not embarrassed with the questions that would arise if the defendant company could not build its road without laying its track through the plaintiff's yard." The minority opinion by Judge Tounkey is very brief, and we quote so much of it as is applicable to the facts at bar: "In this case the testimony clearly shows, and it was so found by the master, that there is ample room next the river where the appellant could lay its tracks without material injury to the property of the appellee. The inconvenience to and cost of changes by the appellee could be compensated in damages. The prudent appropriation of a parcel of land extending from low-water mark on the river to the hillside by the appellant, the whole of which land is not necessary for the uses of its road, ought not to bar the construction of another railway in the valley by a company subsequently chartered."

About the same time that the Pennsylvania rule of absolute necessity was announced, the supreme court of Alabama, in *Mobile & G. R. Co. v. Alabama M. R. Co.*, 87 Ala. 501, 6 South. 404, discussed, with a learning which generally characterizes the decisions of that respected court, the right of a railroad company to take by condemnation proceedings part of the property of another railroad company already devoted to a public use, and say: "As a general rule, a corporation to whom the right of eminent domain is delegated, having the right to locate the line of its road between the terminal points, has also the correlative right, to some extent, to select the lands to be taken. But the discretion must be reasonably exercised, so as to cause as little damage as is practicable; and if abuse in the selection is made apparent, the court before whom the proceeding is pending should interfere to control the discretion, and prevent the abuse by refusing an order of condemnation. *New York Cent. & H. R. R. Co. v. Metropolitan Gas-Light Co.*, 63 N. Y. 326; 6 Am. & Eng. Enc. Law, 541. According to the rule stated above, the liability of any portion of the right of way of the *Mobile & Girard Railroad Company*, though not in actual use, to condemnation for the use of the *Alabama Midland Railway Company*, is subject to the qualification of a necessity therefor. It would be difficult to lay down any specific rule, as to the meas-

ure of the necessity, of sufficient scope to include all cases. It may be observed generally that 'necessary,' in this connection, does not mean an absolute or indispensable necessity, but reasonable, requisite, and proper for the accomplishment of the end in view, under the particular circumstances of the case. On the evidence, there is little room for doubt that the route selected by the Alabama Midland Railway Company to get into the city of Troy and out to the west is the most practicable, if not in its proper sense the only practicable, route." *Anniston & C. R. Co. v. Jacksonville, G. & A. R. Co.*, 82 Ala. 297, 2 South. 710.

Again, the absolute necessity rule not only will not consist with the express delegated authority to take the property of a corporation by virtue of eminent domain, but, if we carry it to its logical results, it is this, that where one corporation to which has been granted the right of taking property by eminent domain has exercised that right, it cannot be interfered with, except for crossings and intersections. This is fallacious. In mining districts it leads to exclusion. When a similar question arose in Illinois, Judge Breese, for the court, thus tersely disposed of it: "The argument, when reduced to its proper measure, is that, while the land of all other persons and corporations lying on the route of a railroad is subject to the power of eminent domain, that belonging to a railroad company is not thus subject. Such land must remain intact. We cannot assent to this proposition." *Peoria, P. & J. R. Co. v. Peoria & S. R. Co.*, 66 Ill. 174. We find the federal court for the district of Colorado taking substantially the same view of the necessity rule as the Alabama court did. *Colorado E. Ry. Co. v. Union Pac. R. Co.*, 41 Fed. 293. The Colorado Eastern Railway Company sought to condemn certain property within the limits of the city of Denver, claiming that the ground was necessary for its use for various railroad purposes. The defendant contended that the land was not of such necessity to the plaintiff as to justify the taking from defendant, and that the land had already been appropriated by defendant to its own use as a public railroad, and was eminently necessary to its prospective business. Philips, J., decided that the ground was necessary to the petitioner, because it was the only piece of ground available to petitioner without entirely changing the survey line and undertaking to accomplish its destination by a circuitous route, and that it would not be a wise judicial discretion to compel the petitioner to adopt a road highly inconvenient, longer, and less available. It was plain in that case that another route could have been selected, and, aside from the matter of economy, with very much more ease than could the respondent, in the case at bar, choose another route for the Butte, Anaconda & Pacific road; but the court evidently refused to follow the absolute neces-

sity rule, and based its decision upon the more just doctrine of the necessity of the petitioner, founded upon the practicability, economy, facilities, and other considerations which should govern the determination of what the necessities may be, always considering the rights of the senior company, yet never forgetting the benefits to the public.

The laws of the state authorized the respondent to locate its railroad. It had a right to select the most feasible route, provided in doing so it did no unnecessary injury to the public or to the appellants. The law does not give to the respondent any predominant right over the appellants, though certainly the line of respondent should be so run as not to materially interfere with the efficiency of the Montana Union. *New York, H. & N. R. Co. v. Boston, H. & E. R. Co.*, 38 Conn. 196. We find no violence done to these principles. The inconveniences inevitably incident to the crossing of one road by another are not violations of the principles. On the other hand, lands belonging to the Montana Union by way of easement and not actually in use by such company, or not actually necessary for the enjoyment of their franchise, should be upon the same footing as the land of the individual citizen. *Peoria, P. & J. R. Co. v. Peoria & S. R. Co.*, 66 Ill. 174. It was never contemplated by the constitution that competition between railroads should not be sanctioned. On the contrary, our construction of the law is that it is the policy of the state, voiced in its constitution and statutes, to build up competing railroads, rather than to deter them. If this were not so, why did the legislature expressly include the right to take lands already appropriated by one corporation and devote them to public use where the latter use was a more beneficial one than the former. The mere fact that the easement is held by a corporation, and that another corporation takes it to subserve public use, cannot affect the principle so long as the second taking is for the greater public good. *Northern R. Co. v. Concord & C. R. Co.*, 27 N. H. 183. Nor can the claim of a superior equity, of respondent be urged as a sound argument, based upon the fact that the appellants already have appropriated the property for public use. *Chicago, R. I. & P. R. Co. v. Town of Lake*, 71 Ill. 333. The Montana Union accepted its easement with the reserved right in the state to retake it whenever the public necessity might require, provided, always, just compensation should be made when it might be retaken. One public corporation cannot take the lands or franchises of another public corporation in actual use by it unless expressly authorized to do so by the legislature. But the lands of such a corporation not in actual use may be taken by another corporation, authorized to take lands for its use in invitum, whenever the lands of an individual may be taken, subject to the qualification that there is a

necessity therefor. 2 Wood, R. R. p. 856. We think this to be the true rule, and that opposing corporations may be limited to the enjoyment of that property in actual use by them, and that which is reasonably necessary for the safe, proper, and convenient management of their business, and the accomplishment of the purposes of their creation. *Mobile & G. R. Co. v. Alabama M. R. Co.*, supra. Upon this proposition we again refer to the opinion of Judge Phillips (*Colorado E. Ry. Co. v. Union Pac. R. Co.*, 41 Fed. 203), where it was held "that mere priority of acquisition, or even of occupation, gives no exclusive right, except in so far as the condemnation trenches on the greater necessities of the other franchise." As has been stated heretofore in this opinion, the right of way prayed for by the respondent in this case was not occupied, and the mere priority of the acquisition of the Montana Union must give way, under our laws, to the superior uses and greater needs of the Butte, Anaconda & Pacific Company, as more necessary to the public.

The learned counsel for the appellants have cited us to many cases besides the Pennsylvania ones already referred to. We will notice one or two principal ones. *Barre R. Co. v. Montpelier & W. R. R. Co.* (Vt.) 17 Atl. 923, simply decided that one railroad company, to avoid a sharp curve in its road, could not take the land of another company, as condemnation was sought upon the ground of convenience rather than necessity. We find nothing in the case to the effect that if the necessity existed still the ground could not be taken. *Boston & M. R. Co. v. Lowell & I. R. Co.*, 124 Mass. 368, was decided upon the ground that there must be an express legislative grant to authorize a longitudinal road to be built upon the right of way of another road, and that the statutes did not contemplate such a taking, but the court recognized that cases may arise where the authority to take land already devoted to another railroad may be implied, either by the language of the act or from the application of the act to the subject-matter, as where the railroad could not be laid, in whole or in part, by reasonable indentment, on any other line. We are cited by the appellants to the case of *Illinois Cent. R. Co. v. Chicago, B. & N. R. Co.*, 122 Ill. 473, 13 N. E. 140. In that case one railroad sought to run within the right of way of another for a distance of 11 miles. A majority of the court held that one company could not take any part of the right of way of another except at a point of crossing, intersection, or union. The Illinois statute granting rights of way to railroad companies was substantially like the first portion of fourth subdivision of section 600 of the laws of eminent domain (Comp. St. Mont. 1887, p. 216), which is as follows: "All rights of way for any and all purposes mentioned in section 598, and any and all structures and improvements thereon, and the lands held or used in con-

nection therewith, shall be subject to be connected with, crossed or intersected by any other right of way, or improvements or structures thereon." It was argued to the court that the provisions of such a statute were broad enough to permit the taking of the right of way of one company by another, but it was decided that the taking contemplated was limited to crossings, intersections, or unions, and not taking for another road longitudinally. Two judges dissented from that opinion, and although we do not find it necessary to approve or disapprove of the law of that case, we note that our statute seems to go further than the Illinois law, for with us it is expressly provided, in the latter part of the section just quoted: "They shall also be subject to a limited use in common with the owner thereof when necessary; but such use, crossings, intersections and connections shall be made in manner most compatible with the greatest public benefit and least private injury." If the property to be subject to limited use in common with the owner means, generally, rights of way, longitudinal as well as other, and the statute does not restrict the application of the pronoun "they" to rights of way immediately connected with crossings and intersections, but enlarges the use to all rights of way when necessary, it would seem by no means unreasonable that conditions like those presented in the case under consideration were in the minds of the legislature at the time that this section became a law, and that of necessity all rights of way shall be subject to a limited use in common with the owner thereof. Perhaps the statute may have meant, by using the word "owner," the owner of the fee, to whom all rights in the property might revert if there were no longer any public use thereof, or it may mean the easement for use of the corporation which had acquired an easement over the property by virtue of the law of eminent domain. We simply refer to this matter in view of the citation made. From the decision in the case of *Railroad Co. v. Moss*, 23 Cal. 323, it appears the court did not consider the effect of any statute similar to ours granting the right to take land once appropriated, if indeed there was any such statute in existence in California when that decision was rendered in 1863. It was held that there was no right to condemn or appropriate land along or upon a previously located line of another railroad company, except for crossing purposes. The court announced that, by its priority of location and appropriation, a railroad company acquired a "vested right to its line of road and the land necessary for its construction, as prescribed by the railroad laws, of which it cannot be divested by another company who seek to appropriate the land for the same use." We must decline to assent to this proposition as it is stated, without careful qualification and modification.

We cannot agree that the statute which au-

thorizes lands to be appropriated for a more necessary public use means a different public use in all cases. If the legislature had intended that construction to be put upon the statute, instead of carefully restricting the right to a more necessary public use, they could easily have said a different public use. Besides, the view which we have discussed is consonant with those clauses of the constitution inhibiting discriminations, as already enumerated. If the appellants' construction were adopted, the practical result would be the exclusion, oftentimes, of more than one railroad on mountain sides or in mountain gorges or precipitous gulches, or routes not embraced within the definitions of cañons, defiles, or passes, especially provided for by law. Comp. St. 1887, div. 5, § 688, tit. "Railroad Corporations." Consider a practical application. A railroad company would take the maximum right of way. Now, if the right of eminent domain is not conferred upon the junior company to take lands for a public use, unless for a different use, the first railroad would be enabled to prevent any and all competition, because, oftentimes, any route off the right of way of the first would be, if not an absolutely impassable one, so impracticable and so enormously expensive that it must as a reasonably necessary consequence deter another corporation from building at all.

To conclude, we adopt that construction which is more jealously careful of the best interests of the state, and say that, where a railroad company traversing the side of a mountain in a mining section has within its right of way tracts of ground not necessary to the proper, successful, and safe operation of its system of tracks and spurs, and not used by it in connection with any such operations, and in all reasonable probability not necessary for any such future use, if another road seeks the same objective points, and in doing so is obliged to take part of such unused right of way to avoid a considerably more circuitous route, at a different grade, of very much greater cost, and of serious damage to many mining properties in their subterranean and surface operations, and withal would be obliged by the topography of the mountains to parallel the adversary road a part of the way, under such conditions the use of the unused parts of the right of way of the one company by the other is a more necessary public use than that to which such unused portions are already appropriated. Wherefore, the law will permit the taking, regarding the interference as a "tolerable one," to be compensated by damages to be paid. In *re City of Buffalo*, 68 N. Y. 167. In concluding this opinion the court expresses its acknowledgment for the argument and research of counsel on either side. By their aid we have been greatly assisted to determine between the parties whether plaintiff could invoke the law of eminent domain in this case,—that power in the exercise of

which, a modern writer (Randolph) says, is invariably provoked a direct issue between man and the state.

Spurs and Crossings.

Gagnon Spur Crossing. The order of the district court in relation to the Gagnon spur is more fully set forth in the statement of facts appended to this opinion. Its use to the defendants was for the delivery of supplies and fuel to the Gagnon mine. It was on the north side of the Montana Union track, while the mine is on the south side of the track and at such a distance from the railroad that supplies are hauled by wagon from the spur to the mine. Where the plaintiff's track crosses the Gagnon spur it is at the same level as the defendants' track, but the spur descends from the time it leaves the Butte, Anaconda & Pacific track and the grade of the plaintiff's track at the point of crossing is considerably above the spur grade. In view of the fact that it would be plainly for the greater convenience of the appellant company to have the spur on the south side of their main track, the order of the district court in relation to this spur is modified, and unless plaintiff and defendants otherwise agree, the order of the district court will be that the Butte, Anaconda & Pacific Railway Company, at its expense, construct a spur, or rebuild the one already constructed upon the south side of the Montana Union main track; and, further, that the said Butte, Anaconda & Pacific Company at its own expense construct and provide suitable and convenient approaches to said spur for teams and wagons, having due regard to the nature and facilities of transportation between the Gagnon mine and the Montana Union Company.

Buffalo Spur Crossing. There is a slight difference of elevation of grades of the two roads at the Buffalo spur. The only practicable way of crossing at the point marked F on the map was to raise the grade of the track of the respondent from the switch of the main track as far as the crossing by the Butte, Anaconda & Pacific. No change was to be made on the main line, and the grade of the spur is to be the same as formerly from the crossing to the end of the spur. We think that the respondent should construct this crossing in the manner proposed, and at their expense entirely, unless it is agreed otherwise between the parties themselves.

Haggin Spur Crossing. The civil engineers take very different views of the feasibility of this crossing. A short distance from the crossing the Butte, Anaconda & Pacific Company found it necessary to construct a reverse grade leading to the Montana Union track. This made a "hump," as railroad men call it,—that is, an uphill and a downhill grade,—on the Butte, Anaconda & Pacific road a very short distance from the crossing. This, of course, was necessary to enable the Butte, Anaconda & Pacific to cross without

disturbing the grade of the Montana Union track. The principal objection to it by the Montana Union witnesses was that it was impracticable and unsafe because of passing over the hump, and, considering the general grade of the railroad, the Butte, Anaconda & Pacific trains would break in two, and thus, by wreckage and other mishaps, the Montana Union tracks would be obstructed and their traffic materially interfered with. It is difficult for us to say, in the radical disagreements of skilled engineers, what the probable effect of this hump may be, but it occurs to us that, as its dangerous tendencies are all primarily towards accident to the Butte, Anaconda & Pacific, and only indirectly to the Montana Union, the risk, if any, and the scientific error, if any, will fall much more heavily upon the respondent than upon the appellants, and that therefore it is proper for us to affirm the order of the district court.

We see no error in referring the question of damages for crossings to the commissioners, as was done by the order of the court. The statute covers the matter. Comp. St. 1887, p. 218, § 607.¹ The last objection of the appellants is to the order of the court giving the power and authority to the Butte, Anaconda & Pacific Company alone to employ and discharge watchmen at the crossings, for whose wages the plaintiff and defendants are jointly responsible. In view of the fact that the respondent company invokes the right to make these several crossings, it would seem quite just that the expenses of a watchman to guard the Haggin Spur crossing and others, if any, where the district court ordered watchmen, should be borne by the respondent alone. We see no objection to permitting the watchmen to be chosen by the Butte, Anaconda & Pacific Company, and it will be directed by this court that the order of the district court shall be modified so as to impose the expenses of watchmen entirely upon the respondent corporation.

Let the judgment and order of the district court be remanded for modification in conformity with the views expressed in this opinion, and when so modified it will stand as affirmed. Modified and affirmed.

PEMBERTON, C. J., and DE WITT, J.,
concur.

BUTTE, A. & P. RY. CO. v. MONTANA
U. RY. CO. et al. (No. 518.)

(Supreme Court of Montana. July 29, 1895.)

RAILROAD COMPANY—RIGHT TO CROSS TRACKS OF
ANOTHER.

1. A railroad company will not be denied the right to cross the tracks of another company merely because the crossing will necessitate the raising of the grade of the latter's road

18 inches, where the new grade is necessary because of another crossing.

2. A railroad company will not be denied the right to cross the tracks of another merely because the crossing will somewhat curtail the storage tracks of the latter.

3. Where plaintiff railroad company sought to cross defendant's road at a point where the latter maintained movable rails, the action of the trial court in allowing plaintiff to remove the rails to land not owned by defendant, and to make title to such land in defendant, will be reversed, and plaintiff required to cross elsewhere, though the change will compel plaintiff to make three crossings over defendant's road.

Appeal from district court, Deer Lodge county; Theodore Brantley, Judge.

Action by Butte, Anaconda & Pacific Railway Company against the Montana Union Railway Company and another for leave to construct crossings over defendants' roads. From a judgment for plaintiff, defendants appeal. Judgment modified.

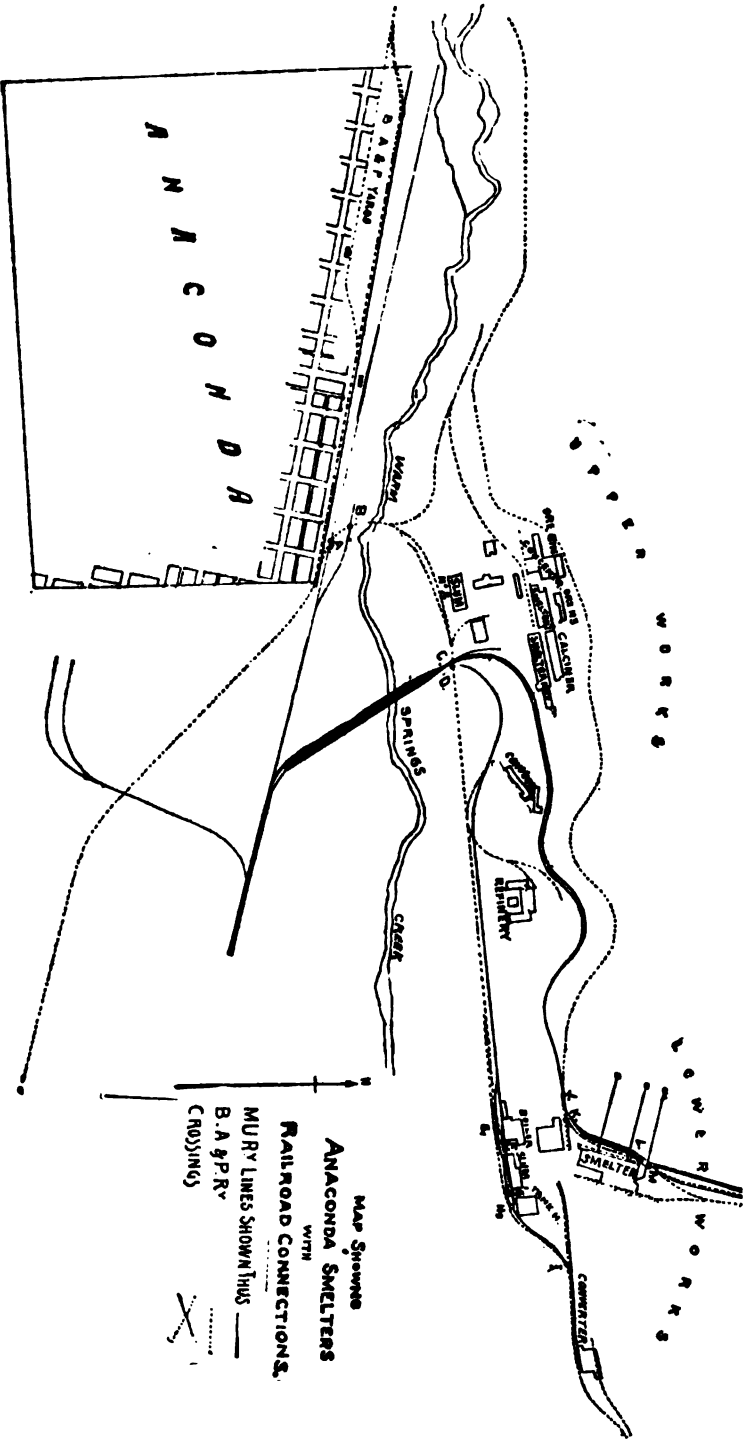
The following is the plat referred to in opinion: [See opposite page.]

Shropshire & Burleigh and Forbis & Forbis, for appellants. W. W. Dixon, M. Kirkpatrick, and Wm. Scallon, for respondent.

HUNT, J. This case may be considered with reference to that of Butte, A. & P. Ry. Co. v. Montana U. Ry. Co., 15 Mont. —, 41 Pac. 232. The formal averments as to the corporate existence of the parties are the same, and like questions of the character of the use of the plaintiff's tracks arise. The more direct object of this suit is for an order permitting plaintiff to construct certain crossings for its own railway, switches, and side tracks, over the main line, switches, side tracks, and spurs owned and controlled by the defendants, in and about the various smelting and concentrating works of the Anaconda Mining Company, situate north and east of the city of Anaconda. The Butte, Anaconda & Pacific Railway Company wishes to reach the same objective points, mining and smelting works, that the Montana Union tracks extend to. To accomplish this, certain crossings of the Montana Union tracks must necessarily be made. The letters A, B, C, D, E, F, G, H, I, J, K, L, and M show upon the map the points where plaintiff asks leave to cross, and the localities involved. That the switches, side tracks, and spurs of defendants and plaintiff are alike public highways, and that plaintiff has a right to cross, intersect, or connect with defendants' main road, spurs, and switches, in the manner provided by law, is decided by the opinion in the former case cited. It only remains, therefore, to inquire into the facts with a view of determining whether the crossings and intersections are made in a manner most compatible with the greatest public benefit and the least private injury.

The learned judge of the district court, accompanied by a civil engineer representing each party, made a careful personal inspection of the ground upon which the tracks are

¹ Comp. St. p. 218, § 607, provides that courts may regulate and determine the place and manner of making crossings.



situated. He was thus enabled to critically apply the somewhat technical explanations of the witnesses to the physical objects directly in front of him. In his opinion, made part of the record, the crossings asked for were practicable. Certain of them, G and H, were disallowed, because, to cross at the point G would carry with it the right to run a side track from F to G, longitudinally for some feet with defendants' tracks, and upon their roadbed. This question was reserved. But no complaint being made by the respondent, the order of the court in this respect need not be considered. The order, in considerable detail, regulated the construction and location and method of operation of each switch. At one point, D, the Montana Union grade was raised a foot and a half, or a little more. It appears that the crossing in this manner is wholly practicable, and that the grade is necessary by the distance and grade between the triple crossings at C and D. Appellants object to other crossings, E and F especially, because they somewhat curtail appellants' storage trackage. But this was not so serious an inconvenience as to outweigh the legal rights of the respondent.

At the point J appellants had what is termed a "three-throw" switch, made of movable rails connecting the Montana Union track going up the grade towards mining works with three prongs. To have crossed the movable rails would have been a great injury to the appellants by preventing the use of their movable rails. To put the crossing further east plaintiff would have had to cross three tracks of defendants to reach the Anaconda works. The court, after seeing and considering the exact situation, ordered the plaintiff, at its expense, to move the defendants' switch north so as to allow respondent to cross one track, and not three, of the defendants'. The principal objection to this crossing seems to be the order of removal of appellants' tracks off their ground, rather than to any inconvenience or injury which may ensue therefrom. But it looks to us as if the crossing ordered would be made with less possible injury to appellants than elsewhere, and as the plaintiff was ordered to procure a good title to defendants for the necessary space for right of way over the new ground upon which it was permitted to construct the Montana Union three-throw switch, it is difficult to understand the real merit of appellants' objection, unless it be in the fact that the proposed change in the grade would slightly increase the curvature in one of appellants' tracks. It would seem, however, that a reduction of curvature in another track would equalize this. Nevertheless, in order to confine the plaintiff to changes of tracks within the rights of way already taken by the Montana Union, lest an unnecessary or unwarranted injury may be done by removing this switch to ground outside of that now lawfully occupied, we have con-

cluded to modify the order of the court in relation to this crossing, by requiring the Butte, Anaconda & Pacific Company to swing its road further towards the north, and, if necessary, to make three crossings of the defendants' tracks beyond the switch, and thus obviate the need of moving the appellants' track off of their present occupied right of way at all. *National Docks, etc., Co. v. State*, 53 N. J. Law, 217, 21 Atl. 570; *East St. Louis C. R. Co. v. East St. Louis U. R. Co.*, 108 Ill. 285; *Kansas City S. B. R. Co. v. Kansas City, St. L. & C. R. Co.*, 118 Mo. 599, 24 S. W. 478; *Lake Shore & M. S. R. Co. v. Chicago & W. L. R. Co.*, 97 Ill. 506.

That railroad crossings are inconvenient, particularly where they are on grade, and frequent, is indisputable. But the law in regarding railroads as public necessities has not extended its generous privileges to them altogether without some possible attending inconveniences. Among the latter are lawful crossings, intersections, and connections of a rival company legally competing for the transportation of freight. It is therefore ordered that that portion of the district court's order and judgment which permitted the three-throw switch of the appellants to be moved off its present right of way or roadbed to the north of its location at the time of the institution of this proceeding, be set aside, and that, unless otherwise agreed between the parties, in lieu thereof the plaintiff is ordered to move its track or tracks to a point further north, with the right to cross the several tracks of the defendants at a point easterly and at a point beyond the movable rails of the defendant company. The cause is remanded to the district court for modification in accordance with these views, and when so modified the judgment and order appealed from will be affirmed. Modified and affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

(16 Mont. 395)

MERCHANTS' NAT. BANK v. GREENHOOD et al.¹

(Supreme Court of Montana. July 22, 1895.)

REVIEW ON APPEAL—PRACTICE—JURISDICTION IN EQUITY—SETTING ASIDE FRAUDULENT ASSIGNMENT.

1. A finding on conflicting evidence, made the ground of a motion for a new trial, which is overruled, will not be disturbed on appeal.

2. A court has power to change its own calendar.

3. Where a sheriff makes return on attachment levied in a suit against a debtor, commenced after an assignment by such debtor, to which the assignee is not a party, of no property to satisfy the attachment except the property attached, which is embraced in an alleged assignment, and it appears that an action at law is pending by the assignee against the attaching creditor for conversion in making the attachment, to which the debtors are not par-

¹ Rehearing denied. See 41 Pac. 851.

ties, a bill in equity will lie to remove the assignment as an obstruction to execution on a judgment for plaintiff in such action, on the ground that it is fraudulent.

4. Levy of execution is not an abandonment of an attachment levied in the suit, where it is shown that there was no intent to abandon by such execution.

5. On suit in equity to have an assignment declared fraudulent and removed as an obstruction to levy of an execution, the admission in evidence of a conversation between the plaintiff and assignors, occurring after the assignment, to the effect that the assignors had hoped to make a settlement with their creditors by borrowing money, but were prevented by plaintiff's action, if error, is harmless.

6. An objection to the admission of evidence cannot be urged for the first time on appeal.

7. A general assignment for benefit of creditors is not a conveyance to a purchaser for a valuable consideration, within Comp. St. div. 5, § 232, providing that statutes making conveyances to hinder creditors void shall not be held to impair the title of a purchaser for a valuable consideration without notice of the intended fraud, so that fraud of the assignors will render such an assignment void.

Appeal from district court, Lewis and Clarke county; William H. Hunt and Horace R. Buck, Judges.

Bill by the Merchants' National Bank against Isaac Greenhood and Ferdinand Bohm, copartners, and others, to have an assignment declared fraudulent and removed as an obstruction to an execution. From a judgment for plaintiff, defendants appeal. Affirmed.

The nature of this action will appear fully by the complaint therein, which pleading we have deemed it best to insert in this statement in full. After the close of the trial, the court allowed the plaintiff to amend its complaint. The complaint, as finally amended under that order, is as follows:

"Now comes the plaintiff, and by leave of court first had and obtained, files this its second amended complaint, and complains on behalf of itself and all others, the judgment creditors of Greenhood, Bohm & Co., who are parties to a certain deed of assignment hereinafter mentioned, and who shall come in and seek relief by and contribute to the expense of this action, and alleges that the subject of this investigation is of common and general interest to all of said creditors under the said deed of assignment. Wherefore the plaintiff sues for the benefit of all, and alleges:

"I. That it is now, and was at all the times hereinafter mentioned, a banking corporation, organized and existing under and by virtue of the banking laws of the United States, and doing business in the city of Helena, Montana, and elsewhere.

"II. That the defendants Isaac Greenhood and Ferdinand Bohm are now, and were at all the times hereinafter mentioned, copartners, doing business in the city of Helena and elsewhere under the firm name and style of Greenhood, Bohm & Co.

"III. (1) That on the 13th day of February, 1892, an action was duly commenced by said

plaintiff against said defendants Isaac Greenhood and Ferdinand Bohm, the copartners hereinabove referred to, doing business under the firm name and style of Greenhood, Bohm & Co., in the district court of the First judicial district of the state of Montana, in and for the county of Lewis and Clarke, in department No. 1 of said court, by the filing of a complaint and the issuance of a summons, for the recovery of a judgment for the sum of \$20,000, together with interest thereon at the rate of 10 per cent. per annum from the 27th day of November, 1891, and for the sum of \$13,500, with interest thereon at the rate of 10 per cent. per annum from the 19th day of November, 1891, and for the sum of \$1,000, with interest thereon at the rate of 10 per cent. per annum from the 16th day of January, 1892, upon certain demand notes made, executed, and delivered by the copartnership of Greenhood, Bohm & Co. to this plaintiff. (2) That on said date a writ of attachment was duly issued in due form in said last-named action, after the issuance of the summons therein, and placed in the hands of the sheriff of Lewis and Clarke county for execution. (3) That on the 15th day of February, 1892, the sheriff, by virtue of the power and authority vested in him as such officer, and under and by virtue of said writ of attachment, did levy upon and seize and take into his possession that certain stock of goods, wares, and merchandise, situate and being in that certain store building on South Main street, in the city of Helena, known and designated as No. 24, and by garnishment levied said attachment upon all the money and other property and effects of said Greenhood, Bohm & Co. in the hands of the defendant Max Kahn, assignee. (4) That thereafter, on the 8th day of April, 1892, judgment was duly rendered and entered in said last named action in said district court, in favor of the plaintiff herein and against said Isaac Greenhood and Ferdinand Bohm, copartners, etc., for the sum of \$35,945.48. (5) That thereafter, to wit, on the — day of April, 1892, an execution was duly issued on said judgment against the property of said defendants Isaac Greenhood and Ferdinand Bohm, copartners as aforesaid, addressed to the sheriff of the county of Lewis and Clarke, state of Montana, in which county said defendants resided, and was by said sheriff returned as follows, to wit: 'No property to be found in my county to satisfy the foregoing execution, except the property attached herein and embraced in an alleged assignment of Greenhood, Bohm & Co. to Max Kahn, on the 12th day of February, 1892, and except the above garnishments, and I herewith return said execution unsatisfied.'

"IV. That, after the contracting of the indebtedness for which the aforesaid judgment was recovered, the said defendants

Isaac Greenhood and Ferdinand Bohm made, executed, and delivered to the said defendant, Max Kahn, a fraudulent, fictitious, and pretended assignment for the benefit of their creditors of all their property, a copy of which assignment is hereto attached, and marked 'Exhibit A,' and made a part of this complaint.

"V. That the said Max Kahn accepted the said pretended, fraudulent, and fictitious trust, and now claims all of the property of the said defendants Isaac Greenhood and Ferdinand Bohm under and by virtue of said fraudulent, fictitious, and pretended assignment, including the property levied upon and seized by the sheriff under said writ of attachment, as aforesaid.

"VI. That said Max Kahn has collected a large sum of money from the assets of said pretended assignors, amounting in all to over the value of \$7,000.

"VII. That the said pretended, fraudulent, and fictitious assignment so made and executed by the said Isaac Greenhood and Ferdinand Bohm, copartners under the firm name and style of Greenhood, Bohm & Co., on the 12th day of February, 1892, as aforesaid, was made, executed, and delivered by the said defendants Isaac Greenhood and Ferdinand Bohm for the purpose and with the intent to hinder, delay, and defraud this plaintiff and the other creditors of said copartnership.

"VIII. That said assignment, and the said claim of the said defendant Max Kahn to the property of the defendants Isaac Greenhood and Ferdinand Bohm are fraudulent, fictitious, and pretended, because of the facts hereinafter stated, to wit: (1) The want of sufficient description of the property herein attempted to be conveyed, in that the following is the whole of the descriptive part of the said assignment, to wit: 'All and singular his goods, wares, and merchandise, bills, notes, book accounts, claims, demands, accounts, choses in action, evidences of debts, stock, and property, both real and personal, of every name, nature, and description and wherever situated, including the list of stock of boots and shoes, clothing, gent's furnishing goods, notions, whisky, and cigars, and general merchandise, book accounts, notes, etc., of the business carried on by them at their store on Main street, Helena, Montana;' that said defendant copartnership was the owner of real estate at the time of said assignment, situated in the city of Seattle, state of Washington, worth about \$4,000, and no such description is made of such real estate that the title to the same could pass to the assignee. (2) That at the time of said assignment said defendant copartnership was the owner of a stock of goods situated in No. 11 Lispenard street, in the city of New York, state of New York, of the value of about \$4,500, and no reference is made to said stock of goods in the said assignment, except the general description, 'all property, both real

and personal, of every name, nature, and description, and wherever situated.' (3) That the aforesaid imperfect description of the property owned by the defendants at the time of the said assignment was not aided by any schedules of the property attached to the same at the time of the execution thereof or since. (4) That at the time of the execution of said assignment by the defendants Greenhood and Bohm, and long prior thereto, the said defendants were carrying on business in the city of New York, and also in the city of Helena, Montana, under the firm name and style of Greenhood & Bohm in New York, and Greenhood, Bohm & Co. in Helena; that these several names were adopted for convenience in transacting business in said city of Helena, and said city of New York, but that it was one and the same copartnership. (5) That the laws in the state of Washington in relation to the assignment of property for the benefit of creditors provide as follows, to wit: Laws 1889-90, p. 83,—an act relating to estates of insolvent debtors: 'An act to secure creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors. Section 1. No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid unless it be made for the benefit of all his creditors, in proportion to the amount of their respective claims. And such assignment shall have the effect to discharge any and all attachments on which judgment shall not have been taken at the date of such assignment; and after payment of the costs and disbursements thereof, including the attorney's fee allowed by law in case of judgment, out of the estate of the insolvent, and claim or claims shall be deemed as presented, and shall have pro rata with other claims, as hereinafter provided. * * * Sec. 3. The debtor shall annex to such assignment an inventory, under oath, of all his estate, real and personal, according to the best of his knowledge, and also a list of his creditors, with their post-office addresses, and a list of the amount of their respective demands, but such inventory shall not be conclusive as to the amount of the debtor's estate.' The said assignment, executed by said defendants Greenhood & Bohm to said defendant Max Kahn, would not pass title, even if the description had been sufficient, to the said lands in Seattle, Washington, for the reason that the same prefers one class of creditors over another, contrary to the provisions of the laws of the state of Washington touching such assignment. (6) That, at the date of the said pretended assignment, the said defendants Isaac Greenhood and Ferdinand Bohm were, as plaintiff is informed and believes, individually indebted in large sums to divers and sundry persons. (7) That said pretended assignment provides for the payment of the individual indebtedness of the said defendants Isaac Greenhood and Ferdi-

nand Bohm before all of the indebtedness of the copartnership of Greenhood, Bohm & Co. is paid and satisfied.

"IX. And plaintiff further alleges that said assignment was made for the purpose and with the intent of hindering, delaying, and defrauding this plaintiff and the other creditors of the said copartnership in the collection of their just debts, and in support of this allegation plaintiff sets forth and alleges the following facts, to wit: (1) The value of the stock of goods, situated in Helena, conveyed in said deed of assignment, together with the book accounts and bills receivable, which were taken possession of at the time of the said assignment by the said defendant Max Kahn, assignee, will not exceed in value the sum of \$75,000. That the total indebtedness of said copartnership exceeds the sum of \$250,000. Of this there is placed in the preferred class about the sum of \$140,000, so that the amount of the assets taken possession of by the assignee, the said defendant Max Kahn, after paying the expenses of said assignment and their collection and disbursement, would not pay upon said preferred debts exceeding 40 per cent. (2) That the said Max Kahn, the assignee mentioned in the said deed of assignment, did not take possession of the stock of goods situate in the city of New York, nor attempt to do the same, and has not yet taken possession of the same, as plaintiff is informed and believes, and did not intend to take possession of the same, nor was it intended by said Greenhood and Bohm that he should. The law of New York upon the subject of taking possession of property which has been assigned, is as follows, to wit: 4 Rev. St. N. Y. (8th Ed.) tit. 11, p. 2591, § 5: 'Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the persons making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud unless it shall be made to appear on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without intent to defraud such creditors or purchasers.' Section 6: 'The term "creditors," as used in the last section, shall be construed to include all persons who shall be creditors of the vendor or assignor or at any time whilst such goods and chattels shall remain in his possession or under his control.' (3) That the defendants Greenhood and Bohm place one Caroline Westheimer in the preferred class for \$2,500, when, as plaintiff is informed and believes, said defendants did not owe said

Caroline Westheimer exceeding the sum of \$2,374. (4) That one Col. Morse is made a preferred creditor for the sum of \$3,500, when said indebtedness is not an indebtedness of the firm of Greenhood, Bohm & Co., but the individual indebtedness of the defendant Isaac Greenhood, and was falsely and fraudulently placed in the class of preferred creditors of the said copartnership for the purpose of hindering and defeating the plaintiff and other creditors of said copartnership from the collection of their just claims. (5) That the defendants Greenhood and Bohm, as the plaintiff is informed and believes, had in their possession at the time of said assignment, and have now, a large sum of money and a large quantity of goods, aggregating many thousands of dollars, and other property which they did not surrender to the assignee, and which they are fraudulently concealing for the purpose of defrauding and defeating the plaintiff and other creditors from the collection of their just debts; that said Max Kahn, the alleged assignee named in said assignment, one of the defendants herein, was and is a party to said fraudulent concealment, and knew, as plaintiff is informed and believes, that said goods were fraudulently removed from the stock of goods in Helena, Montana, and elsewhere, and that said money was fraudulently withheld for the purpose of concealing the same, and hindering, delaying, and defrauding the creditors of the said defendants Greenhood and Bohm; that, at the time of the said assignment, said defendant Kahn was the assistant bookkeeper of Greenhood, Bohm & Co., and the confidential agent of the said Greenhood and Bohm, and was made the assignee for the purpose of being used by the said Greenhood and Bohm in the fraudulent concealment of a portion of the assets of said copartnership, as above set forth. (6) That said defendant Greenhood conveyed by deed of mortgage to one I. Well lots 2 and 3, in block 18, of the Story addition to the city of Helena, for the alleged purpose of securing a note of even date therewith, for \$2,500, which note is as follows, to wit: '\$2500.00. Helena, Montana, February 11, 1892. Two years after date I promise to pay to Ignatz Well, or order, twenty-five hundred dollars, for value received, negotiable and payable, without defalcation or discount, at the Traders' National Bank, Spokane, Washington, with interest at the rate of six per cent. per annum from date until paid. [Signed] Isaac Greenhood.' That said mortgage was filed for record in the recorder's office of Lewis and Clarke county, Montana, on the 12th day of February, 1892, at the hour of 8:50 o'clock p. m. of said day; that said assignment, marked 'Exhibit A' herein, was filed for record in said office at 9:03 o'clock p. m. of the 12th day of February, 1892; that both said instruments were filed by the defendant Max Kahn, and at his request said

mortgage was filed before said assignment; that, as plaintiff is informed and believes, said deed was wholly fictitious; that said mortgage was executed for the purpose of covering up and concealing a valuable piece of real estate as above described, and that said alleged assignee, Max Kahn, participated in said fraud with the said Isaac Greenhood; that the said Ignatz Well knew nothing of said mortgage having been executed until after the said assignment had been made, and did not attempt the same, and had nothing to do therewith, and, as plaintiff is informed and believes, had no claim against the said Isaac Greenhood for the said sum of \$2,500, or any other sum. (6½) That said Isaac Greenhood, on the date of the assignment, to wit, on the 12th day of February, 1892, executed to one H. Barnett a deed of two-thirds of an acre of land situate in Lewis and Clarke county, and fully described in said deed, for the alleged consideration of \$750, and duly acknowledged and put the same of record on said 12th day of February, 1892, at the hour of 8:55 p. m.; that said H. Barnett knew nothing of the execution of said deed until after the said assignment had been executed; that said deed was without consideration; that the same was never delivered to the said Barnett, and the execution of the same was for the purpose of covering up the land thereby conveyed, which was of the value of \$750, and hindering and delaying the plaintiff and other creditors in the collection of their just debts; that said deed, and likewise the mortgage to I. Well as hereinbefore set forth, was not delivered or put of record until after the execution, delivery, and acceptance, on the part of the alleged assignee, of said deed of assignment; and that said Max Kahn, assignee, participated in said fraudulent devises. (7) That in said alleged assignment W. C. Hickey is made a preferred creditor for the sum of \$4,500, and the same is not an indebtedness of the copartnership, but, if an indebtedness at all, is the individual indebtedness of the defendant Isaac Greenhood.

"X. That plaintiff is informed and believes, and so alleges, that said Bach, Cory & Co. are made preferred creditors in said pretended assignment for an amount largely in excess of the amount that was actually owing from said Greenhood, Bohm & Co. to said Bach, Cory & Co.

"XI. That said defendants Greenhood and Bohm placed one E. Rejall in the preferred class of creditors for the sum of \$45,000, when at the time of the said assignment they were indebted to him only in the sum of \$42,035.83.

"XI ½. That on the — day of —, 1890, one I. Well became and was a copartner of the defendants Greenhood and Bohm, in their business then being carried on in Helena, Montana, under the firm name of Greenhood, Bohm & Co., and in the city of

New York under the firm name of Greenhood & Bohm; that said I. Well from the date of said copartnership traveled as a salesman for the said Greenhood, Bohm & Co., until the 8th day of July, 1891, when he ceased to travel as such salesman for said house, and went to Sand Point, Idaho, where he purchased a stock of goods from one E. L. Weeks & Co. for the sum of about \$6,000, paying in cash therefor the sum of about \$4,000, and assuming for the remainder a balance of indebtedness owed by said Weeks & Co. to the firm of Greenhood, Bohm & Co. of Helena; that the cash payment of about \$4,000 made upon said stock of goods was raised through the firm of Greenhood, Bohm & Co.; that said Well had but little, if any, capital of his own; that he did a large business from the date of the opening of his said house in Sand Point, Idaho, on the 1st day of August, 1891, to the date of the assignment on the 12th day of February, 1892, the same being about \$15,000 per month, aggregating the sum of \$90,000; that, as plaintiff is informed and believes, the said defendants Greenhood and Bohm were jointly interested in said mercantile establishment at Sand Point, Idaho; and that they sold and disposed of, through said I. Well at Sand Point, and through said mercantile establishment, a large amount of goods, realizing thereon large profits in moneys, which, together with said goods on hand, they failed to turn over to the said assignee, and that all the property, except the book accounts and bills receivable of the said defendant copartnership situated in Helena, and taken possession of by the defendant Max Kahn, had been seized under an attachment by the sheriff of Lewis and Clarke county, Montana, as aforesaid, and the same is now in his hands; that large expense is being incurred for keepers and otherwise, and that to sell said property at forced sale under an execution would result in a sacrifice of the same; that there are large quantities of clothing and other goods, which are liable to get out of style and otherwise deteriorate in value by being held; that the said Max Kahn has in his possession book accounts, and is collecting the same, and will continue to do so, and will pay out the same under said fraudulent assignment, and proceed to carry out and execute said pretended, fraudulent, and fictitious trust and assignment, unless restrained by the court; that it is necessary for the interest of all parties that a receiver be appointed to take charge of all the property of said copartnership, and to sell the goods, wares, and merchandise, and collect up the accounts, and pay them out under the orders of this court, as it shall finally determine the rights of the parties hereto to be.

"Wherefore the plaintiff demands judgment: (1) That the said assignment and claims of said assignee are fraudulent and void, as against the plaintiff; (2) that Max Kahn account, under the directions of the

court, for all of the property received by him as aforesaid; (3) that the defendants be restrained by injunction from interfering with the said property or its proceeds, except under the directions of the court; (4) that said defendant Max Kahn be restrained by injunction from carrying out or proceeding further with the execution of said fraudulent, fictitious, and pretended assignment and trust; (5) that the plaintiff's judgment be satisfied out of the same; (6) that a receiver be appointed to take charge of said property, sell the same, and collect the outstanding accounts, to the end that the same may be applied to the satisfaction of the plaintiff's judgment; (7) and for costs of suit, and such other and further relief as to the court shall seem just and proper."

To the complaint was attached as an exhibit a copy of the deed of assignment made by Greenwood, Bohm & Co. to the defendant Max Kahn. The deed of assignment named as first preferred creditors the following persons, with the amounts set opposite their names: "Mrs. Catherine Westhelmer, New York, \$2,500; E. Rejall, New York, \$45,000; the Merchants' National Bank, Helena, \$38,000; the First National Bank, Helena, \$17,000; Thomas Cruse Savings Bank, Helena, \$7,500; American National Bank, Helena, \$4,000; Consolidated Milwaukee Beer Agency, \$750; Mrs. J. M. Ryan, Helena, \$2,000; J. Daniothy, \$1,500; W. C. Hickey, \$4,500; John Shober, \$1,000; A. W. Sederburg, \$1,000; L. Daniothy, \$520; A. M. Dorsey & Co., \$863; H. Barnett, \$1,987; Bach, Cory & Co., \$1,900; Cullen, Sanders & Shelton, \$1,000; E. Pode, \$1,000; Col. Morse, New Chicago, \$3,500; Henry Hunter, Helena, \$610."

It was provided in the deed of assignment that, if the assets were sufficient, the assignee should pay these claims in full, but if not sufficient he should pay said claims ratably. It is sufficient to say of the remaining pleadings in the case that substantial issues were made upon practically all of the material matters set up in the complaint. A long, laborious, hotly-contested trial ensued, occupying, we understand, 21 days before the court and a jury. Both of the learned judges of the district court of the First judicial district sat in the trial of the case. We are informed by the opinion of the court below that the jury was one of unusual intelligence. That jury made the following findings of fact:

"(2) What money or property, if any, did Ferdinand Bohm withhold from the assignee of Greenwood, Bohm & Co., with the intent to hinder, delay, and defraud the creditors of said firm? Answer. He withheld money, but we are unable to state the amount."

"(3) Did the defendant Isaac Greenwood retain any property from the assignee at the time that the assignment was made, with the intent to hinder, delay, and defraud the creditors of said firm of Greenwood, Bohm & Co.? Answer. Yes."

"(4) Did Isaac Greenwood and Ferdinand Bohm have any understanding with any of their creditors that they should be preferred for a larger amount than was actually due them, and the money received by such creditor or creditors should be returned to them? Answer. No."

"(5) Did the assignors have any understanding with Max Kahn, the assignee, that any of the property turned over to him as assignee, or any of the property of Greenwood, Bohm & Co., should be returned to them? Answer. No."

"(6) Did said assignors, or either of them, have any agreement or understanding with the said assignee that he should administer the trust in their favor, or so that they would receive any profits or advantage thereby? Answer. No."

"(7) Were any of the creditors, named in the assignment as preferred for certain particular amounts, preferred for a larger amount than was due them, with a fraudulent and dishonest intent on the part of the assignors that the amount so named in excess of what was actually due to such creditor or creditors should be turned back to the assignors, or either of them? Answer. No."

"(7½) Is the amount mentioned in the assignment as due to Rejall the correct sum which was due him on February 12, 1892? Answer. No."

"(7¾) If you answer the foregoing question in the negative, was the error made in good faith, or was it purposely done, and with the intent on the part of the assignors to hinder, delay, and defraud their just creditors, or with an understanding that the excess, if any, should be turned over to the assignors, or either of them? Answer. In good faith."

"(8) Did the assignors, or either of them, fraudulently conceal from the assignee any of the property of the firm of Greenwood, Bohm & Co., with the intent to defraud their creditors? Answer. Yes."

"(9) Was the execution of the mortgage on his homestead by Isaac Greenwood to Ignatz Well so made with intent on the part of said Greenwood to fraudulently conceal or cover up any of his assets? Answer. Yes."

"(10) Was the deed made by the said Isaac Greenwood to the property in Richmond Hill addition to H. Barnett made with the intent to hinder, delay, or defraud any of the creditors of the said firm of Greenwood, Bohm & Co.? Answer. Yes."

"(11) Did the defendant Max Kahn, as assignee, take the New York property into his possession after the assignment, or make any attempt to do so? Answer. No."

"(12) Could he reasonably, through an agent, have taken possession of the said property so situated in the city of New York, before the attachment of the same on the 15th of February, 1892? Answer. Yes."

"(13) Is the alleged indebtedness of Col.

Morse of \$3,500, as set out in the deed of assignment, the indebtedness of the firm of Greenhood, Bohm & Co., or the personal indebtedness of Isaac Greenhood? Answer. Firm indebtedness."

"(14) What was the value of the goods situated in Helena, together with the book accounts and bills receivable, at the date of the assignment on the 12th day of February, 1892? Answer. About \$75,000."

"(15) What was the total indebtedness of Greenhood, Bohm & Co., of Helena, and Greenhood and Bohm, of New York, on the 1st day of February, 1890? Answer. About \$210,000."

"(16) What was the total indebtedness of Greenhood, Bohm & Co. and Greenhood and Bohm on the 1st day of February, 1891? Answer. About \$240,000."

"(17) What was the total indebtedness of Greenhood, Bohm & Co. and Greenhood and Bohm on the 1st day of February, 1892? Answer. About \$250,000."

"(18) How much were the defendants Greenhood, Bohm & Co. owing Caroline Westheimer at the date of the assignment? Answer. About \$2,436.93."

"(19) Was said Isaac Greenhood, at the date of the execution of the mortgage to Well, individually indebted to said Well? Answer. No."

"(20) Did said I. Well know of the execution of said mortgage at the time it was executed, or before the execution of the deed of assignment, on the 12th of February, 1892? Answer. No."

"(21) Did said I. Well know of the execution of said mortgage and note, or have anything to do therewith until after the execution and delivery of said deed of assignment? Answer. No."

"(22) What was the value of said real estate at the date of the execution of said deed of assignment, to wit, on the 12th of February, 1892, exclusive of improvements? Answer. About \$5,000."

"(23) What was the value of the house and improvements upon said real estate? Answer. About \$4,000."

"(24) Did H. Barnett know anything of the execution of the deed to him until after the assignment had been executed, accepted, and recorded? Answer. No."

"(25) Was said deed ever delivered to H. Barnett? Answer. No."

"(26) Was there any indebtedness on the part of Greenhood, Bohm & Co. to the said Barnett at the date of the execution of the said deed on the 12th day of February, 1892? Answer. Yes."

"(27) What was the amount of the indebtedness to Bach, Cory & Co. from the defendants at the time of the assignment, to wit, on the 12th day of February, 1892? Answer. About \$1,385."

"(27½) Was the failure to deduct the amount of Bach, Cory & Co.'s indebtedness from the amount due Bach, Cory & Co. by

Greenhood, Bohm & Co. done by the assignors with the intent to delay, hinder, and defraud their creditors, or was it done in good faith? Answer. In good faith."

"(28) What was the actual indebtedness of the firm of Greenhood, Bohm & Co. to E. Rejall at the date of the assignment, to wit, on the 12th day of February, 1892? Answer. About \$42,035.83."

"(29) Was I. Well a copartner in the firm of Greenhood, Bohm & Co. during the year 1890? Answer. Yes."

"(30) If you answer the foregoing question in the affirmative, state whether such copartnership was ever dissolved. Answer. Yes."

"(31) Did said I. Well go into the mercantile business at Sand Point, Idaho, on the 1st of August, 1891? Answer. Yes."

"(32) If you answer the foregoing in the affirmative, state whether he bought out the firm of E. L. Weeks & Co., and raised the money by which to buy out said firm upon the credit of Greenhood, Bohm & Co. Answer. Yes."

"(33) If you answer the foregoing in the affirmative, state how much he raised. Answer. \$3,750."

"(34) What was the volume of business done by I. Well at Sand Point, Idaho, from the 1st day of August, 1891, to the 12th day of February, 1892? Answer. About \$90,000."

"(35) Did Isaac Greenhood raise the inventory of merchandise on the 1st of March, 1891, and, if so, how much? Answer. Yes; about 20% above original cost where purchased."

"(36) If you answer the foregoing in the affirmative, state with what intent the inventory was so raised. Answer. To cover cost of freight and expenses."

"(37) Did Isaac Greenhood raise the inventory on the 1st of March, 1890, and, if so, how much did he raise the same? Answer. About 20 per cent. above original cost where purchased."

"(38) If you answer the foregoing interrogatory in the affirmative, state with what intent he so raised the inventory. Answer. To cover cost of freight and expenses."

"(39) Did Isaac Greenhood raise the inventory of merchandise on the 1st of March, 1889, and, if so, how much did he raise the same? Answer. Yes; about 20 per cent. above the original cost where purchased."

"(40) If you answer the foregoing interrogatory in the affirmative, state with what intent he raised the same. Answer. To cover cost of freight and expenses."

"(41) If you answer the interrogatory in relation to the raising of the inventory of merchandise of the 1st of March, 1891, state whether the defendant Ferdinand Bohm knew it had been so raised shortly after the same had been done. Answer. Yes."

"(42) Was a credit given to each of the defendants, Isaac Greenhood and Ferdinand Bohm, on the merchandise account of the

sum of \$5,000, on the 30th of June, 1891? Answer. Yes."

"(43) If you answer the foregoing in the affirmative, state with what intent this was done. Answer. To make a better showing in the capital stock of the partners."

"(44) What was the amount of the inventory of merchandise of Greenhood, Bohm & Co. on the 1st of February, 1892? Answer. \$57,564.30."

"(45) What was the average gross profits on the sales of merchandise of the firm of Greenhood, Bohm & Co. from the 1st of March, 1891, to the 1st of February, 1892? Answer. The average profit was about 25%."

"(46) What was the amount of merchandise on hand on the 1st of March, 1891, at Helena? Answer. About \$139,929.56."

"(47) What was the amount of purchases from the 1st of March, 1891, to the 1st of February, 1892? Answer. \$257,204.62, including freight on the same. Freight, \$15,044.37."

"(48) What was the amount of sales from the 1st of March, 1891, to the 1st of February, 1892? Answer. \$342,173.82."

"(49) What amount of merchandise should have been on hand on the 1st of February, 1892? Answer. They should have had about \$120,000 on hand in merchandise."

"(50) Did the defendants Greenhood and Bohm borrow from E. Rejall the sum of \$59,400, from the — day of June to the — day of December, 1891? Answer. Yes."

"(51) Did the said Greenhood and Bohm reduce the indebtedness of the firm of Greenhood, Bohm & Co. and Greenhood & Bohm, during the years 1890 and 1891, or did they increase their indebtedness? and state how much said debts were increased or decreased. Answer. They increased their indebtedness about \$40,000 during the years 1890 and 1891."

"(52) Did the defendants Greenhood and Bohm, both or either of them, make the deed of assignment on the 12th of February, 1892, with the intent to hinder, delay, or defraud their creditors, or any of them, out of their just debts? Answer. Yes."

"(53) If you answer the foregoing in the affirmative, state whether the defendant Max Kahn participated in such fraudulent intent. Answer. Yes."

"(54) Did Greenhood, Bohm & Co. own 40 shares of stock in the Consolidated Milwaukee Beer Company at the date of the assignment, and, if so, what was its value? Answer. Yes. Value, \$1,350."

"(55) If you answer the foregoing interrogatory in the affirmative, state whether they had transferred the same to Max Kahn as collateral or pledge for indebtedness owed by the firm of Greenhood, Bohm & Co. to the said Consolidated Milwaukee Beer Company before the date of the assignment. Answer. Yes."

"(56) Has said stock been sold since the assignment, and the debt of the said Consol-

idated Milwaukee Beer Company been paid out of the proceeds thereof? Answer. Yes."

"(57) Did Greenhood and Bohm, both or either of them, appropriate any portion of the assets of the firm of Greenhood, Bohm & Co., either in money or goods, wares and merchandise, at or before the execution of said assignment, and did they have the same, or any portion thereof, in their possession or under their control at the time of the assignment, and fail or refuse to turn the same over to the assignee? Answer. Yes; both of them."

"(58) If you answer the foregoing question in the affirmative, state whether they so failed or refused to turn the same over to the assignee for the purpose of hindering, delaying, or defrauding their creditors. Answer. Yes."

"(59) Was the consideration for which the original note, of which the present note held by W. C. Hickey was a renewal, received by Isaac Greenhood individually, and used for his individual benefit, or was it received by the firm of Greenhood, Bohm & Co., and used by said firm? Answer. It is a firm obligation."

"(60) Was the Hickey transaction done with fraudulent intent? Answer. No."

The court adopted all of these findings. The court thereupon of its own motion also made the following findings:

"(1) That the Merchants' National Bank, of Helena, Montana, is, and was at all times mentioned in the amended complaint filed in this action, a banking corporation, organized and existing by virtue of the banking laws of the United States, and doing business in the city of Helena, Montana, and elsewhere.

"(2) That the said Isaac Greenhood and Ferdinand Bohm are now, and were at all the times mentioned in the amended complaint filed in this action, copartners doing business in the city of Helena, and elsewhere, under the firm name and style of Greenhood, Bohm & Co.

"(3) That on the 13th day of February, 1892, an action was duly commenced by the plaintiff, the Merchants' National Bank, of Helena, Montana, against the defendants Isaac Greenhood and Ferdinand Bohm, copartners doing business under the firm name and style of Greenhood, Bohm & Co., in the district court of the First judicial district of the state of Montana, in and for the county of Lewis and Clarke, in department No. 1 of said court, by the filing of a complaint and the issuance of a summons, for the recovery of a judgment for the sum of \$20,000, together with interest thereon at the rate of 10 per cent. per annum from the 27th day of November, 1891, and for the sum of \$13,500, with interest thereon at the rate of 10 per cent. per annum from the 19th day of November, 1891, and for the sum of \$1,000, with interest thereon at the rate of 10 per cent. per annum from the 16th day

of January, 1892, upon certain demand notes made, executed, and delivered by the co-partnership of Greenwood, Bohm & Co. to said plaintiff.

"(4) That on said date a writ of attachment was duly issued in due form, in said last-named action, after the issuance of the summons herein, and placed in the hands of the sheriff of Lewis and Clarke county, Montana, for execution.

"(5) That on February 15, 1892, the said sheriff, by virtue of the power and authority vested in him as such officer, and under and by virtue of said writ of attachment, did levy upon and seize and take into his possession that certain stock of goods, wares, and merchandise, situate and being in that certain store building on South Main street, in the city of Helena, known and designated as No. 24, and on said date attached by garnishment all the money and other property and effects of said defendants Greenwood, Bohm & Co., in the hands of Max Kahn, assignee.

"(6) That thereafter, on the 8th of April, 1892, judgment was duly rendered and entered in said last-named action, in said district court, in favor of the plaintiff in said action, and against said Isaac Greenwood and Ferdinand Bohm, copartners as aforesaid, for the sum of \$35,945.48, with interest thereon at the rate of 10 per cent. per annum from the date of said judgment.

"(7) That thereafter, to wit, on the 18th day of April, 1892, an execution was duly issued on said judgment against the property of the said defendants Isaac Greenwood and Ferdinand Bohm, copartners as aforesaid, addressed and directed to the said sheriff of Lewis and Clarke county, state of Montana, in which said county said defendants reside, and was by said sheriff returned with the following indorsement thereon, to wit: 'No property to be found in my county to satisfy the foregoing execution, except the property attached herein, and embraced in an alleged assignment from Greenwood, Bohm & Co. to Max Kahn, on the 12th day of February, 1892, and except the above garnishments; and I herewith return the said execution unsatisfied.' And the court further finds from the said return that, so far as garnishees answered, there was only \$4.42 levied upon by virtue of said execution.

"(8) That the defendants Isaac Greenwood and Ferdinand Bohm, or either of them, have not, and did not have at the time of the issuance and return of said execution, any property in this state, known to the plaintiff, out of which said execution so issued as aforesaid could be satisfied in whole or in part, except that claimed by the said Max Kahn as assignee, under and by virtue of the assignment sought to be set aside in this action.

"(9) That the said defendant in this action, Max Kahn, is a man without means, and pecuniarily and wholly irresponsible, and has

not given any bond for the faithful performance of his duties as assignee."

"(11) That the said deed of assignment was executed and delivered by the assignors to Max Kahn, the assignee, and accepted by him about 7 o'clock p. m. on the 12th day of February, 1892."

The deed of assignment was recorded by the county clerk and recorder, and the court also found that the same was duly acknowledged by the parties executing the same. The court found, as conclusions of law, as follows:

"(1) That the said assignment was made, executed, and delivered with the intent on the part of the said assignors, Isaac Greenwood and Ferdinand Bohm, with intent to hinder, delay, and defraud the plaintiff herein, and other creditors of the said defendants Isaac Greenwood and Ferdinand Bohm, and of the firm of Greenwood, Bohm & Co., and is fraudulent and void as to plaintiff and the other creditors not assenting thereto.

"(2) That the plaintiff, by its writ of attachment and judgment in the said action so commenced on the 13th day of February, 1892, and the levy so made under said writ of attachment, has a lien upon all property seized and levied upon by the said sheriff, under and by virtue of the said writ of attachment, and the proceeds thereof in the possession and under the control of the receiver appointed in this action, or so much thereof as may be necessary to satisfy the plaintiff's judgment, interest, and costs, which lien took effect on the 15th day of February, 1892, at the time of the said seizure and levy, and under and by virtue of the said writ of attachment.

"(3) That the plaintiff, by virtue of the said judgment and execution and the commencement of this action, has a lien upon all the property of every description, and the proceeds thereof, in the possession and under the control of the receiver appointed in this action, or so much thereof as may be necessary to satisfy plaintiff's judgment, interest, and costs, which lien took effect upon the 21st day of April, 1892, when the complaint herein was filed and the summons herein was issued. Judgment and decree ordered accordingly."

The judgment was in accordance with the findings, and need not be recited. A motion for new trial was made by defendants and denied by the court, from which motion, and also from the judgment, the defendants appeal. The ground for a motion for a new trial, and the alleged errors relied upon by the appellants, are stated as they are discussed in the opinion below.

W. E. Cullen, G. F. Shelton, T. C. Bach, Walsh & Newman, H. N. Blake, T. J. Walsh, and Shober & Rasch, for appellants. McConnell, Clayberg & Gunn and B. P. Carpenter, for respondent.

DE WITT, J. (after stating the facts). It is not often that as full and elaborate findings of fact are made in a case as those now before us. The trial involved volumes of figures and days of testimony upon questions of fact. The findings treated all these questions of accounts, and the jury gave mathematical results which would lead one to believe that they were found by a "struck jury" of accountants. Since the case was argued in this court we have spent many days in reviewing the testimony. We would have been aided by specifications of alleged errors of a different character than those contained in the statement on motion for a new trial in this case. We do not purpose to disregard the specifications, or to hold that they are insufficient. We express no opinion upon that subject. But, when a specification is stated as follows: "There is no evidence to sustain finding No. 2, that,"—then giving a statement of the finding, and when every specification is similar to this instance cited, it is a great labor for a court to go through 800 pages of record to ascertain whether it is true that there is no evidence to sustain any of the findings. When a case has been tried for 21 days, before a court of general jurisdiction, producing such a record as this before us, and findings are made and adopted by the court, there would seem to be some presumption that some evidence had been introduced in the case tending to support the findings. But, notwithstanding the form of the specifications, we have read the testimony, and examined it with great diligence. We are prepared to say that there is evidence to sustain the findings. Having satisfied our own minds to that effect, we see no profit in giving in this opinion a review of the testimony. It would not be valuable as a precedent. The case was tried at great length before "a jury of unusual intelligence." The two learned judges of the district court presided at the trial and adopted the findings. The testimony was to a great extent of a technical character, and as to mercantile accounts, transactions, and facts, upon which subjects a jury of intelligent business men are perhaps as competent to form a judgment upon the facts as is a court that has not heard the witnesses testify, or observed their demeanor.

The great issue in this case was fraud. The existence of fraud was determined by an overwhelming line of findings by the jury. See statement of the case preceding this opinion. Fraud cannot often be proven by direct evidence. Fraud conceals itself. It does not move upon the surface in straight lines. It goes in devious ways. We may with difficulty know "whence it cometh and whither it goeth." It "loves darkness rather than light, because its deeds are evil." It is rarely that we can lay our hand upon it in its going. We are more likely to discover it at its destination, before we know

that it has started upon its sinuous course. When we so discover it, the search light of a judicial investigation goes back over its trail and lightens it from beginning to end. As the woodsman follows his game by slight indications, as a broken twig or a displaced pebble, so fraud may become apparent by innumerable circumstances, individually trivial, perhaps, but in their mass "confirmation strong as proofs of holy writ." The weight of isolated items tending to show fraud may be "as light as the shadow of drifting snow," but the drifting snow in time makes the drift, the avalanche, the glacier. Fraud may hang over the history of the acts of a man like the leaden-hued atmosphere upon the house of Usher, "faintly discernible but pestilent, an atmosphere which has no affinity with the air of Heaven." Under this atmospheric pressure of fraud the jury in this case lived and breathed for the 21 days of the trial. We have followed them through the history of those days, as it is transmitted to this court in the record. We have not the advantage of breathing and seeing and hearing which they had. The district court had that advantage, and agreed with the findings of the jury. We are of opinion that, under these circumstances, the evidence is not so insufficient that we should disturb the result. In accordance with our views as to the proof of fraud, we note the following from Bump on Fraudulent Conveyances (page 759): "In questions of fraud a wide range of evidence is allowed. Fraud assumes many shapes, disguises, and subterfuges, and is generally so secretly hatched that it can only be detected by a consideration of facts and circumstances which are not unfrequently trivial, remote, and disconnected. To interpret their meaning, or the full meaning of any one of them, it may be necessary to bring them together and contemplate them all in one view. In order to do this it is necessary to pick up one here and another there until the collection is complete. A wide latitude of evidence is therefore allowed, in order that fraud may be detected and exposed." We will add here, however, that the testimony as to fraud in the conveyances by Greenhood to Barnett and Well, and the testimony as to the participation in the fraud by Kahn, assignee, is not wholly satisfactory to our minds. But it seems to have satisfied the jury. They saw Greenhood, and Barnett, and Well, and Kahn, and heard them testify. We have not. In view of the whole case, we do not feel called upon to disturb these findings. It was held in *Ming v. Truett*, 1 Mont. 322, that the court will not reverse a judgment if the testimony is conflicting, even though the weight of evidence appears to be against the findings of the court below. This court will not disturb the findings or verdict, if there is substantial evidence to support the same, even though the evidence is conflicting. Lincoln

v. Rodgers, Id. 217; Travis v. McCormick, Id. 347; Davis v. Blume, Id. 463; Griswold v. Boley, Id. 545; Kinna v. Horn, Id. 597; Toombs v. Hornbuckle, Id. 286; Kleinschmidt v. Dunphy, Id. 124; Parchen v. Peck, 2 Mont. 570; Vantilburgh v. Hamilton, Id. 413; Orr v. Haskell, Id. 225; Knox v. Gerhauser, 3 Mont. 276; Story v. Black, 5 Mont. 26, 1 Pac. 1; Railway Co. v. Warren, 6 Mont. 275, 12 Pac. 641; Beck v. Beck, 6 Mont. 285, 12 Pac. 646; Ramsey v. Cattle Co., 6 Mont. 501, 13 Pac. 247; Budd v. Perkins, 6 Mont. 226, 9 Pac. 918; Diamond v. Railroad Co., 6 Mont. 586, 13 Pac. 367; Territory v. Reuss, 5 Mont. 607, 5 Pac. 885; Kennon v. Gilmer, 5 Mont. 273, 5 Pac. 847; Id., 9 Mont. 110, 22 Pac. 448; Frank v. Murray, 7 Mont. 4, 14 Pac. 654; Ingalls v. Austin, 8 Mont. 333, 20 Pac. 637; Flitschen v. Thomas, 9 Mont. 52, 22 Pac. 450. These are some of the older cases decided by this court under the territorial government. The same rule has obtained under the state organization. It was said in the recent case of Brownfield v. Bier (Mont.) 39 Pac. 461: "When there is a substantial conflict in the evidence, and that conflict has been resolved by the district court, and the district court has denied a motion for a new trial, this court will not disturb the result. This doctrine has been so persistently announced by this court for 26 years that it may be considered as the settled rule in this jurisdiction." The decisions of this court from its organization to the present time are full declarations of this principle of practice. We shall, therefore, accept the findings as made, and proceed to the discussion of the questions of law presented by the appellants.

The assignment for the benefit of creditors was made February 12, 1892, plaintiff here being the third preferred creditor. On February 13th this plaintiff commenced an action against Greenwood, Bohm & Co. on a money demand for \$33,500. A writ of attachment was issued, and levy made by the sheriff February 15th. On April 8th a judgment was rendered for plaintiff in that case for \$35,945.48. On February 24th Max Kahn, assignee, began an action against the sheriff (Jefferis) and the plaintiff herein, for the conversion of the goods seized under the writ issued in the case of Merchants' National Bank v. Greenwood, Bohm & Co. The defendants in that action of Kahn against Jefferis and the bank justified in their answer under the writ of attachment. Replication was filed, issue made, and the case was ready for trial before the issues in the case now before us were made up. This case now before us was commenced April 21st. It and the case of Kahn against Jefferis and the bank were set for trial for the same day. In this case the issue was fraud in the assignment, and all the parties were before the court,—the bank, the assignors, and the assignee. In Kahn v.

Jefferis et al. there was a legal cause of action and the equitable defense of fraud in the assignment; but in that case Greenwood and Bohm were not parties, and were not before the court. The court determined that the whole matter could be more fully tried in the action in which it found all the parties. For that reason it tried this case prior to that of Kahn v. Jefferis et al. An elaborate argument was made in this court, counsel contending that this action of the district court was error. But we need not follow the counsel into that argument, for the reason that they have strayed far from the point decided by the district court. To ascertain that point we quote as follows from the record: "That thereafter, on the 16th day of January, 1893, this cause coming on for trial, the defendants objected to said cause being tried at said time, for the reason that the case of Max Kahn v. C. M. Jefferis and Merchants' National Bank preceded it upon the calendar, and should be tried first in its order." It thus appears that the only objection which the defendants made to the trial of this case prior to the case of Kahn against Jefferis and the Bank was that the Kahn Case preceded this case upon the docket, and for that reason should be tried first. The counsel, upon the argument before us, stated that they abandoned that point, and conceded that the court had the right to control its own docket and the order in which it may try cases. As this is the only point presented in the objection to the district court, there is nothing else for us to pass upon, and we are disappointed in not being able to accompany counsel in their diligent and learned research into the questions not raised by the record.

Before proceeding to examine what we consider the important question of law in this case, there are a few small matters which may be cleared up in limine. Two matters which were relied upon in the complaint are abandoned by the respondent, namely, the question of Rejall's partnership in the firm of Greenwood, Bohm & Co., and also the question of the laws of the state of Washington. The alleged insufficiency in the description of the property assigned is also a matter which is not relied upon, and, furthermore, seems to be settled by the decision of McCulloh v. Price, 14 Mont. 320, 36 Pac. 194. Again, on the question of the preferences to Rejall and Westheimer and Bach, Cory & Co. being in excess of the amount actually due them, it was found by the jury that they were in good faith, and this is not a subject upon which the court below rendered its judgment. These matters have all, therefore, been passed.

That which we consider the important question in this case is what the appellants call the want of equity in plaintiff's cause of action. The appellants contend that facts are not pleaded or found which entitle the plaintiff to the equitable relief de-

manded in its complaint and granted by the court. The plaintiff bank was a large creditor of Greenhood, Bohm & Co. Greenhood, Bohm & Co. made the assignment. The following day the bank brought the action at law hereinbefore described against Greenhood, Bohm & Co., and levied an attachment upon the assigned goods. When the bank obtained its judgment in that cause it found this situation: It had a large quantity of goods attached. These goods were included in the assignment, which the bank claimed was fraudulent. The assignee was asserting the right of possession to the goods, and, furthermore, had brought an action against the sheriff and the bank for the alleged conversion of these goods. The bank in its money-demand suit issued an execution. The sheriff, with the execution in his hands, found this condition of affairs which we have detailed. He returned the execution in the following language: "No property to be found in my county to satisfy the foregoing execution, except the property attached herein, and embraced in the alleged assignment from Greenhood, Bohm & Co. to Max Kahn on the 12th day of February, 1892, and except the above garnishments, and I herewith return the said execution unsatisfied." There is no point made as to the garnishments mentioned in the sheriff's return, as they were in trifling amounts. The plaintiff in the law case, to wit, the bank, then commenced this equity action, which resulted in the findings and judgment recited in the statement preceding this opinion. Does the plaintiff thus appear to be entitled to equitable relief? This is the vital question in the case, and the one around which the battle has been waged.

This is not the sort of a creditors' bill which seeks the discovery of assets or equitable interests not subject to levy and sale. It is, on the other hand, an action to set aside a fraudulent obstruction to plaintiff's realizing fully and successfully upon its judgment. The counsel for appellants cite innumerable authorities upon the principle that the legal remedy must be first exhausted, and that execution must be returned nulla bona. Here the execution was not returned nulla bona, but it returned the facts, to wit, the existence of the fraudulent obstruction to the execution. We find that the authorities sustain the bringing of an equitable action under circumstances similar to those of the case at bar. In this case, judgment was obtained at law by the plaintiff before it brought this suit. The plaintiff was therefore in a position of a judgment creditor with a liquidated demand. The authorities to the effect that the creditors' bill cannot be brought until judgment is obtained are therefore not applicable. The resort to equity in this case was not a resort to simply aid an attachment, although some cases hold that even a simple attachment without judgment may be aided by creditors' bill. Pom. Eq.

Jur. § 415, note on page 125. As noted before, the action is to remove a fraudulent obstruction, and was brought after the judgment at law was obtained. We are of the opinion that the weight of the better authority is in favor of sustaining such action. The contention over this point has been so earnest and persistent, that we shall proceed to quote from the authorities with some liberality.

We make the following quotations: "The jurisdiction of equity to entertain suits in aid of creditors undoubtedly had its origin in the narrowness of the common-law remedies by writs of execution. These writs, issued by courts of common law, besides being otherwise limited in their operations, were of course confined to those estates and interests recognized by the law, and did not extend to estates and interests equitable in their nature. Creditors' suits were therefore permitted to be brought in those instances where the relief by execution at common law was ineffectual,—as for a discovery of assets, to reach equitable and other interests not subject to levy and sale at law, and to set aside fraudulent conveyances and obstructions. Statutes in England and in certain American states have greatly extended the scope of writs of execution, thereby providing for adequate legal relief in cases where, formerly, resort to equity was necessary, and even extending the relief to instances where, perhaps, a creditors' bill would not lie. In other states, statutes have increased the efficiency of creditors' suits by dealing with the subject directly. It is a necessary result from the whole theory of the creditors' suits that jurisdiction in equity will not be entertained where there is a remedy at law. The general rule is, therefore, that a judgment must be obtained, and certain steps taken towards enforcing or perfecting such judgment, before a party is entitled to institute a suit of this character. In this there is a uniformity of opinion, but the difficulty arises in determining exactly how far a plaintiff should proceed after he has obtained his judgment. It is, of course, necessary for the creditor to allege and prove that he has taken the necessary proceedings at law before he can show a case requiring the interposition of equity. Whether an equitable suit, analogous to the creditor's suit, will be allowed in aid of the lien created by an attachment before the recovery of judgment, is a question to which the American courts have given directly conflicting answers." 3 Pom. Eq. Jur. § 1415. This case at bar is one of those described by Pomeroy as one "to set aside fraudulent conveyances and obstructions." See the authorities cited to this text in note 3.

We find the following in 2 Beach, Mod. Eq. §§ 883, 885: Section 883: "A court of equity will aid a judgment creditor to reach the property of his debtor by removing fraudulent judgments or conveyances or

transfers which defeat his legal remedy at law, and will also aid him where the debtor's property consists of choses in action and mere equitable interests not liable to be sold on execution; and where a debtor transfers his property in fraud of creditors, an injunction may be granted as incidental to the relief sought by the creditors' bill, and will, if necessary, grant him a double relief under one bill by removing the fraudulent obstruction in the way of his execution, and also at the same time enabling him to reach his debtor's equitable assets. If, when the bill was filed and execution returned unsatisfied, there was property within the creditor's knowledge subject to levy on execution the bill cannot be sustained." Section 885: "A creditors' bill may be entertained if the legal remedy is not in all respects as plain and satisfactory as that afforded by equity. For example, a bill may often afford a better remedy than a garnishment against a fraudulent transferee, because on recovery a court of equity would be the more appropriate forum for distributing the fund among numerous claimants." Note 1: "Thus in *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, it was said: 'It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.'" It seems to us quite clear in this case that the remedy at law was not at all as practical and efficient as the remedy in equity. In the money-demand action of the bank against Greenhood, Bohm & Co., the assignee, Max Kahn, was not a party, and in the action for a conversion by Kahn against Jefferis and the bank, Greenhood and Bohm were not parties; but in the case at bar everyone was before the court, and the rights of every one could be finally determined.

We find the following pertinent remarks in 2 Freem. Ex'ns, § 424: "The objects which may be accomplished by proceedings in equity to obtain satisfaction of a judgment at law are three: (1) A full and complete discovery may be obtained of all the defendant's assets, and when discovered they may be compelled to contribute to the payment of the plaintiff's judgment. (2) Equitable and various other assets, not subject to levy and sale at law, may be sold under the direction of chancery, and the proceeds applied to the payment of the plaintiff's debt. (3) Various obstructions may be removed from property liable to seizure and sale at law, and by their removal the plaintiff's legal remedy may be made far more certain and efficient than it would otherwise be. (4) The complainant may, in effect, assert for his benefit a cause of action existing in favor of the judgment debtor, and which the latter neglects or refuses to assert. Under the third subdivision fall that numerous class of cases in which property has been made the subject of liens and transfers made to de-

fraud creditors. In such a case, the creditors may proceed to levy and sell as if no such lien or transfer existed. Their remedy at law is nevertheless seriously obstructed, because few persons can be found willing to purchase property at execution sales, and take upon themselves the burden and the risk of contesting with adverse claimants. A creditor is therefore allowed to go into equity to test the validity of claims which interfere with his rights, and which he believes to be founded in fraud. Upon a proper showing, equity will remove a fraudulent transfer, or mortgage, or judgment, or other lien, or clear away a cloud from the title.

* * * While fraud is a more frequent ground for the removal of obstructions than any other, it is not an indispensable ground. The mere fact that there is an apparent obstruction calculated to inspire doubt and apprehension in the mind of purchasers, and thus prevent them from bidding upon the property, is generally sufficient to warrant equity in decreeing its removal. * * * Whatever may be requisite to prevent the plaintiff's suit from proving abortive will generally be done, provided it is not beyond the relief which equity is competent to extend. Very frequently the property sought to be reached by the bill is taken into the possession of the court, and a receiver appointed for its protection and management. Usually there is great danger that the property sought to be reached by the bill will be transferred by the defendant to some third person, or will by some other means be placed in a situation where it will be either difficult or impossible to make it answerable to the decree which may ultimately be entered in the case. Hence, it is usual, at or very soon after the filing of the bill, to obtain an injunction to prevent the defendant from making any disposition of his property which would tend to make the suit ineffectual. While the necessity of an injunction against a transfer of the defendant's property may be more frequent and obvious than any other, yet this is by no means the only occasion for the use of this preventive relief in connection with creditors' suits. Whatever may be the wrong threatened, if it be of such a character that its perpetration will render the suit wholly or partly ineffectual, as in case of the removal or destruction of the property, an injunction will issue. If a fraudulent obstruction has been interposed to hinder or delay the plaintiff at law, he sometimes does not ask equity to do anything beyond removing such obstruction, for when it is removed the plaintiff may safely proceed at law under his execution. But the more usual practice, both in proceedings to remove fraudulent obstructions, and in proceedings to reach property not subject to execution at law, is to obtain the appointment of a receiver, and thereby bring the property within the custody and control of the court. If the property consists of real

estate, the defendants are required to execute a conveyance to the receiver. If it consists of personality, the title vests in him by virtue of his appointment. After he has been vested with the title, the receiver collects, manages, and disposes of the property as directed by the orders and decrees of the court; and the plaintiff, when entitled thereto, obtains satisfaction out of the funds realized by the receiver." The practice as suggested in *Freeman* is that which was observed in this case. A receiver was appointed, who collected and disposed of the property and retains the proceeds thereof subject to the judgment of the court.

We note the following from *Tappan v. Evans*, 11 N. H. 327: "The general principle, deducible from the authorities applicable to this case, is that where property is subject to execution, and a creditor seeks to have a fraudulent conveyance or obstruction to a levy or sale removed, he may file a bill as soon as he has obtained a specific lien upon the property, whether the lien be obtained by attachment, judgment, or the issuing of an execution. But if the property is not subject to levy or sale, or if the creditor has obtained no lien, he must show his remedy at law exhausted, by an actual return upon his execution that no goods or estate can be found (which is pursuing his remedy at law to every available extent), before he can file a bill to reach the equitable property of the debtor. *McDermutt v. Strong*, 4 Johns. Ch. 687; *Williams v. Brown*, Id. 682; *Brinckenhoff v. Brown*, Id. 676; *Spader v. Davis*, 5 Johns. Ch. 280; *Beck v. Burdett*, 1 Paige, 305; *Child v. Brace*, 4 Paige, 310; *Dodge v. Griswold*, 8 N. H. 425; *Hadden v. Spader*, 20 Johns. 554; *Weed v. Pierce*, 9 Cow. 722; *McElwain v. Willis*, 9 Wend. 548, 560, 561, 566. The same principle seems to be recognized in North Carolina and Kentucky. See cases cited 1 Ben. & H. Dig. 348, 353." In addition to the remarks made in the New Hampshire case just cited, it is always to be remembered that, in the case at bar, we have not only the attachment but the judgment and the return of the execution stating the facts of the obstruction.

We find the following language in the case of *Tuck v. Olds* in the United States circuit court for the state of Michigan, 20 Fed. 738: "But while I do not think the bill could be sustained on this ground, still I think it may be as one filed to remove an obstruction to the execution. * * * The principle upon which this class of creditors' bills rests is that the defendant, by some inequitable proceeding, has put an obstruction in the way of complainant's realizing his just satisfaction out of the property of the defendant levied on. The obstruction must be one calculated to inspire doubt and apprehension in the minds of purchasers, and thus prevent them from bidding upon the property, whereby the process is paralyzed. In such a case the complainant has no adequate reme-

dy at law. *Beck v. Burdett*, 1 Paige, 305; *Jones v. Green*, 1 Wall. 330; *Thayer v. Swift*, Har. (Mich.) 430, 433."

In an old case in New York, in 1829, Chancellor Walworth says: "There are two classes of cases where a plaintiff is permitted to come into this court for relief, after he has proceeded to judgment and execution at law without obtaining satisfaction of his debt. In one case the issuing of the execution gives to the plaintiff a lien upon the property, but he is compelled to come here for the purpose of removing some obstruction, fraudulently or inequitably interposed to prevent a sale on the execution. In the other, the plaintiff comes here to obtain satisfaction of his debt out of property of the defendant, which cannot be reached by execution at law. In the latter case, his right to relief here depends upon the fact of his having exhausted his legal remedies, without being able to obtain satisfaction of his judgment. In the first case, the plaintiff may come into this court for relief, immediately after he has obtained a lien upon the property by the issuing of an execution to the sheriff of the county where the same is situated; and, the obstruction being removed, he may proceed to enforce the execution by a sale of the property, although an actual levy is probably necessary to enable him to hold the property against other execution creditors or bona fide purchasers. *Angell v. Draper*, 1 Vern. 399, and *Shirley v. Watts*, 3 Atk. 200, are cases of this description. In the first, a fraudulent assignment was interposed to prevent a sale of the defendant's property on execution; and in the last case it became necessary to redeem a term of years in a leasehold property from a lien of a prior mortgage. In both these cases the plaintiffs were allowed to come into equity for relief before the executions were returned unsatisfied." *Beck v. Burdett*, 1 Paige, 305.

In the United States circuit court of Missouri, we have the following: "The general rule of equity, as contended for by respondents, is that before the general creditor can resort to a court of equity to reach his debtor's property held under a fraudulent deed and the like, he must reduce his claim to judgment, issue execution, and have a return of nulla bona. In other words, he must exhaust his legal remedies. The reason of this rule, requiring a judgment, etc., is that the claim must be rendered certain; otherwise, the proceeding to vacate the fraudulent transfer of the title, and to remove obstacles placed in the way of the successful operation of the execution, might be entirely fruitless if, after all, the debtor failed to obtain a judgment on his claim. * * * Where the reason of the rule ceases, the rule itself ought not longer to operate. In this case the claim was not only certain, but it had back of it a judgment conclusive and binding, and, under the law of the forum where the attachment suit was instituted, the complain-

ant had secured and fixed his lien upon the real estate. Why should it, then, be compelled to proceed to execution, when all the purchaser could obtain by a sale thereunder would be a lawsuit, before he could get rid of the legal title of the respondents?" *Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co.*, 46 Fed. 584.

We quote as follows from the supreme court of New Hampshire: "The object of the plaintiff's bill, although somewhat inartificially drawn, was clearly twofold: First, to remove out of the way of the levy of the Waldron execution, belonging to the plaintiff, all fraudulent mortgages and conveyances of William H. Sheafe's interest in the Jacob Sheafe farm; and, secondly, to obtain from the court a decree which should secure to the plaintiff a lien upon that interest for the payment of the sums due and to become due to her annually as alimony, under the decree of the superior court, July term, 1852, ordering said William H. Sheafe to pay her the sum of \$150 per annum for that purpose. In the opinion delivered in this case at the adjourned term in March last, we recognized the validity of plaintiff's claim for relief on both these grounds. Upon the first point we remarked: 'The general principle deducible from the authorities seems to be that, where property is subject to execution and a creditor seeks to have a fraudulent conveyance or obstruction to a levy or sale set aside or removed, he may file and maintain a bill for that purpose as soon as he has obtained a specific lien upon the property, whether by attachment, judgment, or the issuing of an execution.' *Tappan v. Evans*, 11 N. H. 327, and cases cited; *Iron Co. v. Goodall*, 39 N. H. 223." *Sheafe v. Sheafe*, 40 N. H. 517.

The New Jersey court of chancery expresses the following view: "But all the cases proceed upon the principle that the judgment creditor, in order to be entitled to the aid of a court of equity in enforcing his remedy by removing obstructions from his path, must have acquired title to or a lien upon the specific thing against which he seeks to enforce his judgment. He must complete his title at law before coming into equity. Unless he has established his title to or lien upon the property of his debtor, he has no right to interfere with his debtor's disposition of it. Such lien the creditor does acquire under our law by the service of the writ of attachment. The law recognizes the claim of the attaching creditor after it has been verified by affidavit as prescribed by the statute, as a subsisting debt, for the purpose of creating the lien. Having that lien by authority of the statute, prior to the recovery of judgment, he is entitled to the aid of a court of equity to enforce his legal right. The statute for various purposes recognizes and enforces this right, although it may be that the claim may eventually prove to be unfounded. The objection to the interference of a court of equity, that the claim of the attaching

creditor is not ascertained, if it be entitled to any consideration, can have no application in the present case, for the plaintiff's claims against the defendant have in fact been established by judgment." *Robert v. Hodges*, 16 N. J. Eq. 304.

A decision which is often quoted is that of the case of *Case v. Beauregard*, 101 U. S. 688, in which the court says: "It is no doubt generally true that a creditor's bill to subject his debtor's interests in property to the payment of the debt must show that all remedy at law had been exhausted. And, generally, it must be averred that judgment has been recovered for the debt, that execution has been issued, and that it has been returned nulla bona. The reason is that, until such a showing is made, it does not appear in most cases that resort to a court of equity is necessary, or, in other words, that the creditor is remediless at law. In some cases, also, such an averment is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand. The rule is a familiar one that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must, therefore, show that he has done all that he could do at law to obtain his rights. But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, '*Bona, sed impossibilia non cogit lex*.' It has been decided that, where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. *Turner v. Adams*, 46 Mo. 95; *Postlewait v. Howes*, 3 Iowa, 365; *Ticonic Bank v. Harvey*, 16 Iowa, 141; *Botsford v. Beers*, 11 Conn. 569; *Payne v. Sheldon*, 63 Barb. 169. This is certainly true where the creditor has a lien or a trust in his favor. So it has been held that a creditor, without having first obtained a judgment at law, may come into a court of equity to set aside fraudulent conveyances of his debtor, made for the purpose of hindering and delaying creditors, and to subject the property to the payment of the debt due him. *Thurmond v. Reese*, 3 Ga. 449; *Cornell v. Radway*, 22 Wis. 260; *Sanderson v. Stockdale*, 11 Md. 563. * * * The foundation upon which these and many other similar cases rest is that judgments and fruitless executions are not necessary to show that the creditor has no adequate legal remedy. * * * But, without pursuing this subject further, it may be said that, whenever a creditor has a trust in his favor, or a lien upon property for the

debt due him, he may go into equity without exhausting legal processes or remedies. *Tappan v. Evans*, 11 N. H. 311; *Holt v. Bancroft*, 30 Ala. 193. Indeed, in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is that a general creditor has no lien. And when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien, either by judgment or execution. But when the bill asserts a lien or a trust, and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference."

Upon the argument of this case our attention was called to an alleged conflict in the decisions from the court of appeals of New York, counsel citing *Thurber v. Blanck*, 50 N. Y. 80, and *Bank v. Dakin*, 51 N. Y. 519; but the recent case of *People v. Van Buren* discusses these cases and states the doctrine as follows: "In *Thurber v. Blanck*, 50 N. Y. 80, it was held that an attaching creditor had no standing in court to reach equitable assets until his remedy at law was exhausted, nor to attack a fraudulent transfer of the property of his debtor until after judgment; and in *Bank v. Dakin*, 51 N. Y. 519, the commission of appeals held that an attaching creditor, after the recovery of judgment and the issuing of execution, may maintain an equitable action in his own name to set aside a fraudulent transfer of the property which had been seized under the attachment. The impression seems to have prevailed that there was an irreconcilable conflict between these two cases, and the reporter, in a footnote in 51 N. Y., says: 'This case, it will be perceived, was argued prior to the decision of the case of *Thurber v. Blanck*, 50 N. Y. 80, with which it is in conflict. That case had not been brought to the attention of the commission at the time of the decision herein.' But we fail to discover any real ground of antagonism between them. In *Thurber v. Blanck* the court was dealing with an attempt on the part of an attaching creditor to reach equitable assets, which it has been uniformly held cannot be done until judgment has been recovered, execution issued and returned unsatisfied, and an action or proceeding in the nature of a creditors' bill instituted. The provisions of the Revised Statutes (now sections 1871-1879 of the Code) which authorized a judgment creditors' action, imperatively required the recovery of a judgment and the issue and return of an execution unsatisfied as an indispensable condition of the creditor's right to bring the action. In *Bank v. Dakin*, the attaching creditor had, by the recovery of judgment and the issue of execution, acquired the right to have the attached property applied to the satisfaction of the execution, but in the assertion of this

right he found the way obstructed by the interposition of a conveyance of the property by his debtor, which was apparently valid but which was in fact void. In such cases it has always been held that, while the process for the collection of the debt was outstanding, the equitable jurisdiction of the court could be invoked to remove the fraudulent obstruction to the legal process and permit it to be effectually enforced." 136 N. Y. 259, 32 N. E. 775.

Counsel for appellants have relied, among other cases, upon *Buckeye Engine Co. v. Donau Brewing Co.*, 47 Fed. 6. That case seems to have decided that a creditors' bill cannot be maintained upon a judgment on which execution was issued and returned unsatisfied, when the return does not expressly show that there was no property subject to levy. But that decision is not in conflict with the principles announced in the above-quoted cases. As we have tried to make clear throughout this discussion, this is not the sort of a creditors' action where the showing that there was no property subject to execution was of great importance, when the return in fact showed the existence of the obstruction which the creditors wished to have removed. It is even held in the state of Washington that the obtaining of judgment is not a prerequisite to equitable interference. Of course, we are not required to go that far in this case, and we mention the Washington case only to show the tendency, perhaps, to extend equitable aid. The Washington court uses the following language: "The first question that presents itself in this case is, is it necessary to reduce a claim to judgment, issue an execution, and secure a return of nulla bona made thereon, to support a creditors' bill, or is an attachment lien a sufficient basis for such an action? Many cases have been cited both by appellant and respondents on this proposition, and from an investigation of the cases it must be conceded that the weight of opinion, considering both the old cases and the new, sustains the doctrine that the claimant must press his claim to judgment, send out his execution, and show a fruitless search for property before he can appeal to a court of equity to set aside a fraudulent conveyance. But we are satisfied that the trend of modern decision is the other way. At all events, the decisions of courts are so conflicting that this court feels justified in adopting that rule which seems to it best calculated to protect the interests of bona fide creditors from fraudulent transactions. We think no good purpose can be subserved by compelling a creditor to await his judgment, but that the effect will be to aid dishonest debtors in fraudulently disposing of their property. And, especially in view of the language used by the supreme court of the territory in *Arms Co. v. Swarts*, 2 Wash. T. 412, 7 Pac. 859, and *Thompson v. Caton*, 3 Wash. T. 31, 13 Pac. 185, we

feel justified in now deciding that, where a lien has been obtained by attachment on the property in controversy, and it appears by bill that the debtor is insolvent, and the issuing of an execution would be of no practical utility, the obtaining of the judgment and the issuance of an execution thereon is not a necessary prerequisite to equitable interference." *Benham v. Ham* (Wash.) 31 Pac. 459. See, also, *Williams v. Michenor*, 11 N. J. Eq. 520.

As looking in the direction of the authorities above quoted, we cite as follows from *Leopold v. Silverman*, 7 Mont. 266, 16 Pac. 580: "The most important one of the incidental questions presented in the record is this: Should the judgment on the pleadings have been rendered in favor of the defendants because the plaintiffs had a plain, speedy, and adequate remedy at law? Let us first inquire whether or not the plaintiffs had such a legal remedy. If both the first and second mortgages are void on their face, as is alleged in the plaintiffs' pleadings, there can be no doubt that they had a remedy at law by an action of claim and delivery under our statute for the possession of the property. But does this fact preclude them from bringing a suit in equity to set aside the prior mortgages for fraud, and to foreclose the subsequent mortgage, and, incidentally, of course, to have a receiver to preserve and dispose of the property and distribute the proceeds under the direction of the court? In states where the two jurisdictions of law and chancery are strictly separated, and relief is administered in different courts or by the same court sitting in different capacities, this question might be answered in the affirmative. But in the territories of the United States there is only one court to try all causes, whether legal or equitable, and the blended system prevails to its fullest extent as established by acts of congress."

Innumerable other cases might be cited. Those from which we have quoted seem to be representative, and state the doctrine clearly and satisfactorily. As heretofore observed, the appellants have cited many authorities upon the subject of creditors' bills, but those cases treat of facts different from those in the case at bar, and of creditors' bills of a nature other than that set up in this complaint. We are perfectly satisfied that, under modern views of equity jurisprudence, the action will lie to remove a fraudulent obstruction to the reasonable success of plaintiff in realizing upon its attachment lien when it has reduced its claim to judgment and it appears that the said obstruction to the fairly successful execution of judgment exists. We are of the opinion that it would not be reasonable or equitable for a court of chancery to turn away such a plaintiff, and require it to go to its remedy at law and sell property and to breed a swarm of actions, some of which would later have to be finally

settled in equity, when this one action may finally dispose of all of the contentions. There may be cases which hold views contrary to those which we have expressed. We do not purpose to review those cases. We have satisfied our own mind upon the conclusions which we have reached, both in reason and upon authority.

It is argued by appellants that, by issuing an execution and its being returned unsatisfied, the plaintiff abandoned its attachment lien. The district court, upon this subject, said: "This contention impresses us as somewhat frivolous. In the whole litigation nothing is clearer than the fact that the plaintiff has clung with the utmost tenacity to this lien, both as a matter of intent and from a legal standpoint." We, also, are of the opinion that this contention of the appellant is not substantial. If it is argued that the respondent abandoned its attachment lien as a matter of fact, this is not true. Abandonment is a question of intent. Intent is ordinarily proved by acts. The acts of respondent certainly indicate that it was far from abandoning the attachment lien. It issued an execution, which execution at once encountered a fraudulent obstruction. Instead of abandoning the attachment in fact, the respondent at once came into the court of equity to render more completely available its attachment lien. If it be contended that the respondent by its acts abandoned, as a matter of law, the attachment lien, the contention is settled by the views which we have heretofore expressed, in treating of the subject, as the appellants call it, of the alleged want of equity in the case. As to the return of the execution, it stated the exact facts, and the facts as we have determined, upon which the equity action may rest. Upon the contention that the attachment lien was abandoned, see the case of *People v. Van Buren*, 136 N. Y. 259, 32 N. E. 775, in which the court says, on page 260, 136 N. Y., and page 775, 32 N. E.: "It would seem to be illogical to accord to the plaintiff the right to attach property fraudulently transferred, as he concededly may under the decisions in *Hall v. Stryker* [27 N. Y. 596] and the other cases cited above, and yet deny him the right to have the lien preserved until he can merge his claim in a judgment and issue final process for its collection. No adequate remedy at law can be suggested in such a case."

Again, the appellants contend that, if the assignment is to be set aside in this action, the only judgment proper to render would be one marshaling the assets and requiring all the creditors to come in and prove their claims, to the end that they might share pro rata in the funds, and that the plaintiff has no lien prior to any of the creditors. The appellants claim that the judgment should therefore be modified. But they make this claim upon the ground that the respondent abandoned its attachment lien. That point

we have already decided against them, and with that falls also their contention that the judgment should be modified. This is not a case where the plaintiff claims a priority because it first brought its suit to discover assets. We think that we have heretofore made it plain that that is not the nature of the action, but, on the other hand, it is an action to remove the fraudulent obstruction.

The appellants allege error in the action of the court in allowing testimony as to statements made by the assignors some days after the assignment was executed, and after possession had been delivered to the assignee. We shall not approve or disapprove the ruling of the court in this respect. It is important to observe what was the character of this testimony, and what was its materiality, in order to ascertain whether this error, if error it were, was sufficiently prejudicial to reverse the case. L. H. Hershfield, president of the plaintiff bank, was first interrogated as to conversations preceding the assignment. He was then allowed to testify as to conversations between Greenhood and Bohm and himself after the assignment. His testimony in this respect was as follows: "I objected to their assignment, and they said they did the best they could, and in that line evidently they had no use for me. They said they were disappointed in the action that had been taken, that they were in hopes that they could borrow from Refall \$40,000 or \$50,000, and make a settlement with their creditors, and that the course that we had pursued had prevented them from doing so; that they thought they could settle with preferred creditors at 50 cents on the dollar and with the other creditors at 25 cents. I asked them where they wanted to get the money, and they said from Refall,—that Refall would give them the money." This evidence does not seem to us to be particularly substantial. It does not necessarily seem to be indicative of fraud that the assignors hoped to make a settlement with their creditors by borrowing money to do so. There may have been fraud in their plans in this respect, but the bare fact of their hoping to borrow money to make a settlement we do not think, in itself, particularly tends to indicate a fraudulent intent in making the assignment. While this testimony may be incompetent and immaterial, it does not seem to us to have been of such a substantial character that the whole case should be reversed upon this ground. Upon this point we append the following quotations: "It then remains to be seen whether there was any such error in the decision of the judge who tried these issues, as to render it proper to grant a new trial. And here it may be proper to observe that the principles upon which this court directs a new trial of a feigned issue are somewhat different from those which govern courts of law in granting new trials. Where this

court directs an action, although accompanied by particular directions, the parties in other respects are left to their legal rights. The application for a new trial is in that case to be made to the court in which the action is brought, and is subject to the rules which govern the proceedings of that court in other cases. But if an issue is directed, it is to inform the conscience of the chancellor, and the application for a new trial must be made here. *Carstairs v. Stein*, 2 Rose, 178; *Fowkes v. Chadd*, 2 Dickens, 576; *Ex parte Kensington, Coop.* 96. In the latter case this court will not grant a new trial merely on the ground that the judge received improper testimony on the trial of the issue, or that he rejected that which was proper, if, on the whole facts and circumstances, the chancellor is satisfied the result ought not to have been different if such testimony had been rejected in the one case or received in the other. *Head v. Head*, 1 Sim. & S. 150; same case on appeal, *Turn. & R.* 142; *Barker v. Ray*, 2 Russ. 63; *Collins v. Hare*, 1 Dow & C. 139, per Lord Lyndhurst." *Apthorp v. Comstock*, 2 Paige, 487. "The lord chancellor then observed, upon the doctrine of courts of equity as to new trials, that if evidence which ought to have been received has been refused, or evidence which ought to have been refused has been admitted, or if, in some instances, the judge can be shown to have miscarried in his directions to the jury, the court will not grant a new trial, if, looking at the whole evidence before the jury and the address of the judge to the jury, its own conscience is satisfied." *Head v. Head*, 1 Turn. & R. 141. "On the appeal to the general term from the original judgment, the order to be made would depend upon the extent to which, in the opinion of the court, errors had affected that judgment. If errors had been committed on the trial of the issues ordered to be tried by a jury, which so affected the result that the court was not willing to proceed to judgment thereon, a new trial would be necessary. But we apprehend that the court was not required to grant a new trial merely because it found on the record some exceptions which were well taken, if satisfied upon the whole case that justice had been done. This case, on the part of the defendant, upon the former appeal to the general term, and on the present appeal, has been treated and considered as though exceptions, if well taken, were to have the effect of reversing the judgment, however technical or unimportant to the general result they may be. Such effect was not given to mere errors on the trial of a feigned issue out of chancery, and it is not apparent that the Code has introduced a new rule on this subject. *Forrest v. Forrest*, 6 Duer, 138, 139; *Barker v. Ray*, 2 Russ. 63; *Lyles v. Lyles*, 1 Hill, Eq. 82; *Mulock v. Mulock*, 1 Edw. Ch. 14, and cases cited; *Apthorp v. Comstock*, 2 Paige, 482,

and cases cited. And the observation, gathered from these cases, that the trial of issues, and much more the proceedings on reference, being to inform the conscience of the court, even the rejection of competent testimony or the admission of incompetent evidence does not necessarily require the court to set aside the proceedings or grant a new trial, may properly be borne in mind in considering the objections heretofore to be noticed." *Forrest v. Forrest*, 8 Bosw. 653. "It was insisted that the same principles upon which a court of law formerly proceeded in granting or refusing a new trial should be applied to the case; and if evidence had been rejected on the trial of the issues that ought to have been received, or evidence received that should have been rejected, the defendant was entitled to a new trial. This is hardly the rule now in a court of law, for, latterly, even these courts undertake to judge for themselves of the materiality of evidence found to have been improperly admitted or rejected, and when satisfied that no injustice has been done, and that the verdict would have been the same with or without such evidence, they have refused a new trial. *Doe v. Tyler*, 6 Bing. 561. Courts of equity have, however, been governed by very different principles from those of a court of law, in granting or refusing new trials of issues of fact. Though evidence had been improperly admitted or rejected, if a court of equity was satisfied that the verdict ought not to have been different, it would not grant a new trial merely on such ground. *Barker v. Ray*, 2 Russ. 63; *Lyles v. Lyles*, 1 Hill, Eq. 82. The object of a feigned issue is to satisfy the mind of the equity judge upon matters of fact, and the object is attained when the conscience of the judge is satisfied that, at the trial, justice has been substantially done. *Mulock v. Mulock*, 1 Edw. Ch. 14; *Apthorp v. Comstock*, 2 Paige, 483; *Collins v. Hare*, 1 Dow & C. 130; *Id.*, 2 Bligh (N. S.) 106; *Boote v. Blundell*, 19 Ves. 503; *Savage v. Carroll*, 2 Ball & B. 444." *Forrest v. Forrest*, 25 N. Y. 509. "Were this an action at law, the rulings of this court in admitting evidence would be subject to review, but, this being a chancery cause, a different rule prevails, and the inquiry here is whether or not the competent evidence in the record, taken in connection with the pleadings, sustains the decree that was entered." *Sawyer v. Campbell* (Ill. Sup.) 22 N. E. 464.

Under these authorities, we are of the opinion that the unimportant and unsubstantial character of the evidence submitted is such that the whole case should not be overturned by reason thereof. It is apparent that the principal findings of fraud may be sustained without this evidence, and it is difficult to understand that this evidence could have any substantial bearing upon the findings. We decline to reverse the case on this alleged error.

What we have said in the last paragraph as to the practice in equity in not reversing a case for unsubstantial errors, where it is perfectly clear that the result is correct, applies to several errors which the appellants have urged, and which we do not purpose to review in this opinion.

Again, it is contended by the appellants that it must be shown that the fraud was participated in by the assignee and by the creditors. As before remarked, the participation in the fraud by the assignee was found by the jury, and while the evidence is not wholly satisfactory upon that finding, we have felt that we are not in a position to disturb it. But as to the question of participation by the assignee and the creditors, we note section 229, div. 5, Comp. St. Mont., which is as follows: "Sec. 229. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or in goods in action, or of the rents or profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and any bond or other evidences of debt given, suits commenced, decrees or judgment suffered, with the like intent as against the person hindered, delayed, or defrauded, shall be void." In order to exclude from the operation of this statute a purchaser for a valuable consideration, section 232 is as follows: "Sec. 232. The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor." The statutes of the state of New York upon this subject are almost identical with ours. They are as follows: "Section 1. Every conveyance, or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons, of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed or defrauded, shall be void." "Sec. 5. The provisions of this chapter shall not be construed, in any manner, to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear, that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." 4 Rev. St. N. Y. (8th Ed.) pp. 2592, 2593. Upon this statute the court of appeals of New York used the following language: "I conclude, therefore, that the judge would have pronounced the assignment void

but for the additional fact that there was no fraud intended by the assignee. Having found that fact also, he held the assignment to be valid. If the decision turned, as it must have done, upon that fact, it was erroneous in point of law. By another section of the statute it is declared that 'the provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor.' 2 Rev. St. p. 137, § 5. I have no doubt that, under this statute, the grantee in a conveyance which is fraudulent on the part of his immediate grantor may be protected, and that this section does not refer exclusively to derivative and subsequent conveyances of the same property. But an assignee in trust for the benefit of creditors is not 'a purchaser for a valuable consideration,' however innocent he may be of participation in the fraud intended by the assignor. The uprightness of his intentions, therefore, will not uphold the instrument, if it would otherwise for any reason be adjudged fraudulent and void." *Griffin v. Marquardt*, 17 N. Y. 29. See, also, the following language from *Rathbun v. Platner*, 18 Barb. 272: "This charge cannot be sustained. The substance of the charge is that it matters not how fraudulent may have been this insolvent debtor's intent in making this general assignment, if his assignees are only free from all imputation of participating in his fraudulent designs, the assignment is to be upheld. The assignment is to be held good, notwithstanding this debtor may have made it with the express view to hinder, delay, and defraud his creditors, if the jury are only satisfied that the trustees whom he has appointed to carry out his fraudulent designs are free from the imputation of fraud themselves. The statute declares that every assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, etc., made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, etc., shall be void. 2 Rev. St. p. 137, § 1. The statute is that every assignment made with such intent shall be void. It was held by Chancellor Walworth, in the case of *Bank v. Atwater*, 2 Paige, 54, that a voluntary conveyance made by a debtor with the intention of defrauding his creditors is void, although the voluntary grantee was not privy to the fraud; and Assistant Vice Chancellor Sandford, in discussing Phillips' assignment [*Mead v. Phillips*] 1 Sandf. Ch. 85, which was a general assignment in trust for the benefit of creditors, says: 'If Phillips made it with the intent to hinder, delay, or defraud creditors, it is void, although his assignees were perfectly honest and entirely ignorant of his designs.' Interests thus obtained through the fraud of the

debtor cannot be sustained upon any principle known to the law. *Haguenin v. Basely*, 14 Ves. 289, 290; [*Hildreth v. Sands*] 2 Johns. Ch. 42, 43. Such assignments must be made in good faith, or they cannot be upheld. *Russell v. Woodward*, 10 Pick. 408; *Burdick v. Post*, 12 Barb. 168, 172. Our statute of frauds pronounces void all such assignments which are made with the intent to hinder, delay, or defraud creditors, as we have already seen. The statute regards the intent with which the act was committed. [*Van Nest v. Yoe*] 1 Sandf. Ch. 9, 10; [*Burdick v. Post*] 12 Barb. 172. It declares void all assignments which shall be made with such fraudulent intent. [*Van Nest v. Yoe*] 1 Sandf. Ch. 10. Our books are full of cases where sales have been declared void under the statute because of the fraudulent intent of the assignors in making them. *Id.* There are many cases where the late chancellor and vice chancellor have set aside assignments made by insolvent debtors in trust for the benefit of creditors, when the assignees have been perfectly free from the imputation of fraud; and it has been the settled rule in all such cases, when the assignees have acted in good faith, to protect and ratify their sales and acts done in good faith. *Barney v. Griffin*, 4 Sandf. Ch. 552. It is claimed and insisted, however, that the case stated in the charge of the judge is governed by a different principle, inasmuch as the assignees themselves are to take the entire avails of the assigned property to pay their preferred debts, and consequently there will not in fact be any trust for them to execute for the benefit of the other creditors provided for in the assignment, and that the case falls within the principle and is governed by the rule of *Waterbury v. Sturtevant*, 18 Wend. 353, where a debtor had conveyed property directly to his creditor in payment and satisfaction of a bona fide debt, and the court upheld the conveyance, notwithstanding it was conveyed by the debtor with intent to hinder, delay, and defraud other creditors, because they found that the creditor was not a party to the fraud, but received the conveyance in good faith, in payment of an honest debt, applying the general rule which exists between vendor and vendee, mortgagor and mortgagee, pledgor and pledgee. [*Beals v. Guernsey*] 8 Johns. 348; [*Wickham v. Miller*] 12 Johns. 320; [*Jackson v. Terry*] 13 Johns. 471; [*Jackson v. Myers*] 18 Johns. 425; *Coote, Mortg.* 421; *Wood v. Dixie*, 7 Q. B. 892; *Pickstock v. Lyster*, 3 Maule & S. 371; *Holbird v. Anderson*, 5 Term R. 235. That rule has never been applied to a case like the present, so far as my acquaintance with the books has extended, and I do not think that any case can be found where this rule has been applied to a case like the one under consideration."

Again, in the later case of *Loos v. Wilkinson* (October, 1888), we find the following language: "If the assignment itself is for

any reason fraudulent and void, it may be set aside, and then all power of the assignee under it ceases. An innocent assignee may not be permitted to act under a fraudulent assignment. The provision of law (3 Rev. St., 7th Ed., p. 2329) that every conveyance or assignment made with the intent to hinder, delay, or defraud creditors is void, is still in full force and operation, notwithstanding the act of 1858 and the various acts relating to voluntary assignments for the benefit of creditors. It may be that in a particular case an honest assignee may, under the acts referred to, undo all the fraudulent acts of the assignor preceding and attending the assignment, and the preparation of the schedules under it. Yet, if the assignment was made by the assignor with the fraudulent intent condemned by the statute, the assignment may be set aside at the suit of judgment creditors, and all powers of the assignee, however honest he may be, taken away. In assailing a voluntary assignment for the benefit of creditors, it is important only to establish the fraudulent intent of the assignor (*Starin v. Kelly*, 88 N. Y. 418), and when that has been established the assignment may be set aside, and creditors may then pursue their remedies and procure satisfaction of their judgments as if the assignment had not been made." 110 N. Y. 195, 18 N. E. 99. See, also, *Starin v. Kelly*, 88 N. Y. 418. See, also, the following remark by the supreme court of California: "It is obvious, therefore, that the question upon which the case must turn is whether the conveyance was in fraud of the rights of the plaintiff as a creditor. This, under our statute, is a question of fact (Civ. Code, § 3442); that is to say, a question of intent. And since the deed was without consideration, the intent which is material is that of the grantor. It is immaterial how innocent the grantee was. *Lee v. Figg*, 37 Cal. 336; *Peek v. Peek*, 77 Cal. 111, 19 Pac. 227; *Swartz v. Hazlett*, 8 Cal. 128." *Judson v. Lyford*, 84 Cal. 508, 24 Pac. 286. We are of the opinion that our statute, as we have recited above, and the constructions given to the same statute by courts of the state of New York, is conclusive upon this subject. A general assignment for the benefit of creditors is not a conveyance to a purchaser for a valuable consideration, and for that reason the fraud by the assignors is sufficient to avoid the assignment. See cases last cited; also, *Farrington v. Sexton*, 43 Mich. 456, 5 N. W. 654, and *Chace v. Chapin*, 130 Mass. 131.

Again, the appellants contend that the secretion of the assets by assignors is the only ground of fraud in this case, and that such secretion is not sufficient to avoid the assignment. Upon this point they cite cases holding that the application by the assignors of some of their assets to debts, which application was made before the general assignment, was not fraud sufficient to avoid the general assignment. But that is not at all this case.

The assignment purports to be a general one of all the property of the assignors, and it is far from the fact that the secretion of the assets is the only evidence of fraud relied upon. In this case the secretion of the assets was not wholly for the purpose of paying debts due by the assignors, but such secretion was part of the evidence and findings showing fraudulent intent in the assignment.

The appellants also contend that there was error in admitting in evidence, upon the trial of this case, the judgment roll in the money-demand action of the bank against Greenhood, Bohm & Co. But the objection which they urge in this court was not made in the court below, by reason of which that court had no opportunity to pass upon the matters which are now urged.

Appellants also contend that the court erred in allowing certain amendments to the plaintiff's complaint. We have examined this matter, and are satisfied that there was no abuse of discretion in allowing those amendments.

The appellants have also called the attention of the court to the case of *State v. Eighth Judicial Dist. Court*, 14 Mont. 577, 37 Pac. 969, upon the question of the appointment of a receiver in the case at bar. That case is wholly distinguished from this one, as a reading of the decision will make apparent. That case was a simple money-demand action, with an attachment as ancillary thereto, and it was held that the statute did not provide for a receiver in such case. The case at bar is an equity action seeking the equitable relief of setting aside an assignment alleged to be fraudulent.

We have now reviewed all of the errors which were relied upon by the appellants, and which we regard as of sufficient importance to demand a treatment in this opinion. We are satisfied that there is nothing in the case which demands its reversal. We will refrain, at the close of this long discussion, from giving a resume of the various findings of the jury, upon which the court determined that the assignment should be set aside. We refer to the elaborate statement of the case preceding this opinion. We are satisfied, as was the district court, that those findings are sufficient to set aside the assignment, and we are also satisfied that the judgment entered by the district court was correct. The trial in that court was a long, patient, and laborious one. As shown above, both of the learned judges of that court presided, and, as they inform us, they had an unusually intelligent jury. From a perusal of the findings of that jury, we are satisfied as to their intelligence and good judgment. Inquiries into alleged fraud are always difficult and tedious. We cannot but conclude, upon our own laborious review of this case, that the same was fairly tried and the result fairly reached. The appellants had the benefit of an array of counsel drawn from the ranks of the ablest members of the bar of the county. They presented every merit

and every technicality of their case. We cannot close this opinion without expressing our appreciation of the earnest and able labors of all the counsel engaged in this case. No diligence and no learning has been spared. Some of the questions involved were first impressions in this jurisdiction, and we have felt the importance of arriving at a conclusion that would satisfy ourselves. It is most gratifying to have our labors lightened by the high order of learning which has been exhibited in the arguments and briefs of counsel. We are satisfied with the result which we have reached, and therefore order that the judgment as rendered and entered be affirmed.

PEMBERTON, C. J., concurs. HUNT, J., having tried the same as district judge, does not participate in the decision.

In re CONNORS' ESTATE.

(Supreme Court of Montana. July 29, 1895.)

EXECUTOR—APPOINTMENT—QUALIFICATIONS—APPEAL—REMAND.

Application for appointment as executor having been denied, under Prob. Prac. Act, § 45, declaring incompetent to serve as executor one who is absent from or resides out of the state, and this disqualification having been omitted by Code Civ. Proc. 1895, § 2401, which took effect after the denial of the application, the case will be remanded, with permission to make application dependent on the law as provided by the latter section.

Appeal from district court, Yellowstone county; George R. Milburn, Judge.

Application by M. C. Connors, Jr., to be appointed executor of his deceased father's estate. Application denied and he appeals. Case remanded.

Strevell & Porter, for appellant.

PER CURIAM. This is an appeal by M. C. Connors, Jr., from the judgment of the district court denying his application for the issuance of letters testamentary. His father, the testator, died a resident of the state of South Dakota. The will appointed the applicant executor. The decision of the court was made under the authority of section 45, Prob. Prac. Act, which is as follows: "Sec. 45. No person is competent to serve as executor who at the time the will is admitted to probate, is; First. * * * Second. * * * Third. * * * or who is absent from or resides out of the state." The will was probated in South Dakota, and a certified copy of the proceedings of the Dakota court presented, with the application for appointment, in Custer county, Mont. The will was admitted to probate by the district court in Custer county; but the appointment of the applicant as executor was denied. This judgment was made June 4, 1895. We incline to the opinion that the district court was correct in its judgment. But we refrain from a dis-

cussion or a decision of the question, for the reason that it appears that perhaps the applicant has been placed in a better position by virtue of the provisions of section 2401 of the Code of Civil Procedure of 1895, which took effect on July 1, 1895. That section treats the same subject as section 45 of the old probate practice act, and, in rectifying the disqualifications of persons to act as executor, it wholly omits the provision excluding an applicant "who is absent from or resides out of the state." What the effect of that statute may be we do not now decide, as it has not been argued. We reserve an opinion. But we think that it is better that whatever rights appellant may have should be decided upon a consideration of said section 2401. A treatment of the question as raised by the brief would be wholly valueless as a precedent, for the reason that the question cannot arise in the future. It would be valueless in this case, for the reason that the applicant should be allowed to make his application, and contend only with the disabilities provided in the Code of 1895. It is therefore ordered that this case be remanded to the district court, with directions to dismiss the application for appointment as executor, without prejudice to the making of a new application, dependent upon the law as existing after July 1, 1895. The costs of this appeal must be paid by the applicant. Remanded.

WIGHT v. BOARD OF COM'RS OF MEAGHER COUNTY.

(Supreme Court of Montana. July 29, 1895.)

COUNTY SURVEYOR—COMPENSATION.

Under Comp. St. 1887, div. 5, § 900, requiring the county surveyor to make certain surveys, and providing that he shall be paid for his services \$7 per day while making the survey, he is not entitled to any allowance for expenses, none being provided by the statute, especially as it makes provisions for expenses in the case of other officers.

Appeal from district court, Meagher county; Frank Henry, Judge.

Action by Richard G. Wight against the board of county commissioners of Meagher county. Judgment for defendant. Plaintiff appeals. Affirmed.

The appellant brought this action against the board of county commissioners of Meagher county to recover for certain expenses laid out by him while making a survey, as county surveyor, upon the order of the county commissioners. The statute in force at that time was section 900, div. 5, Gen. Laws (Compiled St. 1887), as follows: "Sec. 900. It shall be the duty of the county surveyor, by himself or one of his deputies, to execute any survey which may be required by any court, upon the application of any individual or corporation, and shall execute any survey required by the board of county commissioners. He shall be paid for

his services seven dollars per day while making the survey, the amount, in the first instance, to be paid by the person or corporation for whose benefit the survey is made, and in the other, by the county commissioners, by order on the county treasurer, against the proper fund." The plaintiff was ordered by the county commissioners to make a survey. The commissioners allowed him, under this statute, \$7 per day. He also claimed the expense for a team for five days at \$2 a day, and \$8 board of team, and \$9.70 for his own board while doing the work. These items of expense the commissioners refused to pay. Upon the trial, the court found that the charges for expenses were reasonable, but held that under the law (section 900, *supra*) there was no authority for paying these items. The plaintiff appeals from the judgment.

Thompson & Maddox, for appellant. Henri J. Haskell and Powell Black, for respondent.

DE WITT, J. (after stating the facts). It is to be observed in the text writers and the decided cases that the courts have held very closely to the rule that when a certain compensation is allowed by statute there is no authority for allowing anything beyond the provisions of the statute. It is said by the United States supreme court, in the case of *U. S. v. Shields*, 153 U. S. 88, 14 Sup. Ct. 735: "Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts, nor to any discretionary action on the part of the officials." We find the following in *Mechem's Public Offices and Officers*: "Sec. 856. No compensation can be recovered unless provided by law. Unless, therefore, compensation is by law attached to the office, none can be recovered. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously, and he cannot recover anything upon the ground of an implied contract to pay what the service is worth. The rule is otherwise where a person undertakes to render service for a municipal corporation, not as a public officer, but as its private agent. In such a case, he may recover the reasonable value." Also the same work, see section 862, note 5, as follows: "It is a well-settled rule that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services. Nor does it alter the case that by subsequent statutes or ordinances his duties are increased and not his salary. His undertaking is to perform the duties of his office, whatever they may be, from

time to time during his continuance in office, for the compensation stipulated, whether these duties be diminished or increased. Whenever he considers the compensation inadequate, he is at liberty to resign. *Evans v. Inhabitants of City of Trenton*, 24 N. J. Law, 764, citing *Andrews v. U. S.*, 2 Story, 202, Fed. Cas. No. 381; *People v. Supervisors of City & County of New York*, 1 Hill, 302; *Bussier v. Pray*, 7 Serg. & R. 447." The supreme court of Wisconsin says, through Dixon, C. J.: "Officers take their offices cum onere, and services required of them by law for which they are not specifically paid must be considered compensated by the fees allowed for other services. This principle is well settled, as will be seen by examination of the several authorities cited to this point by counsel for the defendant. But in this case the plaintiff was not without specific compensation in the form of fees expressly given by statute for the services rendered by him, and for the performance of which he has charged and obtained judgment against the county for several sums beyond the statutory allowances. The sums charged were for personal expenses, hotel bills, railroad fare, team hire, etc., while travelling to serve criminal process, for which the statute says 10 cents per mile shall be paid. Rev. St. c. 133, § 1, subd. 27; 2 Tayl. St. p. 1514, subd. 27. Those charges were wrong, and it was wrong for the circuit court to allow them, and the judgment appealed from is erroneous. Where a statute gives a fee to the sheriff or other officer for the service of process, and there is nothing in the same or some other statute showing a different intention, the fee so given is the sole compensation to the officer for the performance of the service, and no other or further can be charged or obtained. This principle has been directly affirmed by the decisions of this court in *Massing v. State*, 14 Wis. 502; *Jones v. Supervisors*, Id. 519; and *Tenney v. State*, 27 Wis. 387. And in such case the board of supervisors have no authority to make extra allowances to the officer, even though they should be of opinion that he ought to have them. This has been determined in several of the adjudged cases cited by counsel for the defendant." *Crocker v. Supervisors*, 35 Wis. 286. The same court, in a later case, said: "It was held in *Crocker v. Supervisors*, 35 Wis. 284, that officers take their offices cum onere, and services required of them by law, for which they are not specifically paid, must be considered compensated by the fees allowed for other services.' That rule is sustained by several other adjudications of this court, cited in the opinion in that case by Chief Justice Dixon. The rule is applicable to a case like this, where the claim is for expenses incurred by the officer in the discharge of his official duties instead of official services. Indeed, the claim in *Crocker v. Supervisors* was for expenses and dis-

bursements by a sheriff in the execution of process. Hence, the claim of the plaintiff is not valid unless there is some statute requiring or authorizing the county board to reimburse his expenses for fuel and stationery. We are referred to no such statute. On the contrary, the statute (Rev. St. p. 238, § 669, subsec. 7) confers upon the county board power to provide fuel and stationery for certain county officers, necessary for the discharge of their official business. The county surveyor is not named as one of these officers. 'Expressio unius est exclusio alterius.' If there is any other provision of statute which empowers the board to make such provisions for the county surveyor, there is none which makes it the duty of the board to do so. The fact that the county furnished the plaintiff an office in the courthouse cannot impose upon it the obligation to provide fuel and stationery to be used in it." *Towsley v. Ozaukee Co.*, 18 N. W. 840.

The appellant has not cited us to authorities which take a view of this subject different from those which we have above quoted. He cites numerous authorities to the effect that the law must be construed reasonably, and the law must not be held to require impossibilities, and that the legislature must be presumed not to have intended that which is against reason. But we have no means of knowing that the legislature considered it against reason that \$7 a day would compensate a surveyor for his services and pay his expenses. The legislature said that he should receive \$7 a day for his services. They do not say that he should receive any additional amount for expenses in performing these services. It is to be noted that there are very many provisions in the statute allowing county and state officers certain items of expense, and, as remarked in the last Wisconsin case cited, there seems to be room for the application of the rule, "Expressio unius est exclusio alterius." The legislature provide in detail for what they consider the proper expenses of certain officers, but in the case of a county surveyor they give him simply a per diem in gross, and, for all that is before us, it was the opinion of the legislature that the surveyor could pay his expenses and leave a reasonable margin of profit to himself for his services. It may be that this compensation of \$7 is inadequate, but we are of the opinion that it is not for us to so determine, when the legislature seems to have determined otherwise. This decision is not important as a precedent for the future, for the reason that Pol. Code 1895, § 4659, provides in detail what fees and expenses shall be allowed to a county surveyor. If the old law were such that it did not provide sufficient compensation for the services and expenses, the county surveyor could appeal to the legislature, and have the matter put upon a fair and reasonable basis. Whether that is even done by Pol. Code

1895, we do not know, as we are not the judges of that subject. It is an extremely dangerous precedent for a court to go outside of the statute on the question of fees and allowances of officers for the performance of their duties. While it may be that this decision is a hardship upon the county surveyor, we believe it is upon the safe side of construction, and that the remedy, if any there should be, must be sought from the legislature. The judgment is affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

KELLEY v. FOURTH OF JULY MIN. CO.

(Supreme Court of Montana. July 29, 1895.)

MINING—INJURY TO EMPLOYEE—SAFE PLACE TO WORK—PROMISE TO REMEDY.

1. Where a miner is engaged in running a tunnel, drilling and blasting from its face, the employer is bound to furnish a safe place for work, by using proper precautions to prevent the falling of the roof of that part of the tunnel already created, and by keeping the floor so free from debris as not to obstruct his escape in case of accident.

2. Where a miner engaged in running a tunnel calls the attention of the employer to the accumulation of debris on the floor behind him, and the master promises to remove it, the miner is not guilty of contributory negligence in remaining at work, notwithstanding his danger in case of the roof falling was increased by such accumulation, for such time after the promise as was reasonable to allow for its fulfillment; danger of the roof's caving not being obvious, and the miner being free from apprehension by reason of the assurance of the employer, who had charge of looking after the roof, and was an experienced man in such business, that the roof was safe.

Appeal from district court, Lewis & Clarke county; W. H. Hunt, Judge.

Action by Charles Kelley against the Fourth of July Mining Company for injuries received in defendant's employ. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an action for damages for personal injuries. The plaintiff is a miner, and alleges substantially in his complaint that on the 27th day of May, 1891, he was actually engaged and employed by the defendant, which is a corporation, in mining in a tunnel in its mine; that he was employed in drilling, blasting, and running said tunnel in said mine; that it was the duty of said defendant to furnish and sufficiently and safely timber said tunnel, so as to properly support the roof and sides thereof; that it was the duty of the said defendant, at the same time, to keep the said tunnel free from all debris, dirt, rock, and accumulation of material or matter, so as to render egress and ingress in and out of said tunnel easy and safe, so that any one could pass without obstruction from the point where plaintiff was working in said tunnel to the mouth thereof. It is alleged that defendant negligently failed to so safely timber said tunnel, or to keep the same free of debris, rock, and dirt, and other

matter, which accumulated therein, between where plaintiff was working and mining and the mouth thereof. It is alleged that defendant had negligently permitted said tunnel to become obstructed with a large amount of rock, dirt, and matter, at a point therein between where plaintiff was working and the mouth thereof, which rendered egress and escape therefrom in case of accident difficult and dangerous; and that defendant had notice of the condition of said tunnel. It is alleged that, by reason of these wrongful and negligent acts and omissions of the defendant, the said tunnel, on the 27th day of May, 1891, caved in, and the roof thereof fell upon the plaintiff, at a point near where he was working; and that, by reason of the accumulation of said rock, dirt, and material therein, he was prevented from escaping therefrom; that he was caught and crushed, while attempting to escape from said tunnel, on the pile of rock, dirt, debris, and matter which defendant had wrongfully and negligently permitted to accumulate therein, by the dirt, rock, and material which fell upon him from the roof thereof. Plaintiff alleged that he was without fault or negligence in the premises; that he was permanently injured, and rendered helpless for life thereby; and claims damages in the sum of \$50,000. The answer denies the allegations of the complaint as to negligence, and alleges that it was the duty of the plaintiff and his fellow servants to properly timber the tunnel, and that the tunnel caved in by reason of the negligence of the plaintiff and his fellow servants in timbering the same, and that the plaintiff knew at the time of the accident that the tunnel was obstructed by debris, rock, dirt, etc., as alleged in the complaint, as well as the condition of the timbers in said tunnel. The replication denies the new matter pleaded in the answer, and alleges a promise on the part of the foreman of the defendant to remove the debris, rock, and dirt from the tunnel, made prior to the accident. The evidence of the plaintiff is, substantially, that he was employed to work in the mine of the defendant in the early part of April, 1891; that he continued to work there as a miner until he was injured, on the 27th day of May; that he was employed in running the tunnel or drift on the 100-foot level; he was engaged in drilling and blasting in the face of the tunnel; he assisted in extending the tunnel more than 100 feet in length; that he threw the rock he blasted from the face of the tunnel behind him; that he never removed any of this rock from the tunnel; that he was never asked to take this rock out of the tunnel; his work was exclusively drilling and blasting; that this rock blasted from the face of the tunnel and thrown behind him was removed by another man; that, the afternoon before the accident, he called the attention of the foreman, John Sheehan, to the accumulation of rock, dirt, and debris in

the tunnel; that he told the foreman "it was getting pretty rocky to crawl over that pile of rock,—that a man had to get down on his hands and knees and scratch the dirt away first"; that he asked the foreman when he was going to remove it; that the foreman said he would remove it "the following morning, as soon as he could get the carman off the 200-foot level, where he was working"; that the foreman did not remove this debris, as promised; that, the day before the accident, he had put a stull in the tunnel; that he put the stull in under the directions of the foreman; that, after it was put in, the foreman examined it with a two-handed striking hammer; that the foreman was in the habit of coming around and examining the work every afternoon, and, if anything was wrong, "he would tell you"; that, before putting in the stull, the dirt and sand were dropping from the roof; that he called the attention of the foreman to this, and asked that it be timbered; that he asked the foreman if it was safe; that the foreman said it "was perfectly safe, and when it needed timbering he would attend to it; he was there, and knew his business; he had been a timber man in the Moulton for five years"; that he took his assurance, and had no apprehension of danger whatever; that thereafter the foreman caused two half sets of timbers to be placed in the tunnel; this was done before the stull was put in; that the foreman sent a man (who was carman, and doing whatever they put him at) to put in these two half sets, and directed witness to assist; that he had done no timbering in the mine, himself, prior to this; that, when he went into the tunnel to work, on the morning of the accident, and while throwing back the dirt and rock blasted from the face the afternoon previous thereto, he heard the timbers "creaking," and noticed fine dirt falling from the roof; he made a "jump" to get out, and "landed" on this pile of dirt behind him, and was caught by the falling dirt and timbers, and injured, as alleged in the complaint. He testifies that he was hired and paid by John Sheehan, the foreman; that Sheehan was the only person in control at the mine; that Sheehan received orders from no person at the mine; that he had full control of the mine; that none of the members of the defendant corporation were at the mine until after he was hurt; that the entire work was done as Sheehan directed; he hired and paid off all the men. The evidence of John Sheehan, foreman of the mine, contradicts that of the plaintiff in most particulars. But that he had entire control and management of the mine is not disputed. The two half sets of timbers, mentioned in plaintiff's evidence as having been put in the tunnel, did not fall at the time of the accident. The stull, for some reason, gave way, and the roof, which was supported by it, fell upon the plaintiff. There is evidence, pro and con, as to whether the

stull, if properly put in, was sufficient to support the roof; whether the roof should have been supported by other timbers; and as to whether it was properly placed in the tunnel; as well as to whose duty it was to timber the mine. Any further statement of the evidence necessary to be made will be found in the opinion. No question is raised as to the extent of the injuries sustained by plaintiff. It is not claimed that the damages awarded by the jury are excessive. The case was tried to a jury, who rendered a verdict for plaintiff in the sum of \$15,600. From the judgment, and order denying a new trial, defendant appeals.

Thos. C. Bach, for appellant. C. B. Nolan and T. J. Walsh, for respondent.

PEMBERTON, C. J. (after stating the facts). In this case, the court instructed the jury that "it was the duty of the defendant to adopt all reasonable means and precautions to provide a safe place for the plaintiff in which to prosecute his work." The defendant assigns this as error. Counsel for the defendant contends that, while this instruction states the law in ordinary cases, it is not applicable to this case. His contention is that the plaintiff was not working in a place, but was working in the creation of a place. The evidence in this case is that the plaintiff was employed, at the time of the accident, in running a tunnel in defendant's mine. He was doing this work under the immediate supervision and direction of John Sheehan, the foreman and manager of the mine. Sheehan was not working in the mine with plaintiff. The plaintiff was not engaged in creating a place, on his own judgment, and at his own risk. He assumed the risks naturally attendant upon driving the tunnel. It was the duty of defendant to keep that part of the tunnel or place already created safe, by whatever reasonable means were necessary. If the plaintiff had been injured while in the actual work of drilling or blasting in the face of the tunnel he was driving, he may have had no claim on the defendant for damages; for these were risks he assumed as a miner. But he did not assume the risk of defendant's failure to keep that part of the tunnel or place already created reasonably safe and secure. For instance: If a stone or material blasted or dug from the tunnel by plaintiff should have been blown against, or should have fallen upon, him, he would have had no remedy against defendant for any injury sustained thereby. This is a risk belonging to his employment, and which he assumed. But he did not, by his employment as a miner in driving the tunnel, assume the risk of the failure of the defendant to take such reasonable precautions as were requisite to prevent the caving and falling of the roof of that part of the tunnel already created, upon him, while engaged in

his work. Nor did he assume the risk of the failure of the defendant to keep the floor of the tunnel so free from rock and debris as not to materially hinder or obstruct his escape from his place of work, in case of accident, such as occurred in this case, or might occur by premature or unexpected explosions of the dangerous materials he was using in his work. He assumed the risks incident to the work in front of him, and not the risks of defendant's failure to properly care for that part of the tunnel or place behind him, which he had completed, and turned over to the care and control of the defendant. The authorities cited by defendant's counsel, we think, are not applicable to the case at bar. The conditions and facts in the cases cited are dissimilar from those of this case. We do not think the plaintiff, at the time he was injured, was engaged in creating a place, or rendering a dangerous place safe, within the meaning of the cases cited by defendant's counsel. In *Railway Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. 67, the court says: "It is the duty of the employer to exercise ordinary care to provide a reasonably safe place in which his employé may perform his services." This was a case in which a miner was suing for injuries sustained in a mine by reason of a failure on the part of the employer to provide a "safe place" to work. The decision is a late one, having been rendered in October, 1892. It collates a large number of authorities, and contains an able and exhaustive discussion of the law governing this class of cases. We think it clear, beyond question, that it was the duty of the defendant in this case to provide a reasonably safe place for the plaintiff to work in. To hold otherwise would not be in accordance with authority, sound public policy, or justice. *Cunningham v. Railway Co. (Utah)* 7 Pac. 795; *Beeson v. Mining Co.*, 57 Cal. 20; *Coal Co. v. Wombacher*, 134 Ill. 57, 24 N. E. 627; *Coal Co. v. Hood*, 77 Ill. 68. See, also, authorities cited in *Railway Co. v. Jarvi*, supra; *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464. The cases cited above are those in which damages were sought to be recovered for injuries sustained in mines. They might be multiplied many times. They all hold it to be the duty of the employer to provide a reasonably safe place in which the employé may perform his service, and a failure to do so actionable negligence.

Counsel for defendant contends that the evidence shows that the plaintiff so far contributed, by his own negligence, to his injuries, as to defeat his right of recovery in this case. The plaintiff testifies that he assisted in putting the timbers in the mine, by direction of Sheehan; that he had not done any timbering in the mine before; that his business was blasting and drilling in the face of the tunnel; that, when he asked Sheehan if he did not think the mine needed

timbering, Sheehan said he would attend to that, that he was there and knew his business, having been timberman in the Moulton for five years. Afterwards, Sheehan sent the carman, who was employed at odd jobs as well as running the car, to assist in putting in the timbers. After this, plaintiff and his partner put in the stull. This was put in under the directions of Sheehan. On the part of defendant, there is evidence that it was part of plaintiff's duty to timber the mine. This is disputed. It nowhere appears that plaintiff, or his working partner, or the carman, understood timbering. Whether the stull was properly placed in the mine is a disputed question. Nor is it shown that the stull, if properly put in, was sufficient to support the roof; at least, it is a disputed matter. It is a mooted question whether the mine should not have been protected by full sets of timbers, or, at least, other kind of timbers, at the place where the accident occurred. The evidence shows that the other timbers put in near the stull did not fall when it did. Nor is it improbable that the stull was displaced by the blasts of the afternoon before the accident. Plaintiff testifies that, after the stull was put in, Sheehan came into the mine and tested it with a two-handed hammer. This, Sheehan denies. Sheehan says, in his testimony, that he did not examine the timbers or stull particularly; he just glanced at them as he passed by; that he just held up his candle and looked at the stull as he went through. From this evidence, it appears that defendant did not use proper care in procuring competent men to timber the mine; that Sheehan, defendant's manager, was guilty of negligence in not properly inspecting these timbers after they were put in the mine. In *Railway Co. v. Jarvi*, supra, it is said: "Of the master is required a care and diligence in the preparation and subsequent inspection of such a place as a room in a mine that is not, in the first instance, demanded of the servant. The former must watch, inspect, and care for the slopes through which and in which the servants work, as a person charged with the duty of keeping them reasonably safe would do." Witness Donan, a miner of considerable experience, says that the tunnel, according to the rules of careful mining, should have been timbered every four feet, with full sets of timbers, on account of the character of the rock and ground in the tunnel. This, of course, was not done. He says the tunnel was not sufficiently timbered to hold the roof. Sheehan, himself, testifies that the roof and sides were "drummy," by which he evidently means not solid and strong. We think the evidence was sufficient to warrant the jury in believing that the mine was not sufficiently timbered to prevent caving, and that defendant did not use proper care in selecting competent timbermen to do the work. Plaintiff testifies that, as to the mine being safely and sufficiently timbered, he took

Sheehan's assurance that it was safe, and had no apprehension whatever. As to the timbering of the mine, the most that can be charged as negligence on the part of the plaintiff is that he did not properly put in the stull. But the evidence is not conclusive, by any means, that the cave occurred on account of the stull being improperly placed. It is not an illegitimate inference, from the evidence, that the cave would have occurred however well the stull might have been put in. It is a fair inference from the evidence that the stull was not sufficient to support the roof of the mine, and that the cave occurred for want of sufficient timbering. And it may not be improper, in this connection, to remark that the evidence discloses the fact that Sheehan stated that his instructions were to run the mine with as little expense as possible. Certainly, the evidence does not disclose any extravagance in placing timbers in the mine, or in securing competent men to do the work. We do not think the evidence discloses such contributory negligence on the part of plaintiff as to defeat his right to recover, as contended by defendant.

The court instructed the jury as follows: "If you find from the evidence that the danger of the place in which the plaintiff was working was increased by reason of the accumulation of rock in the drift behind him, in excess of what would ordinarily accumulate in the conduct of the business properly managed (if you find that there was such accumulation in the drift); and you further find that he called the attention of the foreman to the amassing of such rock and debris, and requested him to have the same removed, and the foreman expressly promised to do so,—the plaintiff was justified in continuing at work, notwithstanding his danger was increased by such accumulation, for such period of time after the promise as it would be reasonable to allow for its performance; and, for any injury suffered within any period which would not preclude the reasonable expectation that the promise might be kept, he may recover." Counsel for defendant assigns the giving of this instruction as error, and claims that it is in conflict with the views of this court as expressed in *McAndrews v. Railway Co.* (Mont.) 39 Pac. 85. The instruction under consideration is in harmony with the law as declared by the supreme court in *Hough v. Railway Co.*, 100 U. S. 213. In *McAndrews v. Railway Co.*, supra, this court said: "But this rule is a qualified one. If the machinery is not only defective, but so obviously dangerous that no ordinarily prudent man would assume the risk of using it, and the employé does use it, knowing its absolutely and obviously dangerous condition, and the dangers of using it, the master is not liable, notwithstanding the promise to remedy the defect. This qualification to the rule is well stated in *Railway Co. v. Watson*,

114 Ind. 20, 14 N. E. 721, and 15 N. E. 824, in the following language: 'Where an employé knows that the danger is great and immediate, such as a reasonably prudent man would not assume, he cannot recover for an injury, even though he remained in the employer's service in reliance upon the latter's promise to remedy the defects which produced the danger.' The facts of the case at bar widely distinguish it from the McAndrews Case. McAndrews was using a car which he knew to be absolutely and obviously dangerous. He not only used it for a long time, knowing its dangerous condition, but, at the time he was injured by the car, he was using it in a reckless manner. Under such circumstances, we held he could not rely or recover upon the promise of the foreman to get a new car. In this case, there is no evidence or pretense that the danger of the mine caving at the time of the accident was obvious, absolute, or immediate, and that plaintiff knew of such danger, or that a reasonably intelligent and prudent man, under like circumstances, would have apprehended such danger to himself. The plaintiff testifies that the assurances of Sheehan as to the safety of the mine were such that he apprehended no danger whatever. Under such circumstances, by relying upon the express promise of Sheehan to remove the debris from the tunnel, and continuing at work for a reasonably sufficient time for the performance of such promise, he was not guilty of such contributory negligence as to defeat his right of recovery. We do not think, therefore, that the court erred, under such circumstances, in instructing the jury that, "for any injury suffered within any period which would not preclude the reasonable expectation that the promise might be kept, he [plaintiff] may recover." In view of the facts, we think the instruction properly declared the law. In *Railway Co. v. Jarvi*, supra, it is said: "The degrees of care required of the master and servant also differ, because defects in a piece of machinery or in the roof of a mine that to the eye of a competent inspector, such as the master employs, portend unnecessary and unreasonable risks and great danger, may have no such significance to a laborer or miner who has had no experience in watching or caring for machinery or roofs or slopes in a mine; and the latter is not chargeable with contributory negligence simply because he sees or knows the defects, unless a reasonably intelligent and prudent man would, under like circumstances, have known or apprehended the risks which those defects indicate. The dangers, and not the defects merely, must have been so obvious and threatening that a reasonably prudent man would have avoided them, in order to charge the servant with contributory negligence." And see authorities cited in that case. Counsel for the defendant insists that the instruction should

have been in accordance with the modified rule laid down in the McAndrews Case. But, as we have seen, there was no evidence in the case calling for this modification. Nor does the record disclose that counsel sought in any way to have the instruction modified, in this respect or any other, by the court. We do not think the instruction could be held to be erroneous because it did not state all the law, or all the law under all circumstances and every state of facts, and because it was not modified so as to meet all circumstances and questions of fact, especially where the other instructions fully cover the law of the case. *Grant v. Varney*, (Colo. Sup.) 40 Pac. 771; *Shumward v. Johnson* (Tex. Sup.) 17 S. W. 398; *Ell. App. Proc.* § 730. Counsel for defendant contends that by this instruction the court determined, as a matter of law, that the plaintiff was justified in continuing at work after Sheehan's promise to remove the debris, without leaving it for the jury to determine whether he was justified in so doing, under all the circumstances. The only circumstances and facts that would have rendered it contributory negligence for him to remain at work after this promise would have been the obviously absolutely dangerous condition of the tunnel. As we have said before, there was no evidence of such condition to which the court could have called the jury's attention, or submitted to the jury for consideration. We are unable on this account to discover any defect or error in the instruction. In other instructions the court plainly told the jury that plaintiff could not recover if the evidence showed him to be guilty of contributory negligence. Upon this question, the court instructed the jury as follows: "A man cannot shut his eyes to a fact, he cannot shut his eyes to a danger, and then ask for damages for an injury received from that danger." The substance of this instruction is repeated, with emphasis, in other parts of the charge to the jury. The instructions of the court, taken as a whole, fully and fairly stated the law applicable to the case, to the jury. We do not discover that they were conflicting or misleading in any respect. The instructions fully stated the law of negligence to the jury, and, we think, were remarkably fair, as a whole, to the defendant.

We do not think it necessary or profitable to consider in detail the many technical objections to the instructions raised by counsel for the defendant. Considering the whole case, we think it clearly appears that Sheehan was the vice principal of the defendant corporation. He employed and discharged the employés. He supplied the mine with materials and implements for its development. He had full control of the property, the employés, tools, materials, and complete charge of the management and development of the mine. No officer of the corporation, or other person or agent, had anything to do

with it, or was ever present at the mine. Under such circumstances, it cannot be disputed that he was the legal representative of the defendant corporation. We think the evidence shows he was guilty of negligence in not sufficiently timbering the tunnel where plaintiff was working and received his injuries, and in not procuring competent timbermen to do the work. He was guilty of negligence in not keeping the floor of the tunnel so free from debris as not to materially delay, hinder, or obstruct escape by plaintiff from the place of his work, in case of accident. Sheehan being the vice principal of the defendant, his negligence was its negligence; and it is, and should be, held liable for whatever injuries plaintiff sustained by reason thereof. The judgment and order appealed from are affirmed. Affirmed.

DeWITT, J., concurs. HUNT, J., having tried this case as district judge, did not participate in this decision.

RECLAMATION DIST. NO. 307 v. GLIDE.
(Sac. 10.)

(Supreme Court of California. July 31, 1895.)
RECLAMATION ASSESSMENT—APPORTIONMENT—
CONCLUSIVENESS.

In an action to collect a reclamation assessment, an order of the commissioners apportioning the assessment is not conclusive on the legality of the apportionment. Reclamation Dist. No. 531 v. Phillips (Cal.) 39 Pac. 630, followed.

In bank. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by Reclamation District No. 307 against J. H. Glide to collect an assessment. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

McKune & George, for appellant. Armstrong & Bruner, for respondent.

TEMPLE, J. This action was brought to collect an assessment in the plaintiff district. Plaintiff appeals from the judgment. In its opening brief it is said: "This appeal presents for decision the sole question, can a court, at such a trial, on evidence concerning a matter of judgment confided by the statute to a board of commissioners, set aside the judgment of such commissioners, and determine that they erred in judgment in apportioning the assessment among the several tracts of land in the district?" Reducing the abstract question to the actual controversy, and applying it to a reclamation district under the Code, it has been answered adversely to the appellant in the recent case of Reclamation Dist. No. 531 v. Phillips (Cal.) 39 Pac. 630. The judgment must therefore be affirmed, and it is so ordered.

We concur: HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.

STODDARD, Collector, v. SUPERIOR COURT OF STANISLAUS COUNTY
et al. (S. F. 114.)

(Supreme Court of California. July 31, 1895.)

CERTIORARI—ORDER GRANTING INJUNCTION—
APPEAL.

Under Code Civ. Proc. §§ 1086, 1103, providing that certiorari will lie when there is no appeal, nor any plain, speedy, and adequate remedy, certiorari will not lie to review an order of the superior court staying a sale of land, pending appeal from a judgment, on the ground that an appeal from the order would not be a plain, speedy, and adequate remedy.

In bank.

Certiorari by G. R. Stoddard, collector, to review an order of the superior court of Stanislaus county granting a stay pending appeal. Demurrer to petition sustained, and proceeding dismissed.

E. S. Butterworth, C. C. Wright, and R. Percy Wright, for petitioner. C. W. Eastin, for respondents.

McFARLAND, J. This is an application of petitioner, Stoddard, for a writ of certiorari to review and annul an order of the superior court restraining petitioner from selling certain property; and it has been submitted upon a demurrer of the respondents to the petition.

The demurrer must be sustained. The petition shows these facts: One Underwood and others brought an action in the said superior court against the petitioner here, Stoddard, as collector of the Modesto Irrigation District, for a perpetual injunction restraining Stoddard from selling certain land for delinquent assessments due said district. A temporary restraining order was granted by the court; but, upon the hearing, a final judgment was rendered in said action in favor of Stoddard, defendant therein and petitioner here. The plaintiffs in said action took an appeal from said judgment to this court; but, after the said appeal had been taken, the court, upon plaintiff's motion, made an order enjoining and restraining Stoddard from selling the property described in the complaint, during the pendency of the appeal. It is this last order that petitioner Stoddard seeks to have reviewed and annulled in this present proceeding, upon the ground that said court had no jurisdiction to make it. The demurrer is upon the ground, among others, that the said order is an appealable order, and therefore cannot be reviewed on certiorari. Petitioner, in his brief, does not contest the proposition that the order is appealable, either as an order made after final judgment or as an order granting an injunction. He directs his argument to the points that the court had no jurisdiction to make the order, and that an appeal would not be a plain, speedy, and adequate remedy. It may be readily admitted that the court had no jurisdiction to make the order; but, as the order

is appealable, certiorari will not lie, because it lies only where "there is no appeal." Code Civ. Proc. § 1068. In this respect it differs from mandamus and prohibition, which lie "in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." Sections 1086, 1103. With respect to certiorari, the language of the Code is: "When * * * there is no appeal, nor in the judgment of the court any plain, speedy and adequate remedy." Section 1068. In *Stuttmeister v. Superior Court*, 71 Cal. 322, 12 Pac. 270, the authorities on the point are collated; and it was there declared that: "The writ [certiorari] will not lie when there is an appeal from the action complained of;" and, "The writ is not given in lieu of an appeal, but only to review errors in excess of jurisdiction, for which an appeal does not lie." See cases cited in opinion of Searls, C.; also, *In re McConnell*, 74 Cal. 219, 15 Pac. 746; *Hayne*, New Trial & App. § 307. We have been referred to no case in which it has been held that, under our Code, a writ of certiorari will lie to reverse an appealable order. That the appeal does not afford a plain, speedy, and adequate remedy makes no difference. The provision of the statute governs. The demurrer to the petition is sustained, and the proceedings dismissed.

We concur: TEMPLE, J.; HENSHAW, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

108 Cal. 58

DREYFUS v. BADGER. (No. 19,450.)

(Supreme Court of California. July 11, 1895.)

PATENTS—CONFLICTING CLAIMS—ESTOPPEL—COLLATERAL ATTACK.

1. One who has taken no appeal from the action of the United States land department, in canceling his declaratory statement to pre-empt land, and who, after the land had been listed to the state, made no formal objection to the issuance of a patent to another under a claim that the land was not suitable for cultivation, though he had also made application therefor to the state, has no status from which to hold the patentee as his trustee, on the ground that the land was suitable for cultivation, and that he and not the patentee has been in possession as required by law.

2. A land patent, valid on its face, cannot be collaterally attacked by one whose only claim to the land is possession, by showing that the land was not of the character for which it was patented.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Ejectment by Dreyfus, as executor, against Badger. Plaintiff had judgment, and defendant appeals. Affirmed.

B. T. Thomas, for appellant. Richards & Carrier, for respondent.

McFARLAND, J. This was an action of ejectment, in which judgment went for plaintiff. Defendant appeals from the judgment and from an order denying a new

trial. The land in contest was listed to the state in lieu of certain school land, and a patent thereto was issued by the state to plaintiff's testator in pursuance of a certificate of purchase issued to one C. F. Wilson. Wilson filed his application for the land in the state land office on December 31, 1886; his application was approved August 30, 1889; a certificate of purchase was issued to him September 11, 1889; he assigned his certificate to Isadore Dreyfus (respondent's testator) on October 28, 1889; and on February 24, 1892, the state of California issued its patent for the land to said Isadore Dreyfus. On January 27, 1887, appellant who was a qualified pre-emptor residing on the land, filed in the local United States land office his declaratory statement of his intention to pre-empt said land, but, prior to that, the state surveyor general had made application to have said land listed to the state of California in lieu of certain other land; and on or about July 8, 1889, the said application was approved, and the said declaratory statement of appellant canceled. Appellant did not appeal from the order canceling said statement, or take any other proceeding in the United States land department; but, on the other hand, appellant on August 15, 1889, made application to the surveyor general of California to purchase said land as land belonging to the state, which application was rejected "on account of the said previous application of said C. F. Wilson," and also upon the further ground that the surveyor general had not received information that the land had been listed. It may be noticed here that appellant's said application contained the statement "that said land is not suitable for cultivation, except only small portions thereof being suitable for that purpose," but he avers in his pleadings that it was suitable for cultivation. Appellant took no step in the state land office towards having a contest over his right to purchase said land. He resided on the land, and had improvements thereon. He filed in this action an answer and a cross complaint, and in the latter, in which he set up the foregoing facts, he prayed that respondent be declared to be a trustee of appellant for said land, and that he convey the same to appellant. A demurrer to the cross complaint was sustained. In his answer, in addition to a general denial and the averment of the facts above stated, appellant averred that the land was suitable for cultivation, and that neither Wilson nor Dreyfus resided on the land. At the trial the court heard some evidence as to the character of the land,—that is, whether it was suitable for cultivation,—and then instructed the jury that, under the law, it was their duty to find a verdict for respondent. Appellant asked two instructions,—one generally, to the effect that if at the time of Wilson's application the land was suitable for cultivation, that is, if more than one

half of all the legal subdivisions would, without artificial irrigation, produce ordinary crops, etc., and Wilson was not an actual settler on the land, then the verdict should be for appellant; and the other to the effect that if Wilson made a false affidavit in his application, as to the land being unsuitable for cultivation, and the evidence showed that it was suitable for cultivation, and Wilson was not a resident on the land, but that appellant was such resident and otherwise qualified to purchase, then the verdict should be for appellant. These instructions were refused, and the verdict was for respondent.

A reversal of the judgment could be based only upon these two propositions, or one of them: (1) That upon the facts averred in the cross complaint appellant can hold respondent as trustee for him of the land in contest; (2) that, in defense to the action of ejectment, appellant can attack respondent's patent collaterally by showing the character of the land in contest. A person seeking to have a patentee of land declared his trustee, in the absence of any contract between the parties, must connect himself with the paramount source of title, and also show that he has prosecuted his claim with diligence. *Burling v. Thompson*, 77 Cal. 257, 19 Pac. 429; *Doll v. Meador*, 16 Cal. 295; *Damrell v. Meyer*, 40 Cal. 166; *Kentfield v. Hayes*, 57 Cal. 409; *Bank v. Hynes*, 50 Cal. 195; *O'Connor v. Frasher*, 56 Cal. 499; *Moore v. Wilkinson*, 13 Cal. 478; *Chapman v. Quinn*, 56 Cal. 266; *Buckley v. Howe*, 96 Cal. 596, 25 Pac. 132. Nearly all the cases cited by appellant were cases where contests as to the right to purchase had been referred by the land department to the superior court under section 3414 of the Political Code, or where each party had in some other way acquired a status. In *Hollinshead v. Simms*, 51 Cal. 158, the court discusses mainly the alleged fraudulent acts of one Woods, who was the agent of Hollinshead, and does not discuss the status of Simms. As to the latter it is merely said, generally, that he had "the right as against the government to acquire the legal title," and that Simms was not "lacking in diligence in the assertion of his rights." If the case can be taken as having been decided with the status of Simms fully in view and thoroughly considered, it is not in accord with the other decisions, or with the case of *Burling v. Thompson*, *supra*, in which it is referred to. In the case at bar appellant has no status as claimant of the land under the United States government. After his declaratory statement had been canceled and the land listed to the state, he took no appeal, but recognized the land as state land, and made application to purchase it from the state. Neither has he any status as claimant of the premises as state land. When his application to purchase was rejected, he took no step to contest the prior

application of Wilson, of which he was informed, but slept upon whatever rights he may have had for some years until Wilson's application had progressed, first into a certificate of purchase, and afterwards into a patent. It does not appear that he was kept in ignorance of his rights by any fraud of respondent or his predecessor. In *Kentfield v. Hayes*, 57 Cal. 409,—a case very similar to the one at bar,—it was expressly held that an application by defendant to purchase the land in contest which had been presented to and rejected by the state land department did not give him a status from which to hold the patentee as his trustee.

2. A defendant may defeat an action of ejectment by showing that plaintiff has no title. But where a patent, regular on its face, has been issued by the government (federal or state) for land which it owns, under a law providing for the disposal of the land patented upon the ascertainment of certain facts, the officers of the land department of the government have jurisdiction to determine such facts, and the issuance of a patent is, upon collateral attack, a conclusive declaration, as against all claiming under said government, that the facts have been found in favor of the patentee. "And this rule applies to the determination of the particular character of the land which is the subject of the patent." This was expressly held in *Gale v. Best*, 78 Cal. 235, 20 Pac. 550, where we alluded to the authorities at some length, and, basing our conclusion on decisions of the supreme court of the United States in *Refining Co. v. Kemp*, 104 U. S. 636, *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389, and *French v. Fyan*, 93 U. S. 169, we declared the law to be as above stated. It would be useless to here repeat the views there expressed. See, also, the late case of *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, and *Irvine v. Tarbat*, 105 Cal. 237, 38 Pac. 896. These cases involved patents of the general government; but, upon principle, the rule applies with equal force to a patent of the state government. Moreover, it has been so expressly held by this court in *Doll v. Meador*, 24 Cal. 341, where it was decided that "the patent is the record of the state that the land was subject to location under the grant of the United States, and has been located," and in *Ah Yew v. Choate*, Id. 562, where it was held that the patent is also "a record of the judgment of the state, by its officers duly appointed for that purpose, that the conditions and characteristics of the land were not such as to constitute it mineral within the meaning of the provisions of the statute," etc. In the case at bar appellant seeks collaterally to assail respondent's patent by showing the character of the land. The law provides that if the land be suitable for cultivation,—that is, if each 40-acre tract will produce ordinary crops without artificial irrigation, etc.,—then it is to be sold only to an actual settler. The

respondent's predecessor sought to purchase the land upon the theory that it was not suitable for cultivation, and made an affidavit that it was not so suitable, as required by statute. Now, the contention of appellant is that he may show the patent to be void by showing that said affidavit was false, because the land was suitable for cultivation. But this he may not do, because the patent is conclusive as to the "conditions and characteristics of the land." If in ejectment the plaintiff relies on a patent, it is a defense to show that the patent is void on its face, or that "there is no law which authorizes such a patent under any state of facts"; but if the law provides that those parts of a large body of lands which are of a particular character shall be disposed of in a certain way, "then the land department has jurisdiction to determine the character of any part thereof, and a patent is conclusive evidence that such jurisdiction has been exercised." *Gale v. Best*, supra. And so, in the case at bar, the patent is conclusive to the point that the land was of such character as not to be suitable for cultivation within the meaning of the law, and therefore patentable to respondent. Otherwise, the possessor of a patent would have no muniment of title, and the evils depicted by Mr. Justice Field in *Steel v. Refining Co.*, supra, would ensue.

Counsel for appellant has cited some cases where it has been held that evidence was properly allowed on the point whether certain land was swamp or overflowed or dry; but it is very evident that questions as to swamp lands are very different from those arising in the case at bar. It has always been held that the act of congress of September 28, 1850, by which the swamp lands were given to California (and the other states) was a grant in present, and at its date passed the title to the state, although it also provided that it should be the duty of the secretary of the interior to afterwards send lists and plats of such lands to the governor of the state, and also, at the latter's request, issue patents of such lands to the state. *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985. As the title passed by said act of 1850 to California to all the swamp land within her borders, she was not compelled to wait for the platting and patenting of the same by the land department of the general government; and, as the action of said department was tardy, she proceeded herself to assert her ownership of said lands by providing for their survey and sale, and the issue of patents to the purchasers. *Wright v. Roseberry*, supra. But under these circumstances it happened sometimes that, before any listing to the state, the United States and the state each issued a patent for the same land to a different person,—the former upon the theory that it was dry land and had not passed to the state, and the latter upon the theory that it was swamp and passed to her by the said act of 1850,—or pre-

emptors under the United States claimed against patentees of the state. Nearly all the contests about swamp lands have arisen in this way,—that is, between those who claimed the land under the United States as dry land, and those who claimed it under the state as swamp land; and in such cases the contestants did not claim under the same source of title, but the claim of each was hostile to the source under which the other claimed. If the land was swamp the title had passed to the state in 1850, and a patent for the same land afterwards by the United States was as worthless as a conveyance by A. of the land of B.; and the same was true of a patent by the state if the land was not swamp. It is evident, therefore, that the principle of the conclusiveness of a patent can have no application to such a case; for that principle applies only to those claiming under the government which issued the patent,—under the same source of title. But, of course, the land department of one government cannot conclude those claiming under the other government,—under an independent and hostile source of title. And in such a case the only means of determining the controversy is an inquiry into the character of the land. And that means was properly applied in *Read v. Caruthers*, 47 Cal. 181, and in other cases cited. Where, however, the United States, through proper officials, had listed or patented lands to the state as swamp, then subsequent claimants under the United States were concluded from showing that the land was not swamp. *French v. Fyan*, 93 U. S. 169; *Wright v. Roseberry*, supra.

The judgment and order are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

108 Cal. 8

PEOPLE v. YOUNG. (No. 21,155.)

(Supreme Court of California. July 5, 1895.)

CRIMINAL LAW — USE OF INTERPRETER — DEPOSITIONS.

1. Under Code Civ. Proc. § 1884, providing that an interpreter must be sworn when a witness does not understand the English language, the court is necessarily vested with a discretion which is not abused in refusing an interpreter to a foreigner charged with murder who appeared to sufficiently understand the language.

2. Defendant, on trial for murder, asked for a commission to take testimony in Germany, to show that the father and sister of defendant died insane, and that defendant is subject to epileptic fits, adding in his affidavit that he verily believed that said witness will testify "that they believe and are of the opinion that the defendant is of unsound mind." The people stipulated as a fact that the father and sister of defendant died insane. The evidence showed that defendant had been a resident of the state for the seven years preceding the trial, and had but one epileptic fit in that time. *Held*, under Pen. Code, § 1354, providing that if the court is satisfied that the examination of an absent witness is necessary an order for a commission must issue, that the court was justified in refusing to order a commission.

3. Defendant cannot challenge the panel because the names of two jurors were not found on the assessment roll for the preceding years, when they were excused for cause, and no possible harm could have resulted to defendant from their names being placed in the list.

4. Defendant cannot challenge the panel because no certified list of trial jurors, as provided in Code Civ. Proc. § 208, was ever placed in the possession of the county clerk, it appearing that 300 jurors were regularly drawn, their names entered on paper by the clerk of the board of supervisors, the paper placed in the possession of the county clerk, and the names taken from this paper and placed in the jury box, when the clerk of the county and of the board of supervisors was the same person, and offered at the trial to attach the certificate.

5. An elisor may be appointed when it appears the sheriff and coroner are both disqualified.

6. It is not error, on a trial for murder, to allow a witness to testify that defendant, after his arrest, was brought in the presence of the wounded man, who stated that a purse found on defendant was deceased's, and that defendant neither affirmed nor denied the statement.

In bank. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

William Young was convicted of murder, and appeals. Affirmed.

Wallace M. Pence, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. This is an appeal from a judgment sentencing the appellant to suffer the death penalty, upon a conviction for murder, and from an order denying his motion for a new trial.

1. A motion was made to set aside the information, upon the ground that the defendant had not been legally committed by a magistrate. In support of the motion, the defendant, Young, presented his affidavit to the effect that he was a native of Germany, and had a very limited knowledge of the English language; that he did not know or understand that he had a right to counsel at the preliminary examination, and that he did not hear or understand the magistrate inform him that he had such right. As opposed to the motion, the prosecution introduced a part of the record of the proceedings of the preliminary examination, from which it appeared that the defendant was fully informed of his rights, and thereupon stated to the committing magistrate that he desired no counsel, and was then ready to have the examination proceed. The answers of the defendant to the interrogatories put to him at the time by the magistrate indicate a full comprehension upon his part of the nature and character of the proceedings that were about to take place, and a full understanding of the facts, at the time he declined the aid of counsel. Neither did the trial court commit an error in denying his application for an interpreter. Under section 1884 of the Code of Civil Procedure, the court is necessarily vested with a discretion in granting or refusing such an application, and we see no abuse of that discretion in this case.

2. Appellant, upon affidavits, asked for a

commission to take testimony of certain witnesses residing in Berlin, Germany. In such affidavits it was proposed to show, by the testimony of said witnesses, "that the father of defendant was insane, was confined in an asylum and died insane; that his sister was subject to epileptic fits, and died insane; and that the defendant is subject to epileptic fits. And he verily believes that said witnesses will testify that, from their knowledge of him, his conduct, his conversation with them, and observation of his conduct, that they believe and are of the opinion that he, defendant, is of unsound mind." As opposed to the issuance of the commission, the people stipulated as a fact "that the father of defendant was insane; was confined in an asylum and died insane; that his sister was subject to epileptic fits, and died insane." And thereupon the court refused to issue the commission. In relation to the issuance of commissions, section 1354 of the Penal Code declares: "If the court to whom the application is made is satisfied of the truth of the facts stated, and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take testimony. * * *"

The prosecution admitted all that the appellant desired to prove as to the mental condition of his father and sister. Hence, we deem the object and purpose of a commission to take testimony as to them was gone; and, as to the balance of the showing made, we are satisfied the trial court was justified in holding it insufficient. We think the court could well say that it was not convinced that the examination of these witnesses was necessary to the attainment of justice. We think this true for many reasons, for the showing was inherently weak. It appears, by other portions of the record, that the appellant had been a resident of the state of California for seven years immediately prior to the trial. By his own evidence, he had been afflicted with but one epileptic fit in this state. Hence, the evidence of these witnesses as to epileptic fits could only refer to a time many years ago, when he was but a youth, and he appears to have practically outgrown his affliction as age came upon him. As to the remainder of the showing, wherein affiant "believes that said witnesses will testify that * * * he is of unsound mind," we think the court was right in rejecting his belief upon the matter. Something more than his mere belief as to what the witnesses would testify to was demanded.

3. The appellant challenged the panel of trial jurors upon various grounds. The fact that the names of two of the jurors upon the panel were not found upon the assessment roll for the preceding year does not invalidate the panel. That fact being brought to the attention of the court, they were excused for cause, and no possible harm could have resulted to appellant by the mistake of

the board of supervisors in placing their names upon the list of jurors for the year. It is further insisted that no certified list of trial jurors, as provided in section 208 of the Code of Civil Procedure, was ever placed in the possession of the county clerk. It appears, by the testimony of the clerk of the board of supervisors, that 300 trial jurors were regularly drawn, under the order of the court, to serve for the ensuing year; that these names were entered upon a piece of paper by the clerk of said board, and this paper placed in the possession of the county clerk, without the certificate contemplated by the statute; and from this paper the names were taken and placed in the trial jury box. These matters all came under the personal knowledge of the witness, and he further testified that he was then and there ready to attach to the list the certificate required. The procedure here practiced is not a commendable one, and should never be resorted to. It might result in the total miscarriage of justice; but in this case we see nothing whatever infringing upon appellant's rights. There is no question but that the list of jurors, as drawn by the board of supervisors, was the same list that went into possession of the county clerk, and from which the names were taken and placed in the trial jury box. If there was the slightest doubt as to the identity of the list, we would not hesitate a moment in ordering the entire panel set aside; but there is no such doubt. The county clerk and the clerk of the board of supervisors are the same. Hence, these facts were essentially within the knowledge of the official having possession of the uncertified list, and we see no reason why he could not now attach the certificate contemplated by the law to the list. In *State v. Greenman*, 23 Minn. 209, there appeared to be a doubt as to the identity of the list.

4. A special venire was challenged, upon the ground that it was summoned by an elisor, to the exclusion of the sheriff and coroner. From extreme caution, the district attorney made a showing which, in the opinion of the court, disqualified both of these officers, and for that reason the elisor was appointed. There is no error in this action of the court.

5. The appellant, after his arrest, was brought into the presence of the wounded man, and a conversation then occurred between the deceased and a witness, as to the ownership of a certain purse found upon the appellant at the time of his arrest. This line of examination is claimed to be error, but we think it authorized under the law. The appellant was present at the time, in a position to hear and see all that occurred, and neither affirmed nor denied the statement of the deceased to the effect that the purse was his property. His conduct, under the circumstances, is a fact to which the jury were entitled. *People v. Mallon*, 103 Cal. 513, 37 Pac. 512. It might be further

suggested, in answer to appellant's claims that this evidence was all the evidence offered at the trial, as to the ownership of the purse, that appellant's own admissions placed the possession of the purse in the deceased at the time he was shot.

6. We see nothing objectionable in the character of the cross-examination of the appellant, and the verdict of the jury is fully supported by the evidence. The theory of the prosecution pointed to a murder for the purpose of robbery. The theory of the defense outlined an accidental killing by defendant, while under the influence of liquor. These two theories were squarely and fairly presented to the jury, and by the verdict the jurors rejected appellant's defense as one not true, but manufactured for the occasion. This defense had nothing to support it, save appellant's own testimony. This the jurors disbelieved, and the credibility of his evidence was a matter essentially resting with them.

7. We have carefully examined the law given by the court to the jury, and consider it a full and fair charge, when considered in connection with the evidence. We see nothing in the remaining specifications and assignments of error demanding a reversal of the judgment and a new trial of the case. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: McFARLAND, J.; HENSHAW, J.; HARRISON, J.; VAN FLEET, J.

108 Cal. 154

DIGGINS v. HARTSHORNE. (No. 15,757.)
(Supreme Court of California. July 16, 1895.)

EVIDENCE—JUDICIAL NOTICE—PUBLIC IMPROVEMENTS—DESCRIPTION OF PROPERTY.

1. St. 1858, p. 56, making the Van Ness map the official map of San Francisco; does not enable the court to take judicial notice of the correct location on the ground of the streets therein platted.

2. St. 1871-72, p. 804, authorizing the board of supervisors to order the improvements of streets of San Francisco laid down on the Brooks and Potter map "and" the Humphreys map, does not require that the street to be improved be laid down on both maps, as the conjunction "and" will be construed as a disjunctive.

3. The grading of Seventh street between B. and C. streets was contracted for. On the official map C. street intersected Seventh street at right angles. The true location of C. street was in dispute, such street being platted on some maps as though it intersected Seventh street diagonally. In fixing the limits of the work, C. street was considered as crossing Seventh street diagonally. *Held* that, in an action to enforce an assessment, the defense that the work was not completed as contracted for could not be raised, as the acceptance of the work by the superintendent, in the absence of an appeal, is conclusive on such question.

4. Under St. 1871-72, p. 804, providing that the expense of street improvements shall be assessed against each lot, the lots fronting thereon being assessed in proportion to their frontage, if the frontage of the lot is correctly given in the assessment, the fact that the interior lines are incorrect is immaterial, as the owner cannot

be aggrieved thereby, the depth of the lot not affecting the assessment.

5. In a suit to enforce an assessment against a corner lot for a street improvement, the location of one of the streets was in dispute,—one map giving it as intersecting at right angles, the other as intersecting diagonally. The complaint, after describing the lot by boundaries commencing at the intersection of the street, added, "And is the same lot shown as lot 3" on the assessment diagram, which showed the streets as intersecting diagonally. *Held*, that the judgment should describe the property with reference to the diagram, and not merely as commencing at the intersection of the street, with the boundaries given in the complaint.

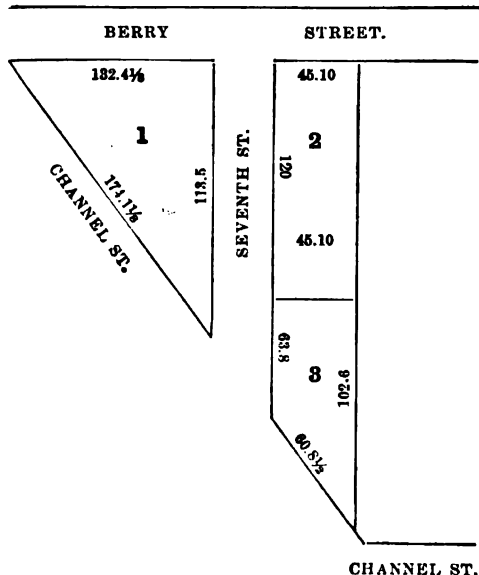
6. An action to foreclose an assessment for a street improvement is properly brought in the name of the person to whom it is assigned as security, and who is authorized by the assignment "to demand, sue for, settle, and compromise" the same.

Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by A. C. Diggins against B. M. Hartshorne to enforce a street assessment. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Boyd, Fifield & Hoburg, for appellant. J. M. Wood, for respondent.

HARRISON, J. Action to foreclose the lien of a street assessment in the city and county of San Francisco. Under proceedings properly taken therefor by the board of supervisors of the city and county of San Francisco, the superintendent of streets entered into a contract, November 28, 1879, with Buckman, the plaintiff's assignor, for grading Seventh street from the northerly line of Berry street to Channel street, and, after the work had been completed to his satisfaction, issued an assessment therefor. The following is a copy of the diagram which is attached to the assessment, so far as the present action is affected:



The present action was brought to foreclose the lien of the assessment against lot 3. It is contended by the appellants that, upon the official map of San Francisco, Channel street runs from Third to Eighth streets at right angles with Seventh street, and parallel to and 275 feet southerly from Berry street, and that as, by the above diagram, Channel street intersects Seventh street diagonally, the assessment shows upon its face that the work contracted for has not been performed, and that the expense of the work done has not been assessed upon all the property liable to be assessed therefor. This contention is supported by the further contention that the court will take judicial notice of the location of Channel street upon the official map of the city and county. It was held in *Whiting v. Quackenbush*, 54 Cal. 306, that, inasmuch as the Van Ness map had been made official by an act of the legislature (St. 1858, p. 56), the streets designated thereon had been "established by law," and that the court would take judicial notice of them (Code Civ. Proc. § 1875, subd. 2); and in *Brady v. Page*, 59 Cal. 55, it was further held that, in taking judicial notice of these streets, courts would take judicial notice of their relation to each other, and of the directions in which they run. It has never been held, however, that a court would by its judicial knowledge determine whether the space set apart upon a map for a street is correctly located upon the ground, or, when the line of such street as a boundary is disputed, fix it, without evidence. The owner of a tract of land in a city may offer to dedicate a portion thereof for a street, either by throwing the space open for use, or by an actual grant to the public, or by selling lots bordering thereon, or he may record a map of the tract, with streets delineated thereon. In such cases the question of dedication may be disputed, and courts do not take judicial notice of the existence and location of the streets, but determine the fact of dedication upon the sufficiency of the evidence to establish it. Neither can courts take judicial notice of the existence of a street that has been opened or adopted by a municipal ordinance, without proof of the passage of such ordinance. In the present case the defendants introduced at the trial a witness from the office of the city and county surveyor, who produced from the records of that office several maps upon which Channel street was delineated, upon no two of which was it delineated alike, and who also testified that in that office there were four different authorities for the lines of Channel street, and four sets of lines for the street. One of the maps so produced was the above-named Van Ness map, and, although on this map there is no street designated by the name of Channel street, yet in the space to the east of Seventh street, which on other maps is designated as Channel street, there are two parallel lines which are deflected before reaching Seventh street, and cross the block at that

corner of Seventh street in nearly the same direction as upon the above diagram. Between these two deflected lines are written the words "Proposed Canal Channel." The Brooks and Potter map, sometimes called the "Engineer's Map," which was adopted as the official map in 1866, represents Channel street at its intersection with Seventh in the same form in which it is represented upon the aforesaid diagram, and in the deflected portion of the street are written the words "Channel Street." Upon the map of 1870, usually called "Humphreys' Map," Channel street is delineated as lying parallel with Berry street, and as projecting beyond Seventh as far as Eighth street; but, as it approaches Seventh street from the east, it is delineated with two lines which deflect in the same manner as on the Brooks and Potter map, and are projected beyond Seventh street in the line of the deflection. There is no designation given to it after it leaves Seventh street. Upon the assessor's map the street is delineated in the same manner as on the diagram. It was shown by the witness that upon these several maps the distance along the easterly line of Seventh street, from Berry to its intersection with Channel street, was as follows: On the Brooks and Potter map, 181 feet; Humphreys' map, 209 feet; block book, 185 feet; assessor's book, 192 feet. And on the westerly side of Seventh street the distances from Berry to its intersection with Channel street are as follows: Brooks and Potter map, 110 feet; Humphreys' map, 138 feet; block book, 114.6 feet; assessor's block book, 121 feet 1¼ inches. These distances are not the result of an actual survey upon the ground, but are measurements made upon the several maps with a scale. It does not appear that either Berry or Channel street was ever located by monuments upon the ground, and at the time of the proceedings for the improvement of the street the whole of this region was covered with water. From these items of evidence it is seen that, if the actual location of Channel street, as an official street, is an essential fact in determining the validity of the assessment, the conflict of evidence which was presented by the appellant himself is so great that the finding of the court cannot be disturbed.

We do not, however, consider that the determination of this question is essential to the determination of the validity of the assessment, but that the correctness of the judgment appealed from must rest upon the consideration of other facts and legal propositions. Section 1 of the act under which the proceedings were had (St. 1871-72, p. 804) declared that all the streets laid down on the maps in the office of the city and county surveyor which are commonly known as the "Brooks and Potter Map" and the "Humphreys Map" were public streets "for the purpose of this law"; and gave to the board of supervisors jurisdiction to order the improvement of any of these streets. By section 3

of the same act the board of supervisors is authorized to order the grading of "the whole or any portion of the said streets." We have seen that Channel street, as laid out upon the Brooks and Potter map, corresponds to the diagram annexed to the assessment under consideration, and that there is laid out upon the Humphreys map an open space corresponding to a portion of said street. The terms of section 1 of the act do not require that the streets laid down upon the maps shall have been actually opened and dedicated to public use before the supervisors could order their improvement. If, in fact, the supervisors should attempt the improvement of a street that had not been so opened and dedicated, but which was in reality private property, their action would fail, not by reason of a want of statutory provision, but because of the inability of the legislature to confer authority to make such an improvement. No question of this character is, however, presented in the present case. It is conceded that Seventh street, upon which the grading was done, was at all times an open street, dedicated to public use. The objection of the appellant rests upon the proposition that it appears upon the face of the assessment that the work contracted for had not been performed by reason of the fact that the true position of Channel street is different from its position as shown by the diagram. This objection, however, is obviated when it is shown that the work "contracted for" is not to be determined by the actual location of Channel street upon the ground, as it may have been originally laid out and dedicated to public use, but by its location as intended by the board of supervisors. The section of the statute above referred to gave the supervisors authority to order the grading of "any portion" of Seventh street. While the declaration in the statute that the streets laid down upon the designated maps are open, public streets, "for the purpose of this law," did not of itself make them in fact public streets, if they were not so already, yet these spaces upon the maps were thereby identified as objects of reference by which to describe the limits of any improvement which might be made. The "portion" of a street which the supervisors could order improved was entirely within their discretion. It would have been within their power to order that Seventh street be graded for a distance of 200 feet southerly from Berry street, or to a point 200 feet distant upon the easterly side, and 100 feet distant upon the westerly side, of Seventh street. They had also the power to limit the portion of the street to be graded by the line of Channel street as laid down upon these maps, and this, it must be held, is what they intended to do. If the resolution ordering the work had been in terms to grade Seventh street from the northerly line of Berry street to Channel street, as said streets are laid down upon the Brooks and Potter map, referred to in section 1 of the statute, their

power to order that portion of Seventh street to be graded could not be questioned, and we are of the opinion that the resolution adopted by them should receive the same construction as if it had been thus expressed. The proposition of the appellant, that only the streets which are laid down upon the Brooks and Potter map and upon the Humphreys map are subject to be improved by the supervisors, cannot be maintained. This construction would exclude from their jurisdiction every street that is on the Humphreys map which had not been previously delineated upon the Brooks and Potter map, and thereby prevent the public improvement of a large portion of the streets in the city and county of San Francisco. The word "and" is, in this connection, to be construed as "or." *Suth. St. Const.* § 252.

If, however, the work ordered by the supervisors and described in the contract was not thus limited, but required that Seventh street should be graded to the line of Channel street contended for by the appellant, there is presented the simple case of the superintendent of streets having accepted the work before the completion of the contract; and in that case it was incumbent upon the owner to first appeal to the supervisors, and seek from that body a correction of the error, before he could make such defense to the enforcement of the assessment. It was for the superintendent of streets to determine, in the first instance, whether the contractor had completed his contract, and this included the determination by him of the line of Channel street that was intended by the board of supervisors in the description of the work ordered to be done. If the true line of Channel street were not a matter of dispute, and the superintendent had accepted the work before the grading had been completed to that point, and issued an assessment therefor, under repeated decisions of this court the error would have been one which should have been corrected on appeal. Much more is this rule applicable where the limit of the work is susceptible of different locations. The determination of this question called for the exercise of judgment by the superintendent, and, in the absence of any appeal from his decision, his judgment thereon must be accepted as conclusive. In such a case the contractor may rely upon his decision, and the acquiescence of the owners therein by their failure to appeal. In *Warren v. Riddell* (Cal.) 39 Pac. 781, the contractor had graded the street to a line entirely at variance with the official grade, and it was held that, unless an appeal had been first taken to the board of supervisors, the owner could not make that defense to a suit upon the assessment. When the assessment in the present case is examined in connection with the statute authorizing the work and the maps therein referred to, it cannot be said that, "upon its face," the work contracted for has not been performed. Neither does it appear upon the face of the

assessment that any property liable to be assessed for the expense of the work has been omitted. The appellant does not contend that if Channel street is properly located on the diagram any other property than that designated therein is assessable. His contention in this respect is based upon his claim that Channel street is erroneously located thereon. The precise distance from Berry street at which Channel street is laid down on the maps named in the statute has never been officially declared, and the different distances given at the trial were reached by measurement with a scale. One of these distances was less, and the others more, than is shown upon the diagram. These discrepancies, however, do not of themselves invalidate the assessment. They are ascertained only by evidence outside of the assessment itself, and in such a case the assessment is not *felo de se*, but, if defective, is to be remedied upon an appeal.

The statute does not specify the depth to which the lands fronting on the work shall be assessed, or the shape or boundaries of such lots; its language being that the expense shall be assessed upon the lots and lands fronting thereon, "each lot" being separately assessed "in proportion to its frontage." The basis of the assessment is the frontage upon the work, and the frontage of each lot determines the amount of the assessment against that lot, irrespective of its shape, size, or depth. There is no requirement that the lots to be assessed shall be rectangular with the street on which they front, nor can this direction for the assessment impair the owner's right to dispose of his lands as he may desire. If the superintendent does not properly delineate an owner's lot upon the diagram, or includes with it property which should be included in another lot, his act can be corrected on an appeal to the supervisors; but an owner cannot be said to be "aggrieved" merely because the superintendent, while correctly giving the frontage of his lot and assessing the proper amount thereto, has incorrectly delineated its interior lines, since the amount of the assessment is in no wise affected thereby.

In an action for the foreclosure of the lien of a street assessment, the plaintiff must describe the land with sufficient definiteness to enable the purchaser under a decree for its sale to obtain possession thereof; and, as the description in the assessment is by reference to the diagram, it is evident that, unless the diagram contains such a delineation of the lot that a definite description thereof can be embodied in the complaint, there can be no foreclosure of the lien of the assessment. It is only the lot assessed which is subject to the lien, and the judgment directing the sale, as well as the complaint for its foreclosure, must be limited to the description of the lot as found in the assessment. The complaint in the present case alleges the making of the assessment and diagram, and the volume and

page in which they are recorded in the office of the superintendent of streets, and then describes the lot of the defendant assessed thereon, and which he asks to have sold in satisfaction of the lien, as commencing at the northeast corner of Seventh and Channel streets, and, after giving its several boundaries, adds, as a further description, "and is the same lot shown as lot No. 3 on said assessment and diagram." This was a sufficient identification of the lot assessed, and confines the particular description by streets and distances to those which are delineated upon that diagram, as fully as if they had been made so by express reference. In the judgment, however, which was entered in the action, the description of the property which is ordered to be sold in satisfaction of the lien is given as a lot commencing at the northeast corner of Seventh and Channel streets, with the same boundaries and distances as are given in the complaint, but there is no reference to the assessment or diagram, or to any map upon which those streets are delineated. As one of the main issues in the case was the proper location of Channel street, and as there was evidence before the court tending to show that Channel street on the official map of the city is not located as it is delineated upon the diagram, and as it was also shown that the land at the northeast corner of Seventh street and the line of Channel street, as contended for by the appellant, is owned by him, the court, in its judgment, should have given such a description of the lot to be sold as would identify it with the lot assessed, and thus prevent any controversy between the purchaser under the judgment and the appellant regarding the property purchased.

The action is properly brought in the name of the plaintiff. Buckman had assigned the assessment to him, and in express terms had authorized him to "demand, sue for, settle, and compromise the same, as in his judgment may be best." This authority was not made nugatory by reason of the assignment having been made to secure an obligation from Buckman to Mrs. Dorland. It was in the nature of a power of sale in a deed of trust, and could be exercised by the grantee of the power. See *Works v. Meritt* (Cal.) 38 Pac. 1109. *Foley v. Bullard*, 99 Cal. 516, 33 Pac. 1081, has no application. In that case Lang and Ruggles, to whom the owners of the assessment had assigned it as security for their indebtedness, had reassigned it to one of the owners, and it was held that by this reassignment their lien was terminated.

Other points presented in the appellant's brief do not require any special consideration. The statute required the person to whom the contract was awarded to enter into the contract within 10 days after the award. The award to Buckman was made November 17th, but, as the 27th of November was Thanksgiving day, he had the whole of the next day into which to enter into the con-

tract. The requirement that the superintendent shall cause the contract to be recorded in the office of the county recorder is an official duty imposed upon that officer, but his failure to perform this duty does not impair a valid contract previously entered into. The statute of 1878 (page 231) is irrelevant to the proceedings for the improvement of the street, except to deprive the owners of any right of protest.

The superior court is directed to modify the judgment by changing the description of the land therein directed to be sold in conformity with this opinion; and, as so modified, the judgment and order will stand affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

108 Cal. 109

WILLIAMS et al. v. BERGIN. (No. 15,689.)
(Supreme Court of California. July 18, 1895.)

STREET IMPROVEMENTS—ASSESSMENTS—APPEAL TO
SUPERVISORS—NOTICE OF APPEAL—
SUFFICIENCY.

1. St. 1885, p. 156 (street-improvement act), provides that, in case of appeal to the board of supervisors from any act of the superintendent of streets, "notice of the time and place of hearing, briefly referring to the * * * acts, determinations or proceedings objected to or complained of, shall be published for five days." *Held*, that such notice must include all persons affected by the appeal, and that a notice fixing the time and place of hearing, and reciting only that "all appellants" are required to appear, was insufficient to give the board jurisdiction.

2. A direction by the board of supervisors that a resolution, which does not contain the essentials of a statutory notice of appeal from the action of the superintendent of streets, shall be published "as and for the notice required by law," does not render it sufficient as such statutory notice.

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by one Williams and others against one Bergin to recover upon a street assessment which had been increased by the superintendent of streets, under direction of the board of supervisors, upon appeal by plaintiffs from the former assessment. Judgment for plaintiffs, and defendant appeals. Reversed.

T. I. Bergin, for appellant. J. C. Bates, for respondents.

HARRISON, J. Action upon a street assessment. After the work had been completed to the satisfaction of the superintendent of streets, that officer made an assessment therefor May 6, 1892, by which the land described in the complaint was assessed in the sum of \$614.30. Within 30 days thereafter, viz. May 14th, the contractors to whom the assessment was issued, deeming that they were entitled to receive a larger sum, appealed therefrom by filing in the office of the

clerk of the board of supervisors a notice of their appeal, in which their objections were stated in writing; and the board of supervisors fixed Monday evening, June 6th, as the time for hearing the appeal, at which time they passed a resolution setting aside the assessment, and directing the superintendent of streets to make and issue a new assessment in accordance with the claim of the contractors. The present action is brought upon the assessment made under this direction of the board of supervisors.

Section 11 of the street-improvement act (St. 1885, p. 156), after providing for an appeal from any act of the superintendent, declares: "Notice of the time and place of the hearing, briefly referring to the work contracted to be done, or other subject of appeal, and to the acts, determinations or proceedings objected to or complained of, shall be published for five days." In the present case the board of supervisors fixed the time and place for hearing the appeal by the following resolution: "Resolved, that Monday evening, June 6, 1892, at 8 o'clock p. m., be fixed as the time for hearing said appeal by this board, in their chamber at the new city hall, at which time and place all appellants are required to appear, when they will be heard in relation to said appeals. And the clerk is hereby directed to publish this resolution in the San Francisco Daily Report newspaper for five days, as and for the notice required by law." This resolution was published as therein directed, and was the only notice of the hearing of the appeal authorized or given by the board of supervisors. The act of the superintendent in making the assessment is in the nature of a judgment by a tribunal of special and limited jurisdiction. After its judgment has once been exercised, its power is exhausted, and, in the absence of statutory authority for its revision, cannot be changed. By the original assessment the land of the owner is charged with a lien of a specified amount, and, if the amount of this lien is to be increased, it is essential that the owner shall have notice thereof, and have an opportunity to be heard thereon. This notice is in the nature of process by which the board of supervisors may acquire jurisdiction to act upon the appeal and change the assessment. It is the only means which the law has provided to warn the owner of the intended increase of the lien upon his property, and must be followed in order to effect such increase. *Cruger v. Railroad Co.*, 12 N. Y. 201; *Scammon v. Chicago*, 40 Ill. 146. The mode which the statute prescribes for a revision of the assessment is the measure of the power, and, unless that mode is followed, any attempted revision will be nugatory. Where a statute prescribes the mode of acquiring jurisdiction, the mode must be complied with, or the proceedings will be a nullity. In *Durant v. Jersey City*, 25 N. J. Law, 309, under a provision in the charter of Jersey City requiring notice to be given, in terms similar to those of the statute under

consideration, the notice specified that the council would hear any objections that might be presented "in writing." It was held that by reason of this departure from the direction of the charter the council did not acquire jurisdiction to pass the ordinance, saying: "It may be that this departure from the direction of the charter was not calculated seriously to interfere with the rights of the property holders whose lands were to be taken; yet, in point of fact, the power delegated to the common council was not strictly pursued in this particular, and their jurisdiction to pass the ordinance therefore fails." In *City of Lowell v. Wentworth*, 6 Cush. 222, the officer was required, before making an assessment, to give to each person liable to be assessed a notice in writing, appointing in the notice a time and place in which all persons interested might appear and be heard in relation to the assessment. Instead of so doing, he notified some of the persons interested to appear at one time and place, and others at a different time. This was held to be such an omission to comply with the ordinance as to render the assessment void. Notice, when required by a statute, is not the equivalent of knowledge, and the supervisors gain jurisdiction to act upon the appeal only by giving the notice that the statute requires, and in the manner that is required, and not by the fact that the parties interested may have knowledge of their intended action. The term "notice" of itself imports that the information given thereby comes from an authentic source, and is to be directed to some one who is to act or refrain from acting in consequence of the information contained in the notice. See *Fry v. Bennett*, 7 Abb. Prac. 355; *Minard v. Douglas Co.*, 9 Or. 210. A notice which, by its terms, is directed to A., is ineffectual as a notice to B., even though it is delivered to B., and he is thereby informed of its contents.

In the absence of any provision in the statute for the mode of giving the notice, it would be necessary that every person who might be affected by the appeal should receive personal notice of the matter appealed from, as well as of the time and place fixed for hearing the same. The provision that the notice shall be given by publication for five days merely changes the mode of giving the notice, but does not change the character of the notice to be given. The publication of the notice takes the place of personal notice, but can have no greater effect as a notice than would a similar one if personally delivered to him who is to receive it. In either case it must indicate the person who is to be notified, as well as the matter of which notice is given; the object of giving the notice being to enable those to whom it is to be given to be heard upon the appeal. "It must be very plain language which will justify the court in holding that the legislature meant to substitute, by way of a published advertisement, anything less explicit than would be required in a written notice, actually delivered to the person whose

property was meant to be affected." *Peters v. City of Newark*, 31 N. J. Law, 364. The only "notice" that was given in the present case is that contained in the resolution aforesaid, and the only portion of this resolution that has any of the qualities of a notice is contained in the clause, "all appellants are required to appear, when they will be heard in relation to said appeals." All else is only the fixing the time and place for hearing the appeal, and directing the clerk to publish the resolution. Although the statute merely declares the manner in which the notice shall be given, and does not indicate the persons who are to be notified, yet it is a rule of universal application, in all proceedings by which a person's property is to be taken or to be charged with a burden, that he shall have notice of the proceedings; and the notice which is here required to be given necessarily includes every one who is to be affected by the appeal. A notice which by its terms is limited to a portion of those who may be so affected cannot be held to extend to others who may be also interested in the appeal, and is not a compliance with the statute. The direction to the clerk to publish the resolution "as and for the notice required by law" can have no effect to enlarge the notice which was actually published, or to change its character from the terms in which it is expressed. The direction in this clause limited the notice to the appellants, and cannot be construed as a notice to all persons interested in the subject-matter of the appeal. It was an express notice to the appellants alone, and by its terms implied that they only would be heard; and it must be construed as a notice only to them. By reason of its limitation to the "appellants," it failed to be a notice to the defendant, and the supervisors acquired no jurisdiction to act upon the appeal. The effect of the appeal was to suspend all action for the collection of the assessment until after its determination (*People v. O'Neill*, 51 Cal. 91; *Mahoney v. Braverman*, 54 Cal. 570); and until the confirmation of the assessment by the board of supervisors, or the making of a new one under its direction, the contractors had no right of action against the owner. It follows that the assessment sued upon was made without authority. The judgment and order are reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

15 Cal. 179

FREEMAN et al. v. BELLEGARDE et al.
(No. 15,606.)

(Supreme Court of California. July 18, 1895.)
BOUNDARIES—THREAD OF STREAM—SHORE LINE.

1. A description in a mortgage extending the boundary line of the mortgaged land from a given point, by certain courses and distances, "to the mouth" of a certain creek, and "thence ascending said creek" by certain courses and distances, made the thread of the creek the boundary line, regardless of the last-named courses and distances, even though the creek was a tidal stream, the grantor having title to its bed.

2. A deed conveying land bordering on a stream, and defining its boundaries as "commencing at the intersection" of a certain ditch "with the shore line," and extending by courses and distances named to the "S. shore" of the same stream, "thence along said shore as it winds and turns, to commencement," made the shore line the boundary, and did not convey the land lying between the low-water mark and the thread of the stream.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Freeman and others against Bellegarde and others to quiet title to lands lying between the shore line and thread of a stream. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Reversed as to part of the defendants, and affirmed as to others.

Freeman & Bates, for appellants. Warren Olney, Harding & Forbes, Grant & Cushing, and Charles F. Hanlon, for respondents.

HARRISON, J. Action to quiet title to certain lands in San Francisco. The lands described in the complaint are a portion of the Bernal Rancho, and the controverted question in the action is the title of the plaintiffs to that portion of the lands described in the complaint which lies between the south shore of Islais creek and the thread of the stream. Islais creek empties into the Bay of San Francisco, and the tidal waters of the bay ebb and flow in the creek for some distance above its mouth. At the line of the land claimed by the plaintiff nearest the bay the creek is at ordinary high tides 300 feet wide, and the ground at that point that is covered and uncovered by the ebb and flow of the tides has a width of 150 feet between the bank of the stream and the line of ordinary low-water mark. At high tide the water nearest the bay is about 3 feet deep, and at a point below the lands in controversy there is at low tide no water in the creek, thus rendering the creek a mere basin which is filled and emptied by the ebb and flow of the tide. The patent for the Bernal Rancho covers the bed of Islais creek and the land on both banks thereof, and includes all the lands described in the complaint. The title of the plaintiffs to the land in controversy is derived through the foreclosure of a mortgage given by the Bernals to J. Mora Moss, and a subsequent conveyance from the grantees of Moss to John Hewston, and depends upon the construction to be given to the description in the mortgage and sheriff's deed thereunder, and to the description in the conveyance from Moss' grantees to Hewston. The plaintiffs had judgment in the court below, and defendants have appealed therefrom, and from an order denying a new trial.

1. The description of the property in the mortgage to Moss, so far as the same af-

fects the present action. is as follows: " * * * Thence along margin of the bay (giving four courses and distances) * * * 11 chains to mouth of creek; thence ascending said creek (giving thirteen courses, with their distances) * * * N. 45°, W. 9 chains, 50 links, crossing the creek to the end of the old wall on N. side of marsh, * * * containing area of 1,958 acres, more or less, according to a survey by N. Scholfield, deputy U. S. surveyor general." This description in the mortgage was carried into the sheriff's deed issued upon the sale under the foreclosure, and the title to the land thus conveyed afterwards became vested in Ploche and Robinson. In *Spring v. Hewston*, 52 Cal. 442, the description in this mortgage was before the court, and it was held that the creek, rather than the line determined by the courses and distances, was the true boundary of the land embraced in the mortgage. The call in the mortgage "to mouth of creek" rendered the thread of the creek the boundary of the land mortgaged. In the absence of any qualifying term, the designation in a conveyance of any physical object or monument as a boundary implies the middle or central point of such boundary, as, for example, if the boundary be a road or highway or a stream, the thread of the road or stream will be intended; if a rock, a heap of stones, or a tree be the boundary, the central point of such tree or rock or heap of stones will be intended. A private grant is to be interpreted in favor of the grantee, and, if the grantor is the owner of the monument or boundary designated in his grant, his conveyance will be held to extend to the middle line or central point of such monument or boundary. This rule is not changed by reason of the fact that a stream which is designated as the boundary is a tidal stream, if the grantor of the land is the owner of the bed of such stream. "When riparian estates are conveyed, the owner may reserve the land under water, but the general presumption is that the purchaser's title extends as far as the grantor owns, in both tidal and fresh waters." Gould, *Waters*, § 195. The title to the beds of tidal streams is ordinarily vested in the sovereign, and in such case a grant from the sovereign which is bounded by tidal waters will be construed to extend only to high-water mark. *Water Co. v. Richardson*, 70 Cal. 206, 11 Pac. 695. A grant from the sovereign is to be interpreted in favor of the grantor, contrary to the rule for interpreting grants between private individuals; but if, as in the present case, the sovereign has parted with the title to the land beneath the stream, a grant of the riparian tidal lands by the owner must receive the same construction as a grant by him of any other riparian lands. It is unnecessary to determine whether the provisions of section 830, Civ. Code, and of section 2077, Code Civ. Proc., were intended to change the rules of construction then ex-

isting, inasmuch as the mortgage to Moss, and the conveyances by which the lands in question became vested in Ploche and Robinson, were executed prior to the enactment of the Codes. The further call in the mortgage and subsequent conveyances, "thence ascending said creek," must prevail over the courses and distances. The creek is the boundary of the land conveyed, and the courses and distances, being only approximate estimates of the direction and length of the boundary, must yield to the actual line of the creek. When a meandering stream is a boundary, it is impracticable for a surveyor to fix monuments in the channel of the water, or to define the actual line of its windings and courses; and in attempting to define its banks it would be impossible for two surveyors to give the courses and lengths of its several meanders alike. *Yates v. Van De Bogert*, 36 N. Y. 526; *Ang. Water Courses*, §§ 29, 30; *Middleton v. Pritchard*, 3 Scam. 510; *Railroad Co. v. Schurmeir*, 7 Wall. 272. This construction is not overcome by the fact that, after "ascending the creek" for several courses, the next course is given as "crossing the creek to the end of the old wall." This call is not inconsistent with holding that the previous call, "ascending the creek," follows the thread of the stream, but merely shows that in going from that point the next course is in a direction which crosses the creek from the thread of the stream towards the end of the wall. Nor is the construction to be given to these calls in the mortgage qualified by the subsequent reference therein to a survey by Scholfield. The defendants offered in evidence a plat of a survey made by Scholfield and approved by the United States surveyor general September 23, 1853, and it was testified that this was a preliminary survey of the Bernal Rancho, made under instructions from the land commission. A comparison of this plat with the description in the mortgage shows, however, that this cannot have been the survey referred to in the mortgage. The plat is of the entire rancho, containing 4,341 acres, and has upon its face several subdivisions, no one of which corresponds with the tract of 1,958 acres which is described in the mortgage. The plat, however, contains upwards of 100 courses,—more than double the number in the mortgage,—and only 11 of these courses are the same as those in the mortgage.

2. Ploche and Robinson conveyed December 6, 1866, to John Hewston, a tract of land "commencing at the intersection of a ditch (dividing land of Haley and O'Neill) with the shore line, and running thence along said ditch * * * to E. line of 15th avenue; thence along the easterly line of said 15th avenue, N. 45° 15', W. 2 chains 60 links, to S. shore of Islais creek; thence along said shore, as it winds and turns, to commencement." Whatever title passed by this deed was vested in the plaintiffs at the commencement of the action. By virtue of conveyances

subsequently executed by Ploche and Robinson, the defendants Luty and Thomas claimed title to the land, "commencing at a point where the northwesterly line of Fourth avenue intersects the southerly shore of Islais creek, and running thence in a northwesterly direction along the northeasterly line of said Fourth avenue, extended to the center of Islais creek; and thence ascending said Islais creek along the center line thereof to the northeasterly line of Fifteenth avenue, if extended in a northwesterly direction, as said avenue is delineated on said map; and thence in a southeasterly direction, and along the northeasterly line of Fifteenth avenue, if extended as aforesaid to the southerly shore of Islais creek; and thence in a northeasterly direction along said southerly shore, as it winds and turns, to the point of commencement." With reference to their title to this land the court finds "that the lands described in the conveyance to Hewston include all the property described in plaintiffs' complaint, unless such deed is to be construed as including no part of the lands covered by the waters of Islais creek, in which event the said deed includes all the lands described in plaintiffs' complaint, except that lying in Islais creek"; and "if Ploche and Robinson retained any title to any part of the lands described in plaintiffs' complaint, after the making of the conveyances hereinbefore set out, then such title thereafter, and prior to the commencement of this action, became vested in the defendants Thomas and Luty as to the lands described in their answer." The conclusion of law that "the plaintiffs are the owners of all the real property described in their complaint" must be regarded as a finding that Ploche and Robinson did not retain any title to any portion of the lands described in the complaint. The term "shore," in its ordinary use, signifies the land that is periodically covered and uncovered by the tide, but it is sometimes applied to a river or pond, as synonymous with bank. In the absence of any qualification, a grant bounded by the "shore" of a river, when the grantor is the owner of the river, conveys the land up to the lowest point of the shore at any time, in order that the grantee may at all times have access to the stream by which the land is bounded. It is competent, however, for the grantor to so designate the line on the shore which shall constitute the boundary that there shall be no uncertainty in its location, and in such case the line of high or low water mark would be immaterial in determining the extent of the grant. In the present case the starting point of the description in the grant to Hewston is "the intersection of the ditch with the shore line." This starting point may be susceptible of exact location, and from some of the evidence offered at the trial it would appear capable of ascertainment, although the court does not find its location. The only land of which plaintiffs have title is that embraced

within a line drawn from this starting point, around the various courses, to the "south shore of Islais creek," and "thence along said shore, as it winds and turns, to commencement." The point in the "south shore," from which the last course is to be drawn, must be the same point in the shore as is the starting point; that is, at whatever point between high and low water mark was the intersection of the ditch with the shore line, there must be the point in the "shore line" to which the course along the easterly line of Fifteenth avenue is to be extended. The term "shore" must be construed with the same meaning wherever it is used in the same conveyance, and its definite location in the first course requires the same location in the last. This is a fixed boundary or monument to which the distance "two chains, sixty links," must yield. Whatever land lies between this boundary and the center of the creek is vested in the defendants Thomas and Luty, and the finding of the court that the plaintiffs were the owners of this portion of the demanded premises was erroneous.

3. The defendants other than Thomas and Luty claim title under Harvey S. Brown to certain lots in gift map No. 4, upon the theory that the Moss mortgage did not include any part of the bed of Islais creek. As Brown had conveyed to Moss all the lands described in the mortgage before he made the conveyance under which these defendants claim, it is evident that the plaintiffs' title, derived from Moss, is superior to theirs.

The judgment and order denying a new trial are reversed as to the appellants Thomas and Luty. As to the other appellants they are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

108 Cal. 189

CITY OF SAN DIEGO v. LINDA VISTA IRRIGATION DIST. et al. (No. 19,485.)

(Supreme Court of California. July 19, 1905.)

ASSESSMENT FOR IRRIGATION PURPOSES—EXEMPTION OF CITY LANDS.

An assessment, for purposes of irrigation, against the pueblo lands of a city, which are vacant, unoccupied, and, when irrigated, susceptible of cultivation, by an irrigation district, under Act March 7, 1887, an act providing for the organization and government of irrigation districts, is not a tax, within Const. art. 13, § 1, which exempts property belonging to municipal corporations from taxation, and such an assessment is valid.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the city of San Diego against the Linda Vista Irrigation District and others to quiet title. From a judgment for plaintiff, defendants appeal. Reversed.

Gibson & Titus, for appellants. William H. Fuller and Clarence L. Barber, for respondent.

HAYNES, C. The city of San Diego brought this action against said irrigation district, and its directors and officers, to quiet its title to several parcels of land, containing in all nearly 3,000 acres. The defendants answered the complaint, alleging its organization under the act of March 7, 1887, "to provide for the organization and government of irrigation districts," etc. (St. 1887, p. 29), and the acts amendatory thereof. The district was organized August 24, 1891, and in 1892 it made an assessment upon all the lands in said district, including those of the plaintiff, described in the complaint, and, plaintiff having failed to pay the assessment so made upon its said lands, the same were sold, on February 23, 1893, to the said irrigation district. These lands were described in the complaint as pueblo lands of the said city; and the answer alleged "that said real property, consisting of lands owned by said plaintiff, was acquired by it as pueblo lands, and held as such until the sale thereof, as hereinafter stated, and that said lands now are, and at all the times herein referred to were, dry, vacant, unoccupied, and uncultivated agricultural lands, susceptible to cultivation by irrigation, and would be largely benefited by irrigation; that they could not and cannot be profitably cultivated without irrigation, and are practically valueless for any other uses than agricultural and horticultural." Plaintiff demurred to defendants' answer. The demurrer was sustained, and, defendants declining to amend, judgment went against them, and they appeal therefrom.

The question to be determined is whether such lands as are described above, situated within an irrigation district, are exempt from assessment by such district, because they are owned and held by a municipal corporation. Respondent contends that said assessment is a tax, and that these lands are exempt from taxation, under section 1 of article 13 of the constitution, which reads as follows: "All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership; provided, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, or to any county or municipal corporation within this state, shall be exempt from taxation. * * *" Section 3007 of the Political Code repeats the above exemption; but we are not referred to any other statutory provision exempting property from taxation. But the assessment to satisfy which the lands in question were sold is not a tax, within the meaning of said provision of the constitution. The act un-

der which the Linda Vista District was organized authorizes the formation of districts where the lands of the different owners are "susceptible of one mode of irrigation from a common source, and by the same system of works." The district, when formed, is a local organization, to secure a local benefit, to be derived from the irrigation of lands from the same source of water supply, and by the same system of works. It is, therefore, a charge upon lands benefited, or capable of being benefited, by a single local work or improvement, and from which the state, or the public at large, derives no direct benefit, but only that reflex benefit which all local improvements confer. In *Taylor v. Palmer*, 31 Cal. 241, 255, the court defined the term "assessment," as distinguished from "taxation," thus: "It is not a power to tax all the property within the corporation for general purposes, but the power to tax specific property for a specific purpose. It is not a power to tax property generally, founded upon the benefits supposed to be derived from the organization or a government for the protection of life, liberty, and property, but a power to tax specific property founded upon the benefits supposed to be derived by the property itself from the expenditure of the tax in its immediate vicinity." In *Emery v. Gas Co.*, 28 Cal. 346, 357, the court spoke of "the long and well established meaning of the words 'taxes' and 'assessments,' as used in the statutes and in the ordinary language of the several states, to indicate different classes of public burdens,—the one imposed for general revenue for the purposes of the ordinary expenses of the state, county, and town governments, and the other to raise a special fund to defray the expenses of public improvements, mainly locally beneficial." See, also, *Doyle v. Austin*, 47 Cal. 353, 358. It cannot be doubted, in view of the well-recognized distinction between a tax and an assessment, not only in common parlance, but in repeated decisions of this court prior to the adoption of the constitution of 1879, that if it had been intended to restrict the power of the legislature in regard to assessments for local purposes, or that the proviso contained in section 1 of article 13 should extend to assessments as well as taxation, apt words to express such intention would have been used. If this be true, it follows that there is at least no express exemption of any property from local assessments, while the act under which said irrigation district was organized provides for an annual assessment upon the real property of the district; "and all the real property in the district shall be and remain liable to be assessed for such payments, as hereinafter provided." St. 1887, p. 37, § 17. In *Cooley, Tax'n* (2d Ed.) p. 650, in speaking of property subject to assessment, the learned author says: "It has been shown in another place that, while these local as-

assessments are laid under a taxing power, they are not taxes in the ordinary understanding of that term, and that, consequently, the usual exemptions from taxation will not preclude the property exempted being subjected to them." And, at page 653, the same author adds: "Even public property is often subjected to these special assessments; there being no more reason to excuse the public from paying for such benefits than there would be to excuse from payment when property is taken under the eminent domain." In *Hassan v. City of Rochester*, 67 N. Y. 528, the state owned lands on Oak street, and it was held that an assessment for the improvement of the street which omitted said state lands was invalid. Among the exemptions from taxation, under the statutes of that state, were enumerated "all lands belonging to the state or the United States." The court said: "The exemption thus stated evidently relates to general county and state taxes, and has no reference to assessments for improvements made under special laws and of a local character;" citing *Mayor, etc., of Troy v. Mutual Bank*, 20 N. Y. 390, and *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419. The court further said: "The collection and enforcement of assessments made for local improvements has never been the subject of general regulation by statute, and there is no provision which exempts the property of the state from liability for such assessments. Not being excepted by the statute law of the state, it is left for the legislature, which is vested with ample power for that purpose, to make such enactments on the subject as may be considered needful and proper."

Respondent suggests that to give the Wright act, under which the Linda Vista District was organized, the literal interpretation contended for by appellants, would make state and United States lands, if there were such in the district, liable to assessment, and authorize the sale of them if the assessment should not be paid. To this it may be replied that, as to state lands, it is undoubtedly within the power of the legislature to subject them to any just liability of the character in question; but the legislature has no such power over the public lands of the United States.

It is also said that "the city of San Diego is not engaged, nor can it engage, in an agricultural enterprise." Under subdivision 30 of section 1 of its charter (St. 1889, p. 656), the city is empowered to provide for the sale and conveyance, or lease, of all its lands not dedicated and reserved to public use. The demurrer admits that the lands in question are pueblo lands, agricultural in character, and not used for any municipal purpose. They may be sold, and the proceeds paid into the city treasury, or leased and an income derived therefrom. In either case, the city would reap a benefit at the expense of the other landowners of the irrigation

district, if it be true that the assessment in question cannot be lawfully made and enforced. These lands are held and devoted to the private uses of the city, and are not incidental to the performance of any public or municipal function. They derive an equal benefit with all other lands in the district from the expenditures made by the district, and no reason is perceived why they should be exempt from its proportion of such expenditure. As we have seen, there is no express exemption covering this property, and implied exemptions should not be extended to property which is not held or used for municipal or governmental purposes. In *Essex Co. v. City of Salem*, 153 Mass. 141, 28 N. E. 431, it was said: "We are of the opinion that, in the absence of any express exemption of the property of counties from taxation, an exemption can be implied only when the property is actually appropriated to public uses." In *Ames v. City of San Diego*, 101 Cal. 390, 35 Pac. 1005, it was held that the title of the city to its pueblo lands which have not been devoted to a specific public use, and which may be alienated by the city, may be lost by adverse possession for the period of time prescribed in the statute of limitations. If the legislature may empower the city to sell its pueblo lands, and if the title to such lands may be lost by adverse possession under the statute of limitations, no reason is perceived why the legislature may not make it liable for an assessment which is not imposed as a burden, but as its proportion of the expense incurred to secure a local benefit which, in contemplation of law, equals or exceeds the charge imposed. The judgment appealed from should be reversed, with directions to overrule the demurrer to defendants' answer.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the court directed to overrule the demurrer to defendants' answer.

108 Cal. 197

STEWART v. SEFTON. (No. 19470.)

(Supreme Court of California. July 20, 1895.)

REMOVAL OF TREES—MEASURE OF DAMAGES—ERRONEOUS DIVISION LINE.

Under Code Civ. Proc. § 733, providing that one who removes trees from land of another, without lawful authority, is liable to the owner in treble damages, and Civ. Code, § 3346, providing that the measure of damages for the wrongful removal of trees from land of another, except where the trespass was committed under the belief that the land belonged to the trespasser, is three times the compensation for the actual detriment, where one of two owners of adjoining tracts of land, the division line between which was unascertained, after having the line fixed by a surveyor, held the land up to the line adversely, and planted trees thereon,

with the acquiescence of the other owner, and where, on having another survey made a year later, he learned that the line was erroneous, and that the trees were on his neighbor's land, and thereupon removed the same, he was not liable for their removal, though the adjacent owner protested.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Julia V. Stewart against J. W. Sefton to recover damages for the removal of trees from land. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Sweet, Sloane & Kirby, for appellant. E. W. Britt, for respondent.

VANCLIEF, C. It is alleged in the complaint that on March 15, 1893, the plaintiff was the owner and in possession of the north-west quarter of the southwest quarter of section 28, township 16 south, range 1 west; on which day, and for a long time prior thereto, there were growing upon said land 72 lemon trees, the property of the plaintiff. That on said day "the defendant wrongfully entered upon said land, and willfully, knowingly, and maliciously, with full knowledge of the ownership of said property by plaintiff, dug up, removed, carried away, and converted to his own use the said lemon trees which were then and there growing upon said land," whereby plaintiff lost said trees, and the said land was greatly damaged and lessened in value to the extent of \$1,000; "and thereby the defendant, under and by force of section 733 of the Code of Civil Procedure of the state of California, has become liable to pay the plaintiff treble the amount of said damage, and that no part of said damages has been paid. Wherefore, plaintiff prays judgment for said sum of one thousand dollars damages, and that the same be trebled under and by virtue of said section of the Code, and for costs of suit."

In his answer the defendant denies that plaintiff owned or possessed the land or the trees; denies that defendant maliciously, or with knowledge of plaintiff's ownership, dug up or removed said trees; and denies all the allegations of damage. During the trial by the court, without a jury, the defendant, by leave of the court, amended his answer by adding thereto the following: "For another and separate defense to plaintiff's alleged cause of action, the defendant avers that at the time of the digging up, removal, and carrying away of the lemon trees mentioned in the said complaint, the defendant was, and for the period of one year and upwards theretofore had been, in the actual, exclusive, notorious, and adverse possession of the lands and premises upon which the said lemon trees, and all of them, were situated. That while the defendant was so in such possession of the said premises, to wit, about the month of June, 1892, the defendant brought

upon the said land, and there planted and set, the said lemon trees, and all of the same, and that such lemon trees were at the time and before they were so planted the property of defendant. That the defendant cultivated, irrigated, and cared for said trees on the said land from the time of the planting thereof, as aforesaid, in the usual and customary manner, until the same were removed by him on or about the 15th day of March, 1893. That the defendant took possession of the said land on which the said lemon trees were planted and grew, and from which the same were removed, and planted the said trees thereon, and cultivated the same in good faith, believing himself to be the owner thereof, and that the plaintiff well knew of the defendant's said possession and the planting of the said trees and cultivation of the same, and made no objection thereto, but acquiesced therein. That defendant is, and was at all the times herein mentioned, the owner of a tract of land about forty acres in area, adjacent on the east to the land on which said lemon trees were so planted and cultivated. That previously to taking possession of the said lands on which the said trees were planted as above alleged, defendant caused a survey thereof, together with the said lands of defendant adjacent thereto on the east, to be made by a competent surveyor, and that such survey so made included the said lands with those of defendant adjacent thereto, and showed the same to be part and parcel of defendant's lands. That afterwards, and about the 14th day of March, 1893, defendant caused another survey to be made of all the lands above described, as well as other lands of defendant adjacent thereto, and that in and by such last-mentioned survey it appeared that the said lands on which the said lemon trees were then planted were not within the boundaries of defendant's land; and that, in consequence of such last-mentioned survey, the defendant was in doubt as to his ownership of the land on which the said trees were situated, and being so in doubt, and while he was in possession of the said land on which the said trees were planted and grew and were situated, on the said 15th day of March, 1893, as aforesaid, he removed the same, and that such removal so made by the defendant, and none other, constitutes the acts of trespass alleged by the plaintiff in her complaint. That defendant removed such trees as above shown in good faith, believing himself to be the owner thereof, and while in possession of the same, and while in the actual, adverse, and exclusive possession of the land on which the same stood, and with no desire or intention to injure the plaintiff."

The court found as facts that the plaintiff was the owner of the land, as alleged in the complaint; but that on March 15, 1893, and for the period of about one year prior thereto, the defendant had been in the exclusive, adverse possession of the land, claiming title

thereto in good faith; that while in such adverse possession the defendant had planted said lemon trees, and cultivated them for the period of about nine months immediately preceding March 15, 1893; that on March 15, 1893, the defendant, being in doubt as to whether he owned the land on which said trees were then growing, dug them up and removed them to other land, believing them to be his property; and that the land from which he removed them was not thereby damaged or lessened in value; and further found substantially, all the facts alleged in defendant's amendment to his answer, as above set out; and, as a conclusion of law, found that the plaintiff should take nothing by her action, and that defendant recover his costs.

The plaintiff has appealed from the judgment, and from an order denying her motion for a new trial.

It appears by the findings of the court, justified by the evidence, that in March, 1892, the plaintiff owned the 40 acres of land described in her complaint, and that defendant owned a lot of 40 acres adjoining the same, but neither plaintiff nor defendant then knew or pretended to know the location of the division line between their lots, although plaintiff, by her agent, had pointed out to defendant about where she had been informed and believed the line ran. Thereupon defendant employed a surveyor (Hawley) to survey both lots, and to locate the division line between them. Hawley made the survey, and located the division line as running to a corner about 80 feet west of the true corner, as afterwards established; thus adding to defendant's lot the triangular strip of plaintiff's land on which the trees in question were planted. The plaintiff knew of the survey by Hawley at the time it was made, and also then knew where Hawley located said corner and the division line; and then, and during about a year thereafter, accepted and acquiesced in that line as the true division line. At the time of the Hawley survey, the land on which the lemon trees in question were afterwards planted was unimproved by inclosure or otherwise. Soon after that survey, the defendant cleared it by grubbing the growing bushes and removing the stones therefrom; and during the months of April and May, 1892, plowed and smoothed it, and planted thereon said lemon trees. In August of the same year defendant built a wire fence on a considerable portion of the Hawley line, but did not entirely inclose the land on which the lemon trees were planted. The plaintiff was cognizant of all this work upon and improvement of the land by defendant, without objecting to any part of it, and furthermore affirmatively manifested her acquiescence by removing and adjusting a portion of her fence to the Hawley line. Mr. W. B. Prentice, plaintiff's son-in-law and agent, testified for plaintiff: "I never suggested to Mr. Sefton that he had planted his trees too far

west, for we knew Mr. Sefton had had Mr. Hawley survey the line, and afterwards took it for granted that the survey was correct, and that Mr. Sefton knew what he was doing; and we did not know that it was not correct until Mr. Sefton had Harris and King make another survey last March" (1893). About March 12, 1893, the defendant had occasion to have all his land, including the 40-acre tract adjoining plaintiff's land, resurveyed, and employed Messrs. Harris and King to make the survey. By this resurvey he first discovered the error in the survey by Hawley, and immediately thereafter ordered his foreman to remove the lemon trees from the land between the Hawley line and the line run by Harris and King, and also to remove the fence which he had built on the Hawley line. On the morning of March 15, 1893, his foreman, with other servants, commenced to take the trees from the ground, and when they had taken up only seven or eight trees they were ordered by plaintiff's agent to desist, and did so for the time being, but later on the same day, in obedience to orders from defendant, removed the remainder of the trees, against the protest of the plaintiff's agent. On the same day (March 15) defendant wrote Mr. Prentice, who was then in charge of plaintiff's land, informing him of the survey by Harris and King, completed the day before, and of defendant's instruction to his superintendent to remove the lemon trees and fence, and asking Prentice to accept the division line as located by Harris and King, or to have it verified by a surveyor of his own choice; and it appears that plaintiff did procure a resurvey by a Mr. Wheaton, which verified that by Harris and King to her satisfaction, and that she accepted the line run by Harris and King as the true division line. There is no question that both plaintiff and defendant, in good faith, believed the Hawley line to be the true division line, until after the survey by Harris and King; nor that plaintiff acquiesced in, and thereby impliedly consented to all that defendant did upon her land, except the removal of the lemon trees. Nor is there any evidence that defendant was even negligent in selecting Hawley as a reputable and competent surveyor, nor that Hawley was not such.

Appellant contends that the action is not of the nature of a common-law action of trespass, but is a special action founded upon section 733 of the Code of Civil Procedure, of which the following is a copy: "Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such

land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction." And further claims that, if plaintiff is entitled to recover any damages, such damages must be trebled by the court. While it may be conceded that the complaint states a cause of action in which the alleged damages may be trebled, it, nevertheless, includes a cause of action for damages which should not be trebled; and whether the plaintiff is entitled to recover at all depends upon whether either of these causes of action was proved. To entitle the plaintiff to treble damages under section 733 of the Code of Civil Procedure she must have proved her allegation that defendant willfully or maliciously removed the trees, knowing them to be the property of plaintiff. Section 251 of the late practice act, which is substantially the same as section 733 of the Code of Civil Procedure, was construed in the case of *Barnes v. Jones*, 51 Cal. 303. In that case it was averred in the complaint that the defendants, "without leave of the plaintiff, wrongfully" entered upon plaintiff's land, cut down and carried off the timber, whereby plaintiff was damaged in a specific sum, "contrary to the form, force, and effect of section 251 of the practice act." But there was no averment that the trespass was committed knowingly, willfully, or maliciously; and for this reason it was held that the complaint failed to state a cause of action entitling the plaintiff to treble damages, though it entitled him to actual damage. The court said: "While the statute does not so state in terms, it is clear, we think, that it was not intended to apply to cases in which the trespass was committed through an innocent mistake as to the boundary or location of a tract of land claimed by the defendant,"—citing several cases in which similar statutes of other states have been so construed. That the defendant, in the case at bar, entered upon plaintiff's land, planted the lemon trees thereon, and cultivated them, until his second survey of the land, through an innocent mistake as to the true location of the division line between his land and that of plaintiff, and that plaintiff acquiesced in all these acts of defendant through a like mistake, is clear and undisputed. But it is claimed by appellant that the act complained of—the removal of the trees—was committed after defendant discovered the mistake, and, therefore, was a willful severance and removal of the trees from what he then knew to be the property of plaintiff, in the sense of section 733 of the Code of Civil Procedure, as qualified by section 3346 of the Civil Code, as follows: "For wrongful injuries to timber, trees or underwood upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and

involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which cases the damages are a sum equal to the actual detriment."

Conceding that after plaintiff regained possession she was entitled to treat the defendant as a trespasser, ab initio, for the purpose of recovering all actual damages suffered by her in consequence of his entry and subsequent acts upon her land, the important remaining questions are: (1) What were the actual damages so suffered by plaintiff? (2) If no actual damage, is she entitled to a reversal of the judgment, to the end that she may recover merely nominal damages?

First. No damage is claimed for mesne profits; nor for any injury to the substance of the estate, unless the removal of the lemon trees may be deemed such. And, under the facts and circumstances of this case, I think the plaintiff is estopped from claiming that the lemon trees ever became a part of her estate in the land, and consequently that she suffered no actual damage in consequence of their removal by the defendant. While the adverse possession of the defendant was not of sufficient duration to give him title to the land, and though there was no express agreement that the Hawley line should be adopted as the true division line, yet, as was said by this court in *Helm v. Wilson*, 76 Cal. 486, 18 Pac. 604: "It has been held that, even without any agreement more than is implied from their acts, if two persons trace their dividing line, and, both recognizing it as such, one goes forward with the knowledge and acquiescence of the other, and makes valuable improvements, so valuable as to work great injury to the party making them if the line be disturbed, the other will be estopped from afterwards alleging such mistake as will deprive the builder of his improvements, and especially if the party seeking to disturb the line knew at the time the improvements were made all that he subsequently learned, or if he had the means of knowledge. *Dolse v. Vodicka*, 49 Mo. 98; *Walt, Act. & Def.* 718, and cases cited." The foregoing quotation is substantially a quotation from the opinion of the court by Bliss, J., in the case cited (*Dolse v. Vodicka*), wherein the learned justice further said: "The kind of possession necessary to give title under the statute of limitations is not necessary to be considered, and though the decisions in regard to estoppel in pais in cases of this kind are not entirely harmonious, yet the doctrine as here announced is founded in equity, and cannot be controverted in principle." The action was ejectment for a strip of plaintiff's land on which the defendant had built a portion of a valuable brick house, through an innocent mistake of both parties as to the true location of the division line between their

adjoining lots, induced by an erroneous survey by their common vendor. *McKelway v. Armour*, 10 N. J. Eq. 113, is a case in which the complainant was relieved from the consequence of a similar mutual mistake of the parties. In that case "complainant erected a valuable dwelling house, by mistake, on the land of the defendant; defendant lived in the vicinity, saw complainant progressing from day to day with the improvements, and admitted that he did not suspect the erections to be on his lot until some time after their erection, when by actual measurement, to his surprise, he discovered the mistake." The court of errors and appeals, by the chancellor, said: "Under such circumstances it would be most unjust to permit Armour to take these improvements, and to send the complainant away remediless. It is very true, as was urged upon the argument, the complainant is the most to blame in this matter. A diligent examination of the deed to Armour, and an actual measurement of the land, would have decided the difficulty. But it was a vacant lot of land, plotted out upon a map only, and the mistake was one which might occur to the most careful and diligent man. The fact of Armour's standing by and participating in the mistake is an important feature in the case." In *Wickliffe v. Clay*, 1 Dana (Ky.) 586, it was held by the court of appeals that "where one in the possession of land, held bona fide as his own, has erected buildings thereon, he (or those claiming under him) may remove them without incurring any responsibility to the owner of the paramount title." In that case the building erected and removed was a stable. The court, by Chief Justice Robertson, said: "There is no reason to doubt that Lytle took possession of the lot, not as a willful trespasser, but in good faith (not then knowing or apprehending that it was the property of Phillips and wife), and that, whilst thus possessed, he erected the stable in equal good faith; and, therefore, he, or any other person claiming under him, had a perfect right, according to the doctrines of the civil law, altogether consistent in this respect with the principles of the common law, to remove the stable, without doing any injury to the lot itself, whilst he was in possession; and, consequently, by such a removal no liability was incurred to the true owners of the lot." As to estoppel by tacit acquiescence, see, also, *Scott v. Jackson*, 89 Cal. 258, 26 Pac. 898. But, aside from the doctrine of estoppel, there are at least two classes of decisions utterly inconsistent with the allegation that plaintiff suffered actual damage in consequence of the removal of the lemon trees; namely, decisions as to the grounds and measure of damage suffered by persons whose lands are

condemned for public use, in which it has been held that, although the owner is entitled to full compensation for the land taken, and for all permanent improvements thereon made by himself or by those from whom he derived title, yet he is not entitled to damages for improvements made by the party at whose suit the land is afterwards condemned, though made by such party without authority of law or the consent of the owner of the land (*Railroad Co. v. Hesser*, 84 Cal. 435, 24 Pac. 288, and cases there cited; *Railroad Co. v. Taylor*, 86 Cal. 246, 24 Pac. 1027); and decisions allowing the value of permanent improvements made by an adverse possessor in good faith to be set off against the actual damages suffered by the owner of the land (*Sedgw. Dam. § 915 et seq.*; *Code Civ. Proc. § 741*). All the reasons advanced in support of the decisions in these classes of cases seem equally applicable to the case at bar, and quite sufficient, without aid from the doctrine of estoppel, to warrant the conclusion that plaintiff suffered no actual damage in consequence of the removal of the lemon trees. Whatever might be the effect of sustaining the contention of appellant that plaintiff had regained possession of the land before defendant removed the trees, it is enough to say the court found that the plaintiff was not in possession of the land at the time the trees were removed, but that the land was then, and for about one year next before that time had been, in adverse possession of the defendant, and that this finding is justified by the evidence.

Second. In actions ex delicto nominal damages are often given, though no actual damage has been suffered; but a judgment for such damages is justified only on the ground that it conserves some right of the plaintiff which has been nominally infringed, and which might else be lost by acquiescence and lapse of time. *Sedgw. Dam. §§ 99, 100*. In this case, however, no right or title of the plaintiff is jeopardized by denying her nominal damage, since defendant acknowledged her title and right of possession, and voluntarily surrendered to her the exclusive possession of the land before the commencement of this action. Besides, appellant makes no point here relating to nominal damages. If the views above expressed are correct, they obviously answer all points made by appellant, though some of them have not been expressly noticed.

I think the order and judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, J.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

(108 Cal. 227)

O'BRIEN v. NEW ZEALAND INS. CO.
(No. 18,349.)

(Supreme Court of California. July 24, 1895.)

INSURANCE—UNAUTHORIZED CONTRACT.

An insurance company is not liable for loss on a building burned before the application for insurance was mailed to it, merely because the local agent, when application was made, told applicant that his insurance would begin at the time; he having no actual or ostensible authority to make a contract, and the building being one of a class which the company did not insure; and it makes no difference that at the time of the application the special agent of the company, who had no authority to enter into contracts, was present and approved of it.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Thomas H. O'Brien against the New Zealand Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed.

W. S. Goodfellow and L. L. Cory, for appellant. J. D. Meux, for respondent.

GAROUTTE, J. This is an action upon a contract of fire insurance, and defendant is appellant, as is usual in that class of cases. One Peters was defendant's local agent in the town of Reedly, Fresno county, and under his commission as agent he had no authority to enter into a contract of insurance. But he was appointed subagent "to receive proposals for insurance, and fix rates of premium, and to receive money for policies and certificates of insurance." Upon July 2, 1892, plaintiff, O'Brien, made a written application to Peters, upon one of defendant's blanks, for insurance upon his saloon, building and fixtures. This application, accompanied by a letter from Peters, was deposited in the post-office July 5th, addressed to defendant at San Francisco. The letter referred to the inclosed application, with the suggestion that the company should place the insurance, if it was deemed advisable. The plaintiff's building was occupied as a liquor saloon, and defendant did not take insurance upon saloons, and the agent, Peters, knew this fact. When the application was made, the agent informed plaintiff that he was insured from that time. Upon July 4th, which was between the time of the making of the application and the time when the application was mailed to defendant, the property was destroyed by fire. It thus appears that the building was destroyed, not only before the application for insurance was passed upon by the defendant, but before the application was ever heard of by the company.

As suggested, the agent, Peters, had no authority to enter into a contract of insurance with plaintiff. His powers did not go to that extent. Under a commission of authority in all material respects similar to the authority possessed by Peters, it was held in *Stewart v. Insurance Co.*, 102 Cal. 218, 36 Pac. 410, that the agent had no actual authority to

enter into a contract of insurance. In that case it was an application for the renewal of a policy, and the court said: "The proposal of plaintiff made to such agent for a renewal of said policy was, until communicated to and accepted by defendant, nothing more than a mere offer upon the part of plaintiff to renew such policy." That there was no actual contract of insurance in this case, as far as defendant is concerned, is apparent at a glance, for the contract could only be made with the defendant, and the defendant knew nothing of it. The defendant had the right to reject the application when presented, and until it was presented and granted no contract was possible. If there was a contract of insurance in force from July 2d until the application reached the defendant, then it was equally in force after that time and during the entire period covered by the policy; but such a construction would deprive the defendant of the right to reject unsatisfactory applications, and place the power of contracting in the hands of agents like Peters, a result diametrically opposed to its purposes and practices. Peters was not only lacking in actual authority to enter into a contract of insurance with plaintiff, but the evidence fails to show any ostensible authority in him. Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess. Civ. Code, § 2317. Certainly in this case the company did not intentionally cause plaintiff to believe that Peters had authority to make a contract of insurance, and there is not a word in the evidence to indicate a want of ordinary care upon defendant's part, which caused or allowed plaintiff to believe that Peters was clothed with any such authority. It would seem to follow inevitably that, this agent having neither actual nor ostensible authority to make a contract of insurance, plaintiff must fail of recovery.

The agent, Peters, told plaintiff that he had no power to write policies, and that the application would have to be forwarded to defendant at San Francisco. This statement would indicate that Peters did not attempt to enter into a contract of insurance with plaintiff, and that plaintiff probably so understood it. If this were all the evidence, there could hardly be a question about it, but it appears that Peters, at the time of the application, told plaintiff that his insurance would begin at that time. While this statement may have resulted in misleading plaintiff, it could have no possible binding effect upon the company defendant. At best, it was but the agent's conclusion as to the legal effect of the transaction, and any loss suffered by plaintiff by reason of this mistake of the agent is a matter to be settled between them. A reasonable view of the meaning of the agent's language would seem to be that the policy would take effect as of the date of the application, if the application were accepted, for,

until action upon it by the company, it was impossible to say whether or not it ever would take effect.

It is attempted to bring this case within the principle declared in *Harron v. Insurance Co.*, 88 Cal. 18, 25 Pac. 982, but the facts do not justify it. Borchers, the special agent of the company, was not authorized to enter into contracts of insurance. He had no more authority in this regard than the subagent, Peters, and, not having power to enter into contracts himself, he necessarily had no authority to delegate such a power to Peters. His appearance upon the scene, pending the negotiations for this insurance, fails to strengthen the plaintiff's case. Looking at the case from all sides, we think it would be a manifest injustice to require defendant to pay the loss suffered by plaintiff. This company did not insure saloon buildings, and the application would most probably have been rejected, as far as defendant was concerned, upon presentation. We conclude the defendant assumed no risk, and is liable for no loss.

For the foregoing reasons the judgment and order are reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

108 Cal. 240

RIVERSIDE WATER CO. v. GAGE. (No. 19,529.)

(Supreme Court of California. July 28, 1895.)

DENIAL OF NEW TRIAL—REVIEW ON APPEAL—PLEADINGS AND EVIDENCE—STATEMENT ON APPEAL—SPECIFICATIONS OF ERROR.

1. On appeal from the denial of a new trial in a case tried by the court, the record being brought in a statement of the case, the sufficiency of the findings to support the judgment, or whether they correspond to the issues presented by the pleadings, or what issues the pleadings present, cannot be considered.

2. Evidence in a case cannot be considered on an issue not presented by the pleadings.

3. It is not to be assumed that, because the statement of a case on appeal does not show that objection was made to evidence therein outside the issues before the court, it was received without objection.

4. Specifications as to insufficiency of evidence will not be considered unless the parts of the record showing it are pointed out.

Department 1. Appeal from superior court, San Bernardino county; James A. Gibson, Judge.

Action by the Riverside Water Company against Matthew Gage. From an order denying a new trial, defendant appeals. Affirmed.

Fox, Kellogg & Gray and Byron Waters, for appellant. R. E. Houghton, for respondent.

HARRISON, J. An appeal from the judgment in this action has been heretofore heard and determined. 89 Cal. 410, 26 Pac. 889. The present appeal is from an order denying the defendant's motion for a new trial, made subsequent to the affirmance of the judgment.

The main portion of the argument on behalf of the appellant is that, inasmuch as the evidence before the court showed that the defendant is the owner of lands riparian to the Santa Ana river above the plaintiff's point of diversion, the plaintiff could not acquire a right of diversion by prescription against defendant, as such riparian proprietor, and that the decree, in so far as it deprives him of any riparian rights, is erroneous. We are of the opinion, however, that this question does not arise upon the present appeal.

Upon the appeal from an order denying a new trial, when the cause was tried by the court, and the record of its action is brought here in a statement of the case, the only questions to be considered are the sufficiency of the evidence to justify the findings of the court, and whether any errors of law occurred at the trial. Whether the findings are sufficient to support the judgment, or correspond to the issues presented by the pleadings, as well as what issues the pleadings present, are questions which can be considered only upon an appeal from the judgment, and do not arise upon an appeal from an order denying a new trial. *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186. "A new trial is a re-examination of an issue of fact in the same court, after a trial and decision by a jury or court." Code Civ. Proc. § 656. And only those matters applicable to the determination of that issue are proper to be considered upon a motion for a new trial. If the finding upon the issue is in accordance with the evidence, it is irrelevant to the motion for a new trial that the finding has not been given proper effect in the judgment, since upon another trial the same evidence must result in the same finding.

Upon the appeal from the judgment herein, one of the questions before the court was a determination of what issues were presented by the answer of the appellant, and whether his right as a riparian owner to divert any portion of the stream was one of those issues; and it was held that this issue was not presented by his answer, the court saying in its opinion: "In short, we think the answer insufficient to raise any issue as to the extent of defendant's right, as a mere riparian proprietor, to divert and exhaust any portion of the waters of the stream. * * * It was not necessary, therefore, to support the conclusions and judgment of the court, to find that the plaintiff had gained a prescriptive right, or that the defendant was barred of his riparian right; and, conceding these findings to be as insufficient as appellant contends they are, we think the other findings cover all the material issues, and fully support the judgment." With this decision upon the character of the answer, we are precluded from considering whether the evidence shows that the defendant was a riparian proprietor above the point at which the plaintiff diverts the waters of the stream, or, conceding that he

was, whether the plaintiff could acquire a prescriptive right against him to divert any of the waters of the stream. It is urged by the appellant, however, that, inasmuch as some of the evidence which he introduced at the trial shows that he was such riparian proprietor, it must be held that the cause was tried upon the theory that this issue was before the court, and therefore is proper to be reviewed upon this appeal. It has been held that when an issue has been tendered by the plaintiff, and evidence upon that issue has been introduced at the trial by both parties, without objection, upon the assumption that an answer, though defective in form, raises the issue, the parties would not be permitted to contend for the first time upon an appeal that such issue was not before the court. This rule, however, has no application to a case where, at the trial, evidence is introduced which is outside of any issue presented in the pleadings; and, under the decision of this court that the issue contended for by the appellant is not presented in his answer, it cannot be held that this evidence was received at the trial in support of such issue. Nor is it to be assumed that, because the statement contains evidence outside of the issues before the court, it was received without objection. The party preparing the statement is required to place therein only such errors as he desires to have reviewed, and any objections or exceptions to the introduction of evidence that may have been made by the prevailing party have no place in such statement. In *re Gates*, 90 Cal. 259, 27 Pac. 195; *Klauber v. Car Co.*, 98 Cal. 105, 32 Pac. 876. If the appellant would rely upon the fact that no objection was made to such evidence, he should make it clearly to appear that such was the case. It is frequently the case that evidence which is admissible to establish one issue may tend to establish another issue than that for which it is offered, and it is a rule that evidence so introduced is available to establish any of the issues in the case. This rule is, however, limited to the issues which are to be tried. If the other issue that the evidence may tend to establish is not before the court, the evidence must be limited to the actual issue. The fact of its introduction cannot be used to establish an issue that the parties have not made in their pleadings. The court would not be authorized to consider it as establishing an issue that was not before it for trial. Even a finding upon such evidence would be disregarded in determining the correctness of the judgment. We hold, therefore, that, as it has been once determined in this case that the right of the appellant, as a mere riparian proprietor, to divert any portion of the waters of the stream was not an issue before the court, any evidence offered at the trial which would tend to establish such issue did not authorize the court to make a finding upon that issue, and its failure to make a finding thereon was not error. As the issue was not in the action,

the court was not authorized to make a finding thereon; and, if it had made such finding, it could not have been considered as a basis for the judgment.

In the statement prepared by the appellant he has specified 19 errors of law as committed at the trial, and 22 points in which the evidence is insufficient to sustain the decision of the court. In his brief, however, he has referred to only 2 of these errors of law, and has disposed of the insufficiency of the evidence as follows: "The specifications of insufficiency of the evidence to justify the decision are ample to cover the discussions above written. Those specifications are found on folios 3943 to 3972, and we refer to numbers 1, 2, 6, 7, 15, 16, and 17." The statement of the case is contained in two volumes of upwards of 500 pages each, but, as counsel has not deemed it of sufficient moment to call our attention to the portions of the record which would illustrate these specifications, we can only infer that he was unable to do so. We have frequently stated that, if counsel do not point out the errors in the record, we shall not search it to ascertain if there are any.

The errors of law to which he has directed our attention do not require extended consideration. The objection to the instruments offered went to their effect as evidence, and not to their admissibility. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(5 Cal. Unrep. 99)

LUDY v. COLUSA COUNTY. (No. 18,403.)
(Supreme Court of California. July 27, 1895.)

ROAD OVERSEER—AUTHORITY TO DO WORK.

1. Under Pol. Code, § 2645, providing that road overseers, under the direction and supervision of the road commissioners, and pursuant to orders of the board of supervisors, must take charge of the highways in their districts, and shall employ the necessary help and keep the highways in good repair, the order of the road commissioner of a district is sufficient authority for the overseer to have repairs done on the road and materials furnished therefor.

2. A road overseer has sufficient authority to make repairs on roads and obtain material therefor, he having kept within the directions of the road commissioner, who, speaking to him in reference to work on the roads, told him not to work in excess of the funds of the district.

Department 1. Appeal from superior court, Colusa county; E. A. Bridgford, Judge.

Action by W. W. Ludy against the county of Colusa, for work done as road overseer. Judgment for defendant. Plaintiff appeals. Reversed.

M. J. Keys, for appellant. Ernest Weyand, for respondent.

GAROUTTE, J. Plaintiff was road overseer of road district No. 6, Colusa county. As such road overseer, during the fiscal year 1890-91, he individually performed work upon

the roads of that district and employed others to do the same, and, at his instance and request, materials were furnished to be used, and which were used, in the repair of the roads of such district. Claims in proper form for the amounts due for this labor and these materials were presented by the various parties to the board of supervisors of Colusa county. These claims were rejected, and thereafter, being assigned to this plaintiff, action was brought to recover judgment thereon. Judgment went for defendant, and this appeal is from such judgment and from the order denying the motion for a new trial.

Defendant, by its answer, admits that the labor was performed upon the roads of road district No. 6, and that the materials were furnished for the benefit and repair of such roads, and that said labor was done and materials furnished at the special instance and request of plaintiff, as road overseer; but defendant denies that this labor was done and materials furnished upon the order of the board of supervisors. The court found as a fact that the work done, money expended, and materials furnished were not in pursuance of any order of the board of supervisors of Colusa county, or of the road commissioner of road district No. 6. Judgment for defendant appears to have been based largely upon the foregoing finding of fact, and we think the evidence fails to support it, for the reasons hereafter stated.

Section 2645 of the Political Code provides: "Road overseers, under the direction and supervision of the road commissioners, and pursuant to orders of the board of supervisors, must take charge of the highways within their respective districts, and shall employ all men, teams, watering carts, and all help necessary to do the work in their respective districts, * * * keep them clear from obstructions and in good repair." Under this statute, there is no question but that the road commissioner of this district was authorized to order the work done and the materials furnished which were charged for in the claims presented to the board of supervisors, and which form the basis of this action. The road commissioner, Herd, was the only witness whose testimony in any way bore upon the finding of fact heretofore quoted. He testified, in effect, that he spoke to plaintiff Ludy in reference to work upon the roads, and told him not to "do work in excess of the amount of money apportioned; that is, not to run the district in debt in excess of the funds of the district." The court made an additional finding that "the entire indebtedness incurred against said road district No. 6, prior to the 12th day of May, including the claim of plaintiff, in the complaint alleged, for the fiscal year ending June 30, 1891, did not equal the receipts from said district for said year"; and, when we consider this finding, in connection with the evidence of the road commissioner, we have no doubt whatever but that Ludy

was clothed with ample authority to do this work, and contract for this material.

The question as to the transfer of certain moneys from the common fund to this road-district fund during the previous fiscal year, and retransfer thereof to the common fund during the year when these liabilities were created, appears to be an immaterial matter. Neither is it material that the territory comprising road district No. 6 was subsequently lost to Colusa county by the creation of Glenn county. The court made an additional finding, to the effect that plaintiff, as road overseer, did not procure this work to be done or the materials to be furnished. This finding is in direct conflict with the admissions of the pleadings, and this fact, of itself, would appear to necessitate a new trial of the case. While a general demurrer to the complaint was overruled, we think, upon a new trial, the issues would be more clearly defined by an amendment to the complaint, alleging authority in the road overseer to enter into these various contracts; and we recommend an amendment to the pleadings to that effect. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.

(108 Cal. 264)

GORDON v. CITY OF SAN DIEGO. (No. 19,574.)

(Supreme Court of California. July 29, 1895.)

DEED FROM CITY—PRESUMPTION OF DELIVERY—
AUTHORITY TO EXECUTE—PAROL EVIDENCE—
DEED BY TENANT IN COMMON—PARTITION—
ACQUIESCENCE OF COTENANT.

1. The presumption, declared by Civ. Code, § 1055, that a deed duly executed was delivered on the day of its execution, is not overcome by the fact that it was not acknowledged until six months after its execution.

2. Where the records fail to show that a deed by the city was authorized by the board of trustees empowered to sell the land, a member of the board may testify to the genuineness of the trustees' signatures to the deed, and that whenever a deed of city land was made by the trustees it was by order of the board.

3. Where a city conveyed an undivided half of a lot to one person, and then conveyed the west half of the lot to another person, evidence that, after the execution of the second deed, the east half of the lot was assessed to the grantee in the first, who paid the taxes thereon for several years, and that, after his death, his administratrix inventoried it as the property of the estate, is sufficient to warrant a finding that the first grantee elected to treat the deed of the west half as a partition of the lot.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by H. C. Gordon against the city of San Diego to quiet title. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Wm. H. Fuller and Clarence H. Barber, for appellant. Cassius Carter and Withington & Carter, for respondent.

HAYNES, C. This is a second appeal. Upon the former appeal the judgment against the city was reversed, and a new trial ordered, and upon such new trial the plaintiff again obtained judgment. The action is to quiet title to the east half of pueblo lot 1215, containing about 45 acres, situate in said city. For a general statement of the facts, see the opinion rendered upon the first appeal, reported in 101 Cal., at page 522, 36 Pac. 18. Only such different or additional facts as were developed upon the second trial need be stated here.

1. As affecting the validity of the deed to Whaley, it is now shown that, though the deed bears date February 27, 1869, it was not not acknowledged until August 21, 1869; and at the time it was acknowledged Schiller and Sloane, two of the trustees who were in office at the date of the deed, and who had joined in its execution, had ceased to be trustees. A deed signed and delivered, except where a married woman is the grantor, is good, and operates to convey the title, though not acknowledged. The object of an acknowledgment is twofold,—to entitle the instrument to be used as evidence without further proof, and to enable it to be recorded. *Fogarty v. Finlay*, 10 Cal. 239. *Estudillo*, the president of the board of trustees at the date of the deed, was still a trustee at the time it was acknowledged, and as to him, at least, it was properly acknowledged. There is no question in the case, however, which makes it necessary or important to determine whether the acknowledgment by the trustees whose term of office had expired was authorized or not, and that question is therefore not considered. It is contended by appellant, however, that the deed was not delivered until at or after the date of its acknowledgment, and that as the resolution of the trustees adopted June 8, 1868, prescribing the "only way in which pueblo lands will be granted," was repealed after the date of the deed, and before the date of its acknowledgment, and consequently before its delivery, there was no power to deliver the deed; or that, if it could then have been properly delivered, it could only be done by the trustees then in office. If the deed was delivered at its date, this contention cannot avail appellant. Counsel cite authorities, however, from seven or eight sister states, to the proposition that, when the date of acknowledgment is different from the date of the deed, the court must presume that the deed was not delivered until after it was acknowledged. It is not necessary to review these cases, or to question their correctness in the several jurisdictions in which they were decided. They merely state the presumption there indulged in the absence of proof; but here the presumption is declared by statute. Section 1055 of the Civil Code is

as follows: "A grant duly executed is presumed to have been delivered at its date." See, also, *Treadwell v. Reynolds*, 47 Cal. 171, where it was said: "That the date found in the body of the deed is presumptively the date at which it was delivered is not questioned. That this presumption, however, is not conclusive, but that the true date of delivery may be proved allunde, is also clear." In appellant's brief it is stated: "In the case at bar there is no proof of when the Whaley deed was delivered, only that which arises from filing it for record." There is, therefore, nothing to overcome or affect the presumption declared by the statute.

2. Appellant further contends that upon the second trial it was shown that the recitals in the Whaley deed were untrue, and that the city never sold any portion of pueblo lot 1215 to Whaley or to Babcock. This contention is based upon the fact that the minutes of the board of trustees contain no record of the sale to Whaley, nor of any meeting of the board held at the date of the deed to him, nor of any resolution or order directing the execution of that deed. It is not disputed that an election was duly held authorizing the sale of pueblo lands under the provisions of the statute, and a resolution passed by the board of trustees on June 8, 1868, prescribing the way and terms upon which pueblo lands would be granted, was read in evidence. Beyond this it does not appear that the statute, or charter of the city, prescribed any special action, proceeding, or formality to be observed in making sales or conveyances of these lands. Of course, the price and the particular parcel of land to be conveyed were left to be determined whenever any one applied to purchase, and these matters required official action by the board of trustees. It was held upon the former appeal that "the recitals in the deed, coupled with the law, are sufficient evidence to bind the parties, and show that title passed by the deed"; the objection then being that there was no showing by the plaintiff that the city ever passed a resolution authorizing the sale or transfer of the property described in the deed, appellant then assuming that it was necessary for respondent to assume the burden of showing that such resolution was passed. Upon the second trial it simply appeared that no such resolution appeared of record. But parol evidence is admissible to prove facts omitted from the record, unless the law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence. *Dill. Mun. Corp.* (4th Ed.) § 300; *Bank v. Dandridge*, 12 Wheat. 64. *Marcus Schiller*, one of the trustees who executed the deed to Whaley, was examined as a witness, and, while he had little or no recollection of this particular matter, testified to the genuineness of the signatures of all the trustees, and that "whenever we sold a piece of property and made a deed to it it was ordered by the board of trustees." It is true he also tes-

tified that a record was kept of these things by the secretary; but such omission, as we have seen, does not invalidate the action of the board. The court found "that said several deeds and the execution thereof were authorized by the defendant," and this finding, I think, is fully justified by the evidence.

3. The deed to Whaley, through whom plaintiffs claim, was executed February 27, 1869, and purported to convey "the undivided one-half" of pueblo lot No. 1215. On the next day after the execution and delivery of said deed to Whaley, the city, by the same trustees, conveyed to one Babcock "the west half of the same pueblo lot." Babcock's deed was first recorded. It is claimed by respondents, as it was upon the former appeal, that by the execution and delivery of the deed to Whaley, he and the city became tenants in common of said lot 1215; that by the conveyance to Babcock the city in effect made a partition of said lot, which, though not binding upon him, Whaley was at liberty to accept under or in analogy to section 764 of the Code of Civil Procedure, which is quoted in the former opinion, 101 Cal., at page 530, 38 Pac., at page 21, where also several authorities are cited. Following these citations it was said: "All the authorities are to the effect that a sale by a tenant in common by specific bounds of a portion of the land in common is not binding upon his cotenant unless ratified by him. I fail to find in the record any evidence of ratification by Whaley, or those holding under him;" and upon that ground alone the former judgment was reversed. Upon the first trial, the deeds to Whaley and Babcock, respectively, were put in evidence, and it was stipulated at the trial "that the plaintiff in this action succeeds by proper mesne conveyances to any title or interest in and to said pueblo lot No. 1215, which was conveyed to Thomas Whaley by the deed dated February 27, 1869." Upon the second trial, plaintiff obtained leave to file a supplemental complaint, in which it was alleged, among other things, that since the commencement of the action the plaintiff had obtained from the estate of Thomas Whaley, deceased, a deed dated September 17, 1892, conveying to the plaintiff the east half of said pueblo lot, and that plaintiff had subdivided said east half into specific lots; and by a subsequent amendment it was alleged that the plaintiff, Gordon, had conveyed one of the four lots into which said east half of the pueblo lot had been subdivided to Flora R. Young, and the other three to Cassius Carter, who were then the owners of said property, and who were substituted as plaintiffs in the action. The defendant's demurrer to the supplemental complaint was properly overruled. It was a general demurrer, and all the allegations necessary to be stated in a complaint, in an action to quiet title, were repeated therein. The defendant then answered, and put in issue, by specific denials,

each and every of the allegations of the supplemental complaint. Instead of relying upon the stipulation, which upon the first trial was the only evidence of plaintiff's title, and which showed no act of ratification by Whaley or his successors in interest, in the partition claimed to have been effected by the conveyance of the entire west half of the lot to Babcock, it was shown upon the second trial that in 1886 the taxes on the east half of said pueblo lot 1215 were paid by T. E. Whaley; in 1887 said east half was assessed to Francis E. Whaley, and the taxes were paid by Whaley and Dalton; in 1888 the said east half was assessed to T. F. Whaley and paid; in 1889 and 1890 it was assessed to Thomas Whaley and he paid the taxes; and in 1891 it was assessed to the estate of Thomas Whaley. All these assessments were upon the east half of said lot, and said taxes were paid to the city. Thomas Whaley, the original grantee of the city, died without having made any conveyance of said east half, or of any interest in said pueblo lot. After his death, his widow was appointed administratrix of his estate, and in the inventory, which was filed before any conveyance to Gordon, the interest of the estate in said pueblo lot 1215 was described as the east half thereof; and, by the same description, proceedings were afterwards taken by her, in probate, to sell the same, and by the same description said premises were afterwards sold and conveyed to plaintiff, Gordon, under said proceedings. Appellant does not contend that plaintiff did not, at the commencement of the action, have all the title Whaley ever had, but contends that Whaley never had any title, for the reasons hereinbefore stated; or that, if he had any title or interest in the east half of said pueblo lot, it was only of the undivided half of said east half; and that the court erred in admitting evidence of facts transpiring after the commencement of the action. It is true that, if there was no cause of action at the time the suit was commenced, the plaintiff could not, under a supplemental complaint, give evidence of a cause of action which accrued afterwards. In *Gleason v. Gleason*, 54 Cal. 135, it was said that, as a general rule, the right to file a supplemental complaint can be exercised only with reference to matters which may be consistent with and in aid of the case made by the original complaint, and it is not allowable to substitute a new and independent cause of action by way of a supplemental complaint. See, also, *Jacob v. Lorenz*, 98 Cal. 332, 337, 33 Pac. 119.

If there were any question as to the correctness of the rulings of the court in admitting in evidence matters occurring after the suit was commenced, inasmuch as, for many years prior to the death of Thomas Whaley, the east half of said pueblo lot was assessed to him by the city, that he paid the taxes thereon, thus assenting to the con-

veyance to Babcock as a partition of said lot; that his wife, who must be presumed to have been familiar with the manner in which her husband had treated the property up to the time of his death, described said property in the inventory filed by her as administratrix as the east half of said lot, and not as an undivided half of the entire lot,—are quite sufficient to sustain the findings and judgment. And that being true, even if the court erred in admitting the evidence touching occurrences after suit began, such error would be harmless. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

107 Cal. 602

RANKIN v. NEWMAN et al. (No. 15,731.)
(Supreme Court of California. July 29, 1895.)

In bank.

Petition for hearing in bank. Denied.

For former report, see 40 Pac. 1024.

PER CURIAM. In this cause the petition for hearing in bank is denied, but the judgment hereinbefore entered in department is modified by adding thereto: "The respondent to recover his costs on this appeal."

108 Cal. 235

HOTCHKISS v. SMITH. (No. 18,378.)
(Supreme Court of California. July 29, 1895.)

COSTS—EXPENSE OF KEEPING ATTACHED PROPERTY—FAILURE TO INCLUDE IN COSTS.

Under Code Civ. Proc. § 1033, providing that a party in whose favor judgment is rendered, and who claims costs, must deliver to the clerk and serve on the adverse party a memorandum of his costs and disbursements, sheriff's fees, and expenses for keeping attached property, not included in the memorandum, are waived.

Department 1. Appeal from superior court, Modoc county; G. F. Harris, Judge.

Action by Sarah Hotchkiss against V. L. Smith. Judgment was rendered for plaintiff, and from an order denying defendant's motion that it be satisfied, he appeals. Reversed.

Spencer & Raker and Clarence A. Raker, for appellant. D. W. Jenks, for respondent.

VAN FLEET, J. This is an appeal from an order denying defendant's motion, made under section 675, Code Civ. Proc., to have satisfaction of judgment entered. The only question involved is whether plaintiff is entitled on execution, as a part of her judgment, to be paid an item of sheriff's fees and expenses for keeping property held under a

writ of attachment, when such fees and expenses were not claimed by plaintiff in her memorandum of costs, and consequently not included in the judgment. Section 1033, Code Civ. Proc., provides: "The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk and serve upon the adverse party, within five days after the verdict, a notice of the decision of the court or referee—or, if the entry of the judgment on the verdict or decision be stayed, then before such entry is made,—a memorandum of the items of his costs and necessary disbursements in the action," etc. And section 1035, Code Civ. Proc., provides that the costs shall be included in the judgment. The effect of these provisions is that all costs and disbursements incurred in the action must, in order to be recovered by the prevailing party, be included in the memorandum of costs filed by the party. This includes all items of costs or necessary disbursements incurred up to the time of the rendition of judgment, and a failure to claim such costs, or any item thereof, in the manner required by the statute, is deemed to be a waiver of such costs, and precludes a recovery thereof. Riddell v. Harrell, 71 Cal. 260, 261, 12 Pac. 67; Sellick v. De Carlow, 95 Cal. 644, 30 Pac. 795; Chapin v. Broder, 16 Cal. 403. The sheriff's charge for keeper's fees and expenses was a part of the necessary disbursements incurred by plaintiff in the action, and which she would have been entitled to recover against defendant, but, being costs and disbursements incurred before judgment, it was incumbent upon plaintiff to include and claim them in her cost bill, or they were waived. The statute makes no distinction between such disbursements and any other items of cost or expense incurred before judgment. The sheriff, judging from his return on the execution, seems to have proceeded upon the assumption that the keeper's fees and expenses were a part of his "accruing costs," under section 691, Code Civ. Proc., and so chargeable against defendant, without being included in the judgment; and such would seem to be the theory adopted by plaintiff, so far as his brief tends to enlighten us. But that theory is entirely erroneous. Such items are in no sense "accruing costs," as that term is used in the statute, the latter being such fees and expenses only as are incurred in executing the judgment. The item for keeper's fees constituting no part of the judgment against defendant, the sheriff was not authorized to charge or deduct the amount thereof against defendant in applying the proceeds of sale to the satisfaction of the judgment. It appears that, exclusive of that item, the property sold under the execution brought more than enough, when properly applied, to satisfy plaintiff's judgment, including the amount of costs claimed in her cost bill to which she was entitled, and the accruing cost; and, this being so, the de-

pendant was entitled to have the proceeds so applied, and to have the judgment satisfied. The order is reversed, and the court below directed to grant the motion.

We concur: HARRISON, J.; GAROUTTE, J.

108 Cal. 273

HAMILTON v. SAN DIEGO COUNTY et al.
(CORONADO SCHOOL DIST., Intervener). (No. 19,543.)

(Supreme Court of California. July 29, 1895.)
SCHOOL DISTRICT—IRREGULAR ORGANIZATION—EXISTENCE DE FACTO—FUNDS TO ITS CREDIT—DISPOSAL OF.

1. Where a board of supervisors, believing that certain territory within the limits of a city is outside of such limits, form a school district out of the same, and the trustees appointed exercise the powers of school trustees, and taxes are levied for the district, and, on an election by the voters of the district, bonds are issued to buy land and build a schoolhouse, one who paid taxes so levied cannot recover the same out of funds in the hands of the county treasurer to the credit of the district, on the ground that the board of supervisors had no authority to organize the district, as the district had, at least, a de facto existence.

2. Where a de facto school district issues bonds, money deposited by it with the county treasurer to pay the bonds should be applied to the payment thereof, and not paid to a school district legally organized in place of the old one.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Charles S. Hamilton against county of San Diego and another to recover taxes paid. The Coronado school district filed a complaint as intervener, and a demurrer thereto was sustained, and it appeals. Judgment was rendered for plaintiff, and defendants appeal. Judgment as to intervener affirmed, and as to defendants reversed.

M. L. Ward and Parrish & Mossholder, for appellants. E. W. Hendrick and A. C. Younkin, for respondents.

BRITT, C. Coronado Beach, formerly known as the peninsula of San Diego, was for several years the subject of dispute as to whether it was within or without the territorial limits of the city of San Diego. A decision of the former district court, rendered in the year 1877, held it to be no part of such city. From the judgment in that case—not entered until 11 years later—an appeal was taken to this court, where the judgment was reversed, and it was determined that said peninsula is "within the limits of the city of San Diego, and land situated on said peninsula is subject to assessment and taxation for city purposes." *City of San Diego v. Grannis*, 77 Cal. 511, 19 Pac. 875. This was in December, 1888. The question arose in other forms (*People v. San Diego*, 85 Cal. 369, 24 Pac. 727; *Fisher v. Police Court*, 86 Cal. 158, 24 Pac. 1000); but the case of *City of San Diego v. Grannis* remained author-

itative as to the legal questions decided,—not to say the points of local geography involved,—and established that the peninsula was, and had been since the passage of the act to reincorporate the city of San Diego, April 1, 1876, an integral part of the city.

The present case grew out of that controversy. In January, 1887, the peninsula being then regarded as without the limits of the city, the board of supervisors of San Diego county took the proper formal steps for the organization of a school district comprising that portion of the peninsula called Coronado Beach, South Island, under the name of "Coronado School District of San Diego County." And the case shows that from and after January 10, 1887, during all the times mentioned in the complaint,—some four years,—the said "so-styled Coronado school district (although said Coronado Beach, South Island, was wholly within the boundaries of the city of San Diego, in said county, and was part of the territory of the San Diego school district, constituted by said city) assumed to exercise and did exercise all the powers and franchises and discharge the duties of a school district organized under the laws of the state of California, * * * exclusive of any other school district, and had an acting board of three persons, who assumed to be its board of trustees; that, among other things, up to December 12, 1888, it received and expended apportionments of state and county school moneys on the same basis with other school districts established within said county, employed teachers, maintained public schools out of said moneys within and for such district; and on November 14, 1887, at an election, in which were followed the forms of law, the qualified electors therein assumed to authorize the issue of bonds of said district to the amount of \$40,000, for the purpose of purchasing a site for a school building, and building a schoolhouse thereon; that, pursuant to the result of said election, the board of supervisors of said county issued the bonds of said district to the amount of \$38,000, and caused the same to be sold at par;" that the proceeds were applied to the purchase of land and the erection of a schoolhouse thereon within said assumed district, and such land was conveyed by deed to the district. And thereafter, in each of the years 1888, 1889, and 1890, the said board of supervisors, at the time of making the levy of taxes for county purposes, levied a tax upon the property within said so-styled Coronado school district, sufficient to pay the interest on the said bonds and such portion of the principal of said bonds as was to become due during the year in which such levy was made. Of the taxes so levied the sum of \$5,412.66 was collected and paid into the county treasury; of which the sum of \$700 was paid out for interest on said bonds, and \$4,712.66 is yet in the hands of the county treasurer,—defendant Long. Plaintiff owned property within said Coronado school dis-

trict, and paid the taxes for the years 1888 and 1889, levied as above shown. He prosecutes this action to recover the sums paid by him, and also the sums paid for the same purposes, and under the same circumstances, prior to December 31, 1890, by numerous other owners of property within such district; they having assigned to him their respective claims therefor. The court finds that plaintiff and his assignors did not discover that said Coronado Beach was parcel of the San Diego school district until the month of August, 1893. Plaintiff's claim, itemized and verified, was presented to the board of supervisors of the county for allowance on September 30, 1893, and was rejected. The action was commenced October 7, 1893.

There was a complaint in intervention filed by a new "Coronado School District," alleging, among other matters, that on October 16, 1890, the territory included within said former so-called Coronado school district was regularly segregated and excluded from the city of San Diego and from said San Diego school district. That thereafter the territory so excluded was incorporated into and named the "City of Coronado," and a new school district was thereby formed, now known and described as "Coronado School District,"—the intervenor. We may suppose that the exclusion of such territory was accomplished in virtue of the proceedings required by the judgment in *People v. San Diego*, 85 Cal. 369, 24 Pac. 727. Said intervenor further alleged "that said intervening school district is the successor of said first-described Coronado school district, and as such is the owner of and is entitled to the use of said money deposited in the county treasury"; and prayed that the court "decree that, since said money cannot be applied to the purpose for which it was paid in, it be applied as nearly as possible to such purpose, to wit, paying for school buildings for said intervening school district." The court sustained a demurrer to the complaint of the intervenor, on the grounds that it had no interest in the matter in litigation, and for want of facts to constitute a cause of action against any of the other parties, and dismissed its complaint. Plaintiff recovered judgment directing that the amount claimed by him—\$1,269.63—and costs "be paid out of the special so-called fund known as the Coronado school bond and interest fund." Defendants appeal from the judgment and an order denying a new trial; and the intervenor appeals from the judgment dismissing its complaint.

A school district is a corporation organized for educational purposes (In re Bulmer's Estate, 59 Cal. 131); and, as the law stood in 1887, "each county, city or incorporated town, unless subdivided by the legislative authority thereof, forms a school district" (Pol. Code, 1576). By sections 1577-1579 of the same Code the county board of supervisors was clothed with the power to establish new school districts within the county. It

is contended by defendants that these various sections, construed together, gave to the board of supervisors power which it regularly exercised in the erection of Coronado Beach into a separate school district, by the proceedings taken in January, 1887; that, failing this proposition, such district was at least a corporation de facto, whose existence cannot be assailed in this collateral manner; while, in the view of plaintiff, the only power to create the Coronado school district in the year 1887 resided, under said section 1576, in the municipal governing body of the city of San Diego,—its city council,—and the attempt of the county board of supervisors in that behalf "could not be even such a semblance of authority as would give it a de facto existence." We shall assume, for the purposes of the decision, that the power under the statute to form the new district rested in the city council, and not in the board of supervisors. We are to inquire if there was such an attempt to impress the character of a corporation upon the Coronado school district, followed by the assumption and discharge on its part of the duties pertaining to such district, as to bring it within the operation of those principles of public policy by reason of which the law will impute to it, for some purposes, the status of a lawful corporation; that is, will treat it as a corporation de facto. (1) In the first place, although a part of the district composed of the city of San Diego, yet it was legally capable of segregation as an independent district. Pol. Code, 1576. (2) The board of supervisors of the county was a body having power under the law to organize new school districts in San Diego county. The respondent says the order of the board was of no more moment than if made by the czar of Russia; but the illustration is not apt. A foreign government having no authority whatever within our borders could make no order in such a matter which would not be void on its face; while here, the order of the board of supervisors—acting as the board did within the lines of the statute (Pol. Code, 1577-1579)—was valid on its face, and only invalid because of the fact, then unknown, that the territory in question was within the limits of an incorporated city. The case shows affirmatively that it was believed to be and was dealt with as if outside those limits. (3) The order purported to form and establish into a school district the said territory, with a designated name, in formal compliance with the statute prescribing the mode for accomplishing that object. (4) Thereafter the district so organized exercised the powers and discharged the duties of a school district in the same manner as if its organization had been legally perfect; contracted debts and acquired and held property in its corporate name for the public purposes it undertook to promote. (5) This was done to the exclusion of any other district; that is, no other district maintained a school or

performed other office of such a corporation within its confines, the district of San Diego having abdicated its functions, at least not attempting to discharge them, within those limits. Had both districts been endeavoring to exercise the same powers in the same territory a different question would be made. 1 Dill. Mun. Corp. § 184. (6) There was acquiescence, not merely by the San Diego school district, but by the county and state, in the assumption of such corporate prerogatives by the new district. The county officers levied and collected taxes in its behalf, and there was apportioned to it, and it expended, school moneys of both the county and state in like manner as other school districts in the county. (7) The plaintiff here and his numerous assignors, owners of property included within the district, recognized its corporate existence by paying taxes for its use in discharging the debts it had incurred. True they did this, as the court finds, under a mistake as to the legal creation of the district, but that is immaterial; well-nigh every merely de facto corporation is the result of the omission or mistake of somebody, or some body of people. We are of opinion that the district had a de facto existence. In the elements above enumerated we see nothing wanting to give the color of legality to its organization, or to render it impolitic to allow the collateral impeachment of such existence. The same rule which recognizes officers de facto applies to corporations de facto. *Clement v. Everest*, 29 Mich. 20. It is one of policy,—to prevent public confusion and private injustice. And it seems to be settled that one assuming to act as a public officer may in some cases be such de facto, although he has not color of election or appointment by the only body which has power to elect or appoint him, and although the appointing or electing body under which he assumes to act had not the legal power. *State v. Carroll*, 38 Conn. 449; 5 Am. & Eng. Enc. Law, 103. The order of the board of supervisors purporting to create the district was the formal exercise of legislative power (*Hughes v. Ewing*, 93 Cal. 417, 28 Pac. 1067); and thereunder, everything having been done to constitute the district a corporation colorably, if not legally, the law, as we see it, refuses, in this incidental way, to declare all its proceedings void (*Attorney General v. Stevens*, 1 N. J. Eq. 378).

The constitution of Tennessee provided that no line of any new county created by the legislature should approach nearer than 11 miles of the courthouse of any existing county. An act was passed forming a new county, under which one of the lines was established within the prohibited distance, but this circumstance did not appear on the face of the act. It was, therefore, on its face, not unconstitutional. The new county collected taxes and exercised other jurisdictional rights up to the line so fixed. Held, that so long as the older county acquiesced in the boundary which cut

off part of its territory the right of the new county over such territory could not be questioned in any collateral proceeding; that only the older county could assert the invalidity of the boundary. *Speck v. State*, 7 Baxt. 46. A somewhat similar case received like treatment in Kansas. The court, citing many authorities, said: "When a public organization of a corporate or quasi corporate character has an existence in fact and is acting under color of law, and its existence is not questioned by the state, its existence cannot be collaterally drawn in question by private parties." In re Short, 47 Kan. 253, 27 Pac. 1005. In Michigan it was sought to review by certiorari the proceedings taken to form a new school district out of old districts; this was about 15 months after the proceedings were had. The court held that after lapse of such time it was presumed that the district had been organized in fact, officers elected, and expenses incurred; that any one desiring to contest the organization must proceed by quo warranto against the district or its officers. *Fractional Dist. No. 1 v. Joint Board*, etc., 27 Mich. 3; see *Stuart v. School Dist.*, 30 Mich. 74. In Arkansas, by mistake as to the tribunal having authority for such purposes, a town was formally organized by order of the circuit court of a certain county, when in fact it had no jurisdiction in the matter. Otherwise the organization was in accordance with the general law, and for several years the town continuously exercised the franchises of a corporation. It was conceded that the order was void; yet the supreme court held that the town "had been an existing de facto corporation all the time from 1873 till now; and many things had in good faith been done under it which it would be shocking now to undo." *State v. Leatherman*, 38 Ark. 81. See, further, *Ashley v. Board*, 8 C. C. A. 455, 60 Fed. 55; *Aller v. Town of Cameron*, 3 Dill. 198, Fed. Cas. No. 243; *School Dist. No. 2 v. School Dist. No. 1*, 45 Kan. 543, 26 Pac. 43; *City of St. Louis v. Shields*, 62 Mo. 247; *People v. Maynard*, 15 Mich. 463; *Cooley*, Const. Lim. 310. Respondent lays much stress on *School Dist. v. Linscott*, 99 Cal. 25, 33 Pac. 781; but that case does not touch the present question. We have assumed the correctness of the remark there (page 28, 99 Cal., page 781, 33 Pac.) that "after the incorporation of the city the board of supervisors ceased to have any power over the school districts within the city."

Since the Coronado school district had a de facto existence, the plaintiff could not have enjoined the collection of the taxes, nor have resisted an action for the same, on the ground of illegality of its organization (*Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514; *Dean v. Davis*, 51 Cal. 406; *Reclamation Dist. v. Turner*, 104 Cal. 334, 37 Pac. 1038; *Land Dist. v. Silver*, 98 Cal. 51, 32 Pac. 866); and, for reasons at least as strong, should not recover the money when paid. It follows also that the intervener has no standing to claim the mon-

ey in dispute. Under section 1887, Pol. Code, the taxes when collected were required to be "paid into the county treasury to the credit of such district, and be used for the payment of the principal and interest of said bonds, and for no other purpose"; and, whether the holders of the bonds have any further remedy on the same or not, a subject on which we intimate no opinion, it seems to us clear that on the facts disclosed by the present record they are entitled to the fund in question, to the exclusion of both the plaintiff and the intervenor. The judgment dismissing the intervenor's complaint should be affirmed, and the judgment against the defendants and the order denying their motion for new trial should be reversed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment dismissing the intervenor's complaint is affirmed, and the judgment against the defendants, and the order denying their motion for new trial, are reversed.

108 Cal. 369

FOX v. HALE & NORCROSS SILVER MIN. CO. et al. (No. 15,301.)

(Supreme Court of California. Aug. 3, 1895.)

TRIAL—CONFLICT OF EVIDENCE—CONVERSION OF BULLION—MEASURE OF DAMAGES—SPOILIATOR OF EVIDENCE—WHAT CONSTITUTES—AGREEMENT TO DEFRAUD CORPORATION—COMPENSATION FOR WORK THEREUNDER—SERVICE ON FOREIGN CORPORATION—ACTION FOR FRAUD—PROOF OF NEGLIGENCE—LIABILITY OF DIRECTOR FOR FRAUD OF OFFICER.

1. On an issue as to whether the amount of bullion that should be extracted from a quantity of ore should be estimated by the car or mill sample, witnesses for defendants testified that the mill sample was the customary standard, and that the car sample was used merely as a check. A witness for plaintiff testified that an assay from a car sample would average \$10 per ton more than from a mill sample, but stated that if, from the 50,000 to 100,000 tons of ore, a car sample was taken with the best known methods, it would approximately show the value of the ore, but that for returns from the mill, the mill samples were relied on, and that the car samples were merely a check. Another witness for plaintiff testified that if a fair sample were gotten from the car it would indicate the value of the ore, but the manner of the assay with which he was familiar was more complete than that with which the ore in question was treated, and that he had had no experience in mining such ore. A witness for defendant testified that car samples were taken as a check, and that if the mill assay did not show a proper percentage of the value shown by the car samples, complaint was made of the mill, but that the car samples assayed from \$6 to \$10 more than mill samples. *Held* to show that the car samples exaggerated the value of the ore, and that the mill samples are the better test.

2. A judgment for the conversion of silver bullion should be based on the coin value of the bullion, and not on the arbitrary standard value.

3. The doctrine that everything will be presumed against a spoliator does not apply to an action by a stockholder of a mining company

against a milling company for improperly extracting the bullion, so as to leave a large quantity in the ore to be afterwards worked over by defendant, because, in the process of milling, the identity of the ore was destroyed.

4. The fact that a witness for a party refused to produce books does not render such party a spoliator of testimony, no demand having been made for the production of the books.

5. Where the records of a company engaged in reducing ore show the quantity of ore received, and in a column headed "On account of," the names of a number of mining companies appear, the records do not show that the quantity of ore opposite the name of a mining company was produced at its mine.

6. Where a corporation for reducing ore agrees to pay the president and manager of a mining company a percentage on the profit of reducing ore received from such company, the intention being that the president should ship ore whether or not it is sufficiently rich in metal to be profitable, the company will be allowed only for the actual costs of treating the ore, without allowing for the use of its mill, though part of the ore shipped was sufficiently rich in metal to make the process profitable to the mining company.

7. Jurisdiction of a foreign corporation cannot be acquired by service on the superintendent of one of its mills who is in this state merely as a witness in the action.

8. One who sues another engaged in the reduction of ore to recover damages for fraud in treating the ore cannot recover for loss resulting from negligence.

9. Const. art. 12, § 3, providing that the directors of corporations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled by the officers, does not apply to all the directors, where the president of a mining company, without the knowledge of the other directors, agrees on behalf of the company to pay a milling company an excessive price for treating its ore in consideration of payment to him of part of the profits.

10. Objection cannot be made to the form of a judgment which follows the complaint, to which no objection was made.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hubbard, Judge.

Action by M. W. Fox against the Hale & Norcross Silver Mining Company and others for conspiracy. Judgment was rendered for plaintiff, and defendants appeal. Judgment affirmed in part, and reversed in part.

W. F. Herrin, Lloyd & Wood, Mesick & Waters, Garber, Boalt & Bishop, Edward R. Taylor, and M. M. Estee, for appellants. Wm. T. Baggett, L. D. McKisick, and E. S. Pillsbury, for respondent.

BEATTY, C. J. The Hale & Norcross Silver Mining Company is a corporation, organized under the laws of California, with its principal place of business at the city of San Francisco. It is the owner of one of the mining claims on the Comstock Lode, in the state of Nevada, where for many years it has been engaged in the business of mining gold and silver bearing ores. The plaintiff, M. W. Fox, since the year 1887, has been at all times a stockholder of said corporation. In August and September, 1890, he addressed communications to its board of directors, and to the individual members of the board, charging, in substance, that for three years

the corporation and its stockholders had been systematically plundered, and its property stolen, to the amount of more than \$2,000,000, by means of a fraudulent conspiracy and combination between said directors and the owners or lessees of the mills employed in the reduction of the ores extracted from the company's mine; that the devices resorted to in furtherance of the object of this conspiracy were the mixture of worthless rock with high-grade ores so as to obscure their value, and at the same time increase the quantity of material to be put through the mills; the concealment from the stockholders of the average value of the ores, as thus reduced; a fraudulent system of milling, by which only a small portion of the precious metals contained in the ores was returned to the company; and a disposition of the stolen bullion in a manner intended to conceal the theft. He further stated in his communication to the board that he was prepared to furnish sufficient evidence of the truth of his charges, and demanded that the directors should institute an action in the proper court, in the name of the company, to recover from the conspirators the full amount of its losses. Nothing having been done by the directors in response to this demand, the plaintiff commenced this action, in which he joined as defendants the corporation, all the individuals who had served as its directors from 1887 to 1890 inclusive, and the owners of the several mills in which its ores had been reduced during the same period,—these last being sued by fictitious names. The summons does not appear to have been served on any of the mill owners, but the other defendants filed their answer to an amended complaint, and on the issues so made the cause was brought to trial November 18, 1891. During the progress of the trial the complaint was further amended by the insertion of the true names of the mill owners sued by fictitious names, and by the addition of some new allegations; and on March 6, 1892, at the close of the trial, a final amended complaint was filed, for the purpose, as stated, of conforming the pleadings to the proofs. All the material allegations of these amended complaints were either denied by the answers of the several defendants, or were by the court treated as denied. On June 11, 1892, the superior court filed its findings and conclusions, and entered its decree in favor of the plaintiff, for the benefit of the corporation defendant, and against the other defendants (except Hobart, a mill owner, who had died on June 2d, and as to whose estate all proceedings were continued) severally for various sums. As against Hayward and the Nevada Mill & Mining Company (a corporation), mill owners, and Levy, who had been president of the Hale & Norcross Company during the whole period from 1887 to 1890, inclusive, there were several judgments for the entire amount of the company's losses, esti-

mated at \$1,011,835. As against the other defendants, directors of the corporation, there were several judgments in smaller and varying amounts, corresponding, as it is claimed, to the losses sustained by the corporation during their respective terms of office from overpayments to the mill owners for the crushing and reduction of ores. Execution was directed to issue upon these judgments, but it was provided that no more should be collected thereon than said sum of \$1,011,835, with accruing interest and costs, and a receiver was appointed, to whom the amount so collected was to be paid, and who was authorized and directed by the judgment to pay over to the attorneys for the plaintiff, as compensation for their services, 25 per cent. of all sums collected. In due time all of the defendants against whom judgment had been rendered moved for a new trial upon a settled statement of the case, and, their motion having been denied, they have taken this appeal from said order and from the judgment.

The large amount involved in the controversy, the difficulties presented by the subjects of investigation, the great length of the trial, the immense mass of evidence, consisting largely of closely-printed columns of figures, and the ability, industry, and ingenuity of counsel, have combined to raise an unusual number of difficult questions for our decision, in the discussion of which it will be necessary to state in considerable detail many of the matters contained in the record. It will be more convenient to make a particular statement of these matters in connection with the several assignments of error to which they relate, but it will facilitate the discussion to state at the outset the general nature of the issues presented by the pleadings, and the facts as found by the superior court. In his last amended complaint, filed, as above stated, after the evidence was all in, and for the declared purpose of conforming the pleadings to the proofs, the plaintiff alleges, among other things: That between the 1st of January, 1887, and the 1st of July, 1890, the Hale & Norcross Silver Mining Company delivered to the Chollar or Nevada mill, and to the Vivian and Mexican mills, at or near Virginia City, in the state of Nevada, not less than 80,000 tons of gold and silver bearing ore, the property of said company, to be by said mills crushed and milled. That said ores were crushed and milled at said mills, and were of the value of not less than \$3,250,000. That said Chollar or Nevada mill was the property of the Nevada Mill & Mining Company, a Nevada corporation, organized under the laws of that state for the purpose of owning, leasing, and operating mills for crushing gold and silver bearing ores, and of which the defendants Hayward and Hobart were large stockholders. That the said Hayward and Hobart, acting with other persons in a conspiracy to defraud the Hale & Norcross Silver Mining Company, con-

trolled and directed all the affairs of said Nevada Mill & Mining Company and of the Mexican mill during all the times mentioned in the complaint, and that all the fruits of said conspiracy came to the hands of said Hayward and Hobart. That said persons and corporations, owners, stockholders, and managers of mills, were at all times mentioned in the complaint also the owners of a large number of shares of the capital stock of the said mining company, and fraudulently and unlawfully, in aid of said conspiracy, procured a sufficient number of proxies of other persons in whose names stock was standing, but who were not the real owners thereof, to elect all the directors of said mining company at the annual elections, held March 9, 1887, March 14, 1888, March 13, 1889, and March 12, 1890. That said directors, so chosen, were at all times controlled by, and acted in subserviency to, and conspired with, said mill owners and managers in all their official acts and proceedings, and in all matters connected with the management and business of the mining corporation and its mine. That immediately after the election of said directors they formed and organized a fraudulent combination and conspiracy with said mill owners for the purpose of cheating and defrauding the Hale & Norcross Company and its stockholders by divers cunning and unjust practices, among which were the following: That the mill owners appointed and selected all the agents and employes about the mills, and having, by means of said combination and conspiracy, the control of the mining company, they caused all of the ore extracted from its mine to be crushed and milled at the mills belonging to or controlled by them, and caused the superintendent of the mining company to suppress or withhold from its stockholders any report of the assays of such ores. That said superintendent did cause assays to be made of every car load of ore extracted from the mine, and reported the same to the directors, not, however, for the purpose of protecting the stockholders, or as a check upon the mills, but merely as a basis for a division of the fraudulent gains of the combination. That said directors, with the consent and approval of the mill men, caused the superintendent of the mine to extract large quantities of low-grade ores of a value below the cost of mining and reduction, and to mix these with the high-grade ores for the double purpose of concealing from the stockholders the real value of such ores, and of giving constant employment to the mills at an extravagant rate of compensation. That the loss to the mining company caused by the mining, transportation, and milling of said low-grade ores amounted to about \$500,000. That the mill owners caused false and fraudulent assays to be made of the pulp of said ores, and, knowing them to be false, represented them to be true. That said mill owners, in furtherance of the objects of the conspiracy, caused all of said ores to be handled by a

fraudulent system of imperfect milling and reduction, intended to leave in the tailings, slimes, and residues a large portion of the gold and silver contained therein, which tailings, slimes, and residues were afterwards worked over for the joint benefit of the conspirators, to the damage of said mining company and its stockholders in the sum of about \$1,000,000. That said directors, in furtherance of the conspiracy, ordered and permitted all of said ores to be milled at said Mexican, Vivian, and Chollar or Nevada mills, at the exorbitant and excessive rate of \$7 per ton, \$3.50 per ton being a fair and reasonable price; to the damage of said mining company and its stockholders in the sum of \$280,000. That about 6,000 tons of ore were delivered to the Virginia & Truckee Railway Company, to be transported to the Chollar mill, which were never accounted for, causing a further loss to the company and its stockholders of \$480,000. That the aggregate losses occasioned by these various acts of the conspirators amounted to \$2,100,000, a large portion of which has been divided up and distributed to the directors of the mining company.

The defendants were not permitted to file any answer to this last amended complaint, but their answers to the second amended complaint were allowed to stand as answers to the last amended complaint, and, so far as its allegations were new or different from previous allegations, they seem to have been treated as if they were in issue, and I shall assume that they were so treated. The answer of the corporation and its directors admits the delivery of its ores to the mills named in the complaint, for the purpose of milling and reduction, and the answers of the mill owners admit the receipt of said ores, but it is denied that they were of the value alleged, or of any greater value than \$1,879,094.68, less the cost of transportation and reduction. Aside from these admissions, it may be said with substantial accuracy that every material allegation of the complaint is put in issue. Hayward and Hobart deny that they were owners or lessees of, or engaged in operating, any of the mills named in the complaint. The Nevada Mill & Mining Company, of which they were stockholders, admits that it owned and operated the Chollar or Nevada mill, and received and worked a portion of the Hale & Norcross ores.

Upon these issues the findings of the superior court were generally in favor of the plaintiff, and I shall merely note in this connection some of the more important particulars in which they were otherwise. It was found that Hayward, Hobart, the Nevada Mill & Mining Company, and Levy did, with the consent and approval of the directors of the Hale & Norcross Company, command the superintendent of the mine to extract large quantities of low-grade ores, and mix them with high-grade ores, for the fraudulent purposes charged in the complaint, and that

the cost of mining, hoisting, transporting, and milling said low-grade ores caused loss and damage to the mining company; but there is no finding as to the quantity of such ores mined and sent to the mills, or of the amount of the damage thereby caused. It is not found that all or any part of the fruits of the conspiracy came to the hands of Hayward or Hobart, otherwise than by the general findings to the effect that they were received by the whole body of the conspirators. There is no finding as to what was the reasonable price of milling Comstock ores during the years 1887-90. It is found that the actual cost of milling the ores in controversy was \$4.50 per ton, and no more, and that the charge made and allowed of \$7 per ton was fraudulent, exorbitant, and excessive to the extent of \$2.50 per ton. But it is conceded that this is not a finding of what an honest miller, entitled to a reasonable compensation for the use of his mill, might properly have charged. It is a finding, only, of the actual cost of reduction, without allowing anything for the use of the mills,—the court being of the opinion that these mill owners, participants as they were found to be in a conspiracy to defraud the mine owners, were entitled to no compensation for the use of their mills. It is not found that any ores delivered to the railway company for transportation to the Nevada mill were unaccounted for, but, on the contrary, it is expressly found that all such ores were accounted for. It is not found that the mine or car sample assays were used by the defendants as a basis for the division of profits, or that any profits were divided, but in general terms it is found that all the defendants—including the directors of the Hale & Norcross Company—received and appropriated the entire amount of which the corporation and its stockholders were defrauded, viz. \$1,011,835. In some particulars the findings go beyond the allegations of the complaint. It is not alleged, but is found, that Hayward, Hobart, and the other conspirators controlled and directed the business and affairs of the Vivian mill, as well as of the Nevada and Mexican mills. It is not alleged, but is found, that the defendant Levy was president of the board of directors of the Hale & Norcross Company during the whole period from 1887 to 1890, inclusive. The quantity of ore alleged to have been delivered at the mills for reduction was not less than 80,000 tons, and its value is alleged to have been not less than \$3,250,000. It was found that 88,887 tons were delivered, of the value of \$3,505,361.

The defendants, in support of their appeal from the judgments, contend that they are erroneous in form and substance; and, in support of their appeal from the order denying a new trial, contend that the findings of the superior court are against the evidence, and are vitiated by numerous errors committed in the course of the trial in rul-

ing upon objections to the evidence, and upon other matters. The most important questions which we are thus called upon to determine relate to certain legal propositions, as to which our decision must become a precedent in future controversies; but the questions which have been most elaborately discussed by counsel, and which go most directly to the merits of this case, relate to the sufficiency of the evidence to sustain the findings of the superior court, and these I shall consider first.

It is contended that there is no evidence to support the findings as to the alleged conspiracy to defraud the Hale & Norcross Company. So far as the defendants Hayward and the other mill owners are concerned, it does not seem to be of much consequence whether these findings can be sustained in their full extent or not, since their liability is sufficiently established by other and independent findings. But with respect to the liability of the directors of the Hale & Norcross Company, the findings as to their active participation in the conspiracy are very material. The evidence upon this point which most nearly affects the directors of the corporation is that which relates to their election. It seems that in 1887, and for some time prior thereto, the bulk of the Hale & Norcross stock was in the hands and under the control of certain stockbrokers in San Francisco. On the books of the company it stood in the names of trustees of these brokers, but according to their theory it was the property of their customers. The evidence in this record as to the exact relations between broker and customer is not very explicit, but what they really were is a matter of common knowledge, with which this court has been made especially familiar by a series of cases recently decided here, involving a construction of the constitutional provisions against sales on margin. *Cashman v. Root*, 89 Cal. 373, 26 Pac. 883; *Wetmore v. Barrett*, 103 Cal. 246, 37 Pac. 140; *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393; *Baldwin v. Zadig*, 104 Cal. 594, 38 Pac. 363, 722; *Kullman v. Simmens*, 104 Cal. 595, 38 Pac. 362. I conclude, therefore, that this Hale & Norcross stock was held as mining stocks were at that time generally held by the San Francisco brokers. It had been purchased on orders from dealers and speculators upon deposit of the customary margin, and had been transferred to the trustees of the brokers as security for their advances. It was, in other words, according to the theory of the broker's contract, a pledge, but according to the constitution it was the property of the broker, and the subject of an unlawful and void contract of sale. It is not necessary, in my opinion, to decide who, under these circumstances, had the strict, legal right to vote the stock so held. Conceding that the brokers could lawfully vote it at the annual elections of the directors of the corporation, they were, nevertheless,

bound to vote it in the interest of those for whom they had purchased it. It seems, however, from the evidence, that they gave proxies often as a mere matter of favor or professional comity, and occasionally for a consideration, to any one who chose to make a contest for the control of the board. By this means the defendant Levy carried the elections for some time prior to 1887, and had been made the president of the board. As president he was invested by the by-laws with the sole management of the business of the corporation, subject to the advice of the board of directors. When the election of 1887 was approaching, Hayward, Hobart, and other stockholders of the Nevada Mill & Mining Company,—who were considerable owners of stock in the Hale & Norcross Company,—determined to contest with Levy for the control of the board. A compromise was, however, effected, resulting in the election of a board acceptable to both parties, and the retention of Levy in the office of president. As a part of this arrangement an agreement was entered into between Levy and the mill owners, by which he was to receive one-eighth of the profit on the crushing of all Hale & Norcross ores milled by them. This agreement was, of course, secret, and there is no evidence that its existence was known to any member of the board of directors, except Levy and his partner, Hoefflich. Sell and Bridge, who ceased to be directors in March, 1888, knew of it after that time, but there is no direct evidence that they had such knowledge while in office. None of the directors, however, had any substantial interest in the corporation. A majority of them owned but 5 or 10 shares, respectively, out of a total of 112,000 shares, and these trifling amounts of stock had, in several instances, been transferred to them by Levy or the mill owners for the express purpose of qualifying them to serve. Being chosen in this way and receiving no compensation for their services, except \$5 for each meeting of the board at which they attended, they gave to the affairs of the company the amount of attention that might have been expected. Several of them seem to have known next to nothing about the operations at the mine. While others took a little more trouble to keep themselves informed in a general way about the mining of ores and the price paid for reduction, they seem, one and all, to have intrusted the management of the entire business to the president, Levy, and to the superintendent of the mine; and if these officers, by abuse of their trust, caused the loss and damage to the mining company which the court has found, the evidence warrants the conclusion that the directors were at least guilty of gross negligence. But, except as to Levy, Hoefflich, Sell, and Bridge, I do not think there is any evidence that the directors knew of the unlawful agreement between Levy and the mill owners, or that they were ac-

tive participants in the conspiracy and frauds alleged in the complaint. That this was the view of the judge of the superior court seems to follow, not only from his decision upon the separate motion of the defendant Wheeler for a new trial, but from the amount of the several judgments rendered against him and the other directors. In denying Wheeler's motion, the judge declared in effect that he did not believe him to have had any share in the frauds upon the company, but he was held responsible for the consequences of his gross negligence,—that is to say, he was held liable for the excessive price of \$2.50 per ton paid for milling the ore reduced during the time he was director. The same judgment was rendered against all the other directors except Levy, against whom there was a several judgment for the entire loss found to have been sustained by the Hale & Norcross Company. Hoefflich having died pending the trial, the action was dismissed as to him. This discrimination shows that, notwithstanding the sweeping language of some of the findings, the superior judge did not really intend to convict the other directors of the fraudulent conspiracy charged; for, if he had found them equally guilty, they would have been liable to the same extent as Levy. Besides, as above shown, he expressly declared that he did not hold Wheeler guilty, and the evidence against Wheeler was substantially the same as the evidence against the other directors. For these reasons I think it must be held that the finding as to the directors other than Levy, that they were participants in the frauds alleged, is not sustained, except so far as they were made participants by a culpable negligence which enabled others to consummate such frauds. This, indeed, seems to be conceded by counsel for respondent in their argument upon Mr. Wheeler's appeal, in which they contend that the judgment against him is fully sustained by the proof of negligence,—a point to be considered hereafter.

It is next contended that the evidence does not sustain the finding that Levy, with others, controlled the Nevada mill. I do not think this point merits discussion, for the reason that the finding is immaterial. It harms no one else, and does not affect the liability of Levy one way or the other.

The next finding attacked is that in which it is found that Hayward, Hobart, and the Nevada Mill & Mining Company controlled and managed the Mexican mill. The evidence on this point is conflicting, and I think the fact, clearly proved, that Hayward and Hobart paid to Levy his one-eighth share of the profits on the crushing at the Mexican mill, in the same manner and at the same time that they paid him on account of the crushing at the Nevada mill, is sufficient to sustain the finding as to them. Their payments, however, are not evidence against the mill company, and I cannot see that there is

any evidence to sustain the finding as against it.

It is next claimed that there is no evidence to sustain the finding that Hayward, Hobart, and the Nevada Mill & Mining Company controlled and operated the Vivian mill, and this contention, I think, must be sustained. The position of respondent's counsel with respect to this point may be best shown by quoting their entire argument. They say: "The arrangement with Levy which was made before any of the ores of the Hale & Norcross were milled, contemplated that he should have one-eighth of the profits of milling all the ores of the Hale & Norcross mine, without regard to where it was milled. The entire business of milling the ores was turned over to Hayward, Hobart, and the Nevada Mill & Mining Company. They had complete control of the affairs of the mining company so far as the milling of its ores was concerned. It is not claimed that any one else ever milled a pound of its ores. The milling of the ores began at the Vivian mill. Is there any doubt but that the same parties who had the ores sent to the Nevada and Mexican mills had them sent to the Vivian? The ownership of the mill is a matter of no consequence. Who controlled and managed the milling of the ores?" It will be observed that there is no reference here to any page or folio of the record, and I can only say that, after a very careful reading of the whole of it, I have failed to find anything to sustain the assertions of counsel. The only arrangement with Levy of which there was any evidence was, not that he should have a share of the profits of milling all ores of the Hale & Norcross mine, without regard to where they were milled, but only that he should have one-eighth of the profits on any ore milled by Hayward, Hobart, and the parties represented by them, including the Nevada Mill & Mining Company. There is no evidence that the entire business of milling the ores was turned over to Hayward, Hobart, and the mill company, or that they had complete control of the affairs of the mining company, so far as the milling of its ores was concerned; and it is not only claimed, but conceded, that the Vivian mill, with which the defendants are not shown to have had any connection, milled nearly 5,000 tons of the ore. It does appear that, owing to the merely passive attitude of a majority of the board of directors of the Hale & Norcross Company, the actual control of all its affairs was in the hands of Levy, the president of the board, and it is obviously true that it was to his interest to give the milling to those in whose profits he was to share. But it does not follow that he could have given no milling to outside parties. What the evidence shows is that towards the end of 1887, when the Hale & Norcross Company commenced extracting considerable quantities of ore from the large ore body then recently developed, the Neva-

da and Mexican mills were crushing for other companies, and neither of them received any Hale & Norcross ore for several months after that company commenced crushing. During that time they were all sent to the Vivian mill. But, as soon as the Nevada and Mexican mills were ready to handle them, the employment of the Vivian mill ceased. From which it would appear that such employment was only a temporary expedient for working such ores as could not be kept for the mills in which Levy was interested, and the circumstances are entirely insufficient to warrant an inference of the material fact which it was incumbent upon plaintiff to prove, in order to recover from Hayward, Hobart, and the Nevada Mill & Mining Company for losses on the working of ore at the Vivian mill. Moreover, since the only proof that Hayward and Hobart controlled the Mexican mill was the evidence furnished by their own books of account that they had paid Levy one-eighth of the profits of the crushing at that mill, the absence of any evidence that they had paid anything on account of the work at the Vivian mill is doubly significant. But, besides all this, the plaintiff in his last amended complaint, which was expressly designed to conform the pleadings to the proofs, omitted, *ex industria*, apparently, to charge that Hayward and his associates had anything to do with the Vivian mill, and the special finding of the superior court as to the separate losses on the ores milled at the Vivian mill, which was doubtless drawn or suggested by counsel for plaintiff as the basis for a modification of the judgment, indicates his lack of confidence in the sufficiency of the evidence to sustain the general finding as to the losses at the Vivian mill. It must be held, in my opinion, that this finding as to the control of the Vivian mill is contrary to the evidence, as it is unwarranted by the complaint.

It is next contended that the finding to the effect that Hayward, Hobart, and the Nevada Mill & Mining Company, in conjunction with the other defendants, controlled all the business affairs of the Hale & Norcross Company is against the evidence. This finding is material only so far as it relates to the mining and milling of the Hale & Norcross ores, and as to those matters the evidence fully warrants the conclusion that a majority of the directors were, as above stated, simply acquiescent or passive, and that Levy did as he pleased. Whatever inference, therefore, as to participation by the mill owners in the control of the mining company, may be legitimately drawn from the existence of the unlawful contract for a division of the profits of the milling, or from the manner in which the ore was milled, or from any inadequacy of returns of bullion, or neglect of proper precautions in behalf of the mining company, is to be considered as a fact proved. Undoubtedly, the existence of the contract supplied a motive to both parties to

increase the amount of milling by the extraction of low-grade ores, and it may fairly be argued that it also afforded an inducement to Levy to connive at a careless and inefficient system of milling, by which a larger number of tons would be milled at the same cost, and consequently at a larger profit. But proof of a motive to commit a wrong is scarcely sufficient by itself to prove that the wrong has actually been committed, and it remains to be considered whether there was any other substantial evidence of the mining of low-grade ores or of imperfect milling.

This brings us to the questions which have received the principal attention of counsel, both in the oral and printed arguments, a proper discussion of which involves a preliminary statement in regard to the custom prevailing along the Comstock Lode in regard to the mining and reduction of its gold and silver bearing ores. It sufficiently appears from the evidence in this record, and is a notorious fact, that the ores extracted from the Comstock Lode since 1887 are of a lower grade, and are produced in smaller quantities, than in former years. Much of the ore at present mined barely pays the cost of mining and reduction, and much is found in the vein, mingled with ore of a better grade, that falls below that standard. Since the question whether such low-grade ores are worth extracting cannot, as in the case of richer ores, be determined by inspection, it is absolutely necessary to have daily assays of samples of the ore from the different drifts and levels in which the work is being done, in order to tell what to take and what to leave. It is also necessary, as a check upon the millers, to have assays of the ore hoisted to the surface, and deposited in the ore bins for transportation to the mills. Accordingly, numerous assays are daily made of specimens taken from the various drifts and levels in which work is being prosecuted, and in addition to these there is an assay of what is known as the car sample, which is obtained in the following manner: Each car load of ore, containing about a ton weight, when hoisted to the surface is pushed by a carman along the track to the ore bins, and, as it passes what is known as the "sample box," he takes from the car and deposits in the box a handful of the ore. At the end of 24 hours the box is emptied, its contents thoroughly mixed, and about eight pounds taken out as a sample of the whole. This sample is taken to the assayer, who breaks up the larger pieces in a mortar, mixes the whole as thoroughly as he can, and takes out about a pound for assay. Before weighing the specimen or sample to be assayed, it is thoroughly pulverized and dried, so as to get at the quantity of gold and silver in a ton of dry ore. The mode of making the assay is not described in the evidence, whether by fluxing and melting in a crucible, or by other means; but it is not questioned that the methods employed were sufficient for the pur-

pose of ascertaining the exact quantity of pure gold and silver contained in the final sample selected by the assayer. Besides these mine samples and car samples, as they are called, taken and assayed as a guide to the miners and a check upon the mills, there are also taken pulp or battery samples at the mills in the following manner: The ores selected for milling are dumped from the cars in which they are hoisted to the surface into large bins overhanging the railroad, from which they are drawn through apertures opened and closed by sliding gates directly into the cars, upon which they are transported to the mills. Here they are again dumped from the railway cars upon an iron grating called a "grizzly," which allows the finer portions to pass through into an ore chamber adjacent to the batteries, and the coarser portions, after passing through the rock breakers, fall into the same receptacle, from which the ore is fed by the action of machinery into the batteries. In the batteries, by the fall of heavy stamps and the constant flow of a stream of water, the ore is reduced to a thin pulp, which, by the action of the stamps, is continually splashed against the perforated screens which inclose them, and through which the water passes, carrying in suspension the finely-crushed particles of the ore. After leaving the batteries the pulp flows to and through a series of tanks, in which the sand and slimes are settled, preparatory to placing them in the amalgamating pans. On the way from the batteries to the tanks samples of the pulp are taken every hour, by passing a dipper under a spout, through which all the pulp flows. From the dipper the sample so obtained is transferred to a large can, conveniently placed, and this, at the end of 24 hours, is set on the boilers, for the purpose of evaporating the moisture. When dried, the whole mass is thoroughly mixed, spread out in a thin layer, divided into squares, and three samples taken and put in paper bags,—one for the assayer of the mine, one for the assayer of the mill, and one sealed up for future reference in case of discrepancy between the mine and mill assays. The settlement between the miller and miner is usually based upon the mine assay of the mill sample, the miner expecting to receive in bullion a proper percentage of the gold and silver contained in the ore, as determined by this test.

It has never been the custom on the Comstock for the miner to supervise the taking of the mill samples. Occasionally a man has been employed by some of the mining companies to watch the milling at custom mills, but usually no such precaution is taken, the car sample assays, which are daily compared with the pulp assays, being deemed a sufficient check on any misconduct or negligence of the miller, besides which there is the additional security afforded by the manner in which the ore is handled from the time it leaves the mouth of the shaft until it leaves the mill as tailings. Ores of all grades are

dumped promiscuously into the bins. By their own gravity they are carried from the bins to the railway cars, and from the railway cars through the grizzlies and rock breakers to the ore house, from which they are fed by machinery to the batteries. From the batteries they pass, in the form of a stream of muddy water, to the settling tanks. In this process it seems impossible that there should be any sorting of ores with a view to sampling. On the contrary, the result must be a more and more thorough mixing. It seems equally impossible that any material quantity of the ore could be lost, or otherwise diverted, without detection. The samples taken in the mill from hour to hour are taken by the men employed about the batteries and pans, working on different shifts, and in the presence and view of various other employes, to whose observation any systematic attempt to debase the samples would necessarily be exposed.

Before leaving the subject, it may be well in this connection to state briefly the manner of treating the pulp after it leaves the batteries, according to the process of reduction commonly employed with what are known as the free milling ores of the Comstock Lode,—the process actually used in reducing the ores in question here. The pulp flows from the batteries to and through a series of sand tanks, and from these through a similar series of slime tanks. In the sand tanks the coarser and heavier of the solid material is settled, but the evidence shows that there is mingled with the Comstock ores, and especially the Hale & Norcross ores, a large percentage of sticky clay, which composes that part of the pulp known as slimes, in contradistinction to the sand which results from the crushing of the quartz rock. These slimes, it appears, do not readily settle, and, with the largest number of slime tanks that can be placed in a mill, the overflow of the last tank will carry some solid material, and this material contains some gold and silver, the ownership of which is one of the questions in this case; for the evidence shows that, although the Nevada and Mexican mills were provided with a full complement of slime tanks, yet for every ten tons of ore crushed in the batteries, one ton of solid material passed out of the mill into the slime ponds or reservoirs, where it was finally collected and claimed as the property of the mill owners. That part of the pulp, both sand and slimes, which settles in the tanks, is shoveled out upon the sand floor, from which, after mixing, it is transferred to the amalgamating pans. In the amalgamating pans it is rapidly stirred and ground, and at the same time treated with certain chemical agents designed to free the gold and silver from combinations that prevent them from amalgamating with the quicksilver with which the pans are charged. In the process of amalgamation, time, as well as proper chemical treatment and a proper allowance of

quicksilver, is an essential element,—that is to say, the longer the process is continued the larger is the proportion of gold and silver amalgamated. But there is a practical limitation to the time that can be economically given to the amalgamation of even high-grade ores, and this is more especially true of low-grade ores; for the additional percentage of the precious metals saved by continuing the process beyond a certain point amounts to less than the cost of running the pans, and this point is sooner reached in working low-grade ores than in the case of more valuable ores. By failing to continue the process a proper length of time,—that is, to the point which is economically justified by the grade of the ore,—a part of its legitimate value is lost in the residues or tailings of the mill. After the pulp has been worked in the amalgamating pans for the time which the amalgamator deems sufficient, it is drawn off into another set of pans, called "settlers," where it is more slowly stirred for a time, completing the process of amalgamation, and allowing the quicksilver, with the amalgamated metals, to settle, preparatory to drawing off. This is done through iron pipes, connected with the bottom of the settlers, through which the amalgam runs into canvas bags. These bags are provided with iron collars, and are locked to an iron framework below the settlers, in such manner that their contents cannot be removed without cutting the bag, or unlocking and detaching it from the frame. The key is carried by the superintendent or foreman of the mill. The bulk of the quicksilver strains through these canvas bags, and is caught and used over again in the pans. What remains in the bags in combination with the gold and silver is removed from time to time, and placed in an iron box, where it remains until a sufficient quantity is collected to justify retorting. It is then placed in a retort, and the remaining quicksilver expelled by heat. The resulting crude bullion is weighed and sent to the mint or assay office, as directed by the mine owner, to whom the returns are made with certificates of weight and fineness by the mint or assayer. Samples of the material remaining in the settlers, similar to the battery samples, are taken every day,—one for the mill, and one for the mine. A comparison of the assay of the battery sample with that of the settler sample shows how closely the ore is being worked, and is especially useful to the amalgamator as an indication of any imperfection of his process, and of the necessity of changing the treatment in case of undue loss. The mill process, however, does not completely end with the settlers, for the contents of those pans pass to the agitators, where they are slowly stirred, and where in a final clean-up some additional amalgam is collected for the mine owner. There is a continual discharge of the agitator through an aperture near the top, and the material there discharged is call-

ed tailings. Formerly the milling ended with the discharge of these tailings from the mill, for they were allowed to run off down the cañon, and were never reclaimed by miner or miller. It was discovered, however, in course of time, that a portion of these tailings could be saved by means of blanket sluices, and worked over at a profit. The blanket sluice consists of a double line of flat, wooden troughs, set at a proper grade or inclination, and lined with blankets, over which the mill tailings are allowed to flow, with the result that there is deposited upon the blankets a portion of the quicksilver that is always escaping from the mill, and a portion of the ore, known as "sulphurets," which is heavier and richer than the rest of the tailings, but resists amalgamation. The material so caught in the blanket sluices is called "concentrates," and is from time to time swept into tanks where it is claimed as the property of the mill owner. According to the most definite testimony in this case, about 1 ton of concentrates ought to result from the working of 30 tons of ore, but the quantity varies greatly, according to different estimates. At the Nevada and Mexican mills concentrates were collected in this manner while they were working the Hale & Norcross ores, and were worked over in the annex pans of those mills for the benefit of the mill owners, defendants herein.

Returning from this digression to the findings called in question by appellants, I shall first consider that in relation to the conspiracy to mine and send to the mills ores not worth the cost of mining and reduction. This finding, like several of the others, is of no consequence so far as it concerns the question of affirming, reversing, or modifying the judgment. For, as above stated, although the superior court finds that worthless ores were mined and milled, to the loss and damage of the mining company, the amount of such damage is not found, and it does not enter into the judgment rendered against any of the defendants; the damages awarded by the several judgments consisting of but two items, viz. the excessive price paid for milling all the ores, rich and poor, and the bullion lost by imperfect milling. But, as it affects the motion for a new trial, and as indicative of the views of the superior court as to some items of evidence which equally affect other questions, it is deserving of some attention. According to the testimony of Mr. Mackay,—and there is nothing to the contrary,—ore of a car sample value below \$14 per ton will not pay the cost of mining and reduction, by which I understand him to mean that such ore will pay the bare cost of mining in a going mine, added to the bare cost of milling, without allowing any profit to the miller, or compensation for the use of his mill. His meaning, in other words, is that a mining company with its mine already opened and in running order, and owning its own mill, could hoist

and mill \$14 ore without going behind. In any other sense his testimony on this point is inconsistent with his testimony as to the usual disparity between the car sample assay and the battery sample assay, and the percentage of the latter that ought to be obtained by good milling. In order, however, that \$14 ore may pay expenses, it must, according to Mr. Mackay, contain about an equal value of gold and silver. Otherwise, owing to the heavy discount on silver, it will not pay. Now, the evidence in this case shows that the foreman of the Hale & Norcross mine was, in effect, instructed to mine and send to the mill ore assaying by car sample as low as \$12, and it appears that the Hale & Norcross ores contained a much larger percentage of silver than of gold. In view of these facts, which show that the practice and the intention was to send to the mills all ores assaying by car sample as high as \$12 per ton, and in view of the understanding that the mills were to receive not merely the bare cost of working the ores, but \$2.50 in addition to the cost for the use of the mills, it cannot be said that the finding of a conspiracy to mine worthless ores is without any support in the evidence. I account for this finding, and for the fact that no damages were awarded by reason of it, in this way: The superior court held that, in view of the contract or understanding that \$7 per ton was to be paid for the milling, and the actual return in bullion of only about 75 per cent. of the battery sample assay, the parties must have known that not only \$14 ore, but ore of even a higher grade, was being mined and reduced at a loss. In determining the question of damages, however, all losses were comprised under two heads, viz. excessive price paid for milling, and loss by imperfect milling. In order to determine these amounts the milling was reduced to actual cost, and the defendants were charged with 75 per cent. of the car-sample assay. This being done, there remained no appreciable loss on the mining of low-grade ores, except upon the comparatively small quantity assaying less than \$12, which the court was justified in finding was unintentionally and unavoidably deposited in the ore bins before the mine assays could be returned. The calculation upon which I suppose the court to have proceeded would be as follows: 75 per cent. of \$14 is \$10.50, or gold \$5.25, and silver \$5.25, which at 80 per cent. equals \$4.20, making a net yield of \$9.45, of which \$4.50 was allowed for milling and \$4.95 for cost of mining. I do not think that this basis of calculation was entirely correct in view of other evidence in the case, but it was the basis upon which the court seems to have proceeded, and, assuming its correctness, the finding in question and the conclusions of the court are rendered perfectly consistent. Upon the whole, I think the evidence sufficient to sustain this finding.

The next, and by far the most important, exception to the decision of the superior court, relates to the various findings to the effect that Hayward, Hobart, Levy, and the other defendants worked the ores of the Hale & Norcross Company by a fraudulent system of imperfect milling, by which a large portion of their value was left in the slimes, tailings, and residues of the mills. The substance and effect of these findings, is that 88,887 tons of ore were worked; that its value (meaning the total amount of gold and silver contained in it) was \$3,505,361, as correctly shown by the car-sample assays, and that if said ores had been honestly crushed and milled, and the gold and silver honestly and with reasonable care extracted and accounted for, the bullion yield would have been \$2,616,491, whereas the actual return made by the mills was only \$1,826,873, and the difference between these two sums, \$789,618, is the main item of the damages going to make up the judgment. The principal and most direct evidence in support of this finding consists of the car-sample assays, which, it is contended, is corroborated and confirmed by proof of certain irregular and suspicious transactions between the managers of the mills and the Carson mint, as well as some other circumstances of like complexion and import. The appellants contend that, even taking the car-sample assays as a criterion of the amount of gold and silver in the ores mined and sent to the mills, the estimate of the superior court is erroneous and excessive to the extent of \$34,427, and they sustain their contention by a citation of the pages and folios of the record, to which counsel for respondent have made no reply. If there is any mistake in the computations which apparently demonstrate the error alleged, it was the duty of counsel to have pointed it out. In the absence of any attempt to do so, I should perhaps have been justified in assuming that the error was conceded. I have, however, gone over the figures as carefully as I could, and, while my computation does not exactly agree with that of counsel for appellants, it does agree substantially. The error of the court amounts to over \$34,000, the larger portion of which is found in the first item of the account, where 1,259 tons and 1,590 pounds of ore delivered at the Vivian mill in December, 1887, of the car-sample value of \$72.12 per ton, is found to have amounted to \$113,518.41, when its real value was only \$90,856.41, an error of \$23,000 in one item. But the appellants contend that the car-sample assays do not, as found by the court, correctly show the true value of the ores, and in this connection they call attention to what they say is an inconsistency between the finding that the value of the ore was \$3,505,361, and that it should have yielded \$2,616,491 in bullion. I do not deem this an inconsistency. One sum stands for the total amount of gold and silver in the ores, and

the other for the percentage (about 75 per cent.) which, in the opinion of the court, it should have yielded under proper treatment.

This objection disposed of, I come to the pivotal question in the case,—the value of the car-sample assays as a criterion of the value of the ore. The testimony is, without conflict, that, according to the general custom and course of dealing between the miners on the Comstock Lode and the managers and owners of custom mills, the battery samples are, and the car samples are not, regarded as the true index of the value of the ores; that all settlements between the miner and the miller are based upon the average assay of the battery samples, and that the car-sample assays are for the guidance of the miners, and useful as a check upon the mills. There is, also, no conflict in the evidence that the car samples always run above the true value of the ore. This fact was clearly proved when the plaintiff closed his case in chief by the testimony of his own witness, Mr. John W. Mackay, and it was much more fully and amply proved by a number of witnesses sworn on behalf of the defendants. The respondent's counsel, of course, contend that there is evidence on this point to sustain the finding of the superior court, and they cite certain passages from the testimony of Mr. Mackay and Mr. Holden in support of their argument, which I shall proceed to examine. Mr. Mackay, as I have stated, was the plaintiff's own witness, and being examined by him with reference to this matter, said: "We take car-sample assays at the mine; that is, the samples of the assays taken on top. There is always a difference between the battery and the assays at the mine,—that is, the samples of the assays taken on top. For various reasons there is a good deal of the assay that comes out on top that is covered up. We cannot get a sample from the top as close as we can in a 500-ton battery, but you get a very fair sample. To answer your question, I can tell you, if I examine the books, what has been the difference between the mine samples and the battery samples. Without stating specifically, I should think about \$10 per ton. The top or car samples are the higher. Generally they run pretty close. Sometimes they run variable. It is a very difficult matter." Being asked what the battery sample ought to be, if car samples properly taken showed an assay of \$72.12 per ton, his answer was: "About \$62, probably \$10 difference." In reply to another question, he said: "If the car sample was \$42.62, that ought to pulp \$32 or \$33, or somewhere in that neighborhood." In answer to a question whether the difference would be less in ore of a lower grade, he said: "Sometimes, but they will average pretty much that,—about from \$8 to \$10; sometimes not so much, sometimes a little more." These clear, direct, and specific statements, made on his direct examination, were confirmed by his cross examination. On his redirect ex-

amination, when testifying to the specific point that even battery samples are not always correct, owing to mistakes of the assayers—as illustrated by the fact that he had frequently obtained from ore more than 100 per cent. of the battery assay—he added this statement: “If you take 50,000 or 100,000 tons of ore, taken out in a year or two years, and a car sample taken of all those, honestly and fairly taken, with the best methods known, the average of those car samples, some being too high, and some being too low, would pretty closely approximate the value of the ore. There is a difference, of course.”

It is upon this passage of Mr. Mackay's testimony, standing alone, and construed without reference to what he had previously stated, and upon one even less to the purpose from the evidence of Mr. Holden, that counsel build their whole argument in support of the proposition that there is a substantial conflict in the evidence in regard to the disparity between the average assay of the car samples and the real value of the ore. The most they can possibly claim, however, is that while their only witness as to this matter has, in explicit terms and in answer to direct questions calling his attention to the precise point, stated and illustrated by two examples the fact that the car samples always go about \$10 above the battery samples, he has, when testifying with reference to another point, made a statement in more general terms which is entirely inconsistent. For, upon the construction which counsel for respondent insist upon giving to the language last quoted, Mr. Mackay's answers are necessarily inconsistent. They cannot be reconciled, and counsel do not attempt to reconcile them, upon the theory that in Mr. Mackay's opinion the car samples are correct and the battery samples are incorrect,—both being fairly and honestly taken,—for he, like all the other witnesses, testifies directly to the contrary. So far as returns of bullion are concerned, he relies upon the battery sample exclusively. The car sample is merely a check. When the discrepancy between the two becomes too great, it is an indication that something is wrong in the working of the ore, which calls for investigation and correction. It indicates that there is some fault in the treatment; that there is not enough salt, or bluestone, or quicksilver in the pans, or not enough time allowed for amalgamation, or that there is some refractory combination in the ores which prevents amalgamation. The whole of his testimony from beginning to end, so far as it touches this point, teems with illustrations of his opinion that the battery assay, although fallacious in some instances, owing to mistakes of the assayer or other causes, is on an average, and in the long run, the only true test of the value of the ores. But really the testimony of Mr. Mackay does not require a construction which makes it inconsistent

with itself. In the passage relied on by counsel for respondent, he was referring to the mistakes of assayers, and the insufficiency of a few samples, even from the battery, and he intended to explain that, although assays were sometimes too high and sometimes too low, these mistakes would in the case of 50,000 or 100,000 tons of ore taken out in a year or two neutralize each other, and the average would afford a fair index of the value of the ore; or, in other words, would afford a basis from which, with the proper deduction, the real value could be estimated. His closing words, “There is a difference, of course,” must refer to his previous testimony, in which he states precisely what the difference is. But, even if I were mistaken in this view of Mr. Mackay's testimony, which makes it entirely consistent in itself, and if there were no escape from the conclusion that within a few minutes he made two diametrically opposite statements as to a point upon which all the other witnesses are agreed, I should say unhesitatingly that this did not make a substantial conflict in the testimony in regard to a matter which, whatever the truth about it may be, presents no opportunities for concealment or deception. If it is not true that car samples give an exaggerated value to the ore, there must have been many competent and trustworthy witnesses to the real truth, who could have been produced during the months that this cause was on trial. No such witness, however, was produced, unless it be true, as claimed by counsel, that Mr. Holden fills the gap. Mr. Holden was a witness called by the plaintiff in rebuttal for the purpose of proving the percentage of the precious metals that ought to be obtained by a proper system of working ores. As a general expert upon that point, he undoubtedly possessed superior qualifications. He is more than usually intelligent and exact in his statements, and apparently perfectly fair. But his testimony was confined to the point stated. He had no experience of his own in mining or milling on the Comstock, and made no pretense of knowing the relative accuracy of car and battery samples. His opinion was that, under proper treatment, the ores of the Comstock Lode of the grade of those in question here should yield a bullion return of from 80 to 85 per cent. of their real value. On redirect examination he made the following answer to a question: “In speaking about 80 or 85 per cent. return, I said from a fair sample of the ore,—a sample of ore taken in a correct, fair, accurate manner, at any stage. I do not care whether it is taken from the drift or any place; so long as you can get a fair, accurate sample of the ore, it should not change in character from where it is taken from the mine into the pulp.” It seems a waste of time to notice the claim that Mr. Holden has here testified that car samples are reliable. All that he says is that, when you get a fair sample,

—a sample which truly indicates the value of the ore,—it makes no difference if it is taken from the drift in which the ore is mined. The expression he uses may be said to imply that possibly a fair sample might be obtained in that way, but certainly he does not say so, and the whole tenor of his testimony, as well as of all the other witnesses, is opposed to such a notion. There are reams of testimony in this record to the effect that the only way to sample ores is to take them out and mix them thoroughly, and that the more thorough the mixture the more reliable the sample,—the more numerous and the larger the samples, the closer the average; and there is nothing to the contrary. Mr. Holden himself, who is a large buyer of valuable ores, tells us what his own practice is. He has the ore spread out and thoroughly mixed. He then takes a large sample,—3, 10, or 20 per cent. of the whole, according to the grade of the ore,—and has it put through a sampling mill and tested. His process is, in fact, much more thorough and complete than the battery sample tests. He merely states an obvious truth when he says that, when you have got a fair and accurate sample, it makes no difference where or how it was obtained. The ore does not change its character in being reduced to pulp.

I should, perhaps, notice in this connection a claim advanced in the course of the oral argument, but not made in the briefs, to the effect that Mr. Lyman, a witness for defendants, testified in favor of the accuracy of the car samples. Mr. Lyman was the superintendent of the Consolidated Virginia and other leading mines on the Comstock, and testified from an experience of 30 years in mining and milling Comstock ores. Testifying as to his own practice at the Consolidated Virginia, he stated that mine and car samples were daily taken and assayed in the manner above described, and that samples were also taken from the ore after it had been loaded on the cars for transportation to the mills. On cross-examination he said: "Our object in taking these samples, the mining-car sample and the railroad-car sample, and having them assayed, is to ascertain as near as we can, correctly and positively, the value of the ore extracted from the mine. Then we claim that, from those samples, we can check the mill; that is, if the mill does not make a return of a proper per cent.,—that is, such a percentage as my experience would dictate was proper,—I would make a complaint of the mills." Upon this passage of Mr. Lyman's testimony, disconnected from all he had testified to before, and what he said almost immediately afterwards in the further course of his cross-examination, the claim is made that, according to his evidence, the value of the ore may be correctly and positively known from the car-sample assay. But Mr. Lyman does not say so, even in this passage, and what he said directly afterwards shows that he did not

mean to be so understood. To make this plain I quote that part of his examination immediately ensuing: "Q. About what percentage,—if you can now recall, in your experience in handling the Consolidated Virginia ores,—about what percentage do the mills make of these car samples, the mining-car or the railroad-car samples; about what percentage? A. Well, I never figured them in that manner, and I don't know. Q. Well, I understood you to say that you took them as a check? A. Yes, sir; they are there on file. All these figures are on file in the office. We figured on a basis of the assay or value returned from the mine on the battery assay. The percentages are all figured up on the battery assay; that is the contract, I believe. The assays are not made by the mill. They are made by the mine. It is sent to the mine for assay. Q. I will ask you again how can you ascertain whether or not your ores have been properly worked, if the samples, if the battery samples from which samples are taken, are made wholly by the employes of the mill, or by the owners of the mill? A. I have answered that before. The only thing that we have is this check from the mine of the assay. Q. The mine assay? A. Yes, the mine assay; and that mine assay we take as a check. I will say right now, if you will permit me, that we never figured up the per cent. on the mine assay, but we figure it from the pulp from the mill, as the contract calls for. Q. Well, if you never figured the percentage, do you mean by that that you never paid any attention whatever to the railroad-car or mining-car sample assays when you come to investigate the question as to whether or not the mill company has returned you or made you a proper return for milling its ores? A. No, sir; I don't mean that at all. Q. Well, what do you mean? A. Well, I mean this: That there is a difference between the car assay in the mine and in the mill. It varies from \$10 to \$6 a piece. If you figure the 10 per cent. on the mill assay, and if you figure it on the mine assay, it will be so much. The per cent. from the mine assay will be less than that from the mill, because there is from \$6 to \$10 difference; but I have not figured that out, or worked it out, down to a point where it can be answered. Our books will answer whenever they are called for."

I have now quoted all the testimony cited by counsel to sustain the finding of the superior court that the value of the Hale & Norcross ores is correctly shown by the car-sample assays, and have only to repeat, what I said in the beginning, that in my opinion it does not raise a substantial conflict with the evidence of the various witnesses who testified that the car-sample assay always exaggerates the value of the ore. It remains only to notice the legitimate argument of counsel for respondent that, if the fact is as these witnesses claim, there ought to be some rational explanation of it. I quite

agree with counsel on this point, that there must be some cause of uniform operation to bring about the invariable result that the average of the car-sample assay always goes above the real value of the ore; and that, if such cause exists, some one ought to be able to point it out. I think, however, that, aside from other suggestions of witnesses and counsel, a perfectly rational and probable explanation is to be found in the evidence. There was a strong preponderance of evidence to the effect that, not only on the Comstock, but in other localities, the richer portions of the ore are more easily broken, and in blasting and picking commonly break into smaller fragments than the poorer portions of the rock, and that the miner who takes the car samples habitually takes the smaller particles in preference to the larger ones, not only because he is instructed to do so, but because, under the operation of a natural law of mechanics, the finer portion of the ore is on the top and in the center of the car; that is to say, when the ore is shoveled from the floor of the drift into the car, the finer portions naturally rise in a cone in the center of the car, while the larger fragments roll down the sides, so that, when the car is filled and the load leveled off, the top is composed of the fine ore. I see no reason to doubt the correctness of this explanation, and, allowing it to be true, it is easy to see how at the end of every 24 hours the sample box would contain a lot of ore of higher grade than the mass of that which had been dumped into the ore bins. If my views as to the effect of the evidence on this point are correct, it follows that there is no basis left for the estimate of the court as to the amount of damage sustained by the Hale & Norcross Company by reason of fraudulent or imperfect milling. It has already been shown that, even on the theory that those ores actually contained the amount of gold and silver indicated by the car-sample assays, their total value was overestimated in the findings by more than \$34,000. If this is deducted, and a further deduction of \$10 a ton (according to the estimate of Mr. Mackay, the plaintiff's own witness) is made on account of the difference between the car-sample assays and the actual value of the ores, it reduces the estimate of the superior court over \$900,000 on the original value of the ores, and makes a corresponding reduction in the amount of bullion supposed to have been lost or diverted; or, in other words, since the defendants were held for about 75 per cent. of the gold and silver supposed to have been contained in the ore, the judgment would require to be reduced by nearly \$700,000. If, instead of deducting \$10 per ton, only half that amount were taken off, the judgment would be reduced by over \$350,000, to which must be added the greater portion of the loss apportionable to the ores worked at the Vivian mill, amounting, on the basis of the estimate of the superior court, to

about \$70,000. I do not add the whole of the supposed loss at the Vivian mill, because, as above shown, the principal error in overvaluation of the ores, according to the car samples, relates to ores sent to the Vivian mill, and the full deduction on that account has already been made.

It will be seen that, in all my calculations and estimates, I assume that 75 per cent. of the assay value of the ores is a proper return in bullion to be made by the mill. I would not have it supposed that I have overlooked the contention of counsel that there is evidence to sustain a finding that a higher return should be made from ores properly worked. But the obvious answer to this is that the superior court has made no such finding. On the contrary, it is as clear as any mathematical demonstration can be, that the superior court's estimate of damages rests upon the assumption that a proper return is $74\frac{8}{10}$ per cent., a fraction less than the percentage I have assumed. The evidence would easily have supported a finding in favor of a still smaller percentage, while a finding in favor of a higher percentage would have had no substantial support. The evidence of Mr. Holden that a return of from 80 to 85 per cent. ought to be made, when properly understood, perfectly agrees with that of the other witnesses. In his estimate he allows for moisture in the ore. He expects a return of from 80 to 85 per cent., but only from the number of dry tons, and the uncontradicted evidence in this case is that the Hale & Norcross ores contain from 8 to 10 per cent. of moisture, or, in other words, that in every 100 tons of ore sent to the mill there were at least 8 tons of water, and, consequently, not more than 92 tons of dry ore. Now $82\frac{1}{2}$ per cent. (the medium of Mr. Holden's estimate) of 92 is only $75\frac{88}{100}$ per cent. of 100. This brings his estimate into substantial agreement with those of the other witnesses. Besides all this, it is proper to add that the court had another good reason for discounting Mr. Holden's opinion as to the ores in question. He had had no experience in working the Comstock ores, and knew nothing about them, except from his dealing in those of a high grade—ores running into hundreds of dollars to the ton, such as would bear transportation to San Francisco and Swansea, and justify reduction by smelting, leaching, and other thorough and expensive methods of treatment. The evidence all goes to show that ores of this grade can be economically worked, and commonly are worked, to a higher percentage than ores of a comparatively low grade. The testimony of Mr. Mackay to the effect that, in the early history of mining on the Comstock, mill owners would buy ore from miners at 65 per cent. of the car or wagon sample, and work them for what they could get out of them, does not raise a conflict upon this point. In those times there was no discount on silver, and the ores mined were

of high grade. There is no evidence that the mode of sampling with a view to such sales from the miner to the miller was the same as that now employed in taking car samples, and it is not reasonable to suppose that the miller would rely upon samples taken exclusively by the miner without any participation by him. No doubt both parties took part in the selection of the samples from the wagons upon which, in those days, the ores were transported from the mine to the mill, and probably the result of the assays was a nearer approximation to the true value of the ores. But, even supposing it was not, and that a wagon sample giving an assay of \$200 to the ton indicated a real value of only \$190 or \$180, the cost of a ton would be \$130, and, if it was, by a more thorough treatment in the pans, such as its value would justify, worked up to 80 per cent., the yield would be \$144, or, in other words, \$14 per ton for milling. In ore of greater value the profit would have been correspondingly greater. All that this evidence of Mr. Mackay proves, then, is that the millers in early times felt that they could afford to purchase the class of ores then mined, upon the chance of getting out 80 per cent. of the precious metals by careful handling. It is in no wise inconsistent with his opinion that 75 per cent. of the battery sample of the class of ores now being mined is a fair return. Mr. Lyman's testimony is that 73 per cent. of the battery sample of the Consolidated Virginia ores is the return they have actually received, but, in answer to questions put to him on cross-examination, he said, in reference to a lot of ore averaging \$48.33 per ton by car sample, that if he had owned them and sent them to mill, he should have hoped for a return of 65 per cent. of the car-sample assay, and should have expected nothing better. The proper deduction from this answer may be stated as follows: Sixty-five per cent. of \$48.33, the car-sample assay, is \$31.41, and this is $81\frac{7}{10}$ per cent. of \$38.33, the corresponding battery assay. So it appears that Mr. Lyman would hope to get $81\frac{7}{10}$ per cent. of the battery sample. He does not say that he would regard it as evidence of fraudulent or dishonest milling if he got only 75 per cent., and according to his actual experience of what he deems correct milling, 73 per cent. of the battery sample has been returned. Finally, it may be said that, if the defendants were held for the return which Mr. Lyman would hope to get, i. e. 65 per cent. of the car-sample assay, the judgment on that basis would be more than \$350,000 less than that which was actually rendered.

It is claimed that there is another serious error in the estimate of losses by milling, arising out of the disregard by the superior court of the discount on silver bullion. It is doubtful, however, if the evidence in relation to this matter is sufficiently clear to demonstrate the error alleged. The claim is

that in all the car-sample assays (the basis upon which the court estimated the bullion contents of the ores in question) the silver was reckoned at \$1.2929 per ounce,—that is to say, at its standard value according to the number of grains of pure silver (371.25) in a coin dollar,—and that in computing the loss the court has taken the same standard of value for the missing silver bullion, and awarded a money judgment for the resulting amount, when the actual market value of the bullion was at least 20 per cent. below the standard value. If this is so, it was certainly a very serious error, amounting, according to my estimate, to at least \$100,000, and probably to a good deal more; for there can be no doubt that a judgment for the conversion of silver bullion, payable in coin, should be based upon the coin or market value of the bullion, and not upon an arbitrary standard of value above its market value. I do not find, however, any direct evidence that the car-sample assays were made upon the basis of \$1.2929 per ounce of silver. The evidence, it is true, does show that the battery or pulp sample assays were based upon that assumed value, and since the car-sample assays were made by the same assayer, and at the same time, it is perhaps a fair inference that they were computed on the same basis. But, however this may be, a decision of the point is not necessary here. There must be a new trial of this issue for other reasons, and it is sufficient to indicate our views as to the proper allowance to be made, in case it shall appear that the ore assays were based upon an assumed value of silver bullion different from its market value. The true method of determining the loss sustained by imperfect or fraudulent milling is to ascertain the quantity of gold and silver actually contained in the ore, as nearly as practicable; next, to ascertain what percentage of the bullion contents should be returned by fair and honest milling, and the difference between this amount and the actual return in the actual damage. To make these computations, it is obvious that the standard of value must be the same in the assays of ore and in the assays of bullion returned, and it makes no difference whether this is \$1.2929 or any other figure, provided that it is the standard used by the assayer of the ores, and is uniform. By this means alone can the true difference between the proper return and the actual return be correctly determined. When this has been done, in order to determine the amount of the damages for the purpose of the judgment, the money value of the difference must be obtained by allowing for the discount on the silver, whatever it was. I find that, roughly speaking, the Hale & Norcross ores, according to the car-sample assays, contained about \$2 of silver to \$1 in gold. This is my own estimate, based upon a comparison of a large number of assays taken at random, and possibly erroneous. The mint returns of the

bullion extracted from these ores show an average disparity considerably less. This is accounted for in great part by the fact, very clearly shown from the evidence, that the mint return was based, not upon a valuation of \$1.2929 per ounce of pure silver, but upon the price which the mint was paying for silver, which was considerably below that rate. This indicates that the amount of silver bullion returned by the mills was underestimated, as compared with the bullion in the ores, for the silver was valued at less per ounce in the bullion than in the ores. It ought to have been estimated on the same basis, and the difference, when ascertained, should have been reduced to its money value. Since the necessary consequence of these errors in the findings is that there must be a new trial as to the question of damages from imperfect milling, it does not seem worth while to discuss the evidence offered to corroborate the general charge of fraud in the milling, by which I mean the evidence intended to show how it was possible to debase the battery samples, or to run the value of the ore into the tailings by improper amalgamation, or to abstract the amalgam, or purloin the bullion. All these things have their place, as tending more or less to corroborate other evidence of improper milling, and are entitled to such weight as the trial judge may think belongs to them, when considered in connection with the mere direct evidence of the assay value of the ores, the bullion returns made, and the percentage that ought to be returned with correct milling. There are one or two matters, however, connected with the milling that require to be noticed.

Exception is taken to the finding to the effect that the slimes and concentrates resulting from the working of these ores were the property of the Hale & Norcross Company, on the ground that all the evidence shows that, according to the universal practice and understanding, the slimes and concentrates become the property of a custom mill. This finding, like that in regard to the mining of worthless ores, is not made the basis of any award of damages and rests upon similar grounds. The court, being of the opinion that 75 per cent. of the car-sample assay was a proper return of bullion, necessarily concluded that a large part of the value of these ores was improperly run into the tailings, and, consequently, that the tailings did not become the property of the mill. And this was a correct conclusion from the premises; for it is only when the milling has been reasonably efficient that the tailings can rightfully be claimed by the mill, according to the custom. But the court gave no separate or additional damages on account of the value of the slimes and concentrates, because their value was included in the 75 per cent. of the car-sample assays with which the defendants were charged.

A claim is made on behalf of the respondent that the superior court was justified by

the doctrine, "*Omnia presumuntur contra spoliatorem*," in assuming that the Hale & Norcross ores were of the value shown by the car-sample assays, and, in support of this contention, they cite the celebrated ring case of *Armory v. Delamirie*, 1 Strange, 505. That was a case in which the defendant, a jeweler, had taken a ring, removed the jewel, and kept it wrongfully from the plaintiff, and the jury were directed to make the value of the best jewel that would fit the setting the measure of their verdict, unless the defendant would produce the jewel and show it to be of less value. The meaning and the limitations of the doctrine of this case are stated in the notes appended to the report, in 1 Smith, Lead. Cas. (Hare & W. Ed.) 589: "It signifies that, if a man by his own tortious act withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted. * * * When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of the loss, the law will aid a recovery against the wrongdoer, and supply the deficiency of proof caused by his misconduct, by making every reasonable intendment against him, and in favor of the party injured. A man who willfully places the property of others in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own or in any other manner, will consequently be compelled to bear all the inconvenience of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole, if the parts cannot be discriminated, or responding in damages for the highest value at which the property in question can reasonably be estimated. * * * The presumption, '*Contra spoliatorem*,' also arises when a party to a suit or controversy willfully destroys or suppresses by wrongful or dishonest means a deed, will, or other instrument, which belongs to, or would be admissible if called for by, the opposite party, and will justify a court or jury in drawing the most unfavorable inference, consistent with reason and probability, as to the nature and effect of the evidence which they have thus been precluded from using and examining as a means for the discovery of truth. * * * The extent and force of the presumption must evidently vary with the nature of the wrong and the circumstances under which it was committed, and it will not, perhaps, even when most hostile, be an absolute and insuperable bar. * * * The presumption arising from the wrongful destruction or suppression of evidence will not, however, justify a judgment or decree without evidence, nor the substitution of conjecture or allegation for proof; and its legitimate effect is confined to rendering evidence admissible which could not be received under ordinary circumstances, and the deduction of

every inference from the evidence actually given, in favor of the injured party, and against the spoliator. * * * The better opinion would seem to be that the mere fact of withdrawing or refusing to produce an instrument which belongs exclusively to the party by whom it is withheld will not render him a spoliator, nor give birth to the extremely hostile presumption which attaches to the wrongful suppression or destruction of the property of others, and will simply authorize the introduction of secondary evidence, which will be construed as favorably as the circumstances will permit for the party who is deprived of the means of full and accurate proof. * * * A line should obviously be drawn between those instruments or means of evidence in which the parties have a common interest, and consequent right to expect that they will be forthcoming when needed, and those which are intended only to meet the eye, or kept solely for the benefit, of the person by whom they are withheld; and the conduct of a tenant who refuses to supply the loss of a lease by the production of the counterpart is viewed in a more unfavorable aspect than that of a merchant or tradesman who withholds private books or papers from a public examination which he may desire to avoid for reasons having little or nothing to do with the particular case in which their production is demanded."

Applying the doctrine as expounded in the foregoing quotations, it falls very far short of sustaining the contention of respondent. In the first place, the facts of the case do not make it applicable. The milling of the Hale & Norcross ores was not in itself a wrongful act. The means by which the employment to mill them was obtained was wrongful, and entails the penalties which are to be considered hereafter; but the milling, if properly conducted, was a lawful, legitimate, and necessary operation. The form of the ores was, of course, changed, and their identity destroyed, but the usual means and the only means of establishing their value were taken, and the evidence preserved. There were the car-sample and the pulp-sample and the settler-sample assays, all taken according to the usual course of the business, and all preserved. They constitute the most direct and trustworthy evidence of the real value of the ores, while all other means of proof are indirect and secondary. So far as they are indefinite or uncertain, the willful suppression of any secondary evidence or corroborating circumstances, which would tend to clear up such uncertainty, would justify a court in giving to the direct evidence the strongest construction in favor of the other side that it would reasonably bear. But, as has been shown, the evidence in this case is all to the effect that the car-sample assay is invariably and largely in excess of the actual value of the ore, and it

is not reasonable in the face of such evidence to assume the car-sample assay as a basis of computation. This is not holding that the respondent is bound by the battery samples, or that a deduction from the car samples of \$10 per ton, or of any other definite sum, must be made, but only that the trial court should give proper consideration to the uncontradicted testimony of all the witnesses, and make such deduction as in its judgment is reasonable in view of all the evidence.

As to the claim that evidence was suppressed by failing to keep any record of the bullion resulting from the working over of concentrates, and by the refusal to produce the books of the Nevada Mill & Mining Company, the record does not bear out the assertions of counsel. There was no record kept in the mill of the working of the concentrates, or, so far as appears, of any other part of the business. The books containing a record of the business of the mill were kept at the office of the corporation, and the testimony of Williams, the superintendent of the mill, is that the account of the proceeds of the concentrates of all the ore worked in the Nevada mill, amounting to 93,000 tons, inclusive of 53,000 tons of Hale & Norcross ore, was kept in the books of the corporation, and showed a product of only about \$14,000. Mr. Williams, when the crude bullion was delivered to him by the foreman of the mill who had charge of the retorting, and who kept a memorandum of the weight, took the bullion to the assayer, who in a few days returned the resulting bars with his certificate of weight, fineness, value, etc., to the office; and he says that, in the meantime, he made no written entry of the weight, but carried it in his head. This may be a loose way of conducting business, but it is not a suppression of evidence. As to the refusal to produce the books of the company, counsel does not cite the evidence in the record, and I have been unable to discover that any demand for the production or inspection of the books was ever made.

Another alleged suppression of evidence was in the refusal of the cashier and clerks of the Bullion & Exchange Bank of Carson to exhibit the books of that concern at the time of the taking of their depositions. Evan Williams was vice president and principal stockholder of the Bullion & Exchange Bank, and Hofer, the cashier, and Brown and Peters, the clerks, may be said to have been in his employ and under his control. He was also a stockholder of the Nevada Mill & Mining Company, and superintendent of its mill and of the Mexican mill. But he has never been a party to this action, and at the time the depositions were taken neither Hayward, Hobart, nor the Nevada Mill & Mining Company had been brought in. No demand was then made, nor has any demand been since made, upon any party to this action for a production or inspection of the

books of the bank, and how, under the circumstances, they can be treated as spoliators of testimony is not apparent.

In connection with this subject of suppression and spoliation of evidence, a good deal has been said in reference to the mint transactions, which were more particularly urged in the argument as evidence of the purloining of bullion, or of large returns secured by the mill owners from the working over of tailings, etc. As to the weight of this evidence as affecting the question of improper milling, any discussion in this opinion in anticipation of a new trial would be out of place, and with reference to the doctrine of spoliation little need be said. It is claimed that the mint records were improperly kept by Hofer, cashier of the Bullion & Exchange Bank, and also acting superintendent of the mint; and the principal irregularity specified is that, in entering the deposits of bullion, instead of giving the name of the mine or locality where produced, he would enter it as "unknown," contrary to law and his duty; and the claim is that these fraudulent entries were made at the instance of Williams for the purpose of covering up abstractions of Hale & Norcross bullion. The only law to which we have been cited in reference to this matter is section 3506 of the Revised Statutes of the United States, which does not make it the duty of the superintendent of the mint to note the place of production of the bullion. But there is probably some regulation of the department, or perhaps some later statute, which does require something of the kind, for the evidence in this record shows that such was the practice at the Carson mint. But it also shows that, long before the reduction of these ores was commenced, there were frequent deposits of bullion, the source of which was entered as unknown. Indeed, such entries were more frequent before than since that time. I do not discover any evidence in the record as to when Hofer first went into the mint, and consequently it does not appear that any of the entries referred to were made by him. Indeed, it does not appear that he was ever the superintendent of the mint,—only that he was acting superintendent in August, 1891, a year after these transactions were closed. But, if it is true, as stated by counsel on the argument, that he first went into the mint subsequent to March 4, 1889, then much the larger proportion of the entries of unknown bullion were made before his advent, and in making the comparatively small number of similar entries, assuming that he did make them, he was following the established practice. I can only infer from the evidence that parties sometimes deposited purchased bullion, the origin of which they did not know. I should add that, notwithstanding the effort I have made to comprehend the evidence relating to these matters, I discuss it with some diffidence. It is extremely volu-

minous, and consists largely of tables of figures. It does not appear to have been introduced at the trial, or printed in the record with any regard to chronological order, or any other system of arrangement. Very few exact references are made by counsel to the particular folios, and I am far from sure that I have examined with due attention the portions upon which they particularly rely. I have, however, carefully examined the pages cited by counsel for respondent on the oral argument, as an illustration of the suspicious practice of the mint officials in entering bullion as unknown. The pages referred to are 1354 to 1360, inclusive. The list contained on these pages seems to have been completely misunderstood by counsel. It does not, from beginning to end, mention the place of production of a single lot of bullion. It gives the name of the depositor, the name of the person on whose account the deposit is made, the name of the person receipting for it, a description of the deposit, whether bars or amalgam, the weight, the value and mode of payment. That is absolutely all. Under the heading "On Account of" appear the names of many different mining companies, and it may be surmised that their mines produced the bullion, but their names are mentioned as owners, not as producers; and in the same column appear the names of other corporations and persons besides the Bullion & Exchange Bank, and in no case is it stated where the bullion was produced. Evidently, the list was not intended to show the place of production, and the word "Unknown" does not occur in it. This being the particular part of the evidence selected by counsel to illustrate their point, I am convinced they have overrated its force.

It does not seem necessary to further extend this discussion of the evidence relating to the value of the ores, and the losses caused by fraudulent and imperfect milling. As to the other element or item of damage,—exorbitant charges for milling,—the evidence and findings are so clear that nothing is left for decision, except a pure question of law. The finding of the superior court that the cost of milling did not exceed \$4.50 per ton is fully sustained by the evidence; and it is equally clear that \$4.50 was not a fair price for milling as between a miner and miller dealing on equal terms, and under circumstances entitling the miller to a fair compensation for the use of his mill. The question, therefore, is whether, in view of the manner in which the contract to mill these ores was obtained and executed, the mill owners are entitled to receive anything for the use of their mills? If they are, there must be a new trial of this part of the case; if they are not, then, so far at least as Levy and the mill owners are concerned, there is no need of a new trial. As to the other directors against whom there are several judgments,

the case may be to some extent different. Were the mill owners in this case entitled to retain, out of the moneys paid them for milling, the ordinary and reasonable price of milling, including a fair return on the capital invested in the mills? The authorities to which we have been cited, including the case so much relied on by counsel for respondent (*Distilling Co. v. Pratt*, 45 Minn. 215, 47 N. W. 789), are all consistent with, and several of them directly sustain, the proposition that a trustee who has contracted with himself on behalf of his cestui que trust, and has received the stipulated price of his goods or services, although he cannot, when called upon to account, retain the whole sum so received, may be, and in equity ought to be, allowed to retain what is equivalent to the benefits and advantages actually received by his cestui que trust; or, in other words, that he is entitled to the reasonable value of his goods or services, measured by their current market price. According to this doctrine the appellants contend that the mill owners in this case must be allowed the ordinary market price of milling Comstock ores, which was \$7 per ton. But I do not think this case can be determined by the rule applied to cases which involved no element of misconduct, except an express agreement of a trustee to pay himself more than reasonable value. Here, as has been shown, was a contract which made it to the interest of the actual manager of the mining company to sacrifice the interests of the stockholders by mining and milling ores which would not pay the cost of mining added to the current price of milling. The court has found, and the evidence is sufficient to sustain the finding, that such low-grade ores were intentionally mined and sent to the mills, involving certain loss to the stockholders if the current price were allowed, but involving no loss if the millers were limited to the actual cost of milling. Under these circumstances, it was not inequitable to allow only the actual cost of milling. It is true that a large proportion of the ores were of sufficient value to pay a profit on the mining and milling at current rates, with a return of 75 per cent. of the pulp assay, and it may be argued that, as to such ores, the market price of milling should be allowed. But in cases of this kind the courts cannot be expected to go into very nice calculations and estimates to save parties from the consequences of wrongdoing; and where it appears that the intention was to mine and mill ores that would barely pay the cost of handling, and where this intention was in fact carried out, a court of equity is justified in applying to the whole transaction one measure of compensation, and that measure must be actual cost. My conclusion is that the superior court did not err in requiring the mill owners to account for \$2.50 per ton for all the ores milled by them; and this part of the judgment, which is erroneous only so far as it includes the ores worked at the Vivian

mill, may be modified upon the findings contained in the record. The proper sum is \$2.50 per ton on 84,079 tons, the quantity of ore sent to the Nevada and Mexican mills, amounting to \$210,197.50. To this extent the judgment against Hayward and Levy is fully warranted by the findings and evidence.

As to the Nevada Mill & Mining Company, it would be necessary to reduce this part of the judgment still further on account of the fact that it had nothing to do with the ores reduced at the Mexican mill, but this and all other errors in the proceedings affecting that corporation become immaterial in view of my conclusion that it was never brought under the jurisdiction of the superior court. It is a Nevada corporation, and the only service of summons was made on Evan Williams, the superintendent of its mill, at Virginia City, who was at the time of service in attendance upon the trial of this cause, but not engaged in attending to any business of the corporation in this state. Such service was wholly insufficient to confer any jurisdiction over the company, and the judgment as to it is erroneous in toto.

As to the directors of the Hale & Norcross Company, other than Levy, it is not seriously contended that they are liable, except on the ground of negligence, and it is clear that such was the opinion of the superior court. But they were not charged with negligence in the complaint, but only with fraud. Fraud and negligence, however culpable, are not the same thing. It is true that, when negligence causes an injury of the same character as would be occasioned by an intentional fraud, it is visited with the same consequences, so far as compensation to the injured party is concerned, but the plaintiff has no right to demand a conviction of fraud when no fraud has been committed. When he relies on fraud he ought to plead fraud, and when he relies on negligence he ought to plead negligence, not only because the defendant has a right to know what the charge is which he is called upon to meet, but because the defenses are different. An action for relief on the ground of negligence is ordinarily barred by the statute in a shorter time than an action for relief on the ground of fraud. In this case, however, it is contended that the action against the directors is founded upon a liability created by statute, and, consequently, that the same limitation of the right to maintain the action applies as in cases of fraud. Code Civ. Proc. § 338. The statute referred to is section 3, art. 12, of the constitution, which contains the following provision: "The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association during the term of office of such director or trustee." This clause of the constitution has never been construed, so far as I can dis-

cover. According to its literal terms, every director of a corporation is severally liable for the full amount of any misappropriation of its funds during his term of office, without respect to any question as to his own culpability, and the argument of counsel is that it must be enforced according to its letter,—“*ita lex scripta est*,”—and hence a director, no matter how innocent he may be, and no matter how hard the case may be, must be adjudged to pay, at the suit of any stockholder, the whole of any misappropriation of corporate funds occurring during his term of office. And therefore, according to the contention of counsel, if some large stockholder of the Hale & Norcross Company, with the sole purpose of protecting his own interests and the interests of the other stockholders, had, by cumulating his stock, secured an election to the board of directors, and as a member of the board had opposed the milling of low-grade ores, or the payment of more than \$4.50 per ton for milling, and had to the utmost of his ability guarded the interests of the company in every direction, he could, nevertheless, have been singled out by any stockholder and compelled to make good the entire loss caused by the wilful and corrupt misconduct of a hostile board. If this construction must obtain, it seems very clear that no man with any property or character to lose will be willing to serve as director of a California corporation after it becomes known that the constitution contains such a provision. I do not think, however, that the construction contended for can be allowed. It does seem that it was the intention of the framers of the constitution to make each director of a corporation severally liable, whether individually culpable or not, for certain kinds of losses to the corporation occurring during his term of office; that is to say, he is made liable for embezzlement or misappropriation of corporate funds by officers of the corporation. But in my opinion the word “misappropriation” is to be construed by the maxim, “*Noscitur a sociis*.” It means something like embezzlement, or, in other words, it means the misapplication of funds intrusted to an officer for a particular purpose, by devoting them to some unauthorized purpose, and does not apply to the payment of an extravagant price for services or materials properly appertaining to the business of the corporation,—which is this case. For losses occasioned by such means the law affords an ample remedy, without the need of resorting to the constitution, against those who are justly responsible, whether by reason of fraud or negligence; but the law does not in such cases visit upon the innocent the sins of the guilty, and if the liability arises from negligence, the action must be commenced in two years after it accrues, whereas, if it arises out of fraud, it may be commenced at any time within three years after the discovery of the facts. In this case, if the directors had been sued for negligence

only in paying too much for milling the ores, the statute of limitations would have been a complete defense as to some of them, and a partial defense as to others. For these reasons I think the directors other than Levy are entitled to a new trial of the whole issue.

Objection is made to the right of the plaintiff, Fox, to maintain the action, upon the ground that the findings and evidence show that he made himself a stockholder after the occurrence of the injuries complained of, for the express purpose of bringing this action, that he acquired but a small amount of stock at that time, and that he never had any substantial interest in the corporation at any time. The finding of the court is, however, that he was at all times a stockholder, and as this finding is not attacked in the specifications of grounds in the statement on motion for a new trial, we cannot look at the evidence; and in construing the finding we must hold that it means that he was a stockholder in a substantial sense.

Objection is made to the form of the judgment or judgments upon various grounds, but these are objections which should have been made to the complaint. Having waived any objection to the complaint on the ground of misjoinder, etc., I think the objection to the several judgments on account of their mere form comes too late. In form they follow the complaint, and, if the several judgments had been for the respective amounts for which the defendants were liable, the form in which they were entered would have afforded no substantial ground of complaint. In view of these conclusions upon the main points in controversy, most of the other assignments of error become immaterial, and, so far as the points not herein particularly discussed seem likely to arise upon a new trial, I see no substantial error calling for particular discussion.

To summarize the above views, my conclusion is that the record sustains, or fails to sustain, the findings and conclusions of the superior court in the following particulars:

1. That the defendants Hayward, Hobart, and Levy formed a fraudulent combination and agreement for mining and milling the ores of the Hale & Norcross Silver Mining Company, but that the other directors of the mining company were not parties to this agreement, but were merely negligent in the performance of their duties, and are therefore chargeable only with such negligence, and are not chargeable with any actual fraud.

2. That the Mexican and Nevada mills were under the control of Hayward, Hobart, and the Nevada Mill & Mining Company, but that it is not shown that the Vivian mill was under their control.

3. That Hayward, Hobart, and Levy, with the acquiescence and consent of the officers of the Hale & Norcross Company, controlled the affairs of that company.

4. That Hayward, Hobart, and Levy, in pursuance of their agreement aforesaid, caused a quantity of inferior and worthless ores to be extracted from the mine and to be milled, after being mixed with ores of a higher grade.

5. That the Hale & Norcross Company paid \$7 per ton for milling said ores; that the actual cost of milling the same was but \$4.50 per ton; that by reason of their fraud, as aforesaid, the said defendants were entitled to receive only the actual cost of milling said ores; that by reason of having been required to pay \$7 per ton for milling said ores, the Hale & Norcross Company had sustained damage in the amount of \$210,197.50.

6. That the evidence is insufficient to sustain the finding of the court that the Hale & Norcross Company sustained damage by reason of the imperfect milling of the ores in the amount of \$789,618, and that the actual amount of damage sustained thereby cannot be determined from the findings of the court.

7. That the Nevada Mill & Mining Company, not having been served with process, was not before the court as a defendant.

The cause is therefore remanded to the superior court with the following directions, viz.: The judgment appealed from is set aside, and the superior court is directed to enter a judgment, as of the date of its former judgment, against Alvinza Hayward and H. M. Levy for the sum of \$210,197.50, with interest from that date, upon the issue presented by the claim for having paid an excessive price for milling the ore in the Mexican and Nevada mills, and upon that issue the order denying a new trial as to these appellants is affirmed. As to the other appellants, except the Nevada Mill & Mining Company, the order denying a new trial as to this issue is reversed, and a new trial thereon ordered. Upon the issue presented by the claim for damages sustained by reason of the imperfect and fraudulent milling, the order denying a new trial is set aside as to all the appellants, and the court is directed upon the evidence already taken in the case, and such other evidence as may be presented by either party, to make findings in accordance with the views hereinbefore expressed. Upon the amount, if any, of such damage sustained by the Hale & Norcross Company, in addition to finding the value of the ore delivered to the mills, the court is directed to find the amount and value of the bullion that should have been returned therefor. The court should also find what amount of this value of the ore delivered to the mills was necessarily lost in working, or would not under fair milling be separated from the baser matter, and also the amount of money, if any, received by the mills from the working or sale of the tailings or residue of the ores. Until the Nevada Mill & Mining Company has been brought before the court, the court will make no trial of the issues against that company.

We concur: HARRISON, J.; VAN FLEET, J.; HENSHAW, J.; TEMPLE, J.; McFARLAND, J.

GAROUTTE, J. (concurring). I concur in that portion of the judgment which is affirmed, but dissent from the opinion of the court wherein it is held that the evidence is insufficient to support the finding of fact to the effect that 74.6 per cent. of the car-sample assay is a fair return to the Hale & Norcross Company. The actual return to this mining company by the milling company was but 52 per cent. of the car-sample assay. This was not enough. No argument or citation of facts is necessary to prove it. Everybody knows it. But the all-important question is, how much bullion in excess of this 52 per cent. should have been returned to the mining company under the evidence found in this record? There is the rub. Mr. Lyman, superintendent of the Consolidated Virginia mine, and one of the principal witnesses for the defense, stated that he would hope to get a return of 65 per cent. of the car-sample assay. And, if I had been the trial judge, upon this and other evidence introduced, I should have recognized the justice of a return to the mining company to that amount at least. But the true rule to be invoked by a justice of this court, in determining the sufficiency of the evidence to support a finding of fact made by a trial court, is not what such justice would have done upon the evidence, if sitting as a trial judge, but, rather, is there a substantial conflict in the evidence? And the question of the presence of a substantial conflict is in no way dependent upon the great number of witnesses upon the one side, and the limited number upon the other; for it is often the case that one shall prevail against the many. For the foregoing reasons, and many others unnecessary to detail, in a case like this the finding of a fact by a trial court should not be set aside without the soundest and most convincing reasons. The opposite conclusion should be so plain that a mere statement of the evidence would indicate it. It should not be necessary to resort to an elaborate and complex analysis of the evidence in detail to prove it. The witness Holden testifies that the mining company should have had a return of 85 per cent. upon the basis of the pulp-sample assay. If we allow a variation of 10 per cent. between the car-sample assay and the pulp-sample assay, then under this testimony there should have been a return to the mining company of about 76.5 per cent. of the car-sample assay. It is attempted to reduce this percentage by a claim of allowance or discount for moisture and evaporation. There appears to have been but little importance attached to this question of moisture during the progress of the trial, and all indications point to it as somewhat of an afterthought. But, however that may be, I think a slight reduction would

satisfy its claims; and, in view of this testimony, taken in connection with that of Mr. Mackay and others, I think there is sufficient evidence in the record to support the finding which the majority of the court hold to be without support.

108 Cal. 475

FOX v. HALE & NORCROSS SILVER MIN.
CO. et al. (No. 15,414.)

(Supreme Court of California. Aug. 6, 1895.)
ACTION FOR BENEFIT OF CORPORATION—CONSPIRACY OF OFFICERS—RECEIVER TO COLLECT JUDGMENT.

Where, in an action by a stockholder against the president of the company and others for conspiracy to defraud the company, judgment is rendered for plaintiff, it is proper to appoint a receiver to collect the judgment and distribute the proceeds in conformity with its terms.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by M. W. Fox against Hale & Norcross Silver Mining Company and others for conspiracy. Judgment was rendered in favor of plaintiff, and from an order appointing a receiver to collect it, defendants appeal. Affirmed.

W. F. Herrin, Lloyd & Wood, Mesick & Waters, Garber, Boalt & Bishop, Edward R. Taylor, and M. M. Estee, for appellants. Wm. T. Baggett, L. D. McKisick, and E. S. Pillsbury, for respondent.

BEATTY, C. J. The facts of this case and the material parts of the judgment of the superior court are fully set forth in the opinion just filed in case No. 15,301. 41 Pac. 308. This is a separate appeal by the Hale & Norcross Silver Mining Company from that part of the judgment appointing a receiver of the moneys collected on the execution, and directing him to pay to the plaintiff's attorneys, as compensation for their services, 25 per cent. of all moneys so collected. Since the appeal was taken it has been voluntarily dismissed by the appellant, so far as the amount of the allowance to attorneys is concerned, so that it now stands as an appeal from that part of the decree appointing a receiver, and involves only the question of the power of the court to make such appointment. There is no doubt, we think, that the case was one in which the court had power to appoint a receiver to carry its judgment into effect. The action was not prosecuted by the plaintiff in his own right, or for his own exclusive benefit. He sued in behalf of the corporation to recover a fund in which others were equally interested, and the judgment in his favor was for the use and benefit of the corporation. He was, therefore, not entitled to receive the amount of the judgment himself, but clearly was entitled to an allowance, out of the moneys collected, of his reasonable expenses, including counsel fees. This right

to his expenses was sufficiently shown by the allegations of the complaint, and the prayer for general relief authorized the court to make proper provision for their payment. The appointment of a receiver to apportion the fund and pay it over to the parties, according to their respective rights and subject to the direction of the court, was a proper provision. The want of findings to support the allowance of attorneys' fees becomes immaterial in view of the dismissal of the appeal from that part of the decree. The order appointing the receiver is affirmed.

We concur: **McFARLAND, J.; VANFLEET, J.; GAROUTTE, J.; HENSHAW, J.; HARRISON, J.; TEMPLE, J.**

108 Cal. 478

FOX v. HALE & NORCROSS SILVER MIN.
CO. et al. (No. 15,612.)

(Supreme Court of California. Aug. 6, 1895.)

DEATH OF PARTY PENDING SUIT—FILING FINDINGS NUNC PRO TUNC—ENTRY OF JUDGMENT—MAINTENANCE AGAINST EXECUTOR.

1. Code Civ. Proc. § 669, providing that if a party die after decision and before judgment the court may render judgment on the decision, does not deprive courts of authority, when a party dies after the submission of a case but before its decision, to order the findings to be filed nunc pro tunc as of the date of submission.

2. Where, in an action by a stockholder for conspiracy to defraud the company, one of the defendants dies after the case is submitted but before its decision, the court should not order that judgment be entered against him nunc pro tunc as of the date of submission, but should direct that it be entered at the same time as that against his codefendants.

3. Under Code Civ. Proc. § 1584, providing that an action may be maintained against an executor of a testator who, in his lifetime, has wasted, destroyed, or converted to his own use goods or chattels, where deceased died pending an action by a stockholder against him and the president of the company for conspiracy to defraud the company, the action can be maintained against his executor.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by M. W. Fox against Hale & Norcross Silver Mining Company and others for damages for conspiracy. Defendant Hobart died after the case was submitted, but before its decision, and from an order that the findings be filed, and judgment against him be entered nunc pro tunc, his executors appeal. Order modified.

W. F. Herrin, Lloyd & Wood, Mesick & Waters, Garber, Boalt & Bishop, Edward R. Taylor, and M. M. Estee, for appellants. Wm. T. Baggett, L. D. McKisick, and E. S. Pillsbury, for respondent.

HARRISON, J. This appeal is taken by the executors of W. S. Hobart, deceased, and involves the same questions which were presented upon the appeal of Hayward et al. in the same action, No. 15,301, recently decided.

41 Pac. 308. The cause was tried and finally submitted to the court for its decision May 3, 1892, and on the 26th of May the court filed a written opinion announcing its conclusions, and directing counsel to prepare findings and a decree in accordance with said opinion. Hobart died June 2, 1892, and upon proper proceedings therefor the appellants, Cross and Bridge, who had been appointed the executors of his last will and testament, were made parties defendant in the place and stead of Hobart, and thereafter, upon proper notice to them, the court, on motion of the plaintiff, ordered its findings and a judgment thereon to be entered against Hobart nunc pro tunc, as of the 20th day of May, 1892. From the judgment thus entered, the executors have appealed, and urge in support of their appeal that, inasmuch as the court had not made its decision prior to his death, the action against him had abated, and the court was not authorized to enter a judgment nunc pro tunc, as of a date anterior to his death.

The authority of a court to order its judgment to be entered nunc pro tunc is inherent in the court, and is to be exercised for the purpose of doing justice between the parties. A court will always exercise this authority when it is apparent that the delay in rendering the judgment, or a failure to enter it after its rendition, is the result of some act or delay of the court, and is not owing to any fault of the party making the application. One class of the cases in which this authority may be exercised, says Mr. Freeman, comprises those "actions in which no judgments have ever been rendered, but which are, so far as the suitors can make them, in condition for the rendition of final judgments." *Freem. Judgm.* § 57. "The rule established by the general concurrence of the American and English courts is that, where the delay in rendering a judgment or a decree arises from the act of the court,—that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, through the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties,—the judgment or the decree may be entered retrospectively, as of a time when it should or might have been entered up. In such cases, upon the maxim, '*actus curiæ neminem gravabit*,'—which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice,—it is the duty of the court to see that the party shall not suffer by the delay. A nunc pro tunc order should be granted or refused as justice may require, in view of the circumstances of the particular case." *Mitchell v. Overman*, 103 U. S. 62. See, also, *Blaisdell v. Harris*, 52 N. H. 191. Whether the decision of the court is to be expressed in the form of findings of fact, or in the form of a judgment,

or both, is immaterial. The principle upon which its action is to be sustained is that justice may be done between the parties. If the cause has been tried and finally submitted to the court for its judgment, the rights of the parties are to be determined as they existed at the time of such submission, and neither party is to be prejudiced by the delay of the court in rendering its judgment. In *Campbell v. Mesier*, 4 Johns. Ch. 342, the cause had been submitted to the chancellor upon proofs taken before the master, and after argument but before decision one of the defendants died. The chancellor ordered the decree to have relation back, and to be entered as of the date when the cause was finally heard.

If, as is provided by sections 632 and 633, Code Civ. Proc., the making and filing of findings of fact is essential to its decision, the court has the same authority to order these findings to be filed nunc pro tunc as it has to order the judgment thereon to be so entered. These various acts—the making, as well as the filing of findings, and the entry of judgment—are only parts of the decision which the court has been invoked to make upon the submission of the cause, and together constitute the final determination of the rights of the parties. The decision which the parties have invoked the court to make is not necessarily the statutory and technical "decision" referred to in section 633, Code Civ. Proc., but is the final determination of the rights of the parties, and includes every step or act of the court which is requisite to a final judgment upon their rights. The rights of the parties are not to be prejudiced by the delay of the court in respect to any of these acts or proceedings, and the court is authorized to direct the making or filing of its findings of fact and conclusions of law, as well as the entry of a judgment thereon, nunc pro tunc as of such date as will preserve these rights.

As the rule has its origin in a purpose to prevent a failure of justice, it is necessary to invoke it only to the extent that is requisite in effecting this purpose. If the Code were silent regarding the procedure in case of the death of a party pending litigation, the court would be authorized to make its decision as complete as if it had become final prior to his death. Section 669, Code Civ. Proc., however, provides: "If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in course of administration on his estate." The effect of this section, in providing for the entry of a judgment which is payable out of the estate of the decedent, affords a statutory procedure which was unknown to the common law, and to that extent removes the necessity of directing the judgment to be

entered upon the decision as of a date anterior to his death. It does not, however, do away with the rule that authorizes the court to direct that its decision, so far as the same shall be necessary to protect the rights of the parties, shall be entered *nunc pro tunc*, as of a day anterior to the death of the party. In *Re Page's Estate*, 50 Cal. 40, it was held that the effect of entering a judgment under the provisions of section 202 of the practice act, which corresponds to section 609, Code Civ. Proc., was the same as if it had been ordered as of a date anterior to his decease, except that it could not be made to charge the estate with a lien which should have priority, and that it was payable only in due course of administration, and that the proper practice was to enter the judgment against the deceased by name.

In the present case, therefore, it was proper for the court to direct that its findings of fact and conclusions of law thereon should be filed as of a date anterior to the death of Hobart. By so doing the decision became in all respects as effective as if actually made before his death, and by the provisions of section 609 the judgment thereon could be entered after his death. In view of this provision, and considering the nature of the action itself, we think that the preferable course would have been to direct the judgment to be entered as of the date of the judgment against the codefendants of Hobart.

The right of the plaintiff to "maintain" the action against the executors of Hobart is fully authorized by section 1584, Code Civ. Proc.¹ See, also, *Coleman v. Woodworth*, 28 Cal. 567. It falls within the rule given by Lord Mansfield in *Hambly v. Trott*, Cowp. 371: "Where property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor."

The judgment is therefore set aside, and the court is directed to enter judgment against the defendant Hobart for the sum of \$210,197.50, as of the same date that it shall enter judgment against the defendants Hayward and Levy, with the directions that the said judgment against Hobart be payable in the course of administration on his estate, and to take such further proceedings in the action against the appellants herein as were directed in the appeal of Hayward et al., so far as the same may be appropriate under the proofs that may be made before it.

We concur: TEMPLE, J.; MCFARLAND, J.; HENSHAW, J.; VAN FLEET, J.; GAROUTTE, J.; BEATTY, C. J.

¹ Code Civ. Proc. § 1584, provides that an action may be maintained against an executor of a testator who in his lifetime has wasted, destroyed, or converted to his own use goods or chattels.

108 Cal. 33

HOSTETTER v. LOS ANGELES TERMINAL RY. CO. (No. 19,521.)

(Supreme Court of California. July 9, 1895.)

BOUNDARIES—DISTANCES—FRACTIONAL LOT—NATURAL OBJECTS.

1. Where three sides and the number of acres are known, and it is disputed whether the fourth side is a straight or meandering line, the straight line will be adopted, when the tract thus inclosed contains the number of acres called for, and when the acreage would be largely increased if the meandering line were adopted.

2. Where a fractional lot is conveyed, the grantee is bound by the distances given, even if reference is made to an official map.

3. Where land conveyed forms a triangle, and two sides and the acreage are given, a straight line from point to point will be adopted as the third side, when the boundary thus formed will inclose the number of acres called for.

4. A river will not control metes and bounds, when it is not clear that such was the intention, when another natural monument could more properly be adopted as a boundary, and when the identity of the land can be sufficiently established from the distances given in connection with the acreage.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

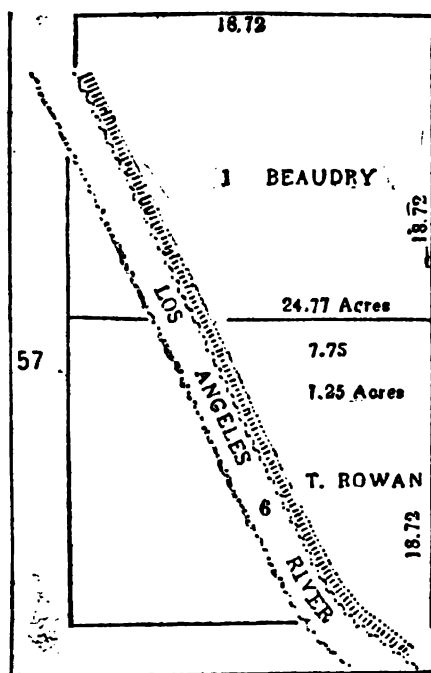
Action by D. Herbert Hostetter against the Los Angeles Terminal Railway Company to recover possession of land. From a judgment for defendant, plaintiff appeals. Affirmed.

Galbreth & Morrison, for appellant. T. E. Gibbon, for respondent.

GAROUTTE, J. This is an action in the nature of ejectment to recover the possession of a certain tract of land, 100 feet in width and 1,936 feet in length, situated within the boundary lines of the city of Los Angeles. It is conceded that, in the year 1868, the city of Los Angeles had the title to the realty; and plaintiff claims title as successor in interest of the grantees of the city. The city conveyed certain lands to plaintiff's predecessors in interest, and he now claims that those deeds carried the city's title to the property involved in this litigation; and it is upon the construction of those deeds that the merits of the present case depend.

The first deed "grants, conveys, and quitclaims unto Thomas Rowan that certain piece or parcel of land situated, lying, and being in the city and county of Los Angeles, and known on the official map of said city as fractional lot No. 6 (six), in block No. 57 (fifty-seven), of Hancock survey of said city, containing 7.25 (seven and twenty-five one-hundredths) acres of land." The second deed "grants, conveys, and quitclaims unto Prudent Beaudry that certain piece or parcel of land situate, lying, and being in the city and county of Los Angeles, and known on the official map of said city as lot No. 1 (one), in block No. 57 (fifty-seven), containing 24.77 (twenty-four and seventy-seven one hundredths) acres." That portion of the official map of

the city of Los Angeles relating to the lots in dispute may be fairly illustrated by the following diagram:



This land lies upon the east side of the Los Angeles river, and the river at high water is confined upon the east side by a precipitous bank of some two hundred feet in height. The river here in flood time is wide in extent, and lessens as summer advances; and the width of the river bed or bottom varies with the seasons and the amount of rainfall. At the date of the city's deeds, the official width of the river bed had been established, and by those lines the strip of land here involved lay between the high bank or bluff and the east line of the official bed. In other words, this land forms that part of the actual river bed or bottom lying east of its official bed. Plaintiff now claims that the city, by these deeds, sold the land to the east line of the official bed. The defendant claims that it only sold the land to the high bluff or bank. The description contained in the deeds from the city is made by reference, by block and number, to the official map; but, upon an inspection of that map, it is not at all plain and apparent as to the exact boundary lines of the respective tracts conveyed. What is to establish the shape and acreage of the tract of land described as "lot 1, block 57, as shown by the official map"? This interrogatory must be answered by a location of the western boundary line of that lot. From the face of the map we have the respective distances of three sides given; and possibly we would have the right to presume, in the absence of anything to the contrary, that the line making the fourth side was a straight line from one point to the other. But, be that as it may,

we have the acreage of the tract given, and, by calculation, ascertain that a tract so located contains the exact number of acres credited to lot 1 upon the official map. This would seem to be conclusive as to the location of the west line of the tract. While a statement in a deed or upon a map as to the acreage of a certain tract of land is not at all conclusive or controlling as to the quantum of land in the tract, and while, as a matter of description, it must go down, when coming in conflict with metes, bounds, and monuments, yet cases are presented where a statement of acreage renders most valuable aid in fixing boundary lines. If the description of tracts of land by monuments, distances, or otherwise is vague and indefinite, by reason of conflicting lines, or by the omission of a line, or from any other cause, then a statement of the acreage sheds valuable light upon the issue, and often serves as the acting, moving cause for the conclusion reached. Such was the result in *Hicks v. Coleman*, 25 Cal. 142; and, in *Hall v. Shotwell*, 66 Cal. 381, 5 Pac. 683, it is said: "Now, it is well settled, where there is not a sufficient certainty and demonstration of the land granted expressed in the other terms of its description, the number of acres is an essential part of the description." In the present case, we see nothing upon the face of the map to indicate that a portion of the river bed is included in lot 1. Full lots, under the Hancock survey, as shown upon the official map, are square in form, each side being 18.32 chains in length, and containing 35 acres; and it is conceded that this lot is a fractional lot, and does not extend across the river. Hence, it becomes unnecessary to refer to the lines inadvertently shown upon the opposite side of the stream; but, the lot being fractional, plaintiff is absolutely bound by the distances given. His belongings go that far, and no further. The testimony of the witnesses and the findings of the court declare that the north and south lines, running west the distance called for upon the map, terminate upon the bluff. They therefore necessarily fail to touch the river bed, and the land here involved could only be brought within lot 1, as so described, by making the western line of the tract a meandering line; and for this we see no authority whatever upon the face of the map. And, in addition thereto, such a construction would increase the acreage of the tract more than four acres, and thus directly contradict the statement of its acreage, as disclosed by the face of the map. All that we have said applies with equal force to fractional lot 6, of the same block. It appears to form a triangle, the length of two sides being given, and the acreage. By calculation, we find that a straight line upon the third side from point to point will inclose a tract of land filling the acreage demanded. Such fact authorizes us to so declare the third boundary line.

Appellant contends that the river is a nat-

ural monument, marking the west line of the tract, and, as such monument, overthrows the calls for distance found upon the north lines of the respective lots. There is some reason in this contention. Natural monuments are all-controlling, and the river here, as a monument, if it was plainly apparent from the map that it was so intended, would force other descriptions to give way. But it is not at all clear that such was the intention; for the line does not stop at the river. It crosses over, and goes away beyond. From the map, it may as well be urged that the north line of these respective tracts crosses the river, and stops at the west bank. Again, the north line going west strikes a natural monument before it reaches the river; and it may, with much more plausibility, be urged that this monument marks the termination of the line; for, by reference to the scale upon which the map is made, it is apparent that it most nearly coincides with the distance calls of the north line of the respective lots. This monument is plainly observable upon the face of the map; and, while it is not designated as a bank or bluff, that fact is immaterial; for that a natural monument of some character is there located cannot be questioned. Even if the map does not speak for itself as to the character of the monument, we still have the evidence of the surveyor as to what the marks there delineated upon the map represent, and there is no question whatever as to the actual fact. It is thus apparent that we are led into inextricable confusion when it is attempted to locate this land from the natural monuments appearing upon the map; and no resort is left us but to hold the distances given controlling; and, taking all the distances given, in conjunction with the acreage of the respective tracts, we deem their identity sufficiently established. Especially are we confident of the soundness of this conclusion when we call to its support the principle of law that grants of land by public bodies, as such, to private parties, are to be interpreted in favor of the grantor. Civ. Code, § 1069.

Owing to the conclusions reached, we do not deem it necessary to review the oral evidence offered at the trial. Neither do we discern any error of the court, in the admission or rejection of evidence, of sufficient importance to demand a retrial of the case. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

5 Cal. Unrep. 105

HOWLAND v. KRETER. (No. 19,478.) (Supreme Court of California. Aug. 3, 1895.) Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by George D. Howland against Leonard Kreter. Judgment for defendant. Plaintiff appeals. Affirmed.

G. D. Howland, for appellant. James Burdette, for respondent.

BELCHER, C. This is an action for unlawful detainer, and the facts which need be noticed are as follows: On March 23, 1893, plaintiff leased to defendant 15 acres of land for a term commencing at the date of the lease and ending January 1, 1894. Covering about one-half of the leased land was an orchard of orange and other fruit trees. The lease contained a covenant on the part of defendant "to keep the orchard entirely free from weeds," and "to plant nothing in the orange orchard, and to allow nothing to grow within four feet of the other trees of the place," and that plaintiff might re-enter for default in any of the covenants. The rent to be paid by defendant for the whole term was \$350, and the last installment thereof—\$50 in amount—was paid by him to plaintiff on August 30, 1893. On the next day, August 31st, plaintiff served notice on defendant that he must perform the covenants of his lease, and that he was "required to free the orchard entirely from weeds, and to stop the growing of anything that is now growing within four feet of the trees of the place, or deliver up possession of the said premises and appurtenances" to him. On September 5, 1893, plaintiff commenced this action, alleging, among other things, "that defendant has failed and neglected to keep the orchard on said premises free from weeds, but has allowed said orchard to become overrun with weeds, and the said orchard now is and at all times hereinafter mentioned was grown up to and overrun with weeds"; and "that defendant has failed and neglected to allow nothing to grow within four feet of the trees of the place, but did so plant squash seeds that the vines growing from said seeds have climbed to and are now growing in the tops of some of said trees, and at all times hereinafter mentioned were climbing upon and growing in said trees." And the prayer was for judgment declaring the lease forfeited, and awarding the plaintiff restitution and possession of the premises, with damages, etc. The answer denied all of the material averments of the complaint. The case was tried before a jury, and a verdict was returned in favor of defendant, on which judgment was entered. The plaintiff appeals from the judgment and from an order denying a new trial.

The appellant contends that the verdict was not justified by the evidence, and that errors in law were committed by the court in its rulings upon the admission of evidence, and in its instructions to the jury. It would subserve no useful purpose to state the numerous points made, or to enter into any lengthy discussion of them. The questions presented are of easy solution, and, in our opinion, it is enough to say that the evidence introduced by defendant was amply sufficient to justify the verdict; that the rulings upon the admission of the evidence objected to were proper; and that the instructions given to the jury stated the law applicable to the case correctly. The record discloses no prejudicial error, and the judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

5 Cal. Unrep. 107

HUNTER v. MILAM. (No. 19,555.) (Supreme Court of California. Aug. 3, 1895.) MARRIAGE—AUTHORITY TO PERFORM—LICENSE—EVIDENCE.

1. The fact that the person performing a marriage ceremony in California in 1858 was not authorized to perform such ceremonies would

not invalidate the marriage, if assented to by the parties and consummated by cohabitation as husband and wife.

2. Prior to Act April 9, 1863, a license was not a prerequisite to marriage.

3. Under St. 1850, p. 424, making 14 years the age of consent, and declaring guilty of a misdemeanor one who joins in marriage a female under 18 years of age without consent of her parent, the marriage is not void, though consent of the parent is not obtained, the female being over 14 years old.

4. A sworn complaint by a female for divorce from M., filed after her marriage to H., alleging her marriage to M., prior to the time of her marriage to H., and that she and M. "ever since have been and now are husband and wife," is, in the absence of explanation, conclusive, in an action against her by H. to annul his marriage with her, that she and M. were married in due form at the time alleged, and that M. was living, and was her lawful husband, when she married H.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Jesse Hunter against Jane Elizabeth Milam, sometimes known as Jane Elizabeth Hunter. Judgment for defendant. Plaintiff appeals. Reversed.

Knight, Simpson & Knight and Simpson & Harphan, for appellant. S. A. W. Carver, for respondent.

SEARLS, C. Jesse Hunter, the appellant, brings this action to annul a marriage entered into with the defendant at Los Angeles, Cal., on the 3d day of July, 1862, upon the ground that at the time of the alleged marriage of plaintiff and defendant the latter had another husband living, viz. one Joseph Milam, from whom she was not divorced, and which said marriage between said defendant and the said Joseph Milam had not been annulled. The amended complaint avers that prior to the marriage of plaintiff and defendant, viz. in the month of February, 1858, at the county of San Bernardino, state of California, defendant intermarried with one Joseph Milam, who was still living, and from whom she was not divorced, but which marriage was still in force and effect at the time of her marriage with plaintiff; that plaintiff and defendant lived together as husband and wife until 1884, when he learned that Joseph Milam, the defendant's former husband, was still living, whereupon he severed his connection with defendant; and that thereupon defendant brought an action to obtain a divorce from said Milam, and that on the 29th day of March, 1884, a decree was duly made and entered in the superior court in and for the county of Los Angeles, dissolving the bonds of matrimony between said defendant and said Milam. The answer admits that in the month of February, 1858, a marriage ceremony was performed between her and the said Joseph Milam, but avers, on information and belief, that the person who performed said ceremony had no right or authority so to do. She further alleges that she was at the time but 15 years

of age; that her father and mother, with whom she was living, did not consent to her marriage with said Milam, and that within 10 days after said purported marriage she left said Milam, and returned to her parents, and that Milam departed from the county of San Bernardino, since which time she has heard nothing of him, or whether he is living or dead. The answer further avers knowledge on the part of plaintiff of the marriage of defendant previously to his marriage to her, and avers cohabitation with her until May, 1884, etc. An amendment to the answer sets up the statute of limitations as a bar to the action. The cause was tried by the court, written findings made and filed, upon which judgment was entered June 14, 1893. The appeal is from the judgment and from an order denying plaintiff's motion for a new trial. The notice of appeal was served and filed August 14, 1894, more than one year after the entry of judgment, and cannot therefore be considered, so far as it applies to the judgment. Counsel for defendant moved in the court below to strike out the statement of plaintiff upon the ground that no notice of intention to move for a new trial was served or filed within the time required by law, or within 10 days after notice of the decision. The affidavits and testimony upon the motion pro and con are quite voluminous, and present a sharp conflict. Under these circumstances, it can serve no useful purpose to discuss it at length, and it matters not what our views might be were the question presented to us as an original proposition, as it involves an issue of fact which was passed upon by the court below and determined against the contention of the defendant, and, in consonance with an oft-repeated rule, this court will not reverse the conclusion reached by the court below upon questions of fact depending for their solution upon conflicting evidence. The motion for a new trial must therefore be determined upon its merits.

The court below, after finding that plaintiff and defendant were duly married in 1862, proceeded to find that in February, 1858, a marriage ceremony was performed between Joseph Milam and defendant (defendant being then 15 years of age), by a person unauthorized to perform marriage ceremonies; that no license was procured therefor, and that defendant was at that time living with her parents, who did not consent thereto or know thereof, and that thereafter the said defendant lived with said Milam as his wife for about 10 days, when her parents compelled her to leave Milam and return home; that Milam then left the county of San Bernardino, and defendant has not seen or heard from him since; that the said Milam was not living at the time of the said marriage of plaintiff and defendant, and the marriage between defendant and Milam was not in force or effect at the time of the marriage between plaintiff and defendant, and there

was no impediment to their marriage on July 3, 1862. These findings, except that in which it is found that plaintiff and defendant were married in 1862, are assailed by appellant as being unsupported by the evidence or as contrary thereto. The conclusion of law drawn from these facts is "that plaintiff and defendant were lawfully married on the 3d day of July, 1862, and ever since that time have been and now are husband and wife; that plaintiff should take nothing by his action"; and that defendant have judgment for \$500 counsel fees. We are of opinion the findings assailed cannot be upheld.

1. There is not a particle of evidence in the record that the marriage ceremony between Joseph Milam and defendant was performed by "a person unauthorized to perform marriage ceremonies," as found by the court. There was no evidence as to the person by whom the ceremony was performed, or as to his official character.

2. The fact that a marriage ceremony was performed in this state in 1858, by a person not authorized, would not in itself invalidate the marriage, if assented to by the parties and consummated by cohabitation of the parties as husband and wife.

3. No license was required as a prerequisite to marriage in this state in 1858, or prior to April 9, 1863. 2 Hitt. Gen. Laws, art. 4466; St. 1863, p. 244.

4. Fourteen years was the age of legal consent in 1858 (St. 1851, p. 186), and defendant, according to her own testimony, was over 15 years of age when married to Milam.

5. By the marriage act of 1850, any person joining in marriage any male under the age of 21 years, or female under the age of 18 years, without the consent of the parent or guardian of such minor, was deemed guilty of a misdemeanor and subject to a fine. St. 1850, p. 424. But the marriage was not void, or even voidable, except in cases where the female was under the age of 14 years, and was not ratified on her part after reaching the age of 14 years. St. 1851, p. 168.

6. The evidence that defendant was married to Joseph Milam in February, 1858, and that he was living in July, 1862, when she intermarried with the plaintiff, is to be found: (a) In her testimony at the trial, where she says that she was living in San Bernardino when she married Milam against her father's wishes; that her parents were Mormons, and were about to go to Salt Lake, and take her and her sister with them, and that she feared she would be sealed to some old man, and they both ran away, and she married Milam, with whom she lived 10 days, when her mother took her home, and in a few days she went to Salt Lake. She further testified that she heard from her nephew that Milam was living in Walla Walla, and that then, by advice of her husband, she consulted counsel, and was advised to apply for a divorce from him. This was in

1883. (b) In December, 1883, defendant filed her sworn complaint against Joseph Milam, in the superior court in and for the county of Los Angeles, in which she alleged that she and Milam intermarried in the county of San Bernardino, state of California, in February, 1858, "and ever since have been and now are husband and wife"; that defendant resides out of the state of California, and his residence is unknown; that about March, 1858, defendant therein willfully deserted her, etc.,—whereupon she prayed that the marriage between herself and the defendant be dissolved, etc. On the 24th day of December, 1883, the plaintiff in said cause filed an affidavit for the publication of summons against said defendant, Milam, in which, after stating the nature and object of the action, she alleged that defendant could not, after due diligence, be found in California, and that, "to the best of her knowledge, information, and belief, he resides at Walla Walla, Washington territory." On the 29th day of March, 1884, the cause was tried by the court, and written findings filed, in which the court found that this defendant and said Milam intermarried in the county of San Bernardino in February, 1858, and ever since have been and now are husband and wife; that defendant resided out of the state; that said defendant willfully and without cause deserted the plaintiff therein in March, 1858; that defendant had been regularly served with process, had failed to appear and answer, and that his default had been regularly entered, etc.,—whereupon a decree was duly entered whereby it was decreed "that the marriage existing between the plaintiff and defendant [therein] be, and the same is hereby, dissolved, and that plaintiff be and she is hereby freed and absolutely released from the bonds of matrimony," etc. (c) On the 16th day of February, 1892, the defendant herein filed her sworn complaint in the superior court in and for the county of Los Angeles, against the plaintiff herein, to procure the annulment of the marriage existing between them, in which complaint she averred: (2) Their marriage in 1862. (3) Her prior marriage in 1858 to Joseph Milam, and his desertion of her, and her ignorance of his whereabouts until after her marriage to the present plaintiff. (4) Her cohabitation with the plaintiff herein until 1884, when she discovered that her former husband, Joseph Milam, was still living; the institution of an action, and the decree of divorce against said Milam. (5) That this plaintiff and defendant herein have not lived together as husband and wife, or at all, since the decree of divorce against Milam. (6) That there was no issue of either marriage, etc.

The foregoing testimony, which is without substantial conflict, would seem to call for but little comment. The record in the divorce case of Defendant v. Joseph Milam was in the nature of a proceeding in rem,

and therefore binding upon, not only the defendant, but all the world. 2 Smith, Lead. Cas. (6th Am. Ed.) 870, and cases there cited. Conceding, however, that this record is not absolutely conclusive of the facts therein enunciated, and which were necessary to confer jurisdiction upon the court in the given case, viz. that the plaintiff and defendant in that case were husband and wife, that defendant therein was living, and that the court had acquired jurisdiction of the case by such service as the law requires, still the admissions in the sworn complaint in that case, and in the action brought by the defendant against her husband, the plaintiff here, were not only sufficient, but, in the absence of explanation, conclusive of the facts that defendant and Joseph Milam were married in due form in 1858, and that said Joseph Milam was living, and the lawful husband of the defendant, at the date of her marriage to this plaintiff in 1862. The testimony of the defendant, tending indirectly to show that the plaintiff knew as well as she did of her former marriage, and of the existence of her husband under such marriage, and that he cohabited with her after her divorce from such former husband, can only be upheld upon the theory that she had deliberately committed willful perjury in her former sworn statements. The order denying a new trial should be reversed, and a new trial ordered.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is reversed, and a new trial ordered.

108 Cal. 306

LOWER KING'S RIVER RECLAMATION DIST., NO. 531, v. PHILLIPS et al.
(No. 18,341.)

(Supreme Court of California. July 31, 1895.)

RECLAMATION OF SWAMP LANDS—CONCLUSIVENESS OF ASSESSMENT.

In an action by a reclamation district to recover an assessment, defendant may show that his land was not benefited by the reclamation works, and that it was excessively assessed.

In bank.

On rehearing. For former report, see 30 Pac. 630.

Daggett & Adams, for appellants. Denson & De Haven, for respondent.

TEMPLE, J. After a careful examination of the original arguments of counsel and of the petition for a rehearing, and also the briefs in Reclamation Dist. No. 307 v. Glide, 41 Pac. 278, one of which contains an elaborate review of the opinion rendered in department, I am convinced that the judgment ordered and the opinion rendered should stand.

The point upon which the rehearing was asked was that the conclusion in department, that "the court erred in excluding the evidence tending to prove that defendants' land was not benefited by the reclamation works, and was arbitrarily and excessively assessed, without regard to proportionate benefits," was unwarranted. Naturally, to this point our attention has been mainly directed, and, while the matter is fully and satisfactorily discussed in the opinion, I will notice some of the objections urged.

It is contended that the opinion overrules several decisions of this court, and that neither the case of Reclamation Dist. No. 108 v. Evans, 61 Cal. 104, nor the other cases cited in support of the conclusion reached in department, sanction that conclusion. In *People v. Hagar*, 52 Cal. 171, it was said: "The statute confides to the commissioners the duty of ascertaining the benefits to each parcel of land severally. They must exercise their judgment and discretion, and, in the absence of fraud, their action in this respect cannot be attacked and shown to be erroneous in a collateral proceeding." This case, and those in which the decision has been followed or approved, constitute, in the main, the authorities which it is claimed are in conflict with the opinion rendered in department. They are cited in that opinion. The attention of the court in the case of *People v. Hagar* was not called to the proposition that the taxpayer had been afforded no opportunity to be heard, and that without such opportunity the assessment could not become a fixed and final charge; and, further, unless such opportunity was afforded by the statute, it was void, and the assessment invalid.

In the subsequent case of Reclamation Dist. No. 108 v. Evans, 61 Cal. 104, the counsel for the appellants, both of whom had appeared as counsel in the case of *People v. Hagar*, 52 Cal. 171, say in their brief: "The question as to whether a given assessment is in proportion to benefits is a question of fact which must be determined favorably or unfavorably to a party by the commissioners whose duty it is to make the assessment. No other board or officer has power to review their decision, and no means are provided by which a party can be heard before them, or by which their decision can be reviewed. This court has held that their determination upon this question is final and conclusive, and hence their determination is a judgment in the strict sense." Id. 187. The constitutional provision was cited, and it was insisted that no hearing was provided for in the statute. In view of a further point, to be noticed hereafter, it should be noted that the matter upon which counsel contended that a hearing ought to have been provided was in regard to the judgment of the commissioners as to whether a given assessment was in proportion to benefits. The court stated the claim of appellant as

follows: "They [the provisions of the Code] are said to be unconstitutional because they do not provide for any mode by which a party assessed should have notice of the proceeding and an opportunity to object to the amount charged against his land." The first question which the court had to decide in that case was whether the statute did provide the taxpayer with the opportunity to be heard as to the amount of his assessment before the tax became a final and fixed charge against his land, and whether the opportunity afforded constituted due process. It was held that such opportunity was afforded, because the tax could only be collected by a suit in which the defenses were not limited, and that in such action "the appellant here could have shown that the sums assessed against his property were not 'proportionate to the benefits' resulting from the work of reclamation." It was further said that appellant could not complain because the court on such hearing had no power to change the assessment, since the court had the power to declare the assessment invalid so far as it purported to create a charge against his land. The point was necessarily involved in that case. The court could not have avoided deciding it unless it was prepared to hold that an assessment not made in accordance with an arbitrary standard laid down by the legislature, but by some rule which required the use of judgment and discretion, could be made a final charge against property when the taxpayer has had no opportunity to be heard. The court was not prepared to sanction this last proposition, and therefore the only alternative was to find that the law did afford an opportunity to be heard as to the amount of the assessment, or that the statute was void and the tax invalid. The same view was taken in *Reclamation Dist. v. Goldman*, 65 Cal. 637, 4 Pac. 676, and in *Swamp-Land Dist. v. Gwynn*, 70 Cal. 566, 12 Pac. 462.

Hutson v. Protection Dist., 79 Cal. 90, 16 Pac. 549, and 21 Pac. 435, arose under an act entitled "An act to provide for the protection of lands from overflow, other than lands recognized as swamp lands." Laws 1880, p. 55. Under this law, districts were formed and trustees elected, who provided plans for protecting the district and made the assessment. No hearing was provided for, and the tax was collected by a sale of the lands, and without suit. This court held the act unconstitutional, saying: "No provision is made anywhere in the statute for a hearing by the landowner whose land is to be charged. No notice is to be given him when the board of trustees is to levy the assessment, and, if he appears when such assessment is to be levied by the board of trustees, no hearing by the board is provided for in the act. The assessment is by the terms of the act made an absolute lien on his property, without any provision or opportunity allowed him to show its illegality or un-

constitutionality." This is the conclusion which would inevitably have been reached in the *Evans Case* if the court had not found in the law an opportunity for the landowner to be heard as to the amount of his tax.

With these views the case of *People v. Hagar* is in evident conflict. If the *Evans Case* was correctly decided, the attack on the assessment is not collateral: (1) For the reason, given in the opinion, that a collateral attack implies a judicial determination in which the parties have been heard, and the determination has therefore become final; (2) also, because, if it can be said to be an attack upon a final determination, it is one provided by law, and therefore cannot be collateral. "Any proceeding provided by law for the purpose of avoiding or correcting a judgment is a direct attack, which will be successful upon showing error; while an attempt to do the same thing in any other proceeding is a collateral attack, which will be successful only upon showing want of power." *Van Fleet, Coll. Attack*, p. 5. But, in my judgment, a defense of this character cannot properly be called an attack on a final determination, either direct or collateral. The suit is itself a step in a proceeding to subject the property of a taxpayer to the burden of the tax, and the charge does not become final until the suit is determined against the property owner. Otherwise it would be a proceeding in which one might be deprived of his property without due process of law. Counsel say that it was not intended in the *Evans Case* to hold that, in defense of an action to collect the tax, the defendant could call in question the judgment of the commissioners in estimating the proportionate benefits. He could plead as a defense that the commissioners acted arbitrarily, and did not use any judgment at all upon the subject, or pursued an erroneous method; but he cannot turn the court into a board of equalization. Certainly the court did mean to say that such an opportunity was afforded as would constitute due process. Whether the limited hearing counsel is willing to concede would satisfy the constitutional requirement counsel have neglected to discuss. I think it is just upon the question of the correctness of the estimate of proportionate benefits that the landowner is entitled to be heard, and probably the legislature could deny him a hearing on any other question without rendering the law unconstitutional. Common sense would seem to teach that a hearing would be of little value except as to the points on which the commissioners had some discretion, and might be lawfully influenced by evidence or argument. True, he may say that the law has not been followed, or that the act is unconstitutional. But he does not lose these defenses altogether, for an assessment under an unconstitutional law is invalid, and so is an assessment not made substantially as directed by law; but, because he cannot call in question

the judgment of the assessor after the charge has been fixed and final, he ought to be heard before it has become so. And, again, where an arbitrary standard for ascertaining the burden is fixed by the law,—that is, where the legislature has itself apportioned the tax,—no notice or hearing is required. *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663; *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921. In such case a hearing would be useless. In other cases, if it were conceded that the commissioners had in all cases pursued the law, still the taxpayer would be entitled to his hearing. To say that he can only object that the law had not been followed would be to hold that a hearing on the assessment may be denied altogether.

Counsel have cited a great many cases in which it has been held that the valuation made upon land by the assessor cannot be called in question in actions to collect the tax, unless the right to do so is provided by law. We are not called upon to dispute that proposition here. If an assessment has been made as the law provides, and that law does not violate the constitutional inhibition alluded to, the tax has become a final charge,—if the law so provides,—and cannot be called in question because the valuations were erroneous. But these cases have no application here. Here the question is, did the charge become final until the determination of the suit for its collection? The courts have held that it had not become a final charge, and if it was held that it had become final it would be necessary to hold the law invalid. The *Evans Case* is plain enough upon this proposition. The very question was whether the judgment of the commissioners could be called in question in the action for the collection of the tax. It was held that it could be. In the case of *Patten v. Green*, 13 Cal. 325, the board of equalization raised the assessment without notice. If the taxpayer had been afforded a hearing, it would only have been as to the valuation. As he was not allowed such hearing, the order made by the board was set aside. In *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71, it was held the constitutional requirement was complied with if the taxpayer could be heard as to the amount of the tax.

I do not agree with counsel on the proposition that the excluded evidence consisted solely of the opinions of witnesses to be set against the opinions of the commissioners. There was evidence other than the opinions of witnesses on the direct point of proportionate benefits, which, if true, showed gross inequality.

For these reasons, and those stated in the opinion rendered in department, the judgment and order are reversed.

We concur: GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.; MCFARLAND, J.; HENSHAW, J.

v.41p.no.3—22

LOWER KING'S RIVER RECLAMATION DIST., NO. 531, v. WOOD. (No. 18,343.)

(Supreme Court of California. July 31, 1895.)

In bank.

On rehearing. For former report, see 39 Pac. 634.

Daggett & Adams, for appellant. Denson & De Haven, for respondent.

PER CURIAM. On the authority of *Lower King's River Reclamation Dist. v. Phillips* (No. 18,341, this day decided) 41 Pac. 335, the judgment and order appealed from are reversed.

LOWER KING'S RIVER RECLAMATION DIST., NO. 531, v. PHILLIPS et al.

(No. 18,344.)

(Supreme Court of California. July 31, 1895.)

In bank.

On rehearing. For former opinion, see 39 Pac. 634.

Daggett & Adams, for appellant. Denson & De Haven, for respondent.

PER CURIAM. On the authority of *Lower King's River Reclamation Dist. v. Phillips* (No. 18,341, this day decided) 41 Pac. 335, the judgment and order appealed from are reversed.

(108 Cal. 354)

SAMONSET v. MESNAGER et al. (No. 19,440.)

(Supreme Court of California. Aug. 3, 1895.)

GRATUITOUS AGENT—LIABILITY FOR NEGLIGENCE—FINDINGS—PROOF OF LOST LETTER.

1. Where facts are found as alleged in a verified answer, defendant cannot question the correctness of the finding.

2. One who receives money, and agrees to loan it without any charge, and to collect the interest and principal, is liable for its loss by reason of his negligence, where he loans it without security to one to whom he personally furnishes goods to enable him to start in business, and does not collect principal or interest when due for fear the borrower would become crippled, and unable to pay what he owed him personally.

3. Testimony of the recipient of a letter that he had lost it, that he had looked for it a great deal, that he thought at one time he had left it at the office of his buyer, but had looked for it there, and been unable to find it, is sufficient to allow proof of the contents.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by J. Samonset against George L. Mesnager and Pierre Darancette. Judgment for plaintiff. Defendant Darancette appeals. Affirmed.

Horace Bell, for appellant. H. H. Appel, E. A. Rizon, and J. McKinley, for respondent.

BELCHER, C. This is an action to recover the sum of \$500, with interest thereon. The court below found the facts and rendered judgment in favor of the plaintiff, from

which, and from an order denying a new trial, the defendant Darancette appeals.

The facts, as disclosed by the record, are, in substance, as follows: In 1886 respondent, being about to leave the city of Los Angeles and go to France, left with appellant the sum of \$500, to be loaned out by him at interest for the use and benefit of respondent. Appellant received the money, and agreed to loan the same, without any charge or compensation for so doing, and to collect the principal and interest, and, when collected, to remit the same to respondent, in France. About October 1, 1886, respondent departed from Los Angeles, and went to France, where he has ever since resided. Within a few days after his departure, appellant loaned the said \$500 to one Couture, and took his promissory note therefor, payable in one year, with interest at the rate of 12 per cent. per annum, but took no security for its payment. The loan to Couture was made to enable him to commence and carry on business in selling groceries and liquors, and appellant furnished him goods from a store in Los Angeles, then owned and conducted by a firm of which he was a member. After the note became due, appellant took no steps to collect it, except he asked Couture several times for the money, and was told by him not to be afraid, that the note was good for a considerable time, and that he had not the money then, but would get it, and pay all that he owed. Couture closed out his business, and in January, 1888, went to France, where he remained till the latter end of that year, and then returned. On his return he again went into business in East Los Angeles, and was furnished with goods and merchandise by appellant's firm. He thereafter continued in his said business until April, 1891, when he became absolutely bankrupt, and unable to pay the said \$500 so loaned him, or the interest thereon, and has so continued ever since. Some time in 1890, appellant took a new note from Couture for the amount due respondent, and again, on April 21, 1891, he took another new note from him. The first two notes were made payable to appellant, and the last was payable to appellant and respondent two years after date, and was for \$2,000, bearing interest at the rate of 10 per cent. per annum, which sum included the amount due respondent, \$789.36, and the balance of an indebtedness due appellant. When Couture returned from France he had \$3,500 in money, \$2,000 being on deposit in a bank in Los Angeles; and he says appellant never asked him to pay the \$500 due respondent, and that, if he had, he could and would have paid it. During all the times mentioned, appellant "failed and neglected to collect the said sum of five hundred dollars from said Couture, or the interest thereon, and used no diligence or reasonable means, or any means at all, to collect said sum of money," and, as an excuse therefor, he says: "I didn't wish to bring suit against Mr. Couture, who owed

this five hundred dollars, because Mr. Couture owed me and Mr. Messager also; and, if I should attach his business, he would have been crippled so that he could not pay me and my partner what he owed our firm." Appellant failed to inform respondent in regard to the said loan, and of the fact that he had not required or obtained security therefor; and at no time did respondent know that the loan had been made to Couture without security, and the money lost, until a short time before this action was commenced, when, by his agent, he demanded of appellant the repayment of the money, and "he refused to pay it, and said: 'I don't want to be molested. Neither you or he can collect that money, because the time has gone by.'" Upon these facts, the question is, was appellant guilty of such negligence as rendered him personally liable to respondent?

It is claimed for appellant that some of the findings were not justified by the evidence, and the first point made under this head is that there was no evidence to support the finding that respondent left the money in question with appellant about the time of his departure from Los Angeles, and that, within a few days after his departure, appellant loaned the money to Couture; and it is said that the evidence of appellant shows, beyond question, that the money was loaned on August 21, 1886. A sufficient answer to this point is that the finding is in almost the exact language of appellant's verified answer, and its correctness cannot, therefore, be questioned by him. The other findings objected to are not without support in the pleadings and evidence; and the judgment cannot, therefore, be reversed on the first ground urged.

It is further claimed for appellant that his agency was merely gratuitous, and that a gratuitous agent can only be held liable for gross negligence. But such an agent is bound to exercise good faith and ordinary diligence. As was said in *Herrick v. Hodges*, 13 Cal. 434: "If defendant had undertaken this agency, he would be bound, though it were gratuitously undertaken, to good faith and ordinary diligence in executing what he pretended to do." And the general rule is that trustees, having trust money to invest, must act in good faith, and with a sound discretion, in investing it, and that it is not a sound discretion to invest in mere personal securities. *Perry, Trusts*, §§ 459, 453. Here it appears, from appellant's own testimony, given on cross-examination, that he did not know what Mr. Couture's circumstances were when he loaned him the money; that Couture worked as a barkeeper for his firm in 1886 or 1887, but how long he could not say; that he never knew what wages he was getting; that he took no security for the loan; that he did not ascertain whether Couture purchased any property or not; that he loaned the money for one year, and, when the debt became due, did not collect it, and did not know

what Couture was doing at that time; that with the money, and with goods and merchandise, he helped Couture to start in business; that when he received the money from respondent he agreed to collect it and remit it; that he allowed the time to go by without payment of principal or interest until 1891, when Couture became bankrupt, because he was afraid, if he brought suit, that Couture would be crippled, and unable to pay what he owed him and his partner. This testimony was, of itself, quite sufficient to show that appellant did not exercise ordinary diligence, or a sound discretion, in the management of the money intrusted to him, but was guilty of gross negligence.

The point that respondent was guilty of contributory negligence, and therefore not entitled to recover, cannot be sustained. He was in France during all the times named, and had no knowledge of the mismanagement of his money by appellant until a short time before this action was commenced.

So the point that the court erred in admitting in evidence proof of the contents of a lost letter from respondent to his brother here is also untenable. The letter directed the brother to go to appellant and demand the payment of the said \$500, and, unless paid, to commence an action to recover the same; and the recipient of the letter testified that he had lost it; that he had looked for it a great deal, and that he thought at one time he might have left it at the office of his attorney, but he had looked for it there, and had been unable to find it. This testimony was sufficient to justify the ruling complained of. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(3 Okl. 152)

WASS v. TENNENT-STIBLING SHOE CO.

(Supreme Court of Oklahoma. July 27, 1895.)

APPEAL—PETITION NOT OBJECTED TO BELOW—
CONSTRUCTION—FINDINGS—SUFFICIENCY
OF EVIDENCE.

1. A petition attacked for the first time in the supreme court for the reason that it does not state facts sufficient to constitute a cause of action will be liberally construed, in order to uphold the judgment rendered in the trial court.

2. When, upon an examination of the entire record, it appears that there is sufficient evidence to justify the trial court in making certain findings of fact, *held*, that this court will not reverse a judgment based upon such findings.

3. A party offering a witness should not be permitted to discredit his testimony. But witnesses frequently draw conclusions not warranted by the facts to which they testify, and it is the duty of a court to say, under the law, what facts are established by the testimony.

(Syllabus by the Court.)

Appeal from district court, Canadian county.

Action by Tennent-Stibling Shoe Company against N. B. Wass and another to set aside a conveyance. From a judgment for plaintiffs, defendants appeal. Affirmed.

Dille & Schmook, for plaintiff in error. Forrest & Gunn and Blake & Blake, for defendants in error.

DALE, C. J. March 20, 1890, the Tennent-Stibling Shoe Company filed in the district court of Canadian county an action against N. B. Wass and Lydia A. Wass, to subject their property to an execution, which plaintiff below had previously obtained against said defendants; and in such petition asked the court to decree that a certain transfer of real estate by the defendant N. B. Wass to the said Lydia A. Wass be declared fraudulent and void, and that such transfer be vacated and set aside, and that the real estate, or so much thereof as might be necessary to satisfy the execution described in the petition, be subjected to levy, and sold under said execution. The defendants answered by general denial. The case was tried at the June term, 1894, of said court, without the intervention of a jury, and judgment was rendered for the plaintiff. N. B. Wass and Lydia A. Wass bring the case here for review.

The facts, as we gather them from the pleadings, the record, and the transcript of testimony before us, are that N. B. Wass was, in the fall and winter of 1893 and 1894, engaged in business at El Reno, carrying on a dry-goods store; that, in addition to the general stock which he carried in that store, he was the owner of 56 lots, in the city of El Reno, and a homestead of 40 acres, adjoining the city on the south; that, on the 18th day of December, 1893, said Wass executed and delivered his deed of trust, conveying the title to 56 lots in the city of El Reno, to one W. N. Hubbell, to be by said Hubbell transferred, by deed of conveyance, to Lydia A. Wass, wife of N. B. Wass; that, at the time such deed of conveyance was so made, the said N. B. Wass was indebted, in the sum of about \$3,000, to different persons, a portion of such indebtedness being for goods then in the store of said Wass, which goods had been purchased from different wholesale firms, in the regular course of business and trade; that he was owing one of the banks at El Reno the sum of about \$1,050, and another bank at the same place the sum of \$294; that he was surety upon a note in the sum of \$500, and that he claimed to be indebted to his wife in the sum of \$3,375, for the payment of which last sum of money the transfer of the 56 lots was made. Prior to the time of the conveyance of the lots to his wife he claimed to be the owner of property of the value of \$9,576, with liabilities of \$6,980; but, from the evidence in this case, it would appear that he

had overestimated his assets to the extent of about \$2,000, and that his real assets, outside of his homestead, which is estimated to be worth from six to eight thousand dollars, were, in fact, about \$7,500, with liabilities of about \$7,000. It appears from the record in this case that, shortly after he conveyed to his wife the lots in controversy, he was unable to meet his obligations, and his stock of goods was seized by his creditors, and sold, and all of his assets, not exempt by law, were subjected to the payment of his debts; and this suit was instituted, for the purpose of subjecting to the payment of his debt to plaintiff below the property deeded to his wife. At the trial of the case in the court below, the court made certain findings of fact, among which were the following: "First. That the plaintiff above named is the judgment creditor of said N. B. Wass. Second. That the indebtedness on which such judgment was found was created prior to the 18th day of December, 1893. Third. That the said transfer of the said real estate by the said N. B. Wass to the said Lydia A. Wass was made to hinder and delay the creditors of the said N. B. Wass, and was made without a valuable consideration. Fourth. That the contention of the defendants that said transfer was made in good faith, to settle, and in payment of, a prior existing debt, is not established by the evidence; nor does the evidence establish that the relations of debtor and creditor existed between the said N. B. Wass and Lydia A. Wass at the time of said conveyance. Fifth. That the execution issued on said judgment was returned unsatisfied, and that said N. B. Wass has no personal property, and no real property except that above described, out of which said judgment could be satisfied." The court then proceeded to give judgment, as prayed for in the petition; and it is to reverse the judgment of the court below that this cause is brought here on appeal. There are two propositions involved in this case, and upon which the plaintiffs in error rely for a reversal: First. That the petition in said cause does not state facts sufficient to constitute a cause of action against the defendants, or either of them. Second. That the decision of the court below was not warranted by the evidence.

1. We have no difficulty in determining the first contention raised by appellant. The plaintiff in error contends that the petition does not state facts sufficient to constitute a cause of action, for the reason that it must be alleged in a creditors' bill of this kind that an execution has been issued and returned unsatisfied. Conceding that such allegation must appear in the petition, we think that the second and third paragraphs in the petition sufficiently show the fact that an execution had previously been issued and returned satisfied only in part,—the petition alleging: "That the execution was duly issued by the judge of said court upon said judgment, and

placed in the hands of the sheriff of said county; that a certain attachment was issued out of the probate court, prior to the judgment therein, and the same was levied upon certain personal property of the said N. B. Wass, subsequent to judgment; the proceeds of the property so attached have been applied on said judgment; but there still remains unpaid upon the aforesaid judgment the sum of \$119.35, and the defendant is wholly without personal property upon which said execution may be levied, and said judgment satisfied therefrom." We think that a liberal construction of the allegations above quoted are sufficient to inform the court that an execution had, prior to the time of the institution of the suit, been issued and returned satisfied in part only. No objection was made to the sufficiency of the petition in the court below, either by motion or demurrer. A petition attacked for the first time in the supreme court for the reason that it does not state facts sufficient to constitute a cause of action, will be liberally construed, in order to uphold the judgment rendered in the trial court. *Railroad Co. v. Morrow*, 36 Kan. 495, 13 Pac. 789.

2. The second contention of appellants, to the effect that no evidence was before the court upon which the court was warranted in finding the facts as heretofore set forth, is one worthy of grave consideration in this case. The only persons relied upon to establish the fraud, as claimed in the petition of the plaintiffs below, were the defendants N. B. Wass and Lydia A. Wass. These parties were both placed upon the witness stand by the plaintiff, and examined at great length. If the evidence in the case warranted the trial court in its findings of fact, the decision rendered was correct. We have carefully examined the record before us, with a view to determining upon what evidence the findings of the lower court were based. It clearly appears that the husband obtained about \$2,500 from his wife in the year 1888; that the money was the wife's share of an estate inherited from her mother; that the wife was appointed administratrix of the estate; and that N. B. Wass acted as the agent of his wife, the administratrix, in settling such estate, and dividing the proceeds among the heirs. Belonging to the estate were notes and mortgages, which were, for the most part, retained by Wass, as the share of his wife. These securities were converted into money, and the proceeds, to the amount of \$2,500, kept by Wass, under what he claims was an arrangement between his wife and himself that he was to use the money, and return the same to his wife as he became able, or as he might find it convenient. The testimony of Mrs. Wass was to the same effect. Neither party claimed that there was any definite time fixed when the money was to be returned, or that any stipulated amount of interest was to be paid for the use of the money. The evidence shows that, at the time Wass transferred the real estate to his wife, in Decem-

ber, 1893, no previous agreement was had between the parties that the debt should be satisfied in this way, and no demand upon the part of the wife for a settlement at that particular time was made; that, at the time of such transfer, N. B. Wass must have known that he had obligations to meet which he could not, in the ordinary course of events, liquidate as they matured. Under these conditions, was the finding of the lower court to the effect that the transfer was made to hinder and delay creditors wholly unsupported by the evidence? We think not. The transfer was made under an impending belief of insolvency, and it was found to operate to hinder the creditors in securing payment of their claims. True, Mr. Wass testifies that he had more than enough outside of his debts to satisfy his creditors; but the result of the liquidation demonstrated that he had not.

It is contended, also, that, if Mr. Wass did convey the property with the fraudulent intent to hinder and delay his creditors, the record nowhere shows, even inferentially, that his wife knew of this intention, or was a party to it in any manner; that, this being a conveyance to secure an honest debt, the knowledge of an intention to defraud must be brought home to Mrs. Wass. We think that, if the record clearly showed the existence of a debt which the husband was bound to pay, the fact that payment of such debt to Mrs. Wass would or would not hinder or delay creditors, or that Mrs. Wass did or did not know that such payment would so operate, is wholly immaterial. If Wass owed his wife a debt, she has a right to payment, the same as any other creditor; and the law is well settled that a creditor may secure his entire debt, even if in so doing he thereby hinders and delays other creditors. And this brings us to the question which we deem of vital importance in this case. Was or was not the husband indebted to the wife? Does the record warrant the finding of the trial court that the evidence does not establish the fact that the relation of debtor and creditor existed between the husband and wife at the time of the conveyance of the property in December, 1893?

The testimony, as before stated, shows that the husband received the \$2,500 from the wife; but this fact alone is not sufficient to justify a court in saying that the money went to the husband as a loan. In fact, in the absence of proof, it might rather be presumed that money from the wife to the husband, or vice versa, should be considered as a gift; as the relation of man and wife is such that, generally speaking, each party to the marriage contract uses the property of the other with as much freedom as if it were his separate portion. And especially is this true in relation to the money of the wife. With rare exceptions, the husband assumes the right to control, use, and invest the money of the wife as freely as if it were his own; and it is sel-

dom that the wife objects. Under the evidence contained in the record of this case, we think it clearly appears that, when the wife came into her inheritance, she turned the same over to her husband, possibly with a vague idea that he would return it to her at some future time, but with no definite idea other than that generally in mind by a wife when her husband takes possession of property belonging to her separately; that is, she believes he can better manage it than can she, that it will be safer with him than with her,—in short, that the interests of the family will be better conserved if he shall take charge of the money. These facts might reasonably be gathered from the record. It is true he testifies that he told her that he would pay the money back, and that she testifies that she let him have the money with that expectation; but, notwithstanding this direct testimony, we think that the entire record would justify a finding that the relation of debtor and creditor did not exist at the time of the conveyance of the property in question in this case; and we think that it might properly be found that the act of the husband in making the conveyance was a voluntary act upon his part to reimburse his wife for a favor received, rather than a settlement of a debt growing out of a contract. The authorities are uniform that, as against creditors, such a conveyance will not stand. *Hunt v. Spencer*, 20 Kan. 130; *Coale v. Plow Co.* (Ill.) 25 N. E. 1016; *Porter v. Goble* (Iowa) 55 N. W. 530.

3. Indeed, counsel for appellants, in very able and exhaustive briefs, concede that, if the evidence warranted the court below in its findings of facts upon this proposition, then the conclusion we here announce is correct; but contend that, inasmuch as the only witnesses relied upon by plaintiff below were Mr. and Mrs. Wass, and as both of such witnesses testified that the sum named as consideration for the transfer was a loan, such testimony must be accepted as conclusively proving the character of the transaction. We concede the general proposition that no person should be permitted to question the truthfulness of his own witnesses. But witnesses frequently testify to facts which do not warrant the conclusions which the witnesses place upon such facts. The court was bound to say, as a matter of law, whether or not, in view of all the testimony and circumstances surrounding the transaction, admitting that the testimony of Mr. and Mrs. Wass was true, did or did not such transaction create the relation of debtor and creditor between the parties? We can readily see how, under the evidence, the court could arrive at either conclusion, and therefore will not disturb the judgment.

BURFORD, J., having presided at the trial in the court below, not sitting; the other justices concurring.

ABEL v. BLAIR.

(Supreme Court of Oklahoma. July 27, 1895.)

APPEAL—RECORD—CASE MADE—CONTRADICTIONS—FAILURE TO SERVE IN TIME—EFFECT.

1. The records of the court, incorporated into a case made, cannot be contradicted by other statements contained in the case made.

2. Where the extensions of time granted by the district court, or judge thereof, have once expired, the district court, or the judge thereof, has no power then to extend the time for serving a case made, and a case made, served, signed, and settled after the expiration of time is void.

3. Where a case made has been held void because it was not served in time, and where the clerk of a district court has not certified that the copies of the pleadings, findings, and conclusions of the court, as contained in the case made, are true and correct copies of the same as shown by the records of the district court, such record cannot be considered as a transcript of the record of the court below upon the certificate of the judge of the district court, attested by the clerk, that the pleadings, orders, and process are true and correct copies of the originals.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Action by W. J. Blair against Dick Abel. There was a judgment for plaintiff, and defendant brought error. The case was dismissed for failure to serve the case made in time, and plaintiff in error moves that the case made be considered as a transcript. Motion denied.

Wisby & Horner, for appellant. Huston & Huston and J. E. Pickard, for appellee.

BIERER, J. To the petition in error in this case is attached the original case made filed in the court below. Upon the motion of the defendant in error, the cause was dismissed in this court because the case made was not served in time. The case made, against which this objection was offered, shows that the judgment of the court below was rendered May 14, 1894, and that motions for a new trial and in arrest of judgment were made and overruled the same day, and the defendant allowed 60 days in which to make and serve a case made for the supreme court; that on July 3, 1894, for good cause shown, an extension of the original time for making case made was granted, giving 60 days' time from the date thereof, that is, from July 3, 1894, in which to make a case made for the supreme court. On the 5th day of September, 1894, the judge of the district court, on application of plaintiff in error, again extended the time for 30 days to make and serve a case made, and the case made was served on the 4th day of October, 1894. Plaintiff in error claims that, when the extension of time to make a case was made by the court on July 3, 1894, it was for 60 days' additional time. The statement in the case made is that 60 days' additional time was given, but the statement also is that the order of the court making such extension is shown

by the journal entry, which is set out in words and figures following the statement in the case, and this journal entry shows that "it is ordered by the court that defendant have an extension of the original time heretofore granted of 60 days from this date to make a case made for the supreme court." The statement in the case made, that 60 days' additional time is granted, is qualified by the further statement that the order for the same is therein set out in words and figures, and this order shows that this 60 days was granted, not in addition to the time theretofore granted, but that the time was extended 60 days from the 3d day of July, 1894; and this journal entry, taken as a record from the entries of the orders of the court, not only shows within itself that the extension of time granted was not to be an additional 60 days from the 3d day of July, 1894, but only 60 days from that date, but it also is a record of the court that cannot be contradicted by any statement in the case made. *Territory v. Day* (Okl.) 37 Pac. 806. This grant of additional time, made on July 3, 1894, for 60 days, expired on the 1st day of September, 1894, and the judge of the district court had no power on September 5, 1894, to grant any additional time, and the service of the case made and the settlement of the case made, served after the time for making and serving same had elapsed, were void. *Insurance Co. v. Koons*, 26 Kan. 215; *Ingersoll v. Yates*, 21 Kan. 90.

To this case made, which we have held void, is attached the pleadings, the special findings of fact and conclusions of law, and exceptions thereto in the court below, and plaintiff in error asks that the errors assigned be considered upon this record by treating it as a transcript instead of as a case made. This might be done if the copies, or purported copies, of these pleadings, findings, and conclusions were certified by the clerk of the district court as being true and correct copies of the originals. *Lauer v. Livings*, 24 Kan. 273. But there is nowhere in the record any certificate of the clerk of the district court that they are true and correct copies. There is attached to this record the certificate of the judge of the district court, who settled the case made, "that the same, as above set forth, and as corrected by me, is true and correct, and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings, and judgment had in said cause," and this is attested by the clerk. This attestation of the clerk, however, does not make these copies a transcript. The clerk has not certified that they are true and correct copies of the original pleadings, findings, and conclusions, as shown by the record in the court below. All that the clerk has done in this case, and all that he is required to do under the law, is to attest the case made. This attestation is not a certificate that the things therein contained are

true and correct, or that anything that may be contained in the case made is true and correct. All that the clerk does is to attest the signature of the judge. It is not the business of the clerk to examine the case made to see whether it is correct or not, and even should he do so, and find that it was incorrect, what power would he have to so certify? The law gives him none. He would have no right to certify that the facts, which the judge had stated were true, were not correct, as shown by the record. His only duty is to attest,—that is, to witness,—the signature of the judge who settled and signed the case. When this is done, it authenticates the signature of the judge to the certificate to the case made, but that does not make the judge's certificate sufficient to treat the record, if void as a case made, as a transcript of the record in the court below. In the case of *Whitney v. Harris*, 21 Kan. 96, the case was taken to the supreme court on a bill of exceptions. This bill of exceptions was held to be insufficient as such, because it did not contain all of the record and proceedings of the court below, and plaintiff in error then asked that the record be considered as a transcript, but the supreme court denied this request upon the ground that the certificate of the clerk to the bill of exceptions did not state that the copies contained in the record were true and correct copies of the original pleadings and proceedings of the court, and that the certificate of the judge to the bill of exceptions was not sufficient to entitle the record to be used as a transcript. The court in this case said: "Besides, the judge does not have authority to certify to the correctness of copies of the record, or copies of any of the proceedings which are already of record. It is the duty of the judge only to see that the original record is made up properly, and that it speaks the truth, and the clerk then certifies to the correctness of copies thereof, or to copies of portions thereof. But the clerk does not, and has not in this case, certified to the correctness of the copies of the pleadings copied into this bill of exceptions. That is, while the clerk certifies that the copy of the bill of exceptions brought to this court is a correct copy of the original bill of exceptions, yet he does not certify that the original pleadings or proceedings, or any of them, were correctly copied into the original bill of exceptions, and he does not certify that the copies of pleadings and proceedings found in the copy of the bill of exceptions brought to this court are true copies of the original pleadings and proceedings." We consider this case cited squarely in point with the case under consideration, and it compels us to deny the request of plaintiff in error that this record, now held to be void as a case made, be considered as a transcript. A case made simply performs the office of bringing into the record matters not otherwise a part of the record, and which were formerly brought into it by a bill of exceptions, and if

a case made is not served in time, so as to make it valid, the certificate of the judge to the case made cannot be held sufficient to bring the record of the court below here as a transcript. The motion of the plaintiff in error to so consider the record is denied, and the appeal dismissed. All the justices concurring, except DALE, J., not sitting.

CITY OF GUTHRIE v. NIX et al.

(Supreme Court of Oklahoma. July 27, 1895.)

ACTION FOR NEGLIGENCE—FREEDOM FROM CONTRIBUTORY NEGLIGENCE—FAILURE TO PLEAD—AIDED BY VERDICT—APPEAL—OBJECTIONS NOT RAISED BELOW.

1. Under the Code of Civil Procedure adopted from the state of Indiana, and in force in this territory under the Statutes of 1890, the rules of interpretation and construction applied to that Code by the supreme court of Indiana prior to its adoption here, when recognized by it as settled rules of interpretation and construction, will be applied to this court; and under this ruling a plaintiff seeking damages for negligence must affirmatively allege in his complaint that he did not contribute to the injury complained of by any negligence of his own.

2. Under the Code of Civil Procedure adopted from the state of Indiana, and in force in this territory under the Statutes of 1890, if a material averment be omitted from the complaint, the complaint may be questioned for the first time by an assignment of error in the supreme court, upon the ground that it does not state facts sufficient to constitute a cause of action, although the objection may not have been raised by demurrer in the court below.

3. Under the Code of Civil Procedure here interpreted, when an averment material to the cause of action has been imperfectly or defectively stated in the pleadings, but yet so that proof may be admitted under such averment, the defect will be cured by verdict, but the total omission of a material averment will not be cured by verdict.

(Syllabus by the Court.)

Error to district court, Logan county.

Action by Nix, Halsell & Co. against the city of Guthrie to recover damages resulting from a defective drain. There was a judgment for plaintiffs, and an order denying a new trial, and defendant brings error. Reversed.

B. T. Hainer and Morgan, Pancoast & Baker, for plaintiff in error. Wisby & Horner, for defendants in error.

McATEE, J. The petition in this case, filed by the defendants in error, plaintiffs below, alleges that they were carrying on the wholesale grocery business as partners in the city of Guthrie in June, 1892, and prior thereto, in a building, including its basement, on lot 23 in block 49 of that city; that the basement was accessible from above by a stairway leading from the sidewalk in front of the building, and that the building and sidewalk are on the grade of Oklahoma avenue, as it had been established by that city; that they had at that time a large amount of goods and merchandise of great value stored in the basement; that prior to

the bringing to grade of Oklahoma avenue, of that city, the land lying adjacent to block 49, on which the building was situated, drained naturally in a southerly direction by reason of the slope and fall of the ground towards the south; that the rain and surface water which fell and found its way to, in, and about the locality of said block 49 found its way by a natural flow into a swale or draw which then intersected said Oklahoma avenue near where lot 23 is located, and then, by way of said swale or draw, to the south; that in the year 1891 the city of Guthrie, by its street commissioners and other officers and agents, brought Oklahoma avenue to grade; that in bringing the avenue to grade the swale or draw was filled at the point where the avenue crosses the same to a height of about eight feet, so as to form a dam or obstruction across the swale sufficient to shut off and prevent the natural flow of water down the draw; that, in order to provide a way of egress for the water that would accumulate behind said embankment or culvert, a drain was constructed therein, which was entirely inadequate to carry off the water of usual hard rains, and that after such rains water accumulated behind the embankment, and that there was no adequate means provided for the water to pass off; that in bringing the avenue to grade, the grading was so done as to throw the rain which might fall or might otherwise find its way into said street into shallow gutters at the sides thereof; that the grading of the avenue was such at and near said lot 23 as to cause the water for eight blocks on the east and three blocks on the west thereof to flow by gravitation to a common point on said avenue,—that is, to where the said swale or draw formerly intersected said avenue, the intersection of Oklahoma avenue and Vine street; that by reason of the collection of a large amount of water, and the drainage of a large space of ground, and in the inadequate arrangement of culverts and sewers, the water of common and usual hard rains was caused to rise and stand around, over, and above the said swale or opening, and to flow and set back therefrom, so that at the time mentioned in the petition and at the time of a usual hard rain the water rose and flowed back over Oklahoma avenue so as to flood the street and overflow the sidewalk in front of said lot 23, which sidewalk had been built in a substantial and workmanlike manner upon the grade established by the defendant city, and that the water overflowed the sidewalk, fell and flowed down the stairway aforesaid, and ran thence into the basement of the plaintiffs' premises, and soaked and saturated their goods, to the damage of plaintiffs in the sum of \$1,000. The petition alleged that the injury and damage were caused by the wrongful and unlawful acts of the city, and by the negligence, carelessness, and unskillfulness of the city, its officers and agents, in interfering with the

natural condition of the land about the premises described, so as to produce a flow and accumulation of water at the place mentioned, without providing adequate means to carry it off and away. The complaint did not contain any averment that the plaintiffs were themselves without fault, or that they did not, by their own act, contribute to the injury. The defendant did not demur to the complaint, but answered by a general denial, and by an averment that long prior to the time of the acts complained of in plaintiffs' petition, and when the building was constructed which the plaintiffs occupied as tenants, it was so negligently and unskillfully constructed that the whole space of the street in front of the building was used as a sidewalk, without authority from the city of Guthrie, and that the sidewalk had been excavated to the full depth of the basement of the building, which was 9 or 10 feet below the grade of Oklahoma avenue, and below the surface of the adjoining property, and that it was by reason of this wrongful excavation in front of the building and under the sidewalk which caused the water to flow into the basement of the building occupied by the plaintiffs that the loss complained of was caused; and the loss complained of in the petition, if any, was not by reason of the negligent and unskillful manner in which the sewer was constructed; that during the time that plaintiffs occupied the building they had full knowledge of the excavation under the sidewalk in front of the building, and that the excavation and drains were wrongfully and negligently allowed to remain in that condition. To this answer the plaintiffs filed a reply containing a general denial. The case was tried by a jury, and a verdict returned in favor of the plaintiffs in the sum of \$500. Motion for a new trial was made, and overruled by the court below.

Various assignments of error are made by the plaintiffs in error, one of which alleged that the court erred in overruling plaintiffs in error's demurrer to the petition of defendant in error, for the reason that the same did not state facts sufficient to constitute a cause of action, which was duly excepted to, and now assigned as error. While it does not appear from the record that the plaintiffs in error, before answering, or otherwise than by this assignment of error, objected to the petition for insufficiency, we consider this as a sufficient assignment of error upon the point contained therein for the purpose of bringing the question to the attention of this court. And under this assignment of error it is argued by the plaintiff in error that the complaint for injury done to the property by the negligence of another must aver that the plaintiff was himself without fault. The Code of Civil Procedure contained in the Statutes of 1890 was in force at the time the cause of action accrued in this case, and at the time suit was brought. This Code was adopted from the state of Indiana, and the settled

rules of interpretation and construction applied to it by the supreme court of that state are adopted and applied as the proper rules of interpretation and construction in the courts of the territory. It has been there held by a long line of decisions extending from the case of *Town of Mt. Vernon v. Dusouchett*, 2 Ind. 586, down to the present time, that, in order to recover for an injury caused by the negligence or carelessness of another, the complaint must show that the plaintiff claiming to be injured was himself guilty of no negligence which contributed to the injury. It is not necessary, and can serve no good purpose, to discuss the correctness of the reasoning upon which this rule is founded. It is based upon the rule that the absence of contributory negligence is a part of the plaintiff's case, and not a matter of defense. This does not seem to us to be the logical view, nor has it been the view which has been adopted in the majority of states, nor do we understand that the view now taken is that which would be applied under the Code of Civil Procedure now in force. But it is clearly the view which has been adopted in the state of Indiana, and, if so, must be accepted as the law governing the solution in this case, and will be applied accordingly. It was said in *Stevens v. Road Co.*, 99 Ind. 393, that: "The complaint seeks to recover damages for negligence. The allegation is that the defendant 'placed barbed-wire strands along his fence in such a negligent and careless manner that,' etc., and there is no allegation that injury was sustained without the fault of plaintiff, and there are no facts averred from which it may be inferred that the plaintiff was without fault. Such allegations in such cases were not formerly required. They are not found in the precedents in Chitty's Pleading. But ever since the case of *Town of Mt. Vernon v. Dusouchett*, 2 Ind. 586, it has been invariably held in Indiana that a complainant, seeking damages for negligence, must show that no fault of the plaintiff contributed to the injury." *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Mitchell v. Robinson*, 80 Ind. 281; *City of Bloomington v. Rogers*, 83 Ind. 261; *Town of Rushville v. Poe*, 85 Ind. 83; *Manufacturing Co. v. Millican*, 87 Ind. 87; *Gheens v. Golden*, 90 Ind. 427; *Railroad Co. v. Lockridge*, 93 Ind. 191; *Board v. Legg*, Id. 523. As it is said in *Railroad Co. v. Peters*, 80 Ind. 171, 172: "There is a more formidable objection to the paragraph. It in no way rebuts contributory negligence in the plaintiff. It nowhere alleges that he was without fault or negligence; nor do we think the facts stated sufficiently show that he was without fault or negligence. * * * And if there is no averment in the complaint of that kind, and the facts stated do not clearly show that the plaintiff was without fault or negli-

gence, a demurrer will also be sustained to the complaint;" citing *Railroad Co. v. Dexter*, 24 Ind. 411. It has been repeatedly held by the supreme court of Indiana that the complaint may be questioned for the first time by an assignment of error in the supreme court, upon the ground that it does not state facts sufficient to constitute a cause of action, although the objection may not have been raised by demurrer in the court below. *Heltman v. Schnek*, 40 Ind. 93; *Bolster v. Catterlin*, 10 Ind. 117; *Blackleg v. Benedict*, 12 Ind. 389; *Ellis v. Miller*, 9 Ind. 210; *Hayworth v. Junction R. Co.*, 13 Ind. 348; *Halderman v. Birdsall*, 14 Ind. 304; *Easterday v. Joy*, Id. 871; *Strader v. Manville*, 33 Ind. 111; *Ford v. Booker*, 53 Ind. 395; *Town of Brazil v. Kress*, 55 Ind. 14. And under repeated and constant holdings of that court, as set forth in numerous cases, the fact that the plaintiff himself exercised ordinary care, and was without fault, is a fact material to the recovery, which it is necessary that the plaintiff should allege in actions of this character, in order to a complete statement of his cause of action.

It is argued by the defendant in error that the defect, if one existed, was cured by the verdict. The case of *Alford v. Baker*, 53 Ind. 279, is cited in support of this proposition. But we do not consider that this contention can be sustained. The case of *Alford v. Baker* simply sustains the general proposition that where an averment material to the cause of action has been defectively or imperfectly stated in the pleadings, but yet so that proof may be admitted of the matter so stated in the defective allegation, the defect will be cured by the verdict. It is not held in that case that the total omission of a material averment will be cured by verdict, which would be necessary to support the view here contended for. We find the rule, as stated herein, to have been one generally adopted by the supreme court of Indiana; and while we might think it better otherwise, the rule has been so uniformly laid down and settled in that state that we cannot do otherwise than adopt it here in consonance with the rule by which we have uniformly accepted the interpretation and construction placed upon its own Code of Civil Procedure by the supreme court of Indiana. But, since the defect was not called to the attention of the trial court by demurrer before answer, we do not think that the case should be dismissed, and the order will be that the case be remanded, with leave to the defendants to amend their complaint, if they see fit to do so, and make the necessary averment by which they may affirmatively allege and prove, if they can, that they did not contribute to the cause of injury. Other assignments of error are made, but it is not necessary to consider them.

SHARPE, County Treasurer, et al. v. ENGLE et al.

(Supreme Court of Oklahoma. June 18, 1894.)

On rehearing. Denied.

For former opinion, see 39 Pac. 384.

McATEE, J. (dissenting). This was an action in the district court of Canadian county by the defendants in error against the plaintiffs in error, defendants below, in which the defendants in error procured a restraining order from the district court, and applied for an injunction permanently restraining the collection of territorial and county taxes. The facts upon which relief was sought by the defendants in error, as set forth in the opinion of the court delivered at the last term, are that the petitioners were the "owners of real estate and personal property in Canadian county which has been, by the assessors, listed for taxation for the year 1893, and that on the 3d day of August, 1893, the board of county commissioners of said county attempted to levy taxes for the various funds in said county, and that the board of county commissioners has not at any time made a levy for territorial taxes, nor a levy for any other purpose for said year, except at the time set forth; that the defendant Ernest Sharpe is the treasurer of Canadian county; that the county clerk of said county, after such levy, made the tax list and delivered the same to the county treasurer for collection, and that the tax, as levied by the commissioners, together with an additional sum of four mills on the dollar for territorial purposes, is now on the books of the treasurer for collection, and is a cloud upon the title of the plaintiffs' property, and that the treasurer is threatening to, and will, unless restrained, issue warrants for the collection of the same, and cause the same to be levied upon plaintiffs' property, and will advertise and sell plaintiffs' real estate, to their irreparable damage." To this petition the defendants filed a demurrer, on the ground that the court had no jurisdiction of the persons of the defendants or of the subject-matter of the action, and that the petition did not set forth facts sufficient to constitute a cause of action. The court overruled the demurrer, and rendered judgment upon the petition, enjoining the collection of taxes. From this judgment appeal is taken.

The provisions of the statute under which the levy of taxes in question was made, and from which the authority to levy such taxes is derived, if it exist at all, from sections 5627, 5628, art. 8, p. 1046, "Rate of Taxation and Levy," St. Okl. 1893. These articles read as follows: "Sec. 3. On the third Monday of July in each year the board of county commissioners must meet in the county seat to levy the necessary taxes for the current fiscal year, and they may levy the taxes at any time after the said third Monday of

July if the statement from the territorial board of equalization has not then been received, but such levy must not be postponed for more than ten days, and they shall levy the taxes as herein directed. Sec. 4. The rate of general territorial tax shall be as directed by the territorial board of equalization or by the territorial auditor; but if such statement or levy of such taxes, as hereinbefore directed, has not been received by the county clerks within ten days after said third Monday of July, then the said board of county commissioners shall levy the general territorial taxes at the rate of three mills on the dollar of valuation."

The defendants brought the case here upon error. It was presented at the last term of court, and passed upon, the judgment having been reversed, and the cause remanded, with directions to sustain the demurrer to the petition, and render judgment for the defendants, in which all the justices concurred, except Burford, J., not sitting, having presided in the cause below. The cause is again brought to this term upon petition for rehearing, which has been by the court refused, and the application dismissed, to which refusal and dismissal I now, after a fuller consideration, dissent.

The validity of the levy made by the board of county commissioners is the point at issue. Had the county commissioners lawful authority to levy the tax after the expiration of the time provided by the statute for making it? The determination of the question depends upon whether the provision of the statute fixing the time was directory or mandatory; that is, whether it was the intention of the legislature, by fixing the limit of time within which it was provided that the levy should be made, merely to provide for a regular and orderly procedure on the part of the territorial board of equalization and the board of county commissioners, or whether it was mandatory, limited the authority of the board of county commissioners intended, and that the exercise of the authority therein provided should be exercised within the time prescribed, or not at all. If the provision was directory, the territorial board of equalization having failed to discharge its duty within the specified time, and the duty having, by express provision, devolved upon the board of county commissioners, and the board of county commissioners having failed to discharge the duty committed to it within the time specified, that yet, the provisions having been inserted in the statute for the direction and convenience of these bodies, and for the sole purpose of promoting their regular and orderly procedure, that the observance of the limit of time is not material, may be disregarded, that the statute is merely permissive or discretionary, and the duty committed to the boards may be discharged thereafter, and be authorized, legal, and binding upon the taxpayer, to the same extent as if the power

had been exercised within the time specified. If, on the contrary, the statute is mandatory, the authority provided for by it must be exercised in the terms and within the time stated. The authority is, under this interpretation, limited to the time prescribed in the statute, falls if not exercised prior to the expiration of the time specified, and the provisions are imperative, and must be strictly obeyed. If the latter is the correct construction of the statute, the exercise of the authority after the time specified was without authority, and the levy made in this case is void. I do not understand that there is any middle ground. The limit of time is compulsory, mandatory, and essential to be observed in order to the lawful exercise of the authority, or it is not. It cannot be both mandatory and directory. Several principles of interpretation are applied to the solution of the question. In the result of their application, I am unable to agree with the court.

By chapter 70, art. 7, "Territorial Boards of Equalization" (section 5624) § 1, St. Okl. 1893, it is provided that "the governor, territorial auditor and secretary, shall constitute the territorial board of equalization, and said board of equalization shall hold a session at the capital of the territory, commencing on the first Monday of July of each year, and it shall be the duty of said board to examine the various county assessments and to equalize the same, and decide upon the rate of territorial tax to be levied for the current year, together with any other general or special territorial taxes required by law to be levied, and to equalize the levy of such taxes throughout the territory. And shall therefrom find the percentage that must be added to or deducted from the assessed value of each county, and shall then order the percentage so found to be added to or subtracted from the assessed values of each of the various counties of the territory, and shall notify the various county clerks of the percentage so ordered to be added to or subtracted from the valuation of property in their respective counties. It shall then be the duty of the various county clerks to add to or deduct from the total value of the property assessed to each party the percentage so ordered and collect the taxes accordingly. * * * This section, together with those sections hereinbefore recited, provides (1) for the creation of a territorial board of equalization, which shall examine the various county assessments and "equalize the same," and "equalize the levy of such taxes throughout the territory"; and (2) that "it shall then be the duty of the various county clerks to add to or subtract from the total value of the property assessed to each party the percentage so ordered and to collect the taxes accordingly"; and (3) "if the territorial board of equalization or the auditor fail to notify the county clerks of the levy of such taxes as hereinbefore directed within ten days after

the said third Monday of July, that then the board of county commissioners shall levy the general territorial taxes at the rate of three mills on the dollar of valuation"; and (4) that the board of county commissioners (a) "must meet in the county seat on the third Monday of July," and (b) "such levy must not be postponed for more than ten days," and (c) "they shall levy the taxes as hereinbefore directed"; and (5) by necessary inference, as well as by article 6, p. 1044, of the Statutes, the board of county commissioners is constituted a board of equalization for the county, with the power to assess each taxpayer the percentage to be collected from him, and to order the collection of the taxes accordingly. For the discharge of the duties here enjoined, these boards are to equalize the taxes, and they are commanded in language, the imperative character of which is not doubtful, that (1) "they must meet in the county seat to levy the necessary taxes for the current fiscal year on the third Monday of July"; and (2) "that such levy must not be postponed for more than ten days"; and (3) that "they shall levy the taxes as herein directed."

The principles which distinguish and determine, in most instances, when a statute is simply directory, and when the legislature means that it shall be mandatory, in matters relating to taxation, were declared by Chief Justice Shaw in the early case of *Torrey v. Millbury*, 21 Pick. 67, as follows: "In considering the various statutes regulating the assessment of taxes, and the measures preliminary thereto, it is not always easy to distinguish which are the conditions precedent to the legality and validity of the tax, and which are directory merely, and do not constitute conditions. One rule is very plain and well settled,—that all those measures which are intended for the security of the citizen, for insuring an equality of taxation, and to enable every one to know, with reasonable certainty, for what polls and for what real estate he is taxed, and for what all those who are liable with him are taxed, are conditions precedent, and if they are not observed he is not legally taxed, and he may resist it in any of the modes authorized by law for contesting the validity of the tax. But many regulations are made by statute designed for the information of assessors and officers, and intended to promote method, system, and uniformity in the modes of proceeding, the compliance or noncompliance with which does in no respect affect the rights of taxpaying citizens. These may be considered directory. Officers may be liable to legal animadversion, perhaps to punishment, for not observing them, but yet their observance is not a condition precedent to the validity of the tax." The distinction here made has, so far as it goes, been followed in subsequent cases by most of the courts. It was declared by the supreme court of the United States in *French v. Edwards*, 13 Wall. 511 (Field, J.), that "there are undoubtedly many statutory

requisitions intended for the guide of officers in the conduct of business devolved upon them which do not limit their power, or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system, and dispatch in proceedings, and by disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the act required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by disregard of which his rights might be, and generally would be, injuriously affected, they are not directory, but mandatory. They must be followed, or the acts done will be invalid. The power of the officer in all such cases is limited by the measure and conditions prescribed for its exercise." It is stated by Judge Cooley, in his work on Taxation (page 283), that "the phraseology of the statute may sometimes settle this question very conclusively. If by the use of negative words it requires a particular proceeding to be taken in a particular time or manner, and makes it void if not so done, or gives it effect provided it is so done, or declares that unless it is taken subsequent proceedings shall not be had, or prohibits its being done except at the time the statute prescribes, or if any terms plainly imperative are employed, the intent is clear, and no discretion can be permitted in construction." The statement of the law here extracted from the work of Judge Cooley, and the opinion of Judge Field, are those which are adopted as authorities and quoted into the opinion of the court in this case as authoritative expositions of the law. They appear to follow in their language, but with added distinctions, the opinion of Chief Justice Shaw. I do not draw from them the conclusions which are adopted as the views of the court herein. It is here declared by Judge Field that, even in the case of "statutory requisitions intended for the guide of officers in the conduct of business, and which do not limit their power, and which are regulations designed to secure order, system, and dispatch in proceedings, and by disregard of which the rights of parties interested cannot be injuriously affected," they "are directory," and, further, that "provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the act required shall not be done in any other manner or time than that designated." Since the statute under consideration provides that "such levy must not be postponed for more than ten days," it appears plainly to provide by "negative words importing that the act required [the levy of the taxes] shall not be done in any other * * * time than that designated," and appears, to my judgment,

in the language of Judge Cooley, to "prohibit its being done except at the time the statute prescribes, * * * and that by the use of negative words it requires a particular proceeding to be taken in a particular time, and makes it void if not so done." And when the territorial board of equalization has failed to discharge its duty of equalization, and the duty has devolved upon the board of county commissioners, and that board proceeds to levy the taxes, territorial and county, involving the function of equalization of the taxes, it appears, in my judgment, to fall within the prohibition set forth in the opinion of Judge Shaw that "one rule is very plain and well settled,—that all those measures which are intended for the security of the citizen, for insuring the equality of taxation, * * * are conditions precedent, and if they are not observed he is not legally taxed, and he may resist it in any of the modes authorized by law for contesting the validity of the tax,"—and to fall under the prohibition, as expressed by Judge Field, that "when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by disregard of which his rights might be, and generally would be, injuriously affected, they are not directory, but mandatory. They must be followed, or the acts done will be invalid." And when the statute declares, with its "must," that the board of county commissioners "must meet" at the time specified, for the purpose of a "levy of necessary taxes," and that "such levy must not be postponed for more than ten days," and that "they shall levy the taxes as herein directed," the language is mandatory, and that just such language was meant, upon the authority of Judge Cooley, by his statement of the law that, "if any terms plainly imperative are employed, the intent is clear, and no discretion can be permitted in construction."

The authorities cited in the learned opinion of the court, and adopted by the court, seem themselves to establish the fact that the statute is mandatory, and that the time limited in the statute, in the terms of which it is set forth, clearly indicate that the levy of the tax within the time specified was a condition precedent, and that the condition not having been fulfilled within the time limited, the authority of the board of county commissioners ceased, in the first place, because the provision was a measure which was "intended for insuring an equality of taxation"; in the second place, because it was "intended for the security and protection of the citizen upon whom the taxes are sought to be imposed"; in the third place, because its "terms are plainly imperative, and the intent clear," and that, with these conditions "no discretion can be permitted in construction." There is no diversity of opinion upon the points enunciated by the above authorities, but, in the fourth place, the authorities are uniform and to the point

that when negative words are used in a statute, restricting the mode of procedure as to public officers, relating to time and manner, the direction as to time, as well as manner, is mandatory, and leaves the public officer so directed without discretion. He must exercise the authority given within the time prescribed, and if it is not exercised until after the time prescribed the act is void. It is said in Anderson's Law Dictionary that "provisions of this character are not mandatory unless accompanied by negative words importing that the act shall not be done in any other manner than that designated." In delivering the opinion of the court in *Bladen v. Philadelphia*, 60 Pa. St. 486, Judge Sharswood expresses the doctrine in the following manner: "It would not, perhaps, be easy to lay down any general rule as to when the provisions of a statute are merely directory and when mandatory or imperative. When the words are affirmative, and relate to the manner in which power or jurisdiction vested in a public officer or body is exercised, and not to the limits of the power or jurisdiction itself, they may be, and often have been, construed to be directory; but negative words, which go to the power or jurisdiction itself, have never, that I am aware of, been brought within that category. 'A clause is directory,' says Taunton, J., 'when the provisions contain mere matter of direction, and no more, but not so when they are followed by words of positive prohibition.'" And it is held in *Dishon v. Smith*, 10 Iowa, 218, that "it is a general rule of law that statutes directing the mode of procedure of public officers, relating to time and manner, are directory; but this proposition is not applicable when the statute uses negative words restricting the action, or when there is something plainly showing a different intent." And Judge Cooley, in his work on *Constitutional Limitations* (8th Ed., p. 92), cited above, had declared the doctrine as it is here understood to be: "And if the act is performed, not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. But this rule presupposes that no negative words are employed in the statute which expressly or by necessary implication forbid the doing of the act, at any other time or in any other manner than as directed. Even as thus laid down and restricted, the doctrine is one to be applied with much circumspection; for it is not to be denied that the courts have sometimes, in their anxiety to sustain proceedings of careless or incompetent officers, gone very far in substituting a judicial view of what was essential for that declared by the legislature." It is, however, argued, in behalf of the view taken by the court, that the statute is directory and not mandatory, inasmuch as, if the county commissioners failed, declined, or refused to make the levy at the

time at which they were directed to do so by the statute, they might thereafter be compelled to do so by a writ of mandamus, upon application of any person being a creditor of the county or territory, and entitled to be paid out of the taxes which should have been properly levied at that time. The argument is, as I think, erroneous, in this: that, if the statute is mandatory, when the time expired within which the levy should have been made the lawful authority of the county commissioners was gone, and no judicial action or authority could revive or extend the expired jurisdiction. The argument proceeds upon the assumption that the authority to levy taxes would still exist in the board of county commissioners after the expiration of the time prescribed for the levying of the taxes, and that the statute is directory, which is the thing to be proved. I understand that upon the expiration of the time specified the power of levying the tax is gone. Mandamus will not issue to compel the exercise of an authority which does not exist.

It is said in the case of *Bohler v. Verdery* (Ga.) 19 S. E. 36, that, "by section 839 of the Code, the tax receiver, when dissatisfied with a return to him on oath, is required to assess the property within thirty days after the return is made. If for any cause he omits to do this, he cannot do it afterwards, nor can any court, for any reason, confer that power upon him. * * * The courts cannot enlarge or extend the scope of the statute by granting further time, if the tax receiver fails to act within the time prescribed." And in *Wells v. Commissioners* (Md.) 26 Atl. 358, that, "the time fixed by statute for levying a tax having expired, the authority for making the tax is ended, and therefore mandamus will not issue to compel it." And in *Martin v. McDiarmid* (Ark.) 17 S. W. 877, that, "where the statute of a state prescribes a certain time for the levying court to convene and levy taxes, a levy by it at any other time is invalid, though it may have convened and made the levy at such time, under a mandamus from a federal court." The power to take the property of the people—to make an appropriation of private property for public uses by taxation—is a statutory provision, and must be strictly construed. Without the provision of the statute it does not exist. It exists, if at all, only as it is expressed in plain terms in those provisions. If the right to exercise power given by the statute in a particular way be doubtful, it does not exist. In the statute now before the court for construction, it having been provided that "the board of county commissioners must meet" at a certain time to make the levy of taxes, and "such levy must not be postponed for more than ten days," and it having also been provided that "they shall levy the taxes as herein directed," the authority to make the levy depends upon its provisions, and out of them

it must come, if at all. And, applying the principles which have been above cited, how can the statute be interpreted to be directory only, be interpreted to authorize the exercise of an authority at a time other than that specified for the discharge of the duty, which expressly prohibits its postponement, which relates to the equalization of taxes, and therefore to the levy of taxes upon the property of the taxpayer, in violation of the settled rule of law, to which I find no exception, that, when negative terms are used, no statutory authority to tax has ever been found to be directory only, in which the power is limited by a prohibition expressed in negative terms. Judge Cooley says that "executive and ministerial officers enforce the tax laws; but, in doing so, they must keep strictly within the authority those laws confer, and they cannot add to, or vary in the slightest degree, any tax lawfully levied. They neither have nor can have any 'roving commission to levy and collect taxes from the people without authority of law, but [they] can only do so in the manner prescribed by the law, which should be the governing rule for their conduct in levying taxes in all cases.'" Cooley, *Tax'n* (2d Ed.) p. 42; *Barlow v. Ordinary*, 47 Ga. 639-642; *Vall v. Bentley*, 23 N. J. Law, 532; *Stetson v. Kempton*, 13 Mass. 272; *Webster v. People*, 98 Ill. 343. "The right to take private property in any form without the consent of the owner is a high prerogative of sovereignty, and must be strictly construed. * * * The power cannot be made by doubtful inference. * * * Nothing short of express words or necessary implication will answer the purpose. * * * Municipal, like private, corporations, must act within the limitations prescribed by the sovereign power; and they cannot impose a charge upon the person or property of individuals without proceeding in the manner prescribed by law." *Sharp v. Speir*, 4 Ill. 81. "The courts have no rightful authority, by mere construction, to aid the defective execution of a power given or created exclusively by statute, nor to dispense with those formalities which the legislature has seen fit to provide for its due execution." *Best v. Gholson*, 89 Ill. 465.

It will not be questioned that these are correct statements of principles of statutory construction. The time specified in the statute having expired, the authority vested in the board of county commissioners to levy the taxes is gone, unless it is continued by express words or necessary implication. There are no express words in the statute extending the authority. Is it by necessary implication that the authority continues? According to my view, the judgment of the court in declaring the authority still existed after the expiration of the time specified in the statute is doing so through doubtful inference, and, if this is correct, is aiding the defective execution of a power created exclusively by statute, and is dispensing

with the formalities which the legislature has seen fit to provide for its due execution, and, in doing so, is sustaining the proceedings of careless or incompetent officers, and is thus substituting a judicial view for that which was declared by the legislature, and is authorizing the taking of private property of the defendants without their consent, and outside of any authority contained in the statute. The case of *Mills v. Johnson*, 17 Wis. 617, relied upon in the opinion of the court as a sure guide to the construction of this statute, states: "On the first Monday of July, or within ten days thereafter, the common council should determine the amount of taxes and levy the same; and that the return of the assessment rolls in the month of August, and the levying of the taxes on the 26th of July, did not invalidate the taxes or render the proceedings void,"—and does not justify the conclusion drawn from it, that our statute is directory as to time. The opinion of the court construes a statute dissimilar in its terms to that in question here, and affords no safe support to the conclusion drawn in this case. The Wisconsin statute is not imperative in its terms, nor does it provide by a negative prohibition that the proceeding shall not be postponed to a later day,—terms of such a character as that, in the language of Judge Cooley, "no discretion can be permitted in construction." In the case of *Wingate v. Ketner* (Wash.) 35 Pac. 592, the court found the fact to be that "the ordinance in question fairly appears to have been passed within the thirty days provided by the statute." The expressions of opinion in that case were therefore obiter dicta, not binding upon the courts of that state, nor instructive as a guide to the courts of any other. It is my conviction, in making a decision which will authorize the board of county commissioners to disregard the imperative commands of the statute, limiting the authority of the boards by the negative prohibitions in the matter in which the equalization of taxes of the territory and county are involved, and the security and protection of the citizen are at stake, that an authority is conferred by the court not provided for by the legislature in the statute. I think that the judgment of the lower court was correct, and should be affirmed.

GOLDEN et al. v. CITY OF GUTHRIE et al.
(Supreme Court of Oklahoma. March 5, 1895.)
INJUNCTION—RESTRAINING ENFORCEMENT OF ORDINANCE—REMEDY AT LAW.

1. Injunction will not lie to restrain a city and its proper authorities from proceeding to enforce and punish, by fine and imprisonment, the violation of an ordinance which provides that, before any persons shall conduct a private or public auction, or conduct the business of selling bankrupt or other stock of goods at public or private auction, such persons shall pay the sum of five dollars per day to the city treasurer

for each day such business is carried on, and that the violation thereof shall be considered a misdemeanor, and shall be punished by fine and imprisonment.

2. Such proceeding is quasi criminal in its character, and for this reason the equitable jurisdiction will not be exercised by injunction; and, in the second place, its validity may be tested by a direct appeal from the decision of the police court. If the ordinance is invalid, it will constitute no defense in an action for damages. The plaintiff in error has a plain, adequate, and complete remedy at law, and there is no ground for the interference of equity.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Action by M. Golden and J. W. Miller, partners as M. Golden & Co., against the city of Guthrie and others. Demurrer to the petition sustained, and plaintiffs bring error. Affirmed.

Harper S. Cunningham, for plaintiffs in error. B. T. Hainer and Green & Strang, for defendants in error.

McATEE, J. This action was begun by the plaintiff company (plaintiffs in error here) to enjoin the city of Guthrie and others, its officers, the defendants in error, from enforcing a city ordinance providing for the payment of occupation taxes upon auctioneers and merchants who engage in the sale of merchandise at public auction. The case was tried in the court below on a demurrer to the petition, upon the ground that the petition did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and the plaintiff in error assigns error in such ruling. The petition alleges the copartnership of the plaintiffs, describing their business as that of retail dealers in merchandise, doing business in the city of Guthrie; that, as such retail dealers, the city of Guthrie exacted from them, and they paid to it, a license tax of \$25 for carrying on their business for the month of February, 1895; and, while the plaintiff firm held such license from the city, and expecting to be allowed to use the same, they made large purchases of goods, wares, and merchandise to replenish their former stock of merchandise, and, at the times therein mentioned, had on hand a large stock of goods, wares, and merchandise for sale at their place of business; that, on the 7th day of February, 1895, the city of Guthrie, by its mayor and council, by resolution revoked the said license-tax certificate so issued to plaintiffs for the month of February, without notice to the plaintiffs, and without cause or excuse therefor, and thereupon passed an ordinance taxing the business of plaintiffs at the rate of \$1,800 per annum, and providing severe penalties for a violation thereof, and immediately thereafter arrested and fined the plaintiffs for carrying on their business in violation of the terms thereof, which cases the plaintiffs duly appealed to the district court; that, as soon as the city ordinance

went into effect, the plaintiffs duly made their application thereunder, and as required by sections 2 and 3 of said ordinance, and were informed that they would be required to pay a license tax of \$420 for the balance of the current year, ending April 30, 1895, and that the license would not be issued for a less sum for said time; that plaintiffs tendered to said city government the sum of \$6, as merchants, and \$15, as auctioneers, as license tax for their said business for said unexpired year, which sums were the full amount of license exacted from any merchant or auctioneer doing business in said city; that said sums were by the said city government rejected and refused; and that said ordinance had been passed at the instigation, and upon the petition, of the competitors in the business of plaintiffs, and for the express purpose of closing up and forcing them to go out of their business as retail dealers; that the business engaged in by the plaintiffs was an honest business, and was so recognized by all men, and that the exaction by said city of Guthrie of a license tax of more than \$1,800 per annum would effectually prohibit and close up their business; that said business was a permanent business, and was organized for the purpose of carrying on a permanent auction store; that said tax was oppressive and unjust, and many times greater than that required to be paid by any other business; that plaintiffs had no adequate remedy at law; wherefore they prayed for a temporary injunction. The authority of the city government of the city of Guthrie to impose the license tax referred to arises under section 6 of the organic act of the territory of Oklahoma (page 41, St. Okl. 1893), which provides as follows: "The legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States, * * * provided, that nothing herein shall be held to prohibit the levying and collecting license or special taxes in the territory, from persons engaged in any business therein, if the legislative power shall consider such taxes necessary." The authority here given to the legislature was, by page 160, c. 14, art. 3, § 19, St. Okl. 1893, deputed to cities of the first class, as follows: "The city council shall have authority to levy and collect a license tax on auctioneers, * * * merchants of all kinds. * * * And, by section 20, that: "All license taxes shall be regulated by ordinance. * * * No license shall be issued until the amount prescribed therefor shall be paid to the city treasurer."

The ordinance referred to was enacted by the city council of Guthrie on the 7th day of February, 1895, which provides that:

"Section 1. Before any person or persons, firm or corporation shall sell, or expose for sale, at public or private auction in the city of Guthrie, any bankrupt or other stock of goods, wares or merchandise; and before

any merchandise of any character whatever shall be exposed for sale at public or private auction by any person or persons, firm or corporation in said city, the owner or owners thereof shall first obtain and take out a license for the sale of such goods, wares or merchandise at public or private auction, and shall pay for said license the sum of five dollars per day, for each day of continuance of such auction or sale.

"Sec. 2. Any person or persons, firm or corporation desiring to conduct the business of selling bankrupt or other stock of goods, wares or merchandise within the corporate limits of the city of Guthrie, at public or private auction, shall first pay to the city treasurer of said city the sum of five dollars for each day said business shall be carried on."

"Sec. 6. Any person or persons, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof in the police court shall be fined not less than twenty-five dollars and not more than one hundred dollars and by imprisonment in the city jail not exceeding ninety days at the discretion of the court for each offense."

It is argued by defendants in error that the trial court was without jurisdiction to restrain the defendants in error, by injunction, from the enforcement of the municipal ordinance, by arresting and fining the plaintiffs for carrying on their business in violation of the terms of the ordinance.

The plaintiffs in error appear to have disregarded the ordinance, for, as stated in their petition, they were immediately "arrested and fined for carrying on their said business in violation of the terms of the ordinance, which cases the plaintiffs duly appealed to the district court." Upon this appeal, the plaintiffs in error have a right to draw into question the authority of the municipality of the city of Guthrie to pass the ordinance here in question, and they may have the validity of the ordinance passed upon. If the ordinance is invalid, they are also entitled to their action for damages at law, against those responsible for the imposition of the fine, for the prosecution, for the delay and damage to their business, and for such other injuries as have been inflicted upon them by such prosecution; and, if invalid, it will furnish no defense to the defendants in error, either in the appeal to the district court, or in such action for damages as the plaintiffs in error may be entitled to, if it should, in such appeal and action for damages, appear that the imposition of the license tax and the arrests were without authority of law, and that there was no warrant or justification for such prosecution. The validity or invalidity of the ordinance is a question of law which the court, sitting to pass upon the appeal from the police court, is fully competent to decide. In an action for damages, if the plaintiffs in error

have been wronged by having their business broken up, or by reason of personal inconvenience or injury from the actions, they may have an adequate remedy for damages, which they cannot have in such a case as the present, and under the equitable jurisdiction of the court. To have the determination of the present prosecution in the district court, where it is now appealed, together with their action for damages, would seem to constitute a plain, adequate, and complete remedy at law. The existence of such a remedy has always precluded the exercise of the equitable jurisdiction. It is unnecessary to cite authorities upon this proposition. It was enacted into positive law by the congress of the United States, in the judiciary act, as long ago as 1793, and it has been incorporated in the Revised Statutes of the United States in section 723, in a declaration that: "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate remedy may be had at law,"—as is illustrated by the declaration of the plaintiffs' petition that they have "no adequate remedy at law." Neither can the equitable jurisdiction be invoked to restrain any criminal or quasi criminal proceeding, or take jurisdiction of any case or matter not strictly of a civil character. It is said by Judge Story, in his Equity Jurisprudence (section 893), that: "The courts of equity will not interfere to stay proceedings in any criminal matters, or in any cases not strictly of a civil nature."

There can be no doubt of the character of relief sought in this case. Having been arrested and fined under the ordinance providing severe penalties for the violation thereof, the plaintiffs in error seek a restraining order against the defendants in error, asking that they be prohibited from interfering with the plaintiffs in carrying on their business. The relief sought is against proceedings which are of a quasi criminal character. If the authorities of the city of Guthrie be restrained from prosecuting an ordinance which provides for its enforcement by fine, or fine and imprisonment, it would lie within the power of this court, by the exercise of orders of injunction, to restrain the enforcement of any or all of the ordinances of the city, upon the application of persons interested in the violation of such ordinances, and who may have become subject, like the plaintiffs in error, to the imposition of such penalties as may be provided in them. In the language of Chancellor Walworth, in *West v. Mayor, etc.*, 10 Paige, 539, such an interference would be a "usurpation of jurisdiction by this court, if it should draw to itself the settlement of such questions when their decision was not necessary in the discharge of the legitimate duties of the court." Their effort to discharge their duty to the public would be rendered unavailing, and the community left at the mercy of the lawless and vicious elements of society until such time

as the question could be settled in the courts of equity, if it should at last be determined that the ordinance was valid, then the court would be powerless to enforce its provisions, or impose the penalties denounced against its violation, but must remit the cases to the courts of law, which, before the assumption of jurisdiction by the courts of equity, had the right to determine every question submitted to and determined in the equity jurisdiction. It is said in 2 High, Inj. § 1244, p. 820: "Nor will an action for an injunction be entertained to test the authority of the mayor of a city to arrest and fine complainants for carrying on a business in contravention of the city ordinances, and to test the legality of such ordinances, the proper remedy being by appeal from the judgments imposing the penalties prescribed by the ordinance. And an injunction will not be granted to restrain the prosecution of suits before justices of the peace for violations of city ordinances, when complainant can test the legality and validity of the ordinances by a direct appeal from the decision of the justices. * * * And in such case the relief is properly refused upon the ground that the act is unconstitutional, and confers no power to make the arrest; or, if the arrest under the statute is itself unjustifiable or unlawful, the remedy at law by an action for damages is the appropriate means of relief, and there is, therefore, no ground for the interference of equity by injunction." *West v. Mayor, etc.*, 10 Paige, 539; *Cohen v. Commissioners*, 77 N. C. 2; *Burnett v. Craig*, 80 Ala. 135; *Devron v. First Municipality*, 4 La. Ann. 11; *Levy v. City of Shreveport*, 27 La. Ann. 620; *Gartside v. City of East St. Louis*, 43 Ill. 47; *Davis v. Society*, 6 Daly, 81; *In re Sawyer*, 124 U. S. 220, 8 Sup. Ct. 482; *Eldridge v. Hill*, 2 Johns. Ch. 281; *Suess v. Noble*, 31 Fed. 855; *Stuart v. Board*, 83 Ill. 341; *Tyler v. Hamersley*, 44 Conn. 419, 422; *Bagg v. City of Detroit*, 5 Mich. 336; *Brewer v. City of Springfield*, 97 Mass. 152.

The court below had no jurisdiction of this case, and its decision will be affirmed.

3 Okl. 62)

REAVES et al. v. OLIVER.

(Supreme Court of Oklahoma. June 22, 1895.)

PUBLIC LANDS—HOMESTEAD CLAIMANTS—RIGHT TO POSSESSION—COURTS—JURISDICTION—MANDATORY INJUNCTION—ABUSE OF DISCRETION—LAND DEPARTMENT.

1. Courts have the power to deal with possession of land prior to the issue of patent, and will protect the possessory rights of those entitled to the same under the laws relating to public lands.

2. Mandatory injunction is a proper remedy to protect the possession of one having a valid homestead entry on public land against persons who are trespassing on the land.

3. One who prosecutes a contest against a homestead entry for fraud, under the act of May 14, 1880, and secures the cancellation of the entry, thereby acquires a preference right of

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entry for 30 days from notice of the cancellation of said entry, and when he makes a homestead entry of the lands within that time his right relates back to the date of the initiation of his contest; and a settlement made upon the land, while his contest is pending, by another adverse claimant, gives such claimant no rights as a settler, and such homestead entryman may have him restrained from interfering with the occupancy and possession of said land.

4. The land officers, in allowing a homestead entry, are required to pass upon the qualifications of the entryman, and the courts will not inquire into or pass upon any question of fact properly belonging to the department, while such matters are pending before the land department.

5. Courts may inquire into the status of the claimants before the land department sufficiently to determine who has the better right to possession under the laws of the United States.

6. One contesting for a preference right has no right to the possession of the land pending the litigation as against the homestead entryman.

7. The granting of temporary injunctions pendente lite are largely in the discretion of the court, and appellate courts will not vacate such orders on appeal, unless there has been clear abuse of discretion, or the same is granted without authority.

(Syllabus by the Court.)

Appeal from district court, Logan county; before Justice Frank Dale.

Action by James E. Oliver against Robert S. Reaves and others for injunction. From a judgment for plaintiff, defendants appeal. Affirmed.

J. A. Baker and F. M. Elkins, for appellants. Keaton & Cotteral, for appellee.

BURFORD, J. This is an appeal from an order of the district court of Logan county granting a temporary order of mandatory injunction. The defendant in error filed his petition in the district court, in which it is alleged that on the 23d day of April, 1889, one Albert G. Jones made homestead entry No. 5, at the Guthrie land office, for the S. W. ¼ section 5, township 18 N., range 2 W., and that, on the 1st day of August, 1889, the petitioner, Oliver, filed a contest in said office against the homestead entry of Jones, and applied to enter the land; that he alleged in his contest affidavit that Jones was not qualified to enter said land, by reason of having entered the Oklahoma country during the prohibited period prior to the opening of said lands to settlement; that other persons, to wit, Dennis Nagle, Temp Elliot, and Edward S. Quarles, also filed contests against said entry of Jones, and alleged prior settlement on the land; that a hearing was ordered and had as to all said parties, and such proceedings had that finally, on the 16th day of June, 1893, the assistant secretary of the Interior dismissed the contests of Nagle, Elliot, and Quarles, held the entry of Jones for cancellation, and awarded the preference right of entry to the petitioner, Oliver; that afterwards a petition for review was overruled by the Honorable Hoke Smith, secretary of the Interior, and all the papers returned to the com-

missioner of the general land office, with instructions to carry into effect the decision of that office; that on the 1st day of March, 1894, the homestead entry of Jones was canceled by the commissioner of the general land office, and on the 27th day of March, 1894, the petitioner, Oliver, was notified of said cancellation, and of his preference right to make homestead entry of said tract, awarded him under the provisions of the act of congress of May 14, 1880; that on the 29th day of March, 1894, Oliver filed his application to make homestead entry of said tract in the United States land office at Guthrie, and paid the fees therefor, but action on the same was at that time suspended for the reason that the office of register was vacant; that afterwards, on June 1, 1894, and as soon as said office of register was filled, his said application was allowed and homestead receivers' duplicate receipt No. 12,258, issued to him for said tract. The petitioner further alleges that he has been a bona fide resident and occupant of said land since June 1, 1894, and has a dwelling house thereon, and other valuable improvements; that pending his proceedings in the land office to secure his preference right of entry, the defendant Robert S. Reaves, with full knowledge of his rights and all the proceedings, moved upon the land in dispute, established his residence thereon, and was attempting to enter said land for a homestead; and also, to contest his preference right, that he had demanded of Reaves that he surrender possession and cease to prevent him from cultivating and occupying the land, and Reaves had refused to vacate, and was using, occupying, and cultivating said land, and preventing him from enjoying the benefits of his homestead rights. It is further alleged that the other defendants, Jones, Close, and William Reaves, were each residing upon the land, or occupying, using, or cultivating portions of the same, and all had refused to vacate after proper demand. Each defendant demurred to the petition, and afterwards filed answers. Close set up that he was a tenant of Robert S. Reaves, and denied further knowledge of the facts. William Reaves denied any knowledge of the facts alleged in the petition. Robert S. Reaves answered, admitting all the allegations as to the entry of Jones, the several contests, the cancellation of Jones' entry, the award of the preference right to Oliver, and his subsequent homestead entry; also, that he and the other defendants were occupying and using said land as alleged, that demand for possession had been made and refused, etc. But he further alleges that on July 5, 1893, he filed a contest in the United States land office at Guthrie against the homestead entry of Jones, and the contest of Oliver, in which he alleged the disqualification of Jones, and that the contest of Oliver was collusive and fraudulent, which contest was rejected, from which he appealed, and the commissioner of the general land office, on appeal, held that

his contest was properly rejected, and gave him the right to contest Oliver's right to make homestead entry, when he should attempt to exercise that right. That he settled upon the land on the 21st day of August, 1893, and has made valuable improvements thereon, and has continuously resided thereon ever since, in good faith, with the purpose of making a homestead entry thereon. That he protested against the entry of Oliver, and after the same was allowed he filed contest to secure the cancellation of said entry, in which he alleged that the entry of Oliver was not made in good faith, but was collusive and speculative; that Oliver had entered into contracts and written agreements to transfer portions of said land to other parties as soon as he should acquire title thereto; and also that he was a prior settler on the land. The pleadings were all properly verified by affidavit. The cause was submitted to the court on the pleading, and a temporary injunction granted pendente lite, which ordered the defendants to, within 10 days, cease from preventing the plaintiff from occupying all of said tract, and to cease from in any manner interfering with his peaceable possession of the entire tract. The defendants were permitted to remove all their buildings and crops, and time was given in which this might be done. To this order the defendants excepted, and now bring the case here for review.

It is contended on one side, and controverted on the other, that this case comes within the principle enunciated in the case of *Sproat v. Durland* (decided by this court at the last term) 35 Pac. 682. We are not able to distinguish any material difference between the facts in this case and the facts in the *Sproat-Durland* Case, and we think the same principle applicable. The title is yet in the United States, and the questions affecting the rights of the several parties to acquire title is for the officers of the land department to deal with. The courts will not interfere with, or attempt to determine, any question involved before the land department, while the title is yet in the United States. The courts will only deal with the question of possession, and in order to do this will look into the record sufficiently to advise itself as to the true status of the parties in that department. Whenever the facts are undisputed, the courts will apply the law to the status of the parties, as justice may require. In this case Oliver has the homestead entry upon the land. This of itself entitles him to the possession of the land as against any one who cannot show such a standing in the land department as will entitle him to an equal right. A contestant for a preference right has no right, under the law, to occupy the land, as against the entryman; but when the entry is canceled as the result of his contest and the preference right is awarded under the act of congress of May 14, 1880, his rights relate back to the initiation of his contest and no

settlement made on the land or contest initiated subsequent to the initiation of his contest can defeat his right to enter the land, or take from him the right to possession if he follows up his right and makes the homestead entry within the time allowed by law. This is the principle enunciated in the *Sproat-Durland Case* and clearly applicable in this case.

Reaves settled on the land and began his contest after Oliver had initiated a contest against Jones to secure a preference right. Oliver followed up that contest successfully, secured the cancellation of Jones' entry, earned his preference right, and took the benefit of it by making homestead entry so soon as he could legally do so after notice. When he did make the homestead entry, his rights related back to the date he began his contest, and Reaves could neither by his settlement during that time, his protest, nor contest, acquire any right to occupy the land, as against Oliver, until he should have finally succeeded in canceling the entry of Oliver. Possession gained in the manner that Reaves acquired it in this case is not to be encouraged. The entry of Jones was canceled on March 1, 1894. Reaves settled on the land in August, 1893. At the time he settled the land was neither subject to entry nor settlement, and he could acquire no rights as a trespasser. His so-called settlement, his protest, and his contest were all subject to the rights of Oliver.

The contention that Oliver has not taken the land in good faith is not one that the court can entertain. The land department must try and determine that question. The land officers have passed upon the qualifications of Oliver, and awarded him the entry of the land, and issued him a proper homestead certificate, which entitles him to the peaceable possession of the land embraced in his entry. The courts have the power, and it is their duty when called upon, to protect him in these rights until an equal or superior right is shown. Mr. Justice Miller in *Marquez v. Frisbie*, 101 U. S. 473, said: "We do not deny the right of the courts to deal with the possession of the land prior to the issue of patent, or to enforce contracts between the parties concerning the land." For further authority in support of the doctrine of this case see cases decided this term.

We find no rule of law or principle in equity that was violated by the district court in this case. The granting of temporary injunctions is largely discretionary, and when the parties are all before the court, and there is sufficient authority for such an order, and the pleadings are sufficient to sustain the action of the court, an appellate court should not interfere, unless the order is clearly erroneous. We find no error in the record. The judgment of the district court is affirmed.

BIERER, J., having been of counsel in contest case involving same tract of land, took no part in this decision.

(8 Okl. 268)

GRIMES et al. v. CULLISON.

(Supreme Court of Oklahoma. July 27, 1895.)

PLEADING—MOTION TO MAKE MORE DEFINITE—EXHIBITS.

1. Where a motion to make a petition more definite and certain is filed, and such motion fails in any manner to point out wherein the petition is indefinite and uncertain, it is not error to overrule such motion.

2. Where the instrument which is the basis of the action is attached by copy to the petition and made a part thereof, such copy should be considered as a part of the petition when construing the allegations thereof

(Syllabus by the Court.)

Appeal from probate court, Oklahoma county.

J. C. Cullison brought an action in the court below against L. C. Grimes, A. Bleeker, W. T. Hale, and C. A. Towler, upon an attachment undertaking, to recover the sum of \$205, damages claimed for a violation of the bond. Judgment was entered for the plaintiff below. The defendants appeal. Affirmed.

Wilson & Atchinson, for appellants. J. Milton, for appellee.

DALE, C. J. October 23, 1894, J. C. Cullison brought an action in the probate court of Oklahoma county against L. C. Grimes et al. upon an undertaking bond in an attachment proceeding. In his petition he alleged, in substance, that the defendants, on the 28th day of August, 1893, undertook, by their certain obligation, to pay to the plaintiff the sum of \$205, if the certain attachment suit then filed should prove to be obtained unlawfully and wrongfully, a copy of which undertaking is attached to the petition and made a part thereof. He alleged, further, in the petition that the case came on for hearing on the motion to discharge the attachment, which motion was by the court sustained, and he attached to the petition a copy of the judgment dissolving the attachment, and made the same a part of his petition. He also alleged that he sustained damages in the sum of \$205, and attached to the petition a verified account, and made such account a part of his petition, and upon such petition asked a judgment. To this petition the defendants first filed a motion to make the same more definite and certain, which was, by the probate judge, overruled. Defendants below then filed a demurrer, upon the ground that the petition failed to state facts sufficient to constitute a cause of action, which demurrer was also overruled. The defendants then answered, setting up a counterclaim, set-off, etc. A trial was had to a jury, and a judgment rendered in favor of the plaintiff below in the sum of \$3.37 and costs. The defendant brings the case here upon a case made, which contains simply the pleadings, motions, and demurrers, verdict and judgment upon the verdict, and motion for a new trial. In the rec-

ord before us there are only two questions raised: First. Error in the court below in failing to sustain the motion to make more definite and certain. Second. Error in overruling the demurrer to the petition.

1. Upon the first proposition it appears from the record that, in the motion to make more definite and certain, the defendants below failed to point out wherein the petition was indefinite and uncertain, and we do not think, in the absence of such matter in a motion, the court below committed any error in overruling the same. If the petition be indefinite or uncertain, it is the duty of counsel, in moving to have the same made more definite and certain, to specifically set out wherein they desire relief at the hands of the court. If they fail to so set out in their motion, it is not error to overrule the same.

2. The question involved in the ruling of the court below upon the demurrer to the petition would be by this court, perhaps, favorably considered, if the same propositions involved had not received a settled construction by the courts of Kansas from whence our Practice Code was adopted. The petition filed in this case in the court below, without the exhibits, would not be a good petition. With the exhibits, giving to such exhibits all of the force and effect which they would have if they were set out in full in the petition, the petition states a cause of action. While we are not prepared to fully assent to the proposition that it is good practice to permit pleadings to be drawn as they are in this case, making it necessary, in order to sustain the petition, to go to the exhibits and include them in their entirety in the petition, yet, inasmuch as this question has been settled by the supreme court of the state of Kansas, and the legislature of this territory adopted the civil procedure of that state, with such construction placed thereon, we feel bound to affirm the decision of the lower court. For a discussion of the propositions involved in this question upon the demurrer, see *Budd v. Kramer*, 14 Kan. 101; *State v. School Dist.*, 84 Kan. 237, 8 Pac. 208; *Ward v. Clay* (Cal.) 23 Pac. 227.

The judgment of the court below is affirmed. All the judges concurring.

(6 Okl. 11)

CARTER et al. v. MISSOURI MINING & LUMBER CO.

(Supreme Court of Oklahoma. July 27, 1895.)

JUDGMENT ON VERDICT—OBJECTIONS TO INSTRUCTIONS—WAIVER—APPEAL.

1. Where the verdict of the jury is one which can properly be returned under the pleadings, it was not error for the court to render judgment thereon, in the absence of a motion for judgment upon the special findings of fact returned by the jury.

2. At the trial of a cause, the instructions went to the jury without objection, no exceptions having been taken to them, either sepa-

ately or as a whole. *Held* a waiver of all errors contained therein.

8. Where counsel fail to point out in their briefs in what manner they have been prejudiced by the overruling of a motion for a new trial, this court will not consider an assignment of error based upon such ground.

(Syllabus by the Court.)

Error from district court, Grant county; before Justice Bierer.

Action brought by W. T. Carter and E. A. Carter, partners as W. T. Carter & Bro., plaintiffs, against the Missouri Mining & Lumber Company in the probate court of Grant county to recover a certain lot of lumber. Decision by the probate court in favor of the plaintiffs, from which judgment the defendant therein appealed to the district court. Case tried in district court, and judgment rendered in favor of the plaintiffs for the recovery of a part of the lumber and in favor of the defendant for the remainder thereof. The plaintiffs bring error. Affirmed.

Burwell & Burwell, Asher & Asher, and G. C. Clegg, for plaintiffs in error. Charles E. Dalley and Buckner, Bird & Lake, for defendant in error.

DALE, O. J. On the 25th day of November, 1893, plaintiffs in error brought an action in replevin in the probate court of Grant county to recover four car loads of lumber. The action was brought against R. H. Hager, as defendant. Hager answered—First, by a general denial; second, that he had no interest in the subject-matter as an individual; and, further denying, said that he did not detain or wrongfully withhold the lumber for which the action was brought. Afterwards, on the 8th day of February, 1894, the Missouri Mining & Lumber Company, by motion, was substituted for the defendant Hager, and in their answer—First, deny generally all of the allegations contained in the petition of the plaintiffs; and further allege that they are entitled to the possession of the property because they are the plaintiffs in a certain judgment against one J. J. Ellis, rendered in the probate court of Grant county, that the property in question was taken by the sheriff of said county by virtue of an execution issued upon the judgment, that the property was levied upon as the property of J. J. Ellis, to whom the lumber was sold by the plaintiffs, and to whom the same was shipped, and that the goods were seized prior to any notice of any lien on the part of the plaintiffs in the action, and that, before receiving the property, it was necessary to pay the railway company the amount of their lien for freight and carriage, in the sum of \$497.50; and alleged that the plaintiffs have never paid or offered to pay the defendant the money thus advanced, to which the defendant is entitled. On the 8th day of February the case was heard in the probate court, and judgment was rendered in favor of the plaintiffs, and afterwards, to wit, April 14, 1894, the case was tried to a jury in the district court.

At the time the case was so submitted to the jury, plaintiffs submitted a number of special findings, to be answered by the jury along with their general verdict. In their general verdict the jury found for the defendant for the recovery of the lumber in two of the cars, and assessed the value of the same at \$451, and found for the plaintiffs on the issues as to the lumber in the other two cars. The plaintiffs below appeal the case to this court and assign error as follows: First. Error in giving judgment for appellee. Second. Error in not giving judgment for appellants upon the special findings of fact returned by the jury. Third. Error in not sustaining appellants' motion for a new trial. This case is here by "case made," duly signed and settled, and the record contains only the pleadings, instructions to the jury, special findings on the questions of fact submitted to the jury by the plaintiffs below, the general verdict by the jury, motion for a new trial, and judgment of the court upon the verdict of the jury.

1. A careful examination of the record before us has been made in order to determine whether or not appellants have preserved, by exceptions taken at the trial of the cause, the questions which they present to us for consideration. The first and second assignments of error will be considered together. Not having the evidence before us, we can only consider the pleadings and verdict in determining whether or not the trial court erred in rendering a judgment upon the verdict. Under the pleadings filed we can perceive no error in rendering such judgment. The plaintiffs below instituted the action to recover four car loads of lumber, of the aggregate value of \$300. To the petition and affidavit of said plaintiffs the defendant filed his answer, joining issue with plaintiffs upon the question of the right of plaintiffs, and in their verdict the jury find for the defendant as to the lumber in two of the cars, and in favor of the plaintiffs as to the lumber in the other two cars. The verdict was justified by the pleadings in the case. Counsel for appellants urge that it was the duty of the court below to have rendered a judgment in their favor upon the special findings of fact as returned by the jury. It may be possible that, if counsel had moved for such judgment, the court would have granted the same, but an examination of the record nowhere shows that the plaintiffs moved for a judgment upon the special findings of the jury, and in the absence of such motion we cannot now consider the question. All that is before us upon this proposition is the pleadings and the general verdict of the jury, and such verdict being one which the jury might properly have returned under the pleadings, we think the first and second alleged grounds of error must be decided against appellants.

2. The third proposition involved is the alleged error of the court below in giving instructions numbered from 5 to 19, inclusive. Counsel for appellants are mistaken in supposing that the record will justify this court

in the consideration of this objection. The record shows that no exception was taken to the instructions, either separately or as a whole. Section 288, art. 15, c. 66, of our Code of Civil Procedure provides how exceptions to instructions may be preserved for review by the supreme court. Where a party fails to object to instructions at the trial of the cause, he thereby waives all errors contained therein.

3. The last assignment of error is based upon the refusal of the court below to sustain the motion for a new trial, and an exception to the ruling of the court is shown, and we will consider the same with reference to the record before us. There are but two grounds set forth in the motion—First, that the verdict of the jury is contrary to law; and, second, for errors of law occurring at the trial and excepted to by the party making the application. When we consider the record for the purpose of determining just what was presented to the trial court upon this motion, we are unable to see how the court below erred in overruling the same. No affidavits were filed in support of the motion, and nothing appears in the record which in any way tends to enlighten this court upon this question. We have no record before us to examine for errors in the admission or exclusion of evidence. Counsel in their briefs fail to point out wherein the court below erred in the action taken. Therefore appellants' contention cannot be favorably considered on the record before us.

Judgment of the lower court is affirmed.

BIERER, J., having presided at the trial in the court below, not sitting; the other justices concurring.

WOODRUFF v. WALLACE.

(Supreme Court of Oklahoma. July 27, 1895.)

PUBLIC LANDS—ADVERSE CLAIMANTS—RIGHT OF POSSESSION—INJUNCTION—DISTRICT COURT—JURISDICTION—HOMESTEAD FILING—COLOR OF TITLE—OCCUPYING CLAIMANT'S ACT—CONSTRUCTION.

1. District courts of this territory have jurisdiction to inquire into the right of possession as between settlers upon public land; and, where it appears that the rights of adverse claimants have been adjudicated by the land department, and the homestead entry of one of the parties has been canceled, *held*, that the district court may, by injunction, give exclusive possession to the person who was successful in the contest proceedings.

2. The forcible entry and detainer act of this territory does not provide an adequate and speedy remedy to a person who is entitled to the exclusive and immediate possession of land covered by his homestead entry.

3. It is the duty of the courts, when called upon, to issue an injunction, mandatory and prohibitory, to restrain a person whose homestead entry has, by the land department, been canceled—First, to compel such party to yield up and surrender possession of land; and, second, to prohibit him from interfering with the possession of the person who has the homestead filing for such land.

4. The occupying claimant's act, passed by congress June 1, 1874, has no application to

land until the title to the same passes from the government of the United States.

5. A homestead filing does not convey "color of title," within the meaning of the act of congress of June 1, 1874.

6. A person whose homestead entry has been canceled for fraud in its inception cannot avail himself of the benefits of the occupying claimant's act.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county.

Action by Willie A. Wallace against Lyman C. Woodruff for injunction. From a judgment for plaintiff, defendant appeals. Affirmed.

Grant Stanley, for plaintiff in error. J. H. Everest, for defendant in error.

DALE, C. J. This is a case upon appeal from the district court of Oklahoma county, and from the pleadings it appears that Willie A. Wallace, plaintiff below, filed in the district court his petition for an injunction, wherein he alleged, in substance, that he is the homestead entryman for the southeast quarter of section 34, township 12 N., range 3 W., in Oklahoma county, having made homestead entry thereon February, 13, 1895; that Lyman C. Woodruff, defendant below, formerly had a homestead entry on the tract of land, and that said Woodruff is continuing to reside upon, use, and occupy the entire tract, to the exclusion of said Wallace; that the homestead entry of said Woodruff was, prior to the institution of suit, canceled by the commissioner of the general land office, under the authority and direction of the secretary of the interior, on the 9th day of February, 1895; that such cancellation was the result of a contest instituted by said Wallace against said Woodruff; that in the contest affidavit, filed as a basis for said contest, it was alleged that said Woodruff violated the act of congress approved March 2, 1889, and the president's proclamation of March 23, 1889, relative to the Oklahoma lands, of which the tract in question is a part, by entering upon said lands prior to noon of April 22, 1889. And it is further alleged that, after the entry of Woodruff was canceled, and the entry of Wallace was made upon the land, Woodruff refused to vacate the premises, and refused to permit Wallace to use or occupy any portion of the land so filed upon by said Wallace. Wallace also alleged that he had no adequate remedy at law whereby he could obtain possession of the tract of land in controversy; and further alleged that, under the laws of congress, it was incumbent upon him to reside upon and improve the tract of land in order to maintain the validity of his homestead entry. In the petition Wallace asked that a mandatory injunction be issued, compelling Woodruff to vacate the premises, and restraining him from further trespassing upon the land in controversy. Attached to the petition appear copies of the decisions of the

commissioner of the general land office and the secretary of the interior, which decisions fully state the issues tried in the contest proceeding before the land department, showing that the entry of Woodruff was canceled by reason of the contest proceedings instituted by Wallace, and that Wallace had been awarded the preference right of entry to the tract of land; also appears, as an exhibit, a copy of the receiver's duplicate receipt, showing that Wallace had filed his homestead entry in the Oklahoma City land office for the tract in question. To such petition, Woodruff first filed a demurrer. The record does not disclose what action was taken by the court upon the demurrer. The record further shows that Woodruff filed his answer, wherein he denied that he entered upon and occupied a portion of Oklahoma lands prior to the hour of 12 o'clock noon of April 22, 1889, contrary to law; also denied that his entry was ever canceled by any court of competent jurisdiction; also denied that the plaintiff had no adequate remedy at law; and, as an additional and further defense, alleged that he settled upon the land after noon of April 22, 1889, and, on the 25th day of April, 1889, filed in the United States land office his homestead entry for such tract of land, and received the receiver's duplicate receipt therefor; and further alleged that he had resided upon and improved the tract of land from the time of his settlement until the date of the institution of this suit in the court below; that, during such time, he had broken a portion of said land, and cultivated the same, erected a house and barn and other improvements thereon, and that the value of said improvements was of the sum of \$1,000; and that, by reason of such filing, entry, and improvements, he acquired an equitable title in the tract of land; and, under color of such title, alleged that he was entitled to the benefit of the occupying claimant's act; and also alleged that the cancellation of his entry was procured by fraud and perjury, and that such cancellation was illegal and void, and that he is in no manner divested of his rights and equities in the said tract of land by reason of the pretended and fraudulent cancellation of his entry; and that he is entitled to be reimbursed by the plaintiff for the money expended by him in placing a house and making the improvements upon the land aforesaid. A demurrer was filed to the answer of the defendant, and was by the court below sustained, and the injunctive order issued restraining the defendant below from trespassing upon or interfering with Wallace in the use or occupancy of any portion of the tract of land, and requiring Woodruff to remove entirely from the tract of land within 60 days from the date of the order, and permitting Woodruff, within said 60 days, to remove from the land all of his buildings, fences, and portable personal property. From

such order the defendant below appealed to this court; and, by his assignments of error, and under the pleadings in this case, there is fairly raised for our consideration three propositions: First, it is contended that the legal title to the land being in the United States, the court below had no jurisdiction over the subject-matter; second, that the plaintiff below had an adequate remedy at law, and the mandatory injunction ought not to have been issued; third, that the act of congress of June 1, 1874, put into effect the territorial occupying claimant's law, and the court below had no power to dispossess the plaintiff in error until the value of his improvements had been determined and paid for.

The first contention raised by plaintiff in error has been heretofore passed upon by this court in *Sproat v. Durland*, 35 Pac. 682, and in *Peckham v. Faught*, 37 Pac. 1085, wherein it was held that: "The courts of this territory have jurisdiction in matters relating to the possession of lands covered by homestead entries when the title to the same remains in the United States. That it is the duty of the courts to inquire into the status of parties claiming the right to reside upon public lands far enough to determine whether or not such parties are there in pursuance of some law of congress, giving such right; and, if it be found that, under the laws of congress relating to the disposition of public lands, there are parties upon lands, claiming adversely, one of whom may have the right of occupancy and possession and the other have no such right, then it is the plain duty of the courts to award possession and occupancy to the one whom congress intended should have such right." We thought we were sufficiently explicit in laying down the rule within which a court may act; but, inasmuch as the question is still in dispute, we will again discuss the matter. In the case under consideration, it appears that Woodruff, on April 22, 1889, settled upon the tract of land in controversy, and, on the 25th of said month, filed his homestead entry therefor; that Wallace instituted a contest against the entry of Woodruff, alleging that said Woodruff was disqualified to enter the land by reason of having entered upon and occupied the land described in the act of congress approved March 2, 1889, and opened by the proclamation of the president dated March 23d following, prior to 12 o'clock noon of April 22, 1889, and that such entry was contrary to law and the terms and provisions of the president's proclamation aforesaid. The contest proceeding so instituted resulted favorably to Wallace, and the entry of Woodruff was by the land department canceled, and Wallace filed his homestead entry therefor; and, at the time these proceedings were begun in the court below, all matters, so far as affecting the status of the parties in the land department of the United States, were *res adjudicata*. We presume it will not be

questioned that congress, at the time it passed the law opening these lands to settlement, had the right to prescribe the rules and regulations under which the same might be lawfully entered by homestead claimants. That question has been finally put at rest by the decision of the United States supreme court in the case of *Smith v. Townsend*, 148 U. S. 490, 13 Sup. Ct. 634; and if, as alleged in the contest affidavit of Wallace, Woodruff violated the act of congress opening these lands to settlement, then the decision of the land department canceling his entry was a proper decision, and entirely within the jurisdiction vested in the land department by congress. Congress has also provided the manner of determining the rights of persons where more than one party claims the same tract; and such determination is had by contest proceedings, instituted in the local land office, with the right of appeal from such tribunal, first to the commissioner of the general land office, and from such officer to the secretary of the interior. The facts as ascertained by the land department are binding upon the courts everywhere. *Johnson v. Towsley*, 13 Wall. 72; *Marqueze v. Frisbie*, 101 U. S. 473; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249; and the numerous cases cited in such decisions. The land department, therefore, having held that Woodruff has no rights in the land in dispute, by reason of the disqualification of said Woodruff to acquire any right or title in said land, it then becomes the duty of the courts to give effect to such decision, unless the land department has misapplied the law. Let us see if we may not be able, with some degree of accuracy, to determine the relative rights to the possession of the tract of land in dispute between Wallace and Woodruff. Now, what right, by virtue of his homestead filing, had Wallace? It has been repeatedly held that a homestead entry segregates the land; and, such being true, it must follow that the government parted with something at the time of the entry. If, before the entry, the land was public domain, after the entry it ceased to have that character. To what extent did the government part with its interest? Before entry, the entire title, both in the land and in the possession, was in the United States; after the entry, one of the elements of title, to wit, possession, had been parted with, so long as such entry remained of record. Did the government reserve to itself any part of the possession? Clearly not; because, upon the filing of the homestead entry, a contract was entered into, binding upon the government, to the effect that, presuming the entryman was one of the parties designated as qualified to homestead land, the government agreed to convey, by patent, if the party filing the entry should, for a period of five years, reside upon and cultivate the land. Thus it must appear as an irresistible conclusion that, conceding the qualification of a homestead entryman, all right of possession passes from the government when

the filing is made, and that such right does not again inhere when, by reason of fraud in making the filing or the establishment of a superior right in another, the entry is canceled.

We think, perhaps, much of the uncertainty and doubt which surrounds this question grows out of the inaccurate use of terms. We are wont to speak of the United States as holding the title, and of the settler being in the attitude of having an inchoate title, equitable interest, or possessory title or right in the land. It may aid us some to notice this subject more closely, and determine, if we can, the degree of title which a homestead filing confers. Blackstone (Bl. Comm. bk. 2, c. 13), in defining title, says: "It is the means whereby the owner of lands hath the just possession of his property." And, following, in an analysis of title, which seems to have been universally accepted as correct, further states: "There are several stages or degrees requisite to form a complete title to lands and tenements: (1) The lowest and most imperfect degree of title consists in mere naked possession, or actual occupation of the estate, without any apparent right or any shadow or pretense of right, to hold and continue such possession. * * * And, until some act be done by the rightful owner to divest this possession and assert his title, such actual possession is *prima facie* evidence of legal title in the possessor. (2) The next step to a good and perfect title is the right of possession, which may reside in one man, while the actual possession is not in himself, but in another. (3) The mere right of property, the *jus proprietatis*, without either possession or even the right of possession. * * * (4) A complete title to lands; for it is an ancient maxim of law that no title is completely good unless the right of possession be joined with the right of property. * * * And, when to this double right the actual possession is also united, * * * then, and then only, is the title completely legal." Under these definitions, may we not accurately determine the title with which a person holds a contract of land where it is covered by his homestead entry? The United States retains the mere right of property, the *jus proprietatis*, without possession or the right of possession. This must be true,—as the United States could not, if the homestead entryman be qualified, dispossess such entryman, as he is in no sense a trespasser; and, under the provisions of the homestead law, the United States has stipulated with him that he may maintain his possession; and, if he shall so maintain it for five years, it is further stipulated that he shall receive a patent. It seems clear, then, that a person holding an uncanceled homestead entry upon land has a good and legal title in the possession, and a contingent title in the patent.

The next question which we naturally come to in a discussion of this feature of the case, is, how may a person holding a home-

stead entry lose this right of possession? This question is easily determined. At the time a claimant presents his application to enter a tract of land, he is required to accompany the same with an affidavit, wherein he undertakes to the United States to the effect that he has certain qualifications, and which qualifications must exist as a condition precedent before he can, under the laws of congress, acquire as a homestead any of the public domain. If he is possessed of these qualifications, he is permitted to file his entry upon any land which appears, upon the record of the local land office, to be unappropriated. As before shown, this filing carries with it, as against the United States, and against all persons, *prima facie*, the right of possession, and the contingent right to patent. But these conditions may be overcome by either fraud in making the entry, or by the showing of an adverse party claiming under the settlement act of May 14, 1890. Under the charge of fraud, the government or a private individual may allege that the entryman did not possess the prerequisite qualifications to enter the land; and if such fact be established, the entry is canceled. Under the settlement act, a party may allege a right to the land which existed prior to the time of the filing of the entry; and, if such fact be proved, the entry is canceled. The result of the cancellation upon either charge is the same. The contract with the government is at an end. The moment the entry is canceled, the land reverts to the government as completely as if no entry had ever been made. No more rights remain in the individual whose entry has been canceled than would exist if his entry had never been made. He stands in the same relation towards the land as he would in any other matter wherein he had contracted and such contract had been revoked or completely rescinded. In this case Woodruff lost, not only his possessory right to the land, but his contingent interest in the patent, at the time his entry was canceled. As we have sought to show, a valid homestead entry carries with it the right of possession as against other individual claimants, and as against the government. It must follow, then, that the courts have jurisdiction to the extent to which the government has parted with its title. For, if the homestead entryman, having a valid entry, shall comply with the law relative to residence and cultivation for the prescribed period, and the government should refuse to execute to him its patent, the courts would, upon application, make the contingent title which he holds under his filing absolute, by compelling the government to comply with its contract entered into at the time of filing the homestead entry. Thus it is seen that what the government parts with—that is, the possession and contingent interest in the patent—the courts at once acquire jurisdiction over. The distinction we have made is not entirely new and wholly without authority. One of the leading cases cited as against this

doctrine is *Marqueze v. Frisbie*, 101 U. S. 473. In that case, the right of title only was involved. All the cases theretofore decided by the supreme court of the United States, relative to the right of a court of equity to deal with the question of title to public land prior to the time the United States had parted with its title, were considered, and a conclusion reached that, in a suit to declare a person who has been awarded the right to enter land a trustee for the benefit of one claiming by a superior equitable title therein, the court will not act, unless the legal title has passed from the government. This is the language of the court in that case: "It plainly appears from this—First, that defendant has not legal title; second, that it was in the United States; and, third, that the matter was still in fieri, and under control of the land officers. * * * We have repeatedly held that the courts will not interfere with the officers of the government in their duties in disposing of the public lands, either by injunction or mandamus." Speaking further, the same opinion says that it would be equally as objectionable to permit a state court to so act. The opinion here quoted from, and others of like import, are cited and relied upon to support the view of appellant. A careful reading of each case will show that the question of the right of possession was not considered, but only the subject-matter of the title. And, if any further evidence of that fact was needed, the case of *Marqueze v. Frisbie*, supra, furnishes the proof. After citing authorities supporting the principle announced in that case, we find the following language used: "We did not deny the rights of the courts to deal with the possession of the land prior to the issue of the patent, or to enforce contracts between the parties concerning the land. But it is impossible thus to transfer a title which is yet in the United States." Clearly, this opinion, so largely relied upon, cannot be treated as supporting the doctrine contended for. In the very nature of things the courts must have the power to deal with the questions of possession as between homestead claimants. Congress has in no way reserved such question, and all matters of dispute or litigation must abide in some court having the power to deal with the subject. It has been repeatedly held that where one enters by force upon the possession of another, claiming under either a homestead or pre-emption filing, the courts will, upon application, restrain such party from such interference. This was the rule laid down in *Atherton v. Fowler*, 96 U. S. 515. And, as bearing upon the question of the duty of the courts to take jurisdiction as to the question of possession, between claimants of public land, we call attention to *U. S. v. Cleveland & C. Cattle Co.*, 53 Fed. 323; *U. S. v. Brighton Ranch Co.*, 25 Fed. 465, 26 Fed. 218; *Webster v. Cooke*, 23 Kan. 637; *Downing v. Reeves*, 24 Kan. 167; *French v. Cresswell* (Or.) 11 Pac. 62; *Lyman v. Todd* (Kan. Sup.) 22 Pac. 103; *Railroad Co. v. Johnson* (Kan.

Sup.) 16 Pac. 125; *Bardan v. Railroad Co.*, 145 U. S. 535, 12 Sup. Ct. 856.

The second assignment of error brings into discussion the question as to whether or not an adequate remedy at law is provided, whereby the relief may be had. The order of injunction issued in this case is in its nature prohibitory, as well as mandatory. It operates to restrain appellant from a further interference with appellee in the use and possession of the land, and also directs him to remove from the land and surrender possession, only permitting him to go upon the tract for the purpose of removing such improvements as might be taken off the land without injury thereto. It is contended that the order was improvidently issued, because the party seeking the same had an adequate remedy at law by the forcible entry and detainer act; and, second, that no authority in law exists for a mandatory injunction in this character of proceedings. It will at once appear that the contention that an action by forcible entry and detainer will lie is consistent with the argument that the courts have no jurisdiction in this case. The right to proceed by forcible entry and detainer is predicated wholly upon the theory that the question of possession is one with which the courts of the territory may deal. The law was passed by the territorial legislature, and is based upon the assumption that the jurisdictional power is in our local courts. But, however that may be, conceding that an action under the forcible entry and detainer act will lie, is such a remedy adequate to afford proper relief? Under the homestead law, Wallace was granted the immediate right to the exclusive possession of the land from the time his filing was placed of record in the local land office. As we have before stated, such right inhered in him by virtue of his filing. In order to comply with the requirements of the homestead law, it became necessary to reside upon and cultivate the land. A failure so to do would forfeit his right, secured by his filing, and might result in a loss to him of the land. A suit instituted under the forcible entry and detainer act must be instituted before a justice of the peace, and a judgment favorable in such tribunal may be appealed from; and a defendant in such action, upon giving bond, may still retain exclusive possession until the matter can be heard in the district court; and a judgment granted in the district court may also be stayed pending an appeal to the supreme court. And, during all this time, a party who, under the laws of congress, is clearly entitled to possession, is kept from exercising such right by a person who, under such laws, and as disclosed by the pleadings, has no right whatever in the land. Possibly the bonds given to stay the judgments of the justice of the peace and the district court may compensate him pecuniarily; but, even then, it would require numerous suits, and would be a very slow remedy to obtain a

right which cannot be seriously disputed. But, if we concede that he may obtain possession of the land, as suggested by counsel for appellant, there yet remains a serious objection against resorting to such remedy in this character of case. Under the law of congress (section 2297, Rev. St. U. S.), every person who files a homestead entry is compelled to begin a residence upon and cultivation of the land within six months from the date of his filing. A failure in this respect subjects the filing to a contest. In this territory, by the orders of the supreme court, but two terms of court are held in each county in each year, and but two sessions of the supreme court are held in the same length of time. To say that an adequate remedy at law exists, under such conditions, as will afford proper relief in this character of case, is absurd. Injunction is the only process that will afford relief; and even such remedy is not entirely adequate, because, under our statute, an appeal will lie from an interlocutory order. But it is the best and speediest remedy which may be had; and because it may not afford all the relief a party seeking its aid may be entitled to is no reason for withholding the remedy. All authorities hold to the view that courts should in all cases grant relief by injunctions, where the remedy at law is either insufficient, or is not speedy enough to afford proper protection. High, *Inj.* §§ 12, 30; Tied. *Eq. Jur.* §§ 478-480, 483; Spel. *Extr. Rel.* § 13; Walker v. Armstrong, 2 Kan. 198; Webster v. Cooke, 23 Kan. 637; Downing v. Reeves, 24 Kan. 167; Long v. Kasebeer, 28 Kan. 226.

It is also earnestly contended that in no event will a mandatory injunction lie in a case of this character. In *Sproat v. Durland*, supra, this court discussed, to some extent, the question of a mandatory injunction, and held to the view that, injunction being a proper remedy, the remedy should extend as far as the necessities of the case demanded. The authorities since examined confirm the doctrine then announced. High on Injunction (section 300) lays down this rule. And, in a note to such section, will be found the following by Hanson, Chancellor: "An injunction for possession is not a new thing in a court of equity. It has long been used in England. It is directed in certain cases by the aforesaid act of assembly; and it would disgrace our laws and administration of justice if, after title to land has been established by the adjudication of a court, there could be no way of obtaining possession but after obtaining judgment in ejectment." And, speaking further, in the note, the following authority is cited: "And it is said by an eminent jurist that courts of equity also interfere and effectuate their own decrees in many cases by injunctions, in the nature of a judicial writ or execution for the possession of the property in controversy,—as, for example, by injunctions to yield up, deliver, quiet, or continue the possession. Indeed,

they have been distinctly traced back to the reigns of Elizabeth and Edward the Sixth, and even to Henry the Eighth. In some respects they bear an analogy to sequestrations. * * * 2 Story, *Eq. Jur.* § 959." In *U. S. v. Brighton Ranch Co.*, supra, the United States sought to compel parties to remove a fence which inclosed public lands, and which also included within their boundary lines lands covered by homestead, pre-emptions, and timber-culture entries. Mr. Justice Miller awarded a mandatory injunction, and compelled a removal of the fences, and prohibited the building of fences in the future. The same conclusion was reached by Mr. Justice Brewer in a case involving the same parties and subject-matter. 26 Fed. 218, supra. Again, in *Wilson v. Rockwell*, 29 Fed. 674, Mr. Justice Brewer announces as a correct principle that: "A party showing an equitable title to realty will be protected by injunction against trespassers, though the legal title has not been finally determined." And, in *Jackson v. Jackson*, 19 Pac. 847, the supreme court of Oregon held that: "Injunction will lie to give a person holding a pre-emption declaratory statement possession, as against a trespasser." It may, we think, be safely asserted that a court should in all instances, where no adequate remedy at law exists, afford relief by injunction. It is a remedy which will readily adapt itself to meet any exigency which may arise between parties who are in litigation. The only inquiry which a court need make is, has the court jurisdiction of the parties and subject-matter of litigation, and is there a speedy and adequate remedy at law? If the jurisdiction obtains, and the law has not provided a proper remedy, the court should unhesitatingly act, by injunction, to the full extent necessary for the protection of the parties.

The last question for consideration in this case grows out of the contention of plaintiff that the court below erred in attempting to divest appellant of the land in controversy without giving to him the benefit of a trial under the occupying claimant's act. It is urged that the act of congress of June 1, 1874, operates to give to a person who has made improvements on land covered by his homestead entry the status of an occupying claimant, under the laws of the territory. The act of congress referred to is as follows: "That when an occupant of land, having color of title, in good faith has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled in the federal courts to all the rights and remedies, and, upon instituting the proper proceedings, such relief as may be given or secured to him by the statutes of the state or territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States after said improvements were so made." The statutes

of this territory have an occupying claimant's act (see St. Okl. p. 865) which, in effect, provides for an adjudication of the right to compensation for improvements made by an occupying claimant. The first section of the act is sufficient to show its purpose, and reads as follows: "(4498) § 620. In all cases any occupying claimant being in quiet possession of any lands or tenements for which such person can show a plain and connected title in law or equity, derived from the records of some public office, or being in quiet possession of and holding the same by deed, devise, descent, contract, bond or agreement from and under any person claiming title as aforesaid, derived from the records of some public office, or by deed, duly authenticated and recorded, or being in quiet possession of, and holding the same under sale on execution or order of sale against any person claiming title as aforesaid, derived from the records of some public office, or by deed, duly authenticated and recorded, or being in possession of and holding any land under any sale for taxes authorized by the laws of this territory, or any person or persons who have made a bona fide settlement and improvement which he, she or they still occupy upon any of the Indian lands lying in this territory, or any lands held in trust for the benefit of any Indian tribe at the date of such settlement, or which may have heretofore been Indian lands, and which were vacant and unoccupied at the date of such settlement, and where the records of the county show no title or claim of any person or persons to said lands at the time of such settlement; or any person in quiet possession of any land claiming title thereto, and holding the same under a sale or conveyance made by executors, administrators or guardians, or by any other person or persons, in pursuance of any order of court or decree in chancery, where lands are or have been directed to be sold and the purchasers thereof have obtained title to and possession of the same without any fraud or collusion on his, her or their part, shall not be evicted or thrown out of possession by any person or persons who shall set up and prove an adverse and better title to said lands until said occupying claimant, his, her or their heirs, shall be paid the full value of all lasting and valuable improvements made on said lands by such occupying claimant, or by the person or persons under whom he, she or they may hold the same previous to receiving actual notice by the commencement of suit on such adverse claim, by which eviction may be effected." Subsequent sections provide for the calling of a jury to assess separately the value of the land and improvements, the damages by reason of waste, and the value of the rents and profits which the occupying claimant may have received; and further provides for the payment of the award to the occupying claimant, or, in case the true owner of the land does not desire to pay the

sum so awarded, he may tender a deed to the land, and the occupying claimant may pay to such owner the sum assessed as the value of the land, without the improvements, and thereby obtain title to the land. No eviction is allowed, as against an occupying claimant, until he has been paid for his improvements, provided he makes his application for such pay, until all the provisions of the act have been complied with. It will appear at once that an attempt to enforce the occupying claimant's act of this territory will meet with the very objection that has been so strenuously urged by appellant, to the effect that the courts have no power to dispose of or molest the title to the land so long as the same remains in the United States. The occupying claimant's act of this territory is predicated upon the fact of title to the land being in one of the parties to the litigation. The supreme court of the United States has held repeatedly that a homestead filing does not convey title, but only passes an interest in the land which may ultimately ripen into one. To say that the courts of a state or territory may proceed to sell or dispose of land belonging to the United States is to state a proposition which cannot be maintained. Neither can land acquired under the provisions of the homestead act be liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor. Rev. St. U. S. § 2296. In short, it was the intention of congress to give to any qualified person a homestead, free of all incumbrances of any kind whatever, and which could not be sold for any debt which existed prior to the time of the issuance of the patent. Neither state nor territorial legislatures are permitted to pass laws interfering with the primary disposal of the soil. That might have remained in the congress of the United States. Did congress intend to change the rule in this respect by the passage of the law of June 1, 1874, *supra*? When we examine closely that act, it clearly appears that such was not the intention. The language used, "that an occupant of land, having color of title, in good faith," etc., does not change the rule relating to the disposition of land under the homestead law. The party claiming the right to invoke the benefits of the occupying claimant's act must have, as a condition precedent, "color of title." By color of title is not meant a homestead filing; because such filing does not rise to the dignity of color of title. It is a certificate which, upon its face, does not purport to give title, but is an instrument given to designate the person who has claimed, and who is granted the right to the use and occupancy of a tract of public land. The government merely parts with the possession of the land, and not the title. This instrument does not convey color of title, and was not so intended. One of the best definitions of the phrase, "color of title," is found in *Brooks v. Bruyn*, 35 Ill. 392, and,

as defined by that court, is: "Any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. Such an instrument purports to be a conveyance of title; and, because it does not, for some reason, have the effect, it passes only color, or the semblance, of title. It makes no difference whether the instrument fails to pass an absolute title because the grantor had none to convey, or had no authority in law or in fact to convey one, or whether such want of authority appears on the face of the instrument, or aliunde. The instrument fails to pass an absolute title, for the reason that the grantor was not possessed of some one or more of these requisites, and therefore gives the semblance or color only of what its effect would be if they were not wanting." And, in *Wright v. Mattison*, 18 How. 53, the supreme court of the United States says: "The courts have concurred, it is believed without an exception, in defining color of title to be that which in appearance is title, but which in reality is no title." It is useless to quote further upon this subject, as all the cases and text-books seem to coincide upon the question that no person having a deed or instrument from a grantor can claim color of title, except he has what purports, upon its face, to be an instrument conveying title. Measured by this rule, it is readily seen that a homestead filing does not give color of title. Again, it will be seen, upon an examination of our territorial act relating to occupying claimants, *supra*, that it nowhere provides for an adjudication of rights between claimants occupying land the title to which is still in the United States. Had our legislature attempted so to do, it would have contravened the express inhibition contained in our organic act, found in section 6, which reads as follows: "That the legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States; but no law shall be passed interfering with the primary disposal of the soil." Counsel for appellant cite, in support of their contention, *Deffenback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 45; *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350; *Krause v. Means*, 12 Kan. 336. These cases do not support the claim of counsel. In *Deffenback v. Hawke*, it appears that one of the parties was a settler and occupant of a town site at Deadwood, S. D.; that, subsequent to his settlement, an entry as a mineral claim was sought to be made for a portion of such town site. The probate judge for the county wherein the town site was situated attempted to enter the land for town site purposes. A contest was instituted, and the land department found that the land was a mineral bearing tract of a character which could not be entered under the town site laws, and awarded to the party

claiming for mineral purposes the land located by him. Afterwards, suit was instituted in the courts to eject the party claiming as an occupant under the town-site laws. As a defense, it was claimed that the land department has misconstrued the law, and the court was asked to declare the plaintiff a trustee for the benefit of defendant. As an additional defense, it was asserted that the person claiming under the town-site act had made improvements upon the land, of the value of \$1,200, and that, outside of the improvements, the land was worth but \$100; and relief was asked under the occupying claimant's act of Dakota, in the event the court found that the decision of the land department was correct in giving a patent to the adverse party. This suit was instituted after the act of congress of June 1, 1874, *supra*; and the opinion of the court was delivered by Mr. Justice Field, and, upon that feature of the case, the learned justice said: "It is asserted, under a statute of the territory which provides that 'in an action for the recovery of real property, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding color of title, adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a counterclaim by such defendant.' The case presented by the plaintiff is not covered by the provision of this law. There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law purporting to transfer to him the title or to give to him the right of possession. And there can be no such thing as good faith in an adverse holding, where the party knows that he has no title, and that under the law, which he is presumed to know, he can acquire none by his occupation." In *Sturr v. Beck*, *supra*, the case turned upon the proposition that a homestead filing which ultimately ripened into a patent carried with it, from its inception, the entire use and occupancy of the land, and excluded a right to divert water, which right was sought to be initiated subsequent to the filing and prior to final proof. In *Krause v. Means*, *supra*, we will give the language of Mr. Justice Brewer, who wrote the opinion, relative to the character of the action. "The title to this land passed from the government to Julia Goodell. She conveyed by a deed regular in form, and apparently valid; and from her grantee Krause obtained his title. The defect in the title does not appear on the records or conveyances, but arises from a disability to convey in Mrs. Goodell. It seems to us this is a plain and connected title derived from the records of some public office, and therefore brings Krause within the first clause of the statute. Of course, the words 'plain and connected title,' as used here, do not import a perfect title; for he who holds by such has no need of the occupying claimant's act. It implies a defect-

ive title, and refers only to the appearance of the record. It applies to a case like the one at bar, when, though there be a regular succession of conveyances, there is a disability in some grantor which prevents the title from actually passing." It afterwards transpired that Mrs. Goodell had no power to convey under the treaty which assigned to her the land, and that, after the disability was removed, she again conveyed the land to one Means, who instituted suit in ejectment; and, as against Means, the court very properly held that Krause was entitled to the benefits of the occupying claimant's act, Mrs. Goodell having parted with her entire interest. The state courts having jurisdiction, the laws of the state relative to occupying claimants would attach. But counsel for Means strongly contended that to allow Krause the benefits of the occupying claimant's act would, in effect, defeat the act of congress, which conveyed to Mrs. Goodell. And in speaking to that question, the learned justice said: "It may be conceded that neither the title nor possession of the Indian owner, secured by treaty with the United States government, can be disturbed by state legislation; and, if Mrs. Goodell were plaintiff in the action, seeking to recover possession, it is probable she would be entitled to both land and improvements (though, as that question is not before us, we do not decide it)." The language is significant, as showing that whatever disposition the government seeks to make of its lands the courts must uphold; and that, too, no matter what the conditions of the grant may be. But there is another feature of this case, which, in our judgment, effectually disposes of the claim of defendant. Under the act of congress opening these lands to settlement, approved March 2, 1889, there is a provision which reads as follows: "But until said lands are opened for settlement by proclamation of the president, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto." See St. Okl. p. 32, § 58. This act has received judicial construction in this territory (*Smith v. Townsend*, 1 Okl. 117, 20 Pac. 80) and by the supreme court of the United States (*Id.*, 148 U. S. 490, 13 Sup. Ct. 634); and it is now well settled that persons within the boundaries of this territory at the time the same was opened to settlement can acquire no rights whatever in land from the United States. As exhibits, attached to the petition filed in the case in the court below, and now part of the record before us, we find that, in the contest proceedings instituted by plaintiff below in the local land office, appellant was charged with being disqualified to enter lands in Oklahoma, by reason of the fact that he entered and occupied the land prior to the time fixed in the proclamation of the president for the settlement

of these lands. We also note that the land department has found such charge to be true, and upon such finding canceled appellant's homestead filing. Such a finding is binding upon the courts. *Johnson v. Towseley*, 13 Wall. 72; *Marqueze v. Frisbie*, supra. We are, in the face of this fact, so found, precluded from holding that the appellant in good faith made improvements upon this land,—and how pertinent to this case is the language of Mr. Justice Field, in *Deffenback v. Hawke*, supra, in speaking of a person claiming to have, in good faith, made improvements upon public land: "And there can be no such thing as good faith, in an adverse holding, where the party knows that he has no title, and that, under the law, which he is presumed to know, he can acquire none by his occupation."

It seems unnecessary to carry this discussion any further. We are of the opinion that the appellant cannot obtain the benefits of the occupying claimant's act, and that the court below committed no error in this case. The judgment of the court below is affirmed.

SCOTT, J., having heard the case at the trial below, not sitting.

BURFORD, J. I concur in all the conclusions reached in this case, but some of the reasonings do not meet my entire approval.

BIERER, J. (dissenting). In my view of the law, this is another extension by this court of the proceeding by injunction to a class of cases in which neither the law nor equity ever contemplated it should be invoked; and, as each encroachment is made by this so-called equity jurisdiction upon legal remedies, I feel it my duty to dissent from the action taken. I am not convinced, either by the argument made or the authorities cited by the court, that injunction is a proper remedy by which to dispossess one who is in the peaceable, and hitherto rightful, possession of land. I have never questioned the right of one homestead occupant to employ the remedy by injunction to restrain any interference with his possession, either on the part of another claimant or any other person; but I have denied that the homestead entry vested in the entryman the right to enjoin from the land covered thereby one who, by any form of contest, was claiming the better right to acquire the government title to the land; and particularly did I deny this in a case where the contestant was claiming settlement prior to the contested entry, and where he had also alleged, by affidavit duly corroborated, that the entryman had committed a violation of the law, the penalty for which was prescribed to be that no violator thereof "shall be permitted to enter upon and occupy the same, and no person violating this provision shall be permitted to enter any of said lands, or acquire any right thereto" (*Sproat v. Durland* [Okl.] 35

Pac. 886); and I now deny that a homestead entry, or any other form or degree of claim to land, either inchoate, legal, or equitable, entitles the holder to supersede the clear legal remedies, and convert the order of injunction into a writ of ouster, by which a person theretofore in the peaceable and rightful possession of land may be ejected from the same, without any other form of trial than an address to the broad discretionary power of a judge of a court of equity. The right of Willie A. Wallace to invoke the aid of the strong arm of a court of equity to prevent Lyman C. Woodruff from interfering with him in his right to peaceably settle on, reside upon, and cultivate the land covered by his homestead entry (*Peckham v. Faught* [Ok.] 37 Pac. 1085) does not give him the right to use the same strong arm to throw Woodruff from his home, eject him from his cultivation, and tear down his improvements. Before this latter relief can be had, Woodruff is entitled to a trial in a legal proceeding, and before a jury of his countrymen; and this right is not taken away by any adjudication of any land tribunal. It existed before land tribunals were heard of, and will likely exist after they are forgotten; and I am opposed to this court being the first to take it away. Possession and right of possession are not synonymous, either in language or law; and it is a mistaken understanding of our procedure to hold that the remedy for the protection of the former against intrusion is the appropriate relief for the enforcement of the latter, against one in actual possession. In the cases cited, not only had the parties restrained not been in the prior rightful possession of the premises (as Woodruff is admitted to have been), but in none of these cases were the parties enjoined from their actual possession of the land, consisting either of residence or cultivation; but the restraint was made against acts which interfered with the occupancy of the complainant, and did not disturb the actual possession of the person enjoined; and the paragraphs quoted from the text writers are concerning entirely different principles than those which must govern a case like the one at bar. Consequently, I cannot regard the authorities referred to as giving any weight to the decision of the court. If any one of the Kansas decisions cited by the court was in point, or justified the conclusion reached, I would be willing to admit that the procedure had the Code to support it, as our legislature has adopted the Kansas practice as an entirety, both for the district and justice courts, and I am a firm adherent to the doctrine that the construction given before its adoption to an adopted statute is as much a part of the law as if it were written in the sections. *Cathcart v. Robinson*, 5 Pet. 264; and, if any of the Kansas decisions approved the procedure of ejecting a man from his home and his fields because he had lost his property therein, by an injunctive order,

I would concede that Wallace had adopted his proper remedy, under the language of the statute, but I would still doubt the constitutional power of the legislature to enact such a law. A brief examination of the Kansas cases cited will, I think, disclose the correctness of my statement that they are no authority whatever for the conclusion of the court in this case. The case of *Walker v. Armstrong*, 2 Kan. 198, was a proceeding brought to restrain the defendants from encroaching upon a ferry franchise claimed by the plaintiff under an act of the legislature of the territory of Kansas, and the court, by Mr. Chief Justice Cobb, said: "An injunction is the appropriate remedy to protect a party in the enjoyment of a ferry franchise against continuous encroachments. Such continuous encroachments constitute a private nuisance, which courts of equity will abate by injunction." That injunction is an appropriate remedy to abate a nuisance has long been the undisputed law; but this is the first time that I have ever heard it claimed that an authority which authorized an injunctive proceeding to abate a private nuisance could be held to sustain a proceeding to eject a man from the possession of real estate, and which possession had, prior thereto, been rightful. If the remedy by injunction must be made rightful by analogy from such a case as this, it certainly has little to support it as authority. *Webster v. Cooke*, 23 Kan. 637, is a case where the plaintiff was in the lawful possession of certain Indian lands, to which he was making an effort to acquire title. The defendant took forcible possession of plaintiff's house, and was preventing plaintiff from pasturing his sheep upon the land,—was driving them and dogging them therefrom,—and the plaintiff showed that great injury would result to his flock if they were not permitted to graze upon the land, and he asked an injunction to prevent the defendant from driving plaintiff's sheep from the land. The plaintiff did not ask to have the defendant ejected from the house, admitting that, even though the defendant was a trespasser, and had never had any lawful possession of any part of the premises, but had taken possession of the house through force, the plaintiff could not recover his actual possession in this way, nor eject the defendant from the actual possession. The gist of the case is reposed in one sentence of the opinion: "The lawful possession of George Webster gave to the plaintiff, under the arrangement pleaded, the right to graze his flocks on the land, and defendant had no authority to interfere." The case of *Downing v. Reeves*, 24 Kan. 167, is one where both parties each had partial possession of certain improvements upon a tract of Kaw Indian trust lands, and the order of the judge was that "each party should be enjoined from interfering with the improvements made by the other." This doctrine has so long been the recognized law of the entire country that

it is manifestly authority upon the question which it decides; but it gives no color of approval for the case at bar. The case of *Long v. Kasebeer*, 28 Kan. 226, discloses a transaction where the plaintiff was the owner and in the actual possession of a quarter section of land, and he brought his proceeding by injunction to restrain the defendant from entering upon the premises and erecting buildings thereon, and from carrying out his efforts to deprive the plaintiff, who was the owner, of the possession of the land. Only a brief citation from the decision of Chief Justice Horton in the case is necessary to show its dissimilarity with the one at bar. "We do not understand from the petition that the defendant has actually turned the plaintiff out of possession and taken full and absolute possession, but only that he has entered upon the land under some pretended claim of title, and that he is seeking to oust the plaintiff of all possession, and to assume the management and control of the land, at the time of the application for the temporary order of injunction."

These are all of the Kansas decisions which are cited by the court as authority for this proceeding by injunction; and, as it was their citation, and not their contents, that made them a formidable objection to my dissent, I have taken the pains to thus briefly review them in order that it may be seen that they are not authority for this case. There is, however, a Kansas case that is in point upon the question here under consideration; but it is squarely against the conclusion reached by the court. It is the case of *Bodwell v. Crawford*, 26 Kan. 293, wherein the defendant had entered into the possession of plaintiff's building under an unauthorized lease, and was seeking to convert the building into a place of amusement, including theatrical performances. Concerning the wrongfulness of defendant's possession, and plaintiff's appropriate remedy, the opinion, which is in the clear language of Mr. Justice Brewer, says: "It is clear that the plaintiff, having never leased the lot or authorized its lease, is entitled to his legal action to recover possession. The defendant has taken possession without authority from the owner, and he has no right to such possession. In all such cases of the unauthorized taking possession of real estate, the ordinary remedy is an action at law for the recovery of possession. Under some circumstances, the owner may maintain forcible entry and detainer, and in all he may maintain ejectment. Both are actions at law. Has he the further remedy of injunction? * * * The unauthorized possession by defendant is of course an injury to plaintiff's rights, and entitles him to relief; but no one will contend that a mere unlawful possession gives occasion for the interference of a court of equity. The reasons for this are familiar to every lawyer. In equity, neither party is of right entitled to a jury; but the constitution

preserves inviolate the right of trial by jury, as it exists at the common law, and an action for the recovery of real estate is one in which, at common law, parties are entitled to a trial by jury. They have a right to the verdict of a jury upon the questions whether plaintiff was owner, whether the defendant was in possession, and whether, if so, the possession was unlawful." On the subject of the right to the remedy by injunction to recover the possession of premises held without authority, it is said by the court in this case, in the following clear language: "Where a party enters into the possession of premises without any authority from the owner, and under pretense of a lease made by an unauthorized agent, and puts said premises to a use which is not forbidden by the law, the owner's remedy is an action at law to recover the possession, and he may not resort to equity, and obtain an injunction, and thus take away the constitutional right of a trial by jury, on the ground that such use is in his judgment immoral and mischievous in its tendencies, and one calculated to injure his reputation in the community." Now, in that case, the plaintiff was the absolute owner of the property in fee simple, and the defendant had no right, and never had had any right, to possession of the premises; yet the court held that the procedure to oust him from such possession could not be by injunction. Surely, Wallace, with simply a homestead entry upon the land, with no title, and with no equity therein (as all the courts of last resort, except this one, have held), could not have a greater right to choose his remedy by injunction to dispossess Woodruff than one who was not simply possessed of an inchoate right, but possessed of an absolute title, and an absolute and unqualified right to possession. The argument resorted to by the court to uphold this proceeding by injunction, if it carried any logical sequence, would entirely wipe away the legal proceedings by ejectment and forcible entry and detainer whenever the complainant chooses to submit his controversy to the court rather than to a jury. The same argument of lack of speediness in legal proceedings would apply to all cases where the owner of the land, or a person entitled to the possession thereof, had a right of action. If forcible entry and detainer and ejectment are not speedy enough remedies to give the entire possession of a tract of land to one who has an inchoate right of a homestead entry therein, how can they be speedy enough as remedies of relief to one who is the absolute owner of the land? If they are not speedy enough remedies in this case to afford Wallace relief in putting Woodruff out of his house, and off of the 70 acres which he has in cultivation, and of which he had before that time had the rightful possession, but which he had lost by virtue of the decision upon Wallace's contest, how can they be speedy enough remedies to give possession to real estate as against a tenant

holding over after his term, or when one has sold the land to another person, or who, by reason of any lack of right, and therefore wrongfully, holds possession of land against another? The conclusions of the court that "a person holding an uncanceled homestead entry upon land has a good and legal title in the possession, and a contingent title in the patent"; and "he stands in the same relation towards the land as he would in any other matter wherein he had contracted, and such contract had been revoked, or completely rescinded"; and that he has a "contingent interest in the patent"; and that he has a "contingent title, which he holds under his filing,"—are not supported by any authority; and I dissent particularly, also, to such conclusions. If this conclusion of the court, however, were true,—that the entryman had any such interest or title in the land,—then it would, of itself, absolutely negative the right of Wallace to resort to a proceeding by injunction to dispossess Woodruff; for one who has such an interest in land as to give him an absolute right of possession is entitled, under the Codes, which give the right to a remedy by ejectment to recover possession upon an equitable or possessory interest, to proceed by the action of ejectment. This, it is true, would overrule *Adams v. Couch*, 1 Okl. 17, 20 Pac. 1009; but the supreme court has heretofore, as I view it, done that, in *Hyroat v. Durland* (Okl.) 35 Pac. 682, and now hold that a homestead entry gives to a party an entirely different right and title than is consistent with the views of the court in *Adams v. Couch*. It would only be natural that the case should be overruled in this phase of it, also.

I have contented myself with a review of the Kansas decisions cited as authority for the right of plaintiff below to proceed by injunction to dispossess Wallace, because such decisions, if they supported the citation, would be manifestly the strongest that could be relied upon. If they were authority for such action, it would be manifestly unnecessary to go any further; and on the other hand, as they do not, and as what I claim to be the Kansas authority is the other way, it is unnecessary to consume further time and space in reviewing the authorities cited. A casual examination of the other cases and the authorities referred to will make it apparent that they give no countenance for the ejectment of a person from the actual and peaceable possession of land by an order of injunction issued in the only action ever brought to determine the legality or illegality of such possession. The most appropriate language I can now refer to in support of my view that the court ought not to dispossess Woodruff from this land, through this proceeding by injunction, is that written by Mr. Justice Brewer in *Bodwell v. Crawford*, supra, in which the court denied the right to the exercise of the remedy by injunction in a case in which, as we have seen, the party

aggrieved had certainly as much right to it as the plaintiff below has in this case, as a means of dispossessing Woodruff from this land, and said: "It is the duty of the courts to stand by the ancient landmarks, to walk super antiquas vias. Additional remedies must be established by other bodies, and in other ways."

I am authorized to state that Mr. Justice McATEE joins with me in this dissent.

(3 Okl. 508)

COUCH v. ORNE

(Supreme Court of Oklahoma. July 27, 1895.)

REVIEW ON APPEAL—GRANTING TEMPORARY INJUNCTION.

1. When a judge of a district court issues a temporary injunctive order, without notice to the defendant in the case, after the answer of defendant was on file, *held*, that the supreme court will not consider an assignment of error predicated upon such alleged erroneous action, until after the matter has been presented for correction to the judge making the order.

2. In an action pending in the district court, wherein the pleadings disclose that an injunctive order will prevent irreparable injury to one of the parties to the litigation, the granting of such order is entirely within the discretion of the court.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county.

Bill by Edward Orne against Meshack Couch for an injunction. From an order granting the same, defendant appeals. Affirmed.

Amos Green & Son and E. B. Green, for plaintiff in error. J. H. Everest and W. S. Field, for defendant in error.

DALE, O. J. On February 8, 1894, Edward Orne filed in the district court of Oklahoma county a petition for injunction, for the possession of a certain tract of land located in Oklahoma county, and which said tract had previously been in contest between Orne and one Meshack Couch. From the pleadings it appears that the contest proceeding was instituted in 1889, in the local land office, by Edward Orne against Meshack Couch, and that the land department, after having the same under consideration, rendered its final decision in the contest case, awarding the land to Orne; that the original homestead entry was placed upon the land by Couch; that such entry was canceled and Orne permitted to file his homestead entry for the tract of land in dispute; and Orne brought the action in the lower court for the purpose of obtaining a mandatory and prohibitory injunction against Couch, requiring Couch to remove from the land, and to cease further trespassing or interfering with Orne's possession and use thereof. The court below issued a temporary injunction, which gave to Orne the use and occupancy of all the tract of land, except a portion upon which Couch had his buildings and improvements and

some growing wheat. The defendant answered to the petition generally, denying the right of Orne to the injunctive order; and, while the matter was in that condition, Orne made a further showing that the wheat standing and growing upon the land at the time the first injunctive order was issued had been harvested; and the court thereupon issued a supplemental order of injunction, without notice to Couch, granting to Orne the use of the entire tract, except that portion heretofore mentioned upon which the buildings of Couch were located. Couch brings this case here, and assigns as error: First. That said court and judge erred in granting the mandatory injunction on the petition and exhibits filed in the cause in the court below, the statements of said petition not being sufficient in law to authorize the granting of such injunction before the final hearing and trial of said cause. Second. The court erred in granting a mandatory injunction on the pleadings in said cause, for the reason that the plaintiff in said suit had an adequate remedy at law. Third. The modified or supplemental order of injunction made by said court below is illegal and void, by reason of the fact, as shown by the record, that it was made ex parte, and without notice to the defendant or the filing of a petition and issuing of a summons, as provided by statute. Fourth. The fourth and fifth assignments of error may be properly joined, and stated as follows: That the facts stated in the pleadings did not justify the court, or authorize the granting of an injunction in the cause. Fifth. The court erred in granting said injunction before the issues joined in the cause were tried and determined. Upon the facts, as they appear in the pleadings and record before us, it will be unnecessary to discuss any of the errors complained of by appellant, except those contained in the third and fifth assignments. The other propositions involved have, we think, been sufficiently noticed in *Woodruff v. Wallace* (decided at this sitting of the court) 41 Pac. 357.

1. In the third assignment of error it is claimed that the court below erred in issuing the modified or supplemental injunctive order, for the reason that the same was so issued without notice to the defendant below, and was in the nature of an ex parte order, made after the answer of the defendant below was filed. It appears from the record that on August 9, 1894, the judge, upon motion and affidavits, and without notice to the defendant, made an order which extended the scope of the former restraining orders, which had been issued when the matter was before the court for a temporary injunction. The last order was issued without notice to the defendant, and at a time subsequent to the date of the defendant's answer. From the record before us, we do not find that the defendant presented a motion for a new trial, or in any manner ever called the attention of the judge to the matter, or asked the

judge granting the order to set the same aside. The probabilities are that the judge granting the order would not have readily vacated the same, if his attention had been directed to the fact that the same was issued without notice to the defendant, after his answer was on file. In *Healy v. Loofbourrow*, 37 Pac. 823, this court held that, "as a general rule, the supreme court of this territory will not consider for the first time, on appeal, questions not presented in the case in the court below." The doctrine there announced is applicable to the question under consideration. The district judge should have been permitted to correct the error complained of before this court is asked to interfere.

2. The fifth assignment of error is not well taken; because, in cases pending in a district court wherein it appears from the pleadings on file that an injunctive order will, during the pendency of the suit, prevent irreparable injury to either party, it is within the discretion of the district judge to grant such order, and his action will not be disturbed unless an abuse of such discretion is shown. That has always been the rule, and no error can be predicated upon such action. *Mead v. Anderson*, 40 Kan. 203, 19 Pac. 708. Holding to the view that the third and fifth assignments of error are not matters sufficient, either in law or equity, to justify this court in reversing the court below, and having, in *Woodruff v. Wallace*, decided the other questions involved in this case adversely to the appellant, the judgment of the lower court is affirmed.

SCOTT, J., trial judge in the court below, not sitting. The other justices concurring.

IRWIN v. IRWIN.

(Supreme Court of Oklahoma. July 27, 1895.)

TERRITORIAL LEGISLATURES—POWERS—DIVORCE—PROBATE COURTS—JURISDICTION.

1. The power to regulate matters of divorce is a legislative one, and the conferring of jurisdiction upon probate courts to grant divorces is not a wrongful exercise of the right granted by the organic act to the legislature of this territory to pass enactments upon rightful subjects of legislation; and the act of the legislature of this territory of 1890, giving probate courts jurisdiction to entertain actions of divorce, needed no ratification by congress, and the act of congress subsequently passed approving the territorial legislative enactments granting jurisdiction to probate courts did not take away the right of the legislature to still further make regulations respecting divorce proceedings, nor the right to repeal its own enactments granting to probate courts jurisdiction in divorce cases. The former conclusion of the court in this case on the question of the general jurisdiction of probate courts to grant divorces approved, but the reason for the holding changed.

2. The jurisdiction of probate courts to grant divorce under section 4096 of the Oklahoma Statutes of 1890 must be exercised in the mode and manner prescribed in the section granting the jurisdiction. It is therefore held

that probate courts, under the statute of 1890, only had jurisdiction to grant divorces where the petition and affidavit showed that the plaintiff had been a resident of the territory for two years and of the county for six months next preceding the date of filing of the petition.

(Syllabus by the Court.)

On rehearing. Former judgment modified. For former opinion, see 37 Pac. 548.

BIERER, J. This case was decided, and the judgment of the court below reversed, and the cause remanded for new trial, at the June, 1894, term of this court (*Irwin v. Irwin*, 37 Pac. 548), and the plaintiff in error has filed his petition for rehearing, which has been granted upon the question of the jurisdiction of the probate court in the cause. In the decision in this case this court held that, by section 4966 of the Laws of Oklahoma of 1890, and by the subsequent congressional ratification of this provision of the territorial legislative enactments, jurisdiction to try and determine divorce cases had been conferred upon the probate courts in this territory, and that, by the repeal of the same by the legislature of 1893, such power had been taken away from the probate courts, but that the jurisdiction in this case was still vested in the probate court by reason of the saving clause of the repeal statute. Applying the law to the petition of the plaintiff, it was held that the petition stated a cause of action under our statutes with reference to divorce, and within the jurisdiction of the probate court. The judgment was reversed, and a new trial granted, because the probate court had rendered its judgment after an adjournment of the said term sine die.

The plaintiff in error claims that the probate courts in this territory never had jurisdiction to grant divorces for our statutory causes, and also, if they did have such jurisdiction, then it was only a limited and special jurisdiction, under the terms of section 4966 of the Statutes of 1890, and that the petition in this case does not contain a necessary statement of the jurisdictional facts, and that there is no affidavit which the statute requires to give the court jurisdiction. The question as to what was the jurisdiction of the probate courts in divorce cases under the Statutes of 1890 must be determined by an examination of the statutes passed by that session of the legislature with reference to the subject of divorce. St. 1890, § 3376, provided: "Marriage is dissolved only: First, by the death of one of the parties; or, second, by the judgment of a court of competent jurisdiction decreeing a divorce to the parties. The effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons. The district court in each county or subdivision has such jurisdiction in an action as is provided in civil procedure." Section 3396, on the same subject-matter, provided: "A divorce must not be granted unless the plaintiff has, in good faith been a resident of the territory ninety days next pre-

ceding the commencement of the action." Section 4966, pertaining to divorces under the Code of Civil Procedure, provided: "Divorce may be decreed by the district and probate courts of this territory, on petition filed by any person who, at the time of the filing of such petition, is and shall have been a bona fide resident of the territory for the last two years previous to the filing of the same, and a bona fide resident of the county at the time of and for at least six months immediately preceding the filing of such petition, which bona fide residence shall be duly proven by such petitioner to the satisfaction of the court trying the same, by at least two witnesses who are resident freeholders and householders of the territory. And the plaintiff shall, with his petition, file with the clerk of the court an affidavit subscribed and sworn to by himself, in which he shall state the length of time he has been a resident of the territory, and stating particularly the place, town, city or township in which he has resided for the last two years past, and stating his occupation, which shall be sworn to before the clerk of the court in which said complaint is filed." These sections (3396 and 4966) are the sections which were repealed by the Laws of 1893.

Section 4966 is the only one of the Territorial Statutes of 1890 which in any way confers jurisdiction in divorce cases upon probate courts; and by the terms of that section it will be seen that the jurisdiction was conferred upon probate courts to grant divorces upon petition filed showing that the person asking the same had been a resident of the territory for two years and of the county wherein the action is brought for six months immediately preceding the filing of such petition, and where an affidavit is filed showing this residence to exist and stating the particular facts relating to such residence. The petition in this case, which is sworn to, contains only this allegation with reference to residence: "That the plaintiff is now, and has been for more than two years last past, a bona fide resident of the territory of Oklahoma, and is now a bona fide resident of Payne county." Under this section of the statute (section 4966), it will be seen that the petition is lacking in the necessary allegation of a six-months residence in the county immediately preceding the filing of the same, and that, should the petition be treated as an affidavit, it being sworn to, it is deficient in that it fails to state the time, place, and circumstances of such residence, as the affidavit should. These are mandatory provisions, and must have been shown to the probate court in order to confer upon it jurisdiction to grant a divorce, if its jurisdiction depended upon this section. In the case of *Eastes v. Eastes*, 79 Ind. 363, the supreme court of that state, in construing this very section of the statute, said: "It is claimed by counsel that these very provisions of the statute are mandatory, and we are of the opinion that

they are so far imperative as that there should be, in every case, a substantial compliance with their requirements. Manifestly, the legislative intent in the enactment of these provisions was to limit the operation of the statute to bona fide residents of the state, and to restrain and prevent the procurement of divorces by nonresidents, through fraud or imposition practiced on the courts. Such substantial compliance with the terms of the statute as may be necessary to carry out and accomplish the purpose and intention of the legislature, the courts should encourage and require." So it will be seen that, if the power of the probate court to grant these divorces depended entirely upon section 4966, the petition was defective, and the affidavit equally so, if not wholly wanting.

But it is contended that section 3396, *supra*, gave jurisdiction to grant divorces where the plaintiff had been a resident of the territory for 90 days, and to that extent modified section 4966. We cannot support this contention. There is nothing in any language given us by the legislature upon which such a construction can be placed. This section (3396) is contained in the same chapter of the statutes relating to marriage contracts which specifically confers the jurisdiction to grant divorces, under that chapter, upon the district court. There is nothing in the jurisdictional features of that chapter which in any way refers to the jurisdiction of the probate courts. The jurisdiction of the probate courts under the Statutes of 1890 was a definite and specific jurisdiction, and it was to be exercised, under its terms, only when a petition and affidavit were filed alleging certain things. The probate court did not have jurisdiction, except by virtue of the provisions of this statute; and it is a well-understood principle of law that, where a right is granted which did not exist at common law and without such statute, and where it is given upon pursuing a certain procedure, the procedure defined is a part of the right, and the right can only be had by following the procedure, and that mode, and that alone, must be pursued. *Conrad v. Starr*, 50 Iowa, 470; *Cole v. City of Muscatine*, 14 Iowa, 296.

It is contended that section 4966 is also a part of the procedure providing for the exercise of the jurisdiction in divorce cases by the district courts, and, if the probate court was limited to the exercise of such jurisdiction in accordance with the specific terms of this section, the district court is equally so limited. But that feature of the contention is not now before the court, and it will be time enough to pass upon that question when it is before us.

It is further contended by plaintiff in error that the article on divorce in the civil procedure act of 1890, of which section 4966 is a part, grants the right to probate courts to decree a divorce only in cases of voidable marriages. Section 1 of this article declares

that marriages which are prohibited by law on account of consanguinity, affinity, difference of color, or where either party to the marriage contract had a former husband or wife, shall be void without any legal proceedings; and section 2 of the same article provides that, when either of the parties to a marriage contract is incapable of making such contract by reason of age or understanding, the same shall be declared void on such incompetent party making application, but that the issue, if any, of such marriage shall be legitimate. These are the only sections of this article referring to the legality of the marriage relation; the other sections are all purely provisions of procedure. These two sections do not pretend to state the causes for which divorce may be declared. The grounds of divorce (which are always statutory provisions) are contained under the chapter with reference to marriage contracts. The legislature, when it enacted the provisions with reference to divorce in the Civil Code, evidently had no thought in mind as to the grounds upon which divorce should be decreed. They were already provided for in a former chapter of the statute, and when the jurisdiction to grant divorces was conferred upon probate courts by section 4966 it was evidently intended that such courts should exercise the same when the grounds for the dissolution of the marriage contract were shown, as provided in the chapter on dissolution of marriage contracts. One of those provisions allows divorce on the ground of extreme cruelty, and, that being shown in the petition, the probate court in that respect was authorized to act.

It is claimed that the probate court was wholly without jurisdiction in this case because the affidavit provided by statute was not filed with the petition. As we have seen, this was one of the mandatory provisions of the Indiana Code. *Eastes v. Eastes*, *supra*. In the case of *Eastes v. Eastes*, *supra*, the case was commenced on the 14th day of October, 1879, and the affidavit as to residence, etc., was sworn to on the 27th day of April, 1879, nearly six months before filing the petition. The defendant filed his motion to set aside the summons because the affidavit as to residence was not made in accordance with the provisions of the statute. The plaintiff asked leave, pending the motion, to file a substituted affidavit, which leave was granted, and on appeal the supreme court, in allowing the substitution, said: "But we fail to see that any good result would or could be accomplished by giving these statutory provisions the literal or rigid construction which the appellant's counsel insists should be placed upon them." With this construction placed upon this statute, which we think should follow, we can see no reason why the probate court was entirely without jurisdiction, and why leave to amend should not be given. If the plaintiff might amend an affidavit sworn to almost six months before fil-

ing the petition, and which therefore could in no way declare the plaintiff's residence during such period of nearly six months, and which by the terms of the Indiana statute must be shown to have been in the county in which the action was brought, why might not an affidavit and a petition which showed two years' residence in the territory and a residence then in the county, but entirely failed to state how long it had been in the county, be amended by inserting proper allegations, if the facts warranted the same? We can see no reason why the rule of amendment should not be equally as applicable in one case as in the other. The petition was sworn to, and was evidently intended by the plaintiff, and so understood by the probate court, to be used both as a petition and as an affidavit. The petition under the Indiana Code, and under our Code of 1890, was not required to be sworn to. Being sworn to, therefore, and the verification being by the court accepted as the statutory affidavit, it would be at least sufficient as a basis for proper amendment. Under the Kansas Code an application for a temporary injunction must be supported by affidavit, and in the case of *City of Atchison v. Bartholow*, 4 Kan. 124, it was held (page 139): "The affidavit of the plaintiff to the necessary facts will, under this provision, be sufficient, and the petition may be used as an affidavit." Under the Indiana Code, also, there was provision for an attachment being had upon affidavit stating the statutory grounds therefor, and under such Code it has been held that the grounds of attachment may be set out and sworn to in the petition, and the same used as a statutory affidavit. *Dunn v. Crocker*, 22 Ind. 324. It is therefore our opinion that the probate court had jurisdiction of the action with the sworn petition filed, but, when the motion of plaintiff in error was made to dismiss the action in the court below because the court had no jurisdiction, the court should either have required the plaintiff to have amended his petition and affidavit, so as to conform strictly to the statute, or should have sustained the motion. The court having failed to do its duty in this respect does not render its proceedings void, but the defendant in error should still have an opportunity to comply with the statute.

We desire now to more correctly state the views of this court upon the question of the jurisdiction of probate courts in divorce cases. We still adhere to the conclusion of the court, in the former opinion in this case, that probate courts, since the act of the legislature which took effect August 14, 1893, repealing the statute of this territory giving such courts jurisdiction in divorce cases, have no jurisdiction to entertain such proceedings, but are not satisfied with the reasons given in our former opinion for such conclusion. The former opinion in this case upon this question is based upon the theory

that the probate courts of this territory have had no jurisdiction in divorce cases except by the congressional ratification of our legislative enactments, and that, this necessary, congressional ratification being of and concerning an act of the legislature, this action of congress did not take away from the legislature the right to repeal its own enactment giving to the probate courts this important jurisdiction. The majority of this court do not believe this position sound. If the conclusion is once reached that the probate courts could not have exercised this jurisdiction excepting by act of congress by ratificatory enactment, then we are free to say that our conclusions as to the present jurisdiction of probate courts might be different, but we do not believe that it was necessary for congress to ratify this act of the legislature giving probate courts jurisdiction in such cases. We believe that the question of marriage and divorce, of the marriage relation and the dissolution thereof, is entirely a legislative question, and one which should and must be controlled by legislative enactment. Except for the act of congress prohibiting local and special legislative acts, the legislature might either grant divorces itself, or it might confer upon some other body, not necessarily a judicial tribunal, the power to grant the same. The right to grant divorces never was inherent in either courts of chancery or common law, and the inherent powers of the district and supreme courts of this territory are those possessed by chancery and common-law courts under the grant of the organic act, which is: "And said supreme court and district courts, respectively, shall possess chancery as well as common-law jurisdiction." 26 Stat. 81. So long, then, as an act of the legislature does not infringe on any of the common-law or equity jurisdiction of the courts of the territory, as defined by act of congress, and the act is within the grant of legislative power extended to the legislature of this territory, we can see no reason why it is not valid. We know of no reason why it cannot, on the one hand, enact, and no reason why it cannot repeal, the same. The act of congress ratifying this law giving jurisdiction to the probate courts does not prevent the legislature from repealing the same. There is nothing in the act of congress making the ratification which indicates that congress meant to repeal any of the provisions of our organic act. Congress had delegated to the territorial legislature the power to legislate upon "all rightful subjects of legislation not inconsistent with the constitution or laws of the United States" (26 Stat. 84), and not prohibited by the other terms of the organic act, and there is no provision against its legislating by general enactment on the question of divorce. The same legislature of 1890 passed various enactments relating to probate courts. It passed an act giving to probate courts the

jurisdiction of justices of the peace; also the jurisdiction to try and determine causes when the same were for the recovery of money or personal property and the amount or value thereof did not exceed the sum of \$1,000. co-ordinate with the district court. It also enacted a chapter of 73 pages defining the jurisdiction and procedure of probate courts with reference to the estates of decedents and the appointment of guardians for and the control of the estates of insane and otherwise incompetent persons. It also granted such courts the power to take testimony in certain instances in land-contest cases. Will it be contended that the legislature might not repeal the provisions of such of these enactments as were valid without any ratifying act of congress? Did the legislature lose its right to repeal or amend the extensive chapter defining the jurisdiction and procedure of the probate courts in the matter of the estates of deceased persons and the guardianship of minors and of the insane merely because the general ratification of these laws relating to probate courts also included this chapter? Did congress, in the ratifying act, mean to give life and validity to those of these acts which were void without such ratification, and also to take away the power of the legislature to repeal such valid enactments as were valid without congressional ratification? We think not. If the power of the legislature to withdraw from probate courts the jurisdiction conferred in divorce cases did not exist because of the congressional ratification, then it is equally true that the power did not exist to repeal these other laws, which had been passed within the rightful grant of legislative power, but which had been ratified by act of congress. We think the ratifying act of congress was only intended to give life and validity to such acts as would not be valid without congressional ratification, and did not intend, in addition thereto, to in any way affect the acts of the territorial legislature relating to probate courts, which it might have passed without authority of congress. It did not mean to take away any of the power granted by the organic act to legislate upon "all rightful subjects of legislation." This act of congress was a grant of validity to, and not a restraint upon, the power and exercise of power by the legislature, and the words used being words of approval and not of restraint, and there being several enactments to which it might by its general terms have applied, part of them requiring an act of congress to give life to the same because of the legislative inability to enact such provisions without such ratification, and part of them requiring no act of congress to make them valid, it cannot be presumed or held that such words of approval could have meant to apply to any other of the legislative provisions than those which required ratification, and cannot be construed to limit a broad congressional

grant of legislative power which had been in no way exceeded. If the legislature had a right to legislate with reference to the granting of divorce before this approving act of congress, it still possessed it afterwards, and if it had a right to grant to the probate courts power to grant divorces for statutory causes, it still possessed the right, after this congressional enactment, to take it away; and having by its own provisions taken away the power prior to that granted by it to the probate courts, of course the probate courts do not now possess the power conferred upon them to grant divorces. The latter part of article 16, c. 19, St. 1890, which is the article extending to probate courts the power to hear and determine actions for the recovery of money or personal property where the value thereof does not exceed the sum of \$1,000, in the same manner and under the same procedure as provided for the justice and district courts, by its very provisions recognizes the fact that it could not be enforced until ratified by act of congress, for it says: "This act shall be in force and take effect from and after its adoption and legalization by act of congress;" and it is but fair to presume that the attention of congress, as exhibited by the act of ratification in question, was called to Oklahoma affairs by this expression of the Oklahoma legislature, and it wished to give effect to its enactments rather than to circumscribe any of its powers. The placing of the divorce laws of Nebraska in force in this territory was not a perpetual grant of jurisdiction to the district courts of this territory to grant divorces, for this very act of congress provided that this very divorce law and the other laws referred to in the same section "are hereby extended to and put in force in the territory of Oklahoma until after the adjournment of the first session of the legislature of said territory." 26 Stat. 87. This divorce law of Nebraska was not only not put in force as a permanent enactment, but this very congressional action recognizes the principle that divorces are a proper subject of the exercise of legislative power; otherwise, congress would certainly have made not a temporary, but a permanent, statute on this subject. The power given by section 11 of the organic act, by which the Nebraska statutes were put in force in this territory, to the courts of this territory to enforce such laws, has already been held by this court to exist only so long as the Nebraska statutes existed in this territory, and not to mean that such enactments or such jurisdiction as given by the Nebraska statutes were to be permanent in their enforcement. Collier v. Territory (Okla.) 37 Pac. 819.

Our conclusion that the regulation and granting of divorce are rightful subjects of legislation is amply supported by authority. The subject is very ably considered and reviewed in the supreme court of Utah by Emerson, J., in the case of Whitmore v. Hardin

3 Utah, 121, 1 Pac. 465, where the former opinion of that court in the case of *Kenyon v. Kenyon*, 24 Pac. 829, not officially reported, was approved, and the case of *Cast v. Cast*, 1 Utah, 112, overruled, and where the court held that an act of the legislature which granted to probate courts in that territory power to hear and determine causes for divorce was valid. In the case of *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723, the supreme court of the United States had occasion to consider this question, and in a very able opinion, by Mr. Justice Field, it appears that on December 22, 1852, the legislature of the territory of Oregon, under a grant of legislative power identical in substance with that granted by congress to the legislature of this territory, granted a divorce to D. S. Maynard from Lydia A. Maynard, his wife, and this act of the legislature was held valid, and as being only a proper exercise of the grant of power given to the legislature to legislate upon "all rightful subjects of legislation." In the opinion the learned judge says: "When this country was settled, the power to grant a divorce from the bonds of matrimony was exercised by the parliament of England. The ecclesiastical courts of that country were limited to the granting of divorces from bed and board. Naturally, the legislative assemblies of the colonies followed the example of parliament, and treated the subject as one within their province. And until a recent period legislative divorces have been granted, with few exceptions, in all the states. Says Bishop in his treatise on Marriage and Divorce: 'The fact that, at the time of the settlement of this country, legislative divorces were common, competent, and valid in England, whence our jurisprudence was derived, makes them conclusively so here, except where an invalidity is directly or indirectly created by a written constitution binding the legislative power.' Section 664. Says Cooley, in his treatise on Constitutional Limitations: 'The granting of divorces from the bonds of matrimony was not confided to the courts of England, and from the earliest days the colonial and state legislatures in this country have assumed to possess the same power over the subject which was possessed by the parliament, and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases.' Page 110. Says Kent in his Commentaries: 'During the period of our colonial government, for more than 100 years preceding the Revolution, no divorce took place in the colony of New York, and for many years after New York became an independent state there was not any lawful mode of dissolving a marriage in the lifetime of the parties but by a special act of the legislature.' 2 Kent, Comm. 97." The learned judge then proceeds in the opinion to review the decisions of the supreme courts of the states of Pennsylvania, Maryland, and Connecticut supporting the holdings of the court, and also the decisions of the supreme

court of Massachusetts expressing contrary views, and then says: "The weight of authority, however, is decidedly in favor of the position that, in the absence of direct prohibition, the power over divorce remains with the legislature. We are, therefore, justified in holding—more, we are compelled to hold—that the granting of divorces was a rightful subject of legislation, according to the prevailing judicial opinion of the country, and the understanding of the profession, at the time the organic act of Oregon was passed by congress, when either of the parties divorced was at the time a resident within the territorial jurisdiction of the legislature." These decisions by Justice Field and by Justice Emerson are so full, complete, and exhaustive as to leave but little more to be said, and no room for argument, on this question, and the views therein expressed meet our entire approval.

Upon the general proposition that the power to grant divorces does not pertain to either a court of law or of equity, without a statute giving power to such courts, we cite the case of *Hopkins v. Hopkins*, 39 Wis. 167, which was decided before and not referred to in either of the above cases. In this case the court said: "It is a general principle of the law of divorce of this country that the courts, either of law or equity, possess no powers except such as are conferred by statute; and therefore authority for the action of the court in that class of cases must be found in the statute, and cannot be looked for elsewhere." The decision of the case of *Ferris v. Higley*, 20 Wall. 375, is not opposed to the view of the question as taken in *Whitmore v. Hardin* or *Maynard v. Hill*. In this case the supreme court of the United States held that an act of the legislature of the territory of Utah, which granted original jurisdiction to the probate courts both in civil and criminal actions, and as well in chancery as at common law, was in violation of the delegation of legislative authority given to the legislature of the territory of Utah, and was an infringement upon the power expressly given by the organic act to the district and supreme courts of Utah, and was therefore void. In the case the court said: "The common-law and chancery jurisdiction here conferred on the district and supreme courts is a jurisdiction very ample and very well understood. It includes almost every matter, whether of civil or criminal cognizance, which can be litigated in a court of justice." The learned judge then proceeds to trace, in a brief but comprehensive manner, the history of probate courts, and the usual scope of their authority, and concludes: "They were not in England considered, originally, as courts of record, and have never, in either that country or this, been made courts of general jurisdiction, unless the attempt to do so in this case be successful." But the court nowhere in that case holds that the legislature had not the right to impose upon

probate courts additional duties, burdens, and jurisdictions which did not infringe in any way upon the grant of judicial authority given to the other courts of the territory. On the contrary, it is expressly stated: "There may be cases when that legislature, conferring new rights or new remedies, or establishing anomalous rules of proceedings within their legislative power, may direct in what court they shall be had. Nor are we called upon to deny that the functions and powers of the probate courts may be more specifically defined by territorial statutes within the limit of the general idea of the nature of probate courts, or that certain duties not strictly of that character may be imposed on them by that legislation." This language or holding is in no way disapproved of in the subsequent case of *Maynard v. Hill*. In fact, in this latter case it is not even referred to as being opposed to the position there taken. The supreme court of Utah, when passing upon this question, evidently had this case of *Ferris v. Higley* before it when considering this subject, for the opinion in *Whitmore v. Hardin* says: "It was within the legislative power of the territorial legislature, not only to declare what should be grounds for a divorce, but to name the probate courts as the proper courts in which proceedings should be taken to procure one. The right of these to exercise this jurisdiction is not denied by either the language or reasoning of *Ferris v. Higley*, 20 Wall. 375."

Congress as late as July 30, 1886, by an act of that date contained in 1 Supp. Rev. St. U. S. p. 303, expressly recognizes this doctrine, that the granting of divorces is a rightful subject of legislation for territorial legislatures; for an act of congress that day passed recognizes not only the fact that territorial legislatures possessed the right to grant divorces, but that they possessed it to an extent of its most vicious exercise,—that is, to grant divorces in individual cases; to grant them by a local, special, or individual act, such as had been done in the *Maynard Case*. The first part of the first section of this act provides: "That the legislatures of the territories of the United States, now or hereafter to be organized, shall not pass local or special laws in any of the following enumerated cases, that is to say: granting divorces. * * * " This is a statutory prohibition that congress would undoubtedly not have passed without a clear understanding that the legislatures of the territories did possess the power to grant divorces, and did that only to prohibit the legislature from granting them by local and special enactment, leaving still reposed in the legislature the right to grant them by an act not prohibited by this statute,—that is, by a general and uniform law. It is worthy of note that the case of *Maynard v. Hill* was decided by the supreme court in March, 1888, less than two years after this act of congress referred to was

passed, and that this legislative construction by the supreme lawmaking power of the land was expressly approved by the supreme judicial tribunal of the country within two years after it was made. This case was decided, and the judgment which the supreme court affirmed was filed in the supreme court of Washington territory, at the July term, 1884 (see 5 Pac. 717), and was no doubt pending in the supreme court of the United States when this act of congress of July 30, 1886, was passed; and it would not, therefore, be resorting to imagination to infer that congressional attention was called to the matter by this very case, in which such an unnatural advantage had been taken of the absent wife by the husband.

The position taken by a majority of this court is that, under the acts of the legislature of this territory of 1890, the probate courts had jurisdiction to grant divorces by proceedings had under section 4966 of the Statutes of Oklahoma of 1890, but that, subsequent to August 14, 1893, such jurisdiction has not existed, because this jurisdiction, so given to the probate courts, was repealed by the provisions of the Civil Code, which took effect that day. The decision of the court heretofore rendered is therefore modified in accordance with these views, and the cause remanded, with directions to the court below to sustain the motion of the defendant to dismiss the action unless proper amendments are made to the petition and the affidavit within a reasonable time. The other questions raised against the validity of the orders of the court below it is not necessary for us now to examine, as our holding is a reversal of all of the final determinations made in the action in the court below.

BURFORD and McATEE, JJ., concur.

DALE, C. J. I agree with the conclusions arrived at in this opinion, but do not agree with the reasons stated for them, but adhere to the decision heretofore rendered by this court in *Irwin v. Irwin*, 37 Pac. 548.

BATTICE v. BATTICE.

(Supreme Court of Oklahoma. July 27, 1895.)

DIVORCE—PROBATE COURTS—JURISDICTION.

Since August 14, 1893, probate courts in this territory have had no jurisdiction to hear and determine divorce proceedings.

(Syllabus by the Court.)

Appeal from probate court, Lincoln county.

Action by Walter Battice against Rosa Battice for divorce. There was a judgment for plaintiff, and defendant appeals. Reversed.

L. E. Payne and H. R. Thurston, for appellant. H. G. Stewart, for appellee.

BIERER, J. On the 17th day of March, 1894, the defendant in error brought his ac-

tion in the probate court of Lincoln county for a divorce against plaintiff in error, and after issues were made in the case a trial was had on the 18th day of April, 1894, and a decree of divorce was granted defendant in error, from which decree plaintiff in error appeals. Only one question is necessary for our consideration, and that is as to the jurisdiction of the probate court in such cases. In the case of *Irwin v. Irwin* (Okl.) 37 Pac. 548, and in the opinion upon the rehearing of that case (41 Pac. 369), it is held by this court that in this territory, since August 14, 1893, the probate courts have no jurisdiction to hear and determine causes for divorce. This action having been brought in the probate court since August 14, 1893, the court below was entirely without jurisdiction, and the judgment of the probate court is reversed, with directions to dismiss the cause of the defendant in error there. All the justices concurring.

UHL v. IRWIN et al.

(Supreme Court of Oklahoma. July 27, 1895.)
 DIVORCE—JURISDICTION OF PROBATE COURT—SUFFICIENCY OF COMPLAINT—INJUNCTION—COLLATERAL ATTACK—ALIMONY.

1. The same complaint is before the court in this case which was before the court for consideration in the case of *Irwin v. Irwin* (Okl.) 37 Pac. 548, and, on rehearing, 41 Pac. 369; and the conclusions there reached are followed in this case, and it is held: First, that on January 14, 1893, probate courts had jurisdiction to hear and determine actions for divorce; second, that the complaint for a divorce in a probate court must show that the plaintiff had been a resident of the territory for two years, and of the county six months, next preceding the date of the filing of the complaint, but, if the complaint stated that the plaintiff had been a resident of the territory six months, and was then a resident of the county, the plaintiff might amend her complaint, and the defect in the complaint would not entirely deprive the probate court of jurisdiction of the cause; third, that a complaint for divorce which charged that the defendant had been guilty of cruel and inhuman treatment towards the plaintiff, and alleged facts showing that the defendant had slapped the plaintiff, and had violently cursed and abused her, and that he had failed and refused to provide for plaintiff and her children, was sufficient to give the probate court jurisdiction to hear her cause for divorce, upon the statutory ground of extreme cruelty.

2. It is not necessary that the complaint in divorce proceedings under the Code of 1890 should allege the facts entitling plaintiff to a restraining order, or pray for a restraining order against the defendant to prevent the disposition of his property in fraud of the plaintiff's rights; but those facts may be set up in the affidavit asking this auxiliary relief, without being stated in the complaint.

3. Where, in a divorce proceeding, a restraining order has been properly granted, commanding the defendant not to dispose of his property pending the action for divorce, such order is operative upon all persons having notice of the granting of such order, although the order and the return of service may be lost or removed from the files of the court.

4. A restraining order, which has been granted without notice to the defendant, in a divorce proceeding, is not void, and may not be at-

tacked collaterally, upon the ground that the emergency therefor was not sufficiently shown.

5. While the decree for alimony under the statute of 1890 should have been made for a sum of money in gross, and not for specific property, yet such a decree was not void as against the collateral attack of one claiming a chattel mortgage upon the property which was the subject of the decree, and which chattel mortgage had been taken prior to the decree of divorce, and in violation of the restraining order against the defendant's making a disposition of his property.

(Syllabus by the Court.)

Appeal from district court, Payne county; before Justice Frank Dale.

Action in replevin by George P. Uhl against Eliza Jane Irwin, W. B. Williams, and Robert A. Lowery. There was judgment for defendants, and plaintiff appeals. Affirmed.

George P. Uhl, in pro. per.

BIERER, J. George P. Uhl, the plaintiff in error, brought his action in replevin in the district court of Payne county, on the 25th day of February, 1893, to recover six head of horses. It appears that, on the 14th day of January, 1893, Eliza Jane Irwin brought an action for divorce in the probate court against her husband E Lorenzo (Lorenzo) Irwin. In her petition she also prayed for a judgment for alimony. On the same day, she filed in the probate court her affidavit, setting up, among other things, that the defendant was threatening to convey away his property, for the purpose of preventing her from collecting any judgment for alimony that she might procure in said action, and asked the probate court for an order restraining the defendant in that action from disposing of his property, which order was duly made and served upon the defendant. George P. Uhl, plaintiff in error, was employed by the defendant in this divorce proceeding as his counsel; and, on February 14, 1893, Lorenzo Irwin gave to Uhl two promissory notes, one in the sum of \$25, and one in the sum of \$100, the \$100 note being for a fee in the divorce case, and the \$25 note being for certain expenses incurred by Uhl while representing Irwin in the divorce case, and, to secure the payment of these notes, have a chattel mortgage on the property for which Uhl brought this suit. Upon the trial of the action for divorce, a decree was rendered in favor of Eliza Jane Irwin for divorce, and, as alimony, she was given the specific personal property in controversy here. On the trial in the district court, judgment was rendered denying Uhl the right to recover possession of this property. He appeals to this court, and urges several objections to the validity of the judgment. He contends that the order of the probate court of January 14, 1893, restraining Lorenzo Irwin from disposing of his property, was void, and therefore could, in no way, prevent Irwin from giving, and the plaintiff from taking, this chattel mortgage, because the probate court had no jurisdiction to entertain the divorce proceeding of

Eliza Jane Irwin against her husband. This contention is based upon three specific objections: First, because it was a proceeding for divorce, and the probate court had no jurisdiction to entertain such a proceeding; second, because the pleadings in the case fail to show a cause of action; third, because the divorce was granted upon the allegation of cruel and inhuman treatment, and this was not a ground for divorce under the Oklahoma statutes.

This contention of plaintiff in error cannot be sustained upon any of the particular grounds urged. These questions have all been passed upon in the case of *Irwin v. Irwin* in the original opinion (37 Pac. 548), and the decision in that case on rehearing handed down at this term of the court (41 Pac. 369). The pleadings and proceedings in that case were the same to which the plaintiff in error again urges these objections, and it is unnecessary to enter into a further discussion of them. The conclusions arrived at in that case are followed here.

Plaintiff in error, however, insists that, even if the probate court may have had jurisdiction to entertain an action for divorce, and the proceedings in the case of *Irwin v. Irwin* may have been sufficient to give the court jurisdiction of that action as a divorce proceeding, the restraining order made against Lorenzo Irwin making any disposition of his property pending the divorce proceeding is void, because no facts were set up in the complaint for divorce which would authorize such restraining order, and, unless the complaint in the case did set up grounds for the issuance of the restraining order, it could not be issued upon the affidavit of the plaintiff in the case, and the affidavit which was filed could only be used in support of the proper allegations made in the complaint. Plaintiff in error cites numerous Indiana decisions upon this question, the last of which is *Road Co. v. Moss*, 77 Ind. 139. In this case it is held that, generally, it is erroneous to grant a temporary injunction without the complaint having a prayer for this relief; but in this case it is also stated that there is a specific exception to this rule, and that is where the defendant threatens or is about to remove or dispose of his property. This exception is specifically provided for in the Indiana statute relating to injunction proceedings. Now, the divorce procedure under the Indiana statute (our statute of 1890) provides that: "Pending a petition for divorce, the court, or judge thereof in vacation, shall make, and by attachment enforce such orders for the disposition of the persons, property and children of the parties as may be deemed right and proper. * * * Provided, that such orders shall be made under the same rules and regulations, and upon such notice as restraining orders and injunctions are granted in other civil actions, except that no bond shall be required of either party." Section 4975. Now, if a restraining order

may be granted in an ordinary action of injunction, when it is shown by affidavit, with no mention of this cause for relief being made or prayed for in the complaint, that the defendant is threatening to or is about to dispose of his property to defeat creditors, the relief being asked for on a similar ground in a divorce case, we see no reason why the court could not grant it upon the same kind of an application therefor. Besides this, the power given by this divorce procedure, pending the action, to make and enforce proper orders, the extent of which power is limited only by the discretion of the court, properly exercised, is most comprehensive in its terms, and there is no requirement here that this relief should be asked for in the complaint,—and, in fact, it would seem to be intended, and it certainly was so intended, that it should not be necessary to ask the relief in the complaint. The court is to make the order pending the proceedings, presumably upon some showing made by the parties that such relief ought to be had. It should only be made when the exigency therefor is made apparent; and it very often occurs that no necessity for such an order is made to appear at the time the complaint or petition for divorce is filed, but the defendant in the case afterwards does something indicating his desire to place the property beyond the reach of the decree for alimony which may be made in the case. It certainly would be unreasonable to hold that, under such a statute as this, it would become necessary for a party to amend his or her petition in order to entitle him or her to this auxiliary relief. The affidavit is all that is required to give the court jurisdiction to make the order.

Plaintiff in error also contends that this order restraining Lorenzo Irwin from disposing of his property could not prevent him from taking this chattel mortgage, because, when he procured a certified copy of the proceedings in the probate court, on February 14, 1893, there was no order among the papers, and nothing to show that the order had been served upon the defendant in that case. There is nothing in this contention. He admitted, on his own cross-examination, that he knew the restraining order had been made, and the evidence clearly shows that it had been personally served on Lorenzo Irwin, by reading the same to him and delivering him a copy thereof, before the chattel mortgage was given. Its temporary removal from the files could be no justification or excuse for its violation, either by Irwin himself or any other person. The order and the return of service being lost, it was proper to prove both of these by the parol evidence of the deputy sheriff who served the order. The fact, also, that Lorenzo Irwin was called in the divorce proceedings "*Alonzo*" and "*Elorenzo*" Irwin could not affect this restraining order. Mr. Uhl knew that the person referred to was Lorenzo Irwin. The action had been brought by Eliza Jane Irwin, his wife, and

Lorenzo Irwin's father had employed Mr. Uhl to appear and defend him in this very proceeding; and Mr. Uhl does not even pretend that he did not know at the time of the taking of the chattel mortgage that Lorenzo Irwin, of whom he took the chattel mortgage, was the person who had been restrained from making a disposition of his property. The court could not permit a suspension of the operation of a restraining order upon such a quibble as this. Besides this, if objection had been made to the order on this account, the defect might have been cured by amendment, and such a mistake could not in any way affect the validity of the proceedings.

Mr. Uhl further objects to the validity of this restraining order, because it was granted without notice. We might concede that, upon the showing made for a restraining order, it should not have been granted without notice, and that the probate court should have required notice before issuing the order. The statute, however, does not make notice a prerequisite to the granting of a restraining order. The statute permitted the court to issue a restraining order without notice upon an emergency being shown, and if the emergency was not sufficiently shown to entitle the plaintiff to an order without notice, the question should have been raised by proper application to vacate the order. There being a reason shown for granting the order, the question as to whether or not it should or should not have been granted without notice upon the emergency shown could not be raised in a collateral proceeding.

Plaintiff in error further objects to the validity of the judgment against him, because the decree rendered in the probate court in the divorce proceeding grants Eliza J. Irwin alimony by decreeing her specific personal property. The decree of the probate court was erroneous in this respect. The decree should have granted alimony in a gross sum of money, and not in specific property. *Rice v. Rice*, 6 Ind. 100; *Green v. Green*, 7 Ind. 113. In both of these cases it is held that a decree of specific property for alimony is erroneous under the Indiana divorce law, but in neither of them is it held that such a decree is void; nor are we cited to any cases which so hold. In the case of *Rice v. Rice*, supra, the supreme court, while reversing the case, took into consideration the evidence upon which the court below had decreed to the wife one-third of the defendant's land, and upon that evidence ordered the court below to give a judgment for alimony to the wife in a gross sum, which was one-third of the value of the land and the money judgment which the court below had made, and ordered that this judgment should be held a lien upon defendant's real estate. Although the decree of the probate court was erroneous, we hardly think that it was void. While, had the defendant in that case saved the proper exceptions, he could have procured a reversal of the judgment on that question on appeal, Mr.

Uhl cannot attack it collaterally; and particularly should this be true when he is attempting to assert a prior claim to the property which was the subject of this decree by a chattel mortgage taken in violation of the restraining order of the court, which was in full force and effect when the mortgage was given. The judgment of the court below is affirmed, with costs. All the justices concurring, except DALE, J., not sitting.

(3 Okl. 68)

RICHARDSON v. SHELBY.

(Supreme Court of Oklahoma. July 27, 1895.)

TRIAL BY COURT—FINDINGS—MOTION TO SET ASIDE—DISCRETION OF TRIAL COURT—CONFLICT OF LAWS—CHATTEL MORTGAGES—RENEWAL—VALIDITY—REGISTRATION.

1. Under the Indiana Code of Civil Procedure, in force at the time of the trial of this cause, when a jury is waived, and trial by court, and the court required to make findings of fact and conclusions of law, a motion "that the court set aside the findings and grant a new trial, for the reason that each of said findings are contrary to law," raises the question whether the facts, as found, are supported by the evidence; and, the evidence not having been brought up with the record, the motion must be overruled. The examination of the evidence required by the motion is impossible. The presumption is that the trial court found the facts truly.

2. Chattel mortgages were executed in Kansas upon property located, and by persons residing, there, who afterwards removed to this territory, bringing the property with them. The law is that the rights of the parties to such chattel-mortgage contracts are to be determined by the law as it exists in the state or country where they were made and are to be performed.

3. The Kansas statute here being construed, which provides that every mortgage of chattels shall be void against creditors of the person making the same, unless, within 30 days next preceding the expiration of one year from the time it was filed, an affidavit exhibiting the interest of the mortgagee be made, as required by the statute, to preserve the rights of the mortgagee as against execution creditors, and after the lapse of one year from the time of filing, the fact that such affidavit has been made must affirmatively appear in behalf of the mortgagee; otherwise the conclusion must be that no such affidavit was made.

4. The statute is peremptory that the mortgage so filed shall be void as against the creditors of the person making the same, unless the renewal affidavit be filed as provided by it; and, in case of a failure to so file it, the mortgage will be rendered void as to creditors, notwithstanding the re-filing, and renewal may have been rendered impossible by the removal of the mortgagors from the state.

5. The statutes of Nebraska, in force in this territory at the time, declared chattel mortgages to be "absolutely void as against a creditor of the mortgagor, unless the mortgage or a true copy thereof shall be filed in the office of county clerk of the county where the mortgagor resides." Under this statute, in the absence of the filing of the original mortgage, a copy of it, properly authenticated as a "true copy," must be placed on file as here provided. Such authentication, under the Statutes of 1890, in force at the time, must have been "by an attestation made by the keeper of the same that the same was a true and complete copy of the original in his custody, and the seal of the office of said keeper thereto annexed, or by the certificate:

of the clerk and the seal of the district or probate court of the proper county where the keeper resides, that such attestation is made by the proper officer." And a certificate made by the register of deeds of Oklahoma county, where an instrument was filed, which "purported to be a copy of such chattel mortgage," that a copy of such copy was "a true copy of the original mortgage on file in 'his office,'" is not such authentication, and is plainly erroneous and misleading.

6. In order to have the effect of notice to creditors, a chattel mortgage, or copy of it, must be such as is by the statute declared to be sufficient and effective for that purpose, and the registry must have been made in compliance with the law: otherwise the registry will be treated as a mere nullity.

(Syllabus by the Court.)

Error to district court, Canadian county.

Replevin by George O. Richardson against Orville Shelby. There was a judgment for defendant and an order denying a new trial. Plaintiff brings error. Affirmed.

Blake & Blake, for plaintiff in error. Huger Wilkinson and Green & Strang, for defendant in error.

McATEE, J. The plaintiff below, plaintiff in error here, filed his complaint in replevin in the district court for Canadian county, setting forth that he was the owner, and legally entitled to the possession, of certain personal property, consisting of one Massillon separator, truck, and stacker, and other personal property, by virtue of two chattel mortgages, and a release from the mortgagor to him of all interest and rights in the property. The defendant filed his general demurrer to the complaint, which was overruled. The defendant thereupon filed his answer, in four separate counts, to which the plaintiff demurred. The fourth paragraph of the answer consisted of a counterclaim. The plaintiff's demurrer was heard by the court, and sustained. Thereupon, the defendant elected to stand upon the first three paragraphs of his answer, which consisted of general denials, expressed in various forms, of the matter contained in the petition. Trial was then had before the court, and, at the request of the defendant, the court made separate findings of fact and conclusions of law.

It was found by the court that, on the 15th day of November, 1889, James Hafer purchased of George O. Richardson, of St. Joseph, Mo., the property mentioned in the complaint, and executed to the said George O. Richardson a chattel mortgage on said property, and that the chattel mortgage bore the following indorsement:

"Territory of Oklahoma, Oklahoma County—ss.: I, R. H. Mansur, recorder of Oklahoma county, hereby certify that the foregoing is a true copy of the original mortgage on file in this office. Witness my hand and seal this 2d of May, 1892. R. H. Mansur, Register of Deeds. By J. C. Williams, Deputy."

That, on the 2d day of February, 1890, James Hafer and Alice Hafer, his wife, ex-

ecuted a chattel mortgage upon the said property to Ben Hafer of Holton, Kan., to secure the payment of two certain promissory notes, each dated November 16, 1889, and due, respectively, January 16, 1891, and January 16, 1892, which mortgage was signed and sealed on the 15th day of February, 1890. This mortgage was indorsed as follows:

"Filed on the 10th day of October, 1890. John Martin, County Clerk, Oklahoma County, Oklahoma Territory."

The finding further states that, "at the time said mortgages were filed with the register of deeds of Oklahoma county, said property was situated in Oklahoma county, Oklahoma territory, and the mortgagees were residents of said county"; that, on the 7th day of December, 1891, in the probate court of Oklahoma county, in the case of Ford and Reed, Plaintiffs v. James Hafer, Defendant, the plaintiffs recovered a judgment against the said defendant in the sum of \$365.25, and that on the 11th day of January, 1892, execution was duly issued on said judgment to the sheriff of Canadian county, Okl. T., and was delivered to the said sheriff on the same day, and was, on the 27th day of January, 1892, by the said sheriff, levied upon the property described in the complaint, in Canadian county; that, at the time the execution was issued, James Hafer was residing in Canadian county, and the property in controversy was in Canadian county; that the chattel mortgage executed by James Hafer to Benjamin Hafer was transferred and assigned to George O. Richardson, for a valuable consideration, prior to the 10th day of August, 1892, and that there was due to said George O. Richardson from said James Hafer upon said notes and mortgages the sum of \$1,000. Thereafter, on the 11th day of March, 1892, James Hafer delivered to George O. Richardson a written instrument, by which, in consideration of one dollar, he agreed to "release" to George O. Richardson all of his right and interest in the property described in the mortgage of November 15, 1889, and granted to him the right to take the property out of the territory and sell it. Richardson accepted the relinquishment thus executed to him by Hafer on the 11th day of March, 1892, and upon that day agreed to accept the property in full payment of the indebtedness to him, and to release the notes and mortgage. Upon attempting to take possession of the property, immediately after the execution and delivery of the last-named paper, Richardson found it in possession of the defendant in error, who claimed it under an execution issued from the probate court of Oklahoma county on the judgment in favor of Ford and Reed. The findings state that George O. Richardson has obtained possession of said property, and sold the same, and appropriated the proceeds thereof; that the instrument filed for record in the register's and clerk's offices of Oklahoma county were not the original mortgages

executed by Hafer, but were what purported to be "copies of said instrument." It was also found by the court that, at the time the mortgages were executed, the mortgagors resided in the state of Kansas, and that the property mortgaged was also in that state. The court found, as conclusions of law, that "(1) The lien of the execution in the hands of Shelby, as sheriff, in favor of Ford and Reed, against Hafer, for the sum of two hundred and sixty-five dollars (\$265.00) and costs, taxed at the sum of forty dollars and twenty-five cents (\$40.25), and interest thereon, is paramount and superior to the lien of the mortgages held by the plaintiff, George O. Richardson. (2) That, at the time of bringing this action, the plaintiffs were not entitled to the possession of the property mentioned in the mortgage, until they had satisfied the lien of the execution in favor of Ford and Reed, then in the hands of Shelby, sheriff. (3) That the defendant is entitled to a return of the property, or, in lieu thereof, payment of a sufficient sum of money to satisfy said execution, costs, and interest in favor of Reed and Ford,"—"to which conclusions, and each of them, the plaintiff at the time excepted." Thereupon the plaintiff moved the court to "set aside the findings and grant a new trial herein, for the reason that each of said findings is contrary to law." Judgment was entered up in accordance with the conclusions of law, to all of which judgment the plaintiff excepted. Motion for a new trial was made by the plaintiff, and overruled, to which the plaintiff also excepted.

Plaintiff made assignment of error, as follows: "(1) That the district court erred in overruling the demurrer to the answer of defendant, filed on the 4th day of April, 1893. (2) That the said court erred in overruling plaintiff's motion for a new trial. (3) The said court erred in its conclusions of law. (4) The court erred in rendering judgment for the defendant that, upon failure of plaintiff to return the chattels therein described, defendant recover of the plaintiff the sum of three hundred and five dollars, with interest at the rate of 7 per cent. per annum from the 7th day of December, 1891."

Upon the first assignment of error, the record does not show that the court overruled the demurrer to the answer of defendant filed on the 4th day of April, 1893. The statement made in the record is that: "Plaintiff and defendant argued the demurrer to the answer and cross complaint herein, and the court sustains said demurrer, and the defendant excepts." No statement of any kind appears in the record from which it can be inferred that plaintiff's demurrer was overruled.

The relief sought for under the second assignment of error is that the court refused to "set aside the findings, and grant a new trial herein, for the reason that each of said findings is contrary to law." This case was tried under the Oklahoma Statutes of 1890,

including the Indiana Code of Civil Procedure, and under which the rules of interpretation and construction adopted by the supreme court of Indiana were, at the time, in force here. The motion for a new trial, made in this form, is the remedy, when it is sought by the assignment of error to contest the question whether the facts as found by the court are supported by the evidence. The evidence produced at the trial of this case is not furnished in the case. The assignment of error has been made upon the record, unaccompanied by evidence, other than that which is contained in the findings of fact made by the court itself. It would not, therefore, be possible to make the investigation required by the motion; and it will be presumed, in the absence of the testimony, that the findings made by the trial court, so far as they were made by it, were within the issues, and, relative to them, were full and correct. There is no ground for relief under this assignment of error, unless pertinent and material facts were proven at the trial, and that the court did not find upon them. No omission of testimony is apparent on the record, nor has any been pointed out in argument, which can possibly be material, and upon which the plaintiff in error would be entitled to a reversal of the judgment of the cause, or a venire de novo. *Graham v. State*, 66 Ind. 386; *Martin v. Cauble*, 72 Ind. 67; *Vannoy v. Duprez*, 72 Ind. 26; *Stropes v. Board*, 72 Ind. 43; *Ex parte Walls*, 73 Ind. 110.

By the third assignment of error it is declared that the court erred in its conclusions of law. Assuming, for the present, that the mortgages under which the plaintiff claims the property in controversy were entitled to record, so as to constitute notice of the lien described in them, it is found by the court that "at the time the mortgages were executed the mortgagors resided in the state of Kansas, and that the mortgaged property was also in that state." It is contended by plaintiff in error, upon this finding of fact, that, inasmuch as the Hafers moved the mortgaged property to Oklahoma county, and there established their residence, the validity of the mortgages, as to execution creditors, is controlled entirely by the laws of Oklahoma in force at the time the mortgages were filed in the office of the clerk of Oklahoma county. We do not find that this contention should be supported. The law is that the rights of the parties to a contract are to be determined by the law as it exists in the state or country where the contract is to be performed. The mortgagor having resided in the state of Kansas, and the property mortgaged being there at the time, it is evident that the contracts were made with reference to the laws of that state; and those laws will therefore be applied to them here, and will determine their validity or invalidity, and receive the same interpretation and construction which they would receive in the

courts of Kansas.. *Martin v. Hill*, 12 Barb. 637; *Tyler v. Strang*, 21 Barb. 198; *Langworthy v. Little*, 12 Cush. 109; *Arnold v. Potter*, 22 Iowa, 194; *Smith v. McLean*, 24 Iowa, 322; *Edgerly v. Bush*, 81 N. Y. 199; *Iron Works v. Warren*, 76 Ind. 512; *Feurt v. Rowell*, 62 Mo. 524; *Kanaga v. Taylor*, 7 Ohio St. 134; *Jeter v. Fellowes*, 32 Pa. St. 465; *Jones, Chat. Mortg.* § 249.

It is provided by the statutes of the state of Kansas in force at the time of the execution of these mortgages that:

"Par. 3903. Every mortgage or conveyance intended to operate as a mortgage of personal property which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of the possession of the things mortgaged shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the register of deeds in the county where the property shall be then situated, or, if the mortgagor be a resident of this state, then the county of which he shall at the time be a resident.

"Par. 3904. 'Endorsed and Filed.' Upon the receipt of any such instrument the register shall endorse on the back thereof the time of receiving it and shall file the same in his office to be kept there for the inspection of all persons interested.

"Par 3905. 'Void One Year After.' Every mortgage so filed shall be void as against the creditors of the person making the same or against subsequent purchasers or mortgagees in good faith after the expiration of one year after the filing thereof, unless, within thirty days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his attorney or agent, shall make an affidavit exhibiting the interest of such mortgagee in the property at the time last aforesaid claimed by virtue of such mortgage, and if such mortgage is to secure the payment of money, the amount yet due and unpaid. Such affidavit shall be attached and filed with the instrument or copy on file to which it relates."

The first of the mortgages was executed on the 15th day of November, 1889, and the second upon the 12th day of February, 1890, and upon the former the entry is made:

"Territory of Oklahoma, Oklahoma county—ss.: I, R. H. Mansur, recorder of Oklahoma county, hereby certify that the foregoing is a true copy of the original mortgage on file in this office. Witness my hand and seal this 2d day of May, 1892."

Upon the latter appears the indorsement:

"Filed this 10th day of October, 1890. John Martin, County Clerk, Oklahoma County, Oklahoma Territory."

There is no indorsement upon either of them by which it may appear that the "mortgage or a true copy thereof" was ever "deposited in the office of register of deeds in

the county where the property was then situated, or of the county of which the mortgagor was at the time a resident." Nor is any finding made in the record that any such deposit was ever made, as against the creditors of the mortgagors, dealing with the creditor in good faith. These mortgages were therefore absolutely void as against creditors. There is no statement contained in the findings of the court whereby it can be ascertained at what time the first of these two mortgages was filed in the office of register of deeds of Oklahoma county. The Kansas statute, which is cited, declares that every mortgage of chattels, even if so filed, "shall be void as against the creditors of the person making the same, unless within thirty days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his attorney or agent, shall make an affidavit exhibiting the interest of the mortgagee," etc. The record does not show that any such affidavit was filed. After the expiration of a year, the mortgage will be void as against the creditors, unless the renewal affidavit is filed as provided by the statutes; and, the year having elapsed from the time of its execution, it must affirmatively appear, in behalf of the mortgagee, that the renewal affidavit was made as required. No such showing appears in the findings of fact, and the conclusion must be that no such affidavit was made, and that the mortgages are void, as against creditors, under the law of that state, which determines their validity and effect. *Swigget v. Dodson*, 88 Kan. 713, 17 Pac. 594; *Newell v. Warren*, 44 N. Y. 244; *Seaman v. Eager*, 16 Ohio St. 219; *Day v. Munson*, 14 Ohio St. 488; *Briggs v. Mette*, 42 Mich. 12, 3 N. W. 231.

Nor does the fact of the removal of the mortgagor from the state make any difference. The statute is peremptory that the mortgage so filed shall be void, as against the creditors of the person making the same, unless the renewal affidavit be filed, as provided by it; and, in the case of the failure to so file it, the mortgages will be rendered void as to such creditors, notwithstanding the refiling and renewal may have been rendered impossible by the removal of the mortgages from the state. *Dillingham v. Bott*, 37 N. Y. 198. But the statute of the state of Nebraska upon chattel mortgages was in force at the time as a part of the statutes of Oklahoma, which required that a chattel mortgage should be "absolutely void as against a creditor of the mortgagor, unless the mortgage or a true copy thereof shall be filed in the office of county clerk of the county where the mortgagor executing the same resides." The court makes no such finding of fact. Indeed, it could not do so. While upon the first mortgage the certificate of "R. H. Mansur, Recorder of Oklahoma County," appears, certifying that "the foregoing is a true copy of the original mortgage

on file in this office," that is not a proper authentication. Authentication must come from the county and from the office (being the proper office) in the state of Kansas where the mortgage was originally, if ever, recorded. It was provided by section 11, art. 15, "Written Evidence," of the Code of Civil Procedure of 1890 (page 831), under which the case was tried below, that: "Exemplifications or copies of records, and records of deeds and other instruments, * * * shall be proved or admitted as legal evidence in any court * * * in this territory, by the attestation of the said records, * * * deeds or other instruments, * * * that the same are true and complete copies of the records, * * * instruments, or books, or parts thereof in his custody, and the seal of office of said keeper thereto annexed, if there be a seal, and if there be no seal, there shall be attached to such attestation, the certificate of the clerk, and the seal of the district or probate court of the proper county where the keeper resides, that such attestation is made by the proper officer." No such exemplification appears in the record or among the findings of fact; and the court, therefore, properly found, not that the mortgages were the original mortgages, or were "true copies," as would have been requisite to their validity or effect under the statute of Nebraska then in force, but that the instruments filed for record in the register of deeds and clerk's office of Oklahoma county were what "purported to be copies of said instruments." In order to have had the effect of giving notice, the mortgages must be such as are authorized to be recorded, and the registry must have been in compliance with the law, otherwise the registry will be treated as a mere nullity. *Astor v. Wells*, 4 Wheat. 466; *Brown v. Girard*, 1 Bl. 40; *Frost v. Beekman*, 1 Johns. Ch. 300; 1 Story, Eq. Jur. §§ 403, 404; *Bulard v. Hinckley*, 5 Me. 272. It is not claimed that the mortgages under and by virtue of which the property is claimed by plaintiff were the originals, and it cannot be claimed that they were properly authenticated as "true" copies, entitled to be recorded and to have the force of a notice to the world of the lien. The instruments were of no force or effect as mortgages or liens upon the property; and the conclusion of law by the court that the lien of the execution was paramount, and that the mortgages were void as against the lien of the execution herein, and that the defendant was entitled to the return of the property, was correct. The judgment of the court below is affirmed.

McMEACHAN v. CHRISTY.

(Supreme Court of Oklahoma. July 27, 1895.)

APPEAL—RECORD—BILL OF EXCEPTIONS—CASE MADE—TRANSCRIPT.

Under the Code of 1893, a motion to dismiss an appeal from the probate court to the dis-

trict court, and a motion for a new trial, and the evidence taken on the trial in the district court, and the exceptions made to the various rulings of the district court upon these matters, are not a part of the record without a case made or bill of exceptions, and a transcript of the record of the district court presents no questions in this court for a review of the actions of the district court in its rulings upon such motions.

(Syllabus by the Court.)

Appeal from district court, Kingfisher county; before Justice John H. Burford.

Action by T. P. Christy against T. F. McMeachan. There was a judgment for plaintiff on appeal to the district court, and orders denying a previous motion to dismiss the appeal, and a subsequent motion for new trial, and defendant brings error. Affirmed.

Hobbs & Kane, for plaintiff in error. T. G. Cutlip, for defendant in error.

BIERER, J. To the petition in error in this case is attached a transcript of the record of the court below, duly certified by the clerk of the district court. The errors assigned in the petition are to matters which occurred upon the trial, and to the overruling of the motion of plaintiff in error for a new trial, and to the overruling of the motion of plaintiff in error, made in the district court, to dismiss the appeal taken to that court from the judgment of the probate court. This transcript purports to contain all of the original pleadings filed in the probate court, and which were used upon the trial in the district court; the motion made by plaintiff in error in the district court to dismiss the appeal taken by defendant in error from the probate to the district court; the evidence offered in the case, with the rulings thereon; the verdict of the jury; the motion for a new trial; the judgment of the court overruling the same, with the exceptions thereto; and a statement that 90 days' time was given defendant below, plaintiff in error here, to prepare a bill of exceptions. There is, however, no certificate showing that the judge of the district court ever signed the record as a bill of exceptions, or settled it as a case made. There is nothing attached to this record but the certificate of the clerk of the district court. This being the case, there is nothing presented to this court for review. None of the errors assigned arise upon the transcript of the record. The particular matter urged in this court by plaintiff in error, and opposed by defendant in error, is upon the action of the court below in overruling plaintiff in error's motion to dismiss the appeal from the probate court. This matter, however, cannot be reviewed upon the record before us, for such a motion, without a bill of exceptions or case made, is not a part of the record which can be brought to this court by a transcript. This case was brought under the Code of 1890, but was tried after the taking effect of the Code of 1893, and by the latter Code its provisions were to apply after judgment. Section 4633, Code 1893. Sections 4306 and 4307 of the

Code of 1893 require the clerk to make a complete record of every cause as soon as it is finally determined, and provides for the signing thereof by the judge of the court. Section 4306 of the same Code provides: "The record shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court. * * *" Section 3984 of the same Code provides: "The only pleadings allowed are: First, the petition by the plaintiff. Second, the answer or demurrer by the defendant. Third, the demurrer or reply by the plaintiff. Fourth, the demurrer by the defendant to the reply of the plaintiff." From these sections it will be perceived that a motion to dismiss an appeal, a motion for a new trial, the evidence used on the trial, and the rulings of the court and exceptions thereto are not a part of the record. Other portions of the Code provide for bringing into the record by case made all such matters which are not otherwise a part of the record, and further provide for the bringing of the cause to this court upon a transcript or on a case made. Upon a transcript of the record no questions can be considered except those which appear from a consideration of the record as made in the court below, and the errors assigned not being presented upon the transcript, and no bill of exceptions or case made having ever been filed in the court below, nothing is presented for our consideration in this case, and the judgment below is affirmed, with costs against plaintiff in error. All the justices concurring, except BURFORD, J., not sitting.

(3 Okl. 184)

IRWIN v. IRWIN.

(Supreme Court of Oklahoma. July 27, 1895.)

JURY—CHALLENGE FOR CAUSE—GROUNDS.

Under the statute of 1890 it was not a ground for a challenge for cause to a juror that he had already served as talesman upon the trial of a cause during the same term of court. (Syllabus by the Court.)

Error to district court, Payne county; before Justice Dale.

Replevin by Nelson Irwin against Eliza Jane Irwin. There was a judgment for defendant, and plaintiff brings error. Affirmed.

George P. Uhl, for plaintiff in error.

BIERER, J. Error is assigned because the court below overruled the plaintiff in error's challenges for cause preferred to the three jurors Ed. Strange, C. E. Merman, and John Barnes. The record shows that these jurors were called by the sheriff as talesmen, and that upon their examination they answered that they had already served as talesmen upon the trial of a cause at the same term of the court at which this action was tried. The court overruled the challenges to these jurors, and it is claimed by plaintiff in error that

this action was erroneous, because section 4160 of the Laws of 1893 makes it a good cause for a challenge to a juror that he has "served once already on a jury as a talesman on the trial of any cause, in the same court, during the term." The objection to the jurors would have been good if the cause had been tried under the 1893 Code, but this action was brought on the 22d day of February, 1893, and therefore was properly tried under the statute of 1890, and that statute does not give a challenge for cause on account of a juror having already served as talesman on the trial of a cause during the same term of court. The challenge was, therefore, properly overruled. The plaintiff in error makes, in a general way, several other objections to the trial in the court below, such as the excluding of proper evidence, the admitting of improper evidence, and that plaintiff in error was not allowed to prove all the facts of his case, and that the instructions were misleading. These matters are not specifically pointed out, excepting to suggest that they appear on various pages of the record, given by number. We have examined the entire record, and do not observe any error of the court below in the respects suggested. There being no error in the record, the judgment of the court below is affirmed, with costs to the plaintiff in error. All the justices concurring, except DALE, J., not sitting.

(3 Okl. 26)

STILES, Treasurer, et al. v. CITY OF GUTHRIE et al.

(Supreme Court of Oklahoma. July 27, 1895.)

STATUTES—CONSTRUCTION—COUNTY COMMISSIONERS—POWERS—ROAD AND BRIDGE TAX—INJUNCTION—PARTIES—GENERAL DEMURRER.

1. The intention of the legislature governs the construction of a statute, and, if that requires a change in the punctuation, or even in the wording, of the statute, such change must be made.

2. The board of county commissioners, under the Laws of 1893, had no authority to levy any tax for road and bridge purposes, unless they were first authorized to do so by a majority vote of the people, upon the question being submitted at a general or special election.

3. A misjoinder of parties both plaintiff and defendant is no ground for a demurrer to the petition under our Code.

4. Several persons, whose property is affected in the same manner by the same illegal tax, may, under our statute, join in an action to restrain the collection of such tax.

5. Under our Code injunction is a proper and legal remedy to restrain the collection of illegal taxes.

6. Where a demurrer is joined in by several persons, on the ground that the petition does not state a cause of action, there is no error in overruling the demurrer as to all of the defendants if a cause of action is stated against any of them, although no cause of action whatever may be stated against a part of them.

7. One or more taxpayers whose property is attempted to be subjected to an illegal tax cannot maintain an action enjoining the collection of the tax as against the property of other taxpayers similarly situated, under the provisions of the Code, which is that "when the question is one of common or general interest in many

persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

(Syllabus by the Court.)

Appeal from district court, Logan county; before Justice Frank Dale.

Action by the city of Guthrie and others against Joseph Stiles, treasurer, and others, for injunction. From a judgment for plaintiffs, defendants appeal. Modified.

A. H. Huston and Buckner & Son, for plaintiffs in error. Bayard T. Hainer, for defendants in error.

BIERER, J. The city of Guthrie, a city of the first class, and G. H. Lynds and J. W. Snyder, residents and taxpayers of said city, brought this action in the court below against Joseph Stiles, treasurer of Logan county, Richard Smith, J. J. Sampson, and S. P. Atherton, county commissioners of Logan county, to enjoin the collection of five mills of tax, which had been levied by the board of county commissioners as a road and bridge tax for the year 1893. A demurrer to the petition of the plaintiffs below was presented by defendants, overruled, and excepted to, and judgment rendered in favor of plaintiffs and against defendants, enjoining the collection of these taxes. Two days afterwards, upon application of plaintiffs, the court permitted an amendment to be made to the petition, showing that this levy of tax was made against all of the property of all citizens and taxpayers of Logan county inside as well as outside of the city of Guthrie, where Lynds and Snyder resided, and asked that the defendants be enjoined from the collection of any of these taxes against any and all of the taxpayers of the county. Upon this amended petition the court rendered judgment enjoining the entire collection of this tax against any and all taxpayers of the county. Exceptions were duly saved to all of the rulings of the court, and an appeal is brought here for a review of this judgment.

There are several important questions of practice and procedure urged for our consideration by plaintiffs in error, and which would ordinarily be considered before the principal question of substantive law involved in the controversy, but, as a disposition of these former questions, as involved in this case, will depend somewhat upon what conclusion we arrive at on the question as to whether the plaintiffs below, or any of them, had any cause of complaint in any form of procedure against the defendants, or any of them, we will consider first the principal question involved in the controversy, and that is as to whether or not, under the statutes of this territory of 1893, the county commissioners had any authority to make a general levy of a road and bridge tax throughout the county, without first being authorized so to do by a vote of the

qualified voters of the county. The petition alleges that the commissioners had no authority to levy a tax, and the case is briefed by counsel on both sides without any contention but what the petition is sufficient in this respect to show that the commissioners had no authority to levy the tax, unless they had it without the question being submitted to the taxpayers, and under general authority given under the revenue law. Counsel for the commissioners base their contention that they had the authority to levy this tax entirely under the provisions of section 5625 of the Statutes of 1893, which section is section 1 of an article entitled "Rate of Taxation and Levy," and contains the marginal note, "Limitation of Taxes." The section reads as follows: "The rate of the general territorial tax shall not be less than one-half mill nor more than three mills on the dollar valuation, and one-half mill each year for the erection and support of a territorial normal school, and one-half mill each year for the erection and support of a territorial university, the rate for ordinary county revenue, including the support of the poor, not more than six mills on the dollar; a road and bridge tax not to exceed five mills on the dollar, to be paid in money for the county sinking fund, such rate as in the estimation of the county board will pay one year's interest on all the outstanding debt of the county, with ten per cent. on the principal, and such other taxes as may be authorized by law." The clause from this section referring to the road and bridge tax and to the levy for a sinking fund is evidently improperly punctuated, and, being punctuated as the legislature evidently intended it to be, would read thus: "A road and bridge tax not to exceed five mills on the dollar; to be paid in money for the county sinking fund, such rate as in the estimation of the county board will pay one year's interest on all of the outstanding debt of the county, with ten per cent. on the principal, and such other taxes as may be authorized by law." It will be observed that this reading of the statute changes no word, but only substitutes a semicolon for the comma after the word "fund," and makes the clause "to be paid in money for the county sinking fund" relate entirely to the provision for the payment of the outstanding debt of the county with the interest thereon, and not so that it may be applied, according to the fancy or interest of the reader, to a road and bridge tax or a county debt fund. This reading is, to a disinterested person, manifestly what was intended by the legislature, for the legislature certainly never intended that taxes should be levied for road and bridge purposes, and that the payment of such levy should be made in money for the county sinking fund. Such a reading would be absurd on its face, and we cannot let an absurdity supersede the intention of the legislature in construing the law. We must construe the law as the leg-

islature intended it, and, if that requires a change in the punctuation, or even in the wording of the statute, such change must be made. *Territory v. Clark* (Okla.) 35 Pac. 882.

Having ascertained now what the language and connection of the different matters referred to in this section are, does it give any authority to the county commissioners to levy a road and bridge tax? We observe nothing of that kind in the section. There is nothing in the section which directs any particular body, tribunal, or officer to make a levy of the tax, nor is there anything in or about the section that purports to do such a thing. It only fixes the rate, or rather it only fixes the limitation upon certain taxes which may be levied for certain purposes in this territory, and does not say, or pretend to say, what officer or body shall make the levy. It leaves the question as to who or what officer or tribunal shall make the levy to other provisions of the statute. The very next section following this one provides that the territorial board of equalization shall fix the rate of taxation for a territorial tax, and that the auditor shall certify the same to the county clerks of the counties. The section following this latter one provides the time when the county commissioners shall meet and levy the taxes in the counties. Upon a consideration of these three sections, it would be as fair to hold that the county commissioners were the body to fix the amount which should be levied for territorial taxes as that they should make a levy of taxes for road and bridge purposes, and this conclusion can certainly not be reached. But there are other sections of the statute which make it very clear as to whose duty it is to levy taxes for road and bridge purposes in cities, and when, if ever, the county commissioners can levy any such taxes. Section 5729 of the same statutes, provides: "The county commissioners of each county by and with the consent of the respective township trustees, may at the time prescribed by law for levying county taxes, levy a road tax of not more than five mills on the dollar on all taxable property in their respective townships except the real estate in incorporated city [meaning cities] of over two thousand inhabitants, and the said tax may be paid in labor under the direction of the over-seer of the district in which the property is situated, by any able bodied man at the rate of one dollar per day and the same amount shall be allowed for horse-team and wagon, or team and plow." This section pertains only to the levying of a road tax in the townships, and there the county commissioners can levy such a tax only with the consent of the township trustees. It expressly excepts the real estate in incorporated cities of over 2,000 inhabitants, but it does not evince any intention, because the exception is not made to apply also to personal property, to give the county commissioners

power to levy a tax for road purposes, even upon personal property in incorporated cities, for the section pertains simply to townships, and to the levying of this tax with the consent of the township trustees, and cities have no township trustees who could consent to the levy of any kind of tax whatever. This is the only section we have been able to find, or have been referred to in the briefs of counsel, under the provisions of the law relating to revenue and to roads and highways, which gives the county commissioners any general authority, acting with other officers, to levy any tax for road purposes; and the part relating to this question discloses no provision whatever regulating the levy of taxes in cities of the first class, of which the city of Guthrie is, in the petition, alleged to be one. The law governing cities of the first class, however, makes it very clear as to who has the authority to levy such taxes. One of the subdivisions of section 561, under the laws relating to "Cities of the First Class," and which defines a part of the authority of cities, is as follows: "The cities coming under the provisions of this act, in their corporate capacities, are authorized and empowered to enact ordinances for the following purposes, in addition to the other powers granted by law: * * * First. For opening, widening and bringing to grade all streets, avenues and alleys, and for building bridges, culverts and sewers, and for foot-walks across streets, avenues and alleys, the assessment shall be made on all the taxable property within the limits of the city, not exceeding five mills on the dollar for these purposes in any one year." Section 566 gives the city council power to appropriate money and to provide for the payment of the debts and expenses of the city. Section 568 is very specific as to who has the authority to levy taxes in a city; not only who has authority, but who is required to do so. It provides: "The city council is authorized, and required, to levy annually, taxes on all taxable property within the city, in addition to other taxes, and in sufficient amount for the purposes of paying the interest and coupons, as they become due, on all bonds of the city, now issued, or hereafter to be issued by the city, which taxes shall be payable only in cash." Section 569 provides that "at no time shall the levy of all city taxes, of the current year for general purposes, exclusive of school taxes, exceed four per cent. of the taxable property of the city, as shown by the assessment book of the preceding year." Section 573 provides: "All taxes and assessments shall be certified to the county clerk of the proper county, to be placed on the tax roll for collection, subject to the same penalties, and collected in like manner as other taxes are by law collected." From these sections it is very apparent that in cities, city as well as road and bridge taxes must be levied by the city, and must be certified to the county clerk, to be there placed

on the tax roll for collection. Section 5625 not only does not conflict with these provisions of the law relating to cities of the first class, but is generally upon an entirely different subject-matter. It is upon the question of the rate of taxation, and not upon the question as to who shall make the levy; and, in so far as it contains anything which is kindred to the provisions of the law under the chapter relating to cities, it is identical with that law, because it fixes the rate of limitation on road and bridge taxes at exactly the same amount which is fixed under the chapter relating to cities. It seems to us that the matter is so clear that there never ought to have been any contention on the part of the county commissioners that they had any authority to levy any tax for road and bridge purposes upon property in cities of the first class unless they had been given specific authority to do so by vote of the people of the county, under section 1788 of the Laws of 1893, which is as follows: "They [referring to county commissioners] shall submit to the people of the county at any regular or special election any question involving any extraordinary outlay of money by the county or any expenditure greater in amount than can be provided for by the annual tax, or whether the county will construct any court house, jail or other public buildings, or aid, or construct any road or bridge, and may aid any enterprise designed for the county, whenever a majority of the people thereof shall authorize the same as hereinafter provided." It is under this section, and this section alone, that the board of county commissioners could, under any circumstances, levy any tax for road and bridge purposes within a city; and by the plain terms of its provision they could make such levy only when authorized to do so by a majority of the people at an election when this question was submitted for public determination. Having been given no such authority, the levy was clearly illegal.

The defendants demurred to the petition of the plaintiffs, and urge that it should have been sustained upon several grounds. The demurrer is a general one, two of the grounds of which were that there was a misjoinder of parties both plaintiff and defendant. That there was a misjoinder of parties both plaintiff and defendant, we have no doubt. The city of Guthrie had no interest whatever in the subject-matter of this action. There is no allegation that it had any property which was subjected to this illegal tax, or against which it is claimed that the illegal tax was a lien, and was attempted to be enforced; nor do we know of any law in this territory under which this tax could be a lien against the property of a public corporation, such as a city devoted to public use. It is true, it is one of the duties of a city to look after the financial interests and general concerns of the city, but this means corporate interests of the city as a political entity, and

not as a protectorate of the private interests or property concerns of its inhabitants. The city of Guthrie has no more interest in the question as to whether or not a property owner shall pay an illegal county tax than some other city in the territory, or any of the states, would have. The property owner may, in fact, be a resident and citizen of one of these other cities, and the city is under no moral or legal obligation to look after his private interests. So, too, the board of county commissioners were neither necessary nor proper parties to this proceeding. They had done all the damage they could do in the premise of this illegal tax. They had levied it, had had it placed upon the tax rolls, and these tax rolls were in the possession and under the control of the county treasurer; and it was he, and he alone, who had anything to do with their collection. There was, however, no error committed in overruling the demurrer upon the ground of this misjoinder, for our statute does not make misjoinder of parties either plaintiff or defendant a ground of demurrer, and, although it may plainly appear on the face of the petition that there is a misjoinder of parties in one or both of these respects, it is not a defect in a petition for which a demurrer lies. *Winfield Town Co. v. Maris*, 11 Kan. 128; *McKee v. Eaton*, 26 Kan. 226; *White v. Scott*, Id. 476; *Hurd v. Simpson*, 47 Kan. 372, 27 Pac. 961. There is no misjoinder from the fact that both Lynds and Snyder joined in the same petition to restrain the collection of this illegal tax, and the contention of counsel for plaintiff in error in this respect is entirely untenable. Under the express provisions of section 4143 of our Statutes any number of persons whose property is affected by the same illegal tax can join in an action to restrain its collection. This is a plain provision of the statute, and would not need any authority in its support. However, the supreme court of Kansas have several times decided the question upon this section squarely against the contention of the plaintiffs in error. *Parker v. Winsor*, 5 Kan. 362; *Wyandotte & K. C. Bridge Co. v. Board of Com'rs of Wyandotte Co.*, 10 Kan. 326; *Gilmore v. Norton*, Id. 491.

Plaintiffs in error also demurred on the ground that the plaintiffs had an adequate remedy at law. Under our statute, such a charge, as directed to this section, is really a misnomer. It raises no question whatever. The plaintiffs had an adequate remedy at law, and that adequate remedy was being pursued by them in this proceeding. The remedy pursued was a legal remedy, because it was given by law. The same section just referred to (section 4143) expressly gives to a litigant the right to proceed by injunction to enjoin the levy of an illegal tax. It says: "An injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the

same." And proceedings by injunction to restrain the collection of illegal taxes have, under this section, so often been resorted to as to place its appropriateness beyond all question. *Parker v. Winsor*, 5 Kan. 362; *Gillmore v. Norton*, 10 Kan. 491; *Hudson v. Commissioners*, 12 Kan. 140; *Center Tp. v. Hunt*, 16 Kan. 430.

The defendants also demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was a general one, joined in by all of the defendants; and as such a demurrer there was no error committed in overruling it. A demurrer to a petition, which is joined in by all of the defendants, cannot be sustained if a cause of action is stated against any of the defendants, although none whatever may be stated against a part of them. If the demurrer is general, and the petition states any cause of action, the demurrer must be overruled. We have already held that a demurrer filed to a pleading as an entirety, the pleading containing several paragraphs, must be overruled if there is one good paragraph in the pleading. *Hurst v. Sawyer* (Okl.) 37 Pac. 817. For authorities upon the propriety of overruling a general demurrer where any cause of action or defense is stated, see *Munn v. Taulman*, 1 Kan. 254; *Pfister v. Wade* (Cal.) 10 Pac. 369; *Flint v. Dulany* (Kan. Sup.) 15 Pac. 208; *Moyle v. Landers* (Cal.) 21 Pac. 1133; *O'Callaghan v. Bode* (Cal.) 24 Pac. 269; *Chevet v. Lumber Co.* (Wash.) 31 Pac. 24. This last case is in point, not only in principle, but in the character of the question raised. There, under a provision of the Code of Washington permitting such joinder, similar in this respect to our provision which permits several taxpayers to join in an action to restrain the collection of the same illegal tax, several parties joined to foreclose laborers' liens, and, although the petition was defective as to the causes of action of a part of the parties, it was held that the demurrer, being general only, did not reach the defect. The facts are sufficient in this petition to give a good cause of action on the part of *Lynds and Snyder*, and the demurrer was properly overruled.

There was, however, one material error committed by the court below in this case, and that was in rendering judgment upon the plaintiffs' amended petition enjoining the defendants from the collection of any of this illegal tax from any of the taxpayers throughout the county. The collection of the tax was properly enjoined so far as it related to the property of *Lynds and Snyder*, but these parties had no authority or power whatever to ask for an injunction against the collection of this tax from any other taxpayer or any other taxpayer's property. They were simply private individuals, and as such they had the right to complain of the wrong which was being committed against their interests and against their property rights; but they had no right to a judgment pre-

venting this wrong from being inflicted upon the property of others. The other taxpayers could pay the tax, or prevent the collection of the same, as they chose. *Lynds and Snyder* could not prevent either the other taxpayers paying the tax or the county treasurer from collecting it. The authorities are very clear upon this proposition. We cite a number of them in support of it, and the brief of counsel contains no cases which are against it. In the case of *Wyandotte & K. C. Bridge Co. v. Board of Com'rs of Wyandotte Co.*, 10 Kan. 326, the supreme court of that state said: "It is true, under the statute, that any number of persons whose property is affected by a supposed illegal tax may unite in an action to restrain its collection; but the court adjudicates upon the rights of those only who do so unite, or who appear as parties before it. And the court cannot restrain the collection of any tax upon any property belonging to any person who is not a party to the suit, or who does not ask that the collection thereof shall be restrained. In this action the *Wyandotte and Kansas City Bridge Company* is the sole plaintiff, and it has no right to ask for an injunction to restrain the levying of any tax except a tax against itself, and upon its own property. It has no right to assume to be the champion of all of the other taxpayers of the county, and ask that no tax shall be levied against them. The other taxpayers may be willing to pay any tax that may be levied against them to build a free bridge, whether they are bound by law to do so or not." In the case of *Center Tp. v. Hunt*, 16 Kan. 430, Mr. Justice Valentine, who also wrote the decision just quoted from, speaking again for the court, said: "One taxpayer cannot enjoin a tax levied against another taxpayer. Each taxpayer must sue for himself, either in an action brought by himself alone, or in an action brought by himself and others with like interests. * * * *Hudson v. Commissioners*, 12 Kan. 140-146 et seq." Again, in this case the learned judge said: "Nor can private individuals sue merely for the protection of the rights of the public. *Craft v. Commissioners*, 5 Kan. 518; *Bobbett v. State*, 10 Kan. 9; *Turner v. Commissioners*, Id. 16; *Wyandotte & K. C. Bridge Co. v. Board of Com'rs of Wyandotte Co.*, Id. 326; *Miller v. Town of Palermo*, 12 Kan. 14. Public rights and private rights, public actions and private actions, are kept separate; and no action can be brought except by the party having a special interest in the result (*Crowell v. Ward*, 16 Kan. 60); that is, the public must sue to protect public interests, and private individuals must sue to protect their own interests; and each must sue in his or its own name." Notwithstanding the uniform holdings of the supreme court of Kansas in an unwavering line of decisions squarely against the claim of counsel for plaintiffs in error that *Lynds and Snyder* have the right to sue for themselves and on behalf of all the other taxpayers of the

county to enjoin the collection of this illegal tax, they still claim the right to maintain the action in this form, and to this extent, under section 3910 of our Statutes. His hope of winning a favorable decision upon this proposition in the face of the long line of Kansas decisions must lie in the fact that the legal history of similar injunction cases, in which the supreme court of Kansas has held directly against his position, seems not to disclose the fact that this statutory provision, which is identical with section 38 of the Kansas procedure act, has ever been considered by the supreme court of that state in reviewing the question as it arose in cases identical with this. It appears to us, however, that only a mistaken comfort could be drawn from the fact that in the ample and numerous considerations of the question by the supreme court of that state the learned counsel contending for this position in the various cases determined there, in their desperate effort to get the supreme court to change its former rulings, could never feel bold enough to claim that this section could aid them. When considering this question, however, as applied to the right of a private citizen to maintain an action where his own separate and distinctively private interests are not involved, the supreme court of Kansas has uniformly held, under our Code, that a private person cannot, by virtue of being a citizen and a taxpayer, maintain an action against public officers, where the act complained of affects only the interests of the public in general, and not those of a private person in particular. *Nixon v. School Dist.*, 32 Kan. 510, 4 Pac. 1017; *Craft v. Commissioners*, 5 Kan. 518; *Bobbett v. State*, 10 Kan. 9; *Turner v. Commissioners*, Id. 16; *Wyandotte & K. C. Bridge Co. v. Board of Com'rs of Wyandotte Co.*, Id. 326, 331; *State v. Commissioners of Jefferson Co.*, 11 Kan. 66; *Miller v. Town of Palermo*, 12 Kan. 14; *Atchison, T. & S. F. R. Co. v. State*, 22 Kan. 1-13. And we do not now perceive how the fact that the wrong complained of involved such an injury as would entitle a private party to enjoin the public officers would permit him, because he did have that particular interest which would enable him to sue the public officers, to extend his right of action beyond the scope of that which he must possess in order to be enabled to sue at all. A party may have an action to redress his own wrongs, but, unless the right be specifically given by statute to him so to do, he may not call a public officer, or even a private citizen, into a judicial contest to redress the wrongs of other persons. The statute in question does not change the rule to the extent claimed for it by counsel for defendants in error. It is not an abstract, common, or general interest of many persons, which the question must involve in order to entitle a party to sue on behalf of himself and other persons. In the language of Mr. Justice Val-entine, when considering the cases in which

parties may join in an injunction proceeding even under the liberal terms of our section 4143, "the joint or common interest of the plaintiffs necessary to enable them to sue jointly must be in the subject-matter of the action, and not merely in the legal questions involved in their separate causes of action." *Hudson v. Commissioners*, supra. There the question was as to whether the parties could join at all or not, and it was held that, although the statute gave a number of persons whose property was affected by an illegal tax the right to join in the same action, a joint or common interest must exist in the subject-matter of the action, and not simply in the legal questions involved. So, too, in this case, the question of common or general interest in many persons, which will entitle one or more persons to sue on behalf of all when the parties are very numerous, must be in the subject-matter of the action, and not in the question as an abstract legal proposition, as is the case when applied to property in which the person bringing the action has no personal interest, but is concerned from a philanthropic impulse, or as the case may be a precedent for his individual litigation. A man who has property sought to be subjected to the payment of an illegal tax is, from a legal standpoint, no more interested in the question as to whether or not property wholly belonging to other persons shall be subjected to the burden of the same illegal tax, than if he had no property affected by such tax at all; and surely, if he has no property affected by the tax, he cannot involve his neighbor, or public officers, in litigation for the mere mental satisfaction of settling a legal question, however common or general it might be. This section of the statute makes provision whereby, in a case where a large number of persons are involved in a controversy over property in which all have some, an equal, or a general interest, one person, or a few of the persons, may litigate the question, and thus disincumber the proceedings from the useless burden of many parties, and enable all of those interested in the action to obtain the same relief as if they had joined in the proceeding. The part of the judgment which enjoined the collection of this tax from the property of Lynds and Snyder was proper; the part which ordered a general injunction in behalf of all other taxpayers was erroneous. The judgment of the court below is modified accordingly, and the costs divided. All the justices concurring, except DALE, J., not sitting.

(3 Okl. 237)

BALDWIN v. MASON.

(Supreme Court of Oklahoma. July 27, 1895.)

PUBLIC LANDS—CONTESTANTS FOR TOWN-SITE LOTS—NECESSITY FOR DEPOSIT—INJUNCTION.

1. The rule of the land department requiring a deposit of \$32 from contestants for lots before a town-site board is a legal requirement,

and one which must be complied with. The poverty of a claimant is a condition which does not constitute a defense against the rule, or against the action of the town-site board, and will not constitute a sufficient excuse to entitle a claimant to the intervention of a court of equity.

2. In a case in which the complainant seeks an injunction to restrain an adverse claimant, upon the ground that the complainant had failed, by reason of poverty, to make the deposit for expenses of contest, required by the rules of the secretary of the interior and land department, the complaint does not state facts sufficient to constitute a cause of action, and a demurrer to such complaint should be sustained.

(Syllabus by the Court.)

Error to district court, Logan county.

Action by John Mason against Alva G. Baldwin for injunction. There was a judgment for plaintiff, and defendant brings error. Reversed.

Keaton & Cotteral, for plaintiff in error. H. R. Thurston, for defendant in error.

McATEE, J. The amended complaint upon which this cause was tried was filed by the plaintiff, the defendant in error here, June 28, 1893, in the district court of Logan county, and sought relief by injunction. The plaintiff alleged that he was a qualified entryman under the laws of the United States, on the 28th day of June, 1891, and at that time selected and staked lots Nos. 23 and 24, in block No. 68, in Capitol Hill, in the city of Guthrie, and proceeded shortly thereafter to make his settlement thereon, and that he had never selected any other lots except those mentioned; that he was living upon, cultivating, and using the same for a home at the time that the town-site trustees entered the tract including them, for the benefit of the occupants thereon, to wit, December 14, 1891; that the defendant, Baldwin, had never been in possession of the said lots, nor was he in possession at the date of the entry made by the town-site trustees for the benefit of the occupants thereof, but that, at the time of the settlement made by the plaintiff, the lots were vacant and unoccupied for any purpose whatever; that his occupation and settlement were peaceable, and that he had remained on the lots from that time until the present time in the undisturbed possession; that, on the 20th day of December, 1891, he filed his application before the town-site board, at which time the defendant, Baldwin, also filed his application. The complaint alleged that, at the time the case was set down for hearing before the town-site board, he was unable, owing to his poverty, to make the deposit of \$32 required under the rule promulgated by the secretary of the interior, but that, notwithstanding this rule and requirement, he was the first legal settler upon said lots, and that the improvements placed there by his labor, which were all the improvements on the lots, were of a permanent character. He further offered to pay all assessments and necessary expenses for the purpose of refunding the amounts in

full expended by the defendant, and to pay all assessments that had been legally assessed against the lots; and charged that the defendant, Baldwin, was threatening, and was about to, dispossess plaintiff and remove plaintiff's improvements. Upon this showing of facts, the plaintiff asked for a restraining order, and, upon final hearing, a perpetual injunction was asked for, to restrain the defendant from interfering with his possession in any manner whatever. To this complaint the defendant demurred—First, that the court had no jurisdiction of the subject-matter of the action; and, second, that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was by the court overruled, whereupon a hearing was had before the court, and a finding made, by which the lots in controversy were awarded to the plaintiff. To the overruling of defendant's demurrer, as also to the conclusion of law and order of the court made upon the final hearing, the defendant duly excepted, and brings the case here upon error.

Upon a similar state of facts, this court has passed heretofore in the case of *Twine v. Carey* (Okla.) 37 Pac. 1096, to which ruling the court now adheres. The rule established by the interior department requiring a deposit for costs has been by the court found reasonable and proper, and constituted no defense to the action of the town-site board in awarding the lots to the defendant, the plaintiff in error here. While the plea of poverty in this case is a strong appeal, and cannot but command the respect and sympathy of fair and just men, it is too liable to abuse to be accepted as a defense in a matter of this character. The land department is authorized to provide rules, which must be complied with in seeking to secure title to land or town lots from the United States. The ruling heretofore made in the case of *Twine v. Carey* will now be made in this case, and the judgment of the district court will be reversed, with directions to enter judgment for the defendant below, the plaintiff in error here, and for such further proceedings as may be required to confirm the title to the said lots in him, as against the defendant in error.

COYLE et al. v. BAUM.

(Supreme Court of Oklahoma. July 27, 1895.)

SALE—IMPLIED WARRANTY—ACTION FOR BREACH—MEASURE OF DAMAGES—RESCISSON—QUESTION FOR JURY—ACTIONS—JOINDER OF CAUSES—ELECTION—OPINION EVIDENCE—EXPERT TESTIMONY.

1. Baum purchased from Coyle & Smith oats to be fed to his livery horses, paid the purchase price, and received the oats. This constituted an executed contract, and the ownership of the oats passed. After using a portion of the oats, Baum discovered that they were unfit for feed by reason of having castor beans intermingled with them, and notified the vendors of such fact. By agreement, he returned

the unused portion of the oats, and was paid for such unused portion the same rate per bushel as the original purchase price. *Hdd*, that this did not constitute a rescission of the contract, but was a new agreement, by which a resale was made, and the question as to whether the new agreement amounted to a compromise, or accord and satisfaction, of the damages occasioned by breach of the implied warranty of quality, was a question of fact to be determined from the agreement itself, and the intention of the parties at the time.

2. When a dealer in feed sells oats to a livery man, for the purpose of being fed to his livery horses, and such purpose is known to the seller at the time of the sale, and the vendee does not examine or inspect the oats, there is an implied warranty that the oats are reasonably fit for the purpose for which they are intended; and if such oats contain castor beans, a poisonous substance when fed to horses, this constitutes a breach of the warranty, for which an action will lie.

3. When a cause of action in tort and one *ex contractu* are improperly blended in the same petition, and no objection is made to the same until after plaintiff's proof is introduced, and it appears from the special findings of fact by the jury, the instructions of the court, and the whole record, that the case was determined upon the theory of a breach of contract, and the elements of tort did not enter into the final results, error of the trial court in overruling a motion by defendant to require the plaintiff to elect on which theory he will stand, is harmless, and a cause will not be reversed for such ruling.

4. The measure of damages in an action for breach of warranty of quality of oats sold for feed for horses, where the oats contained substances which killed a portion of the horses, made some sick, and permanently injured others, is the value of the horses killed, the difference in value of the injured horses before and after the injury, the loss of the use of the horses while sick, the expense of medical treatment and medicine, and such other damages as are the natural and direct consequences of such breach of warranty.

5. Where a witness testifies that he is acquainted with the values of livery horses generally, and that he knew the horses in question, and testified as to their value, it will be assumed that the market value is meant, unless from the testimony of the witness it appears that he fixes his values on some other basis.

6. When a veterinary surgeon has treated certain horses for disease caused by eating castor beans, and gives the effect of the poison on the stomach and digestion of the horses, and is acquainted with the general effects of such poison on horses, he may give his opinion as to the permanency of the injury, and, where he is acquainted with the general values of such horses, may testify as to the damages occasioned by such injuries.

(Syllabus by the Court.)

Appeal from district court, Logan county; before Justice Dale.

Action by Joe Baum against W. H. Coyle and another, partners as Coyle & Smith. There was a judgment for plaintiff, and order denying a new trial, and defendants appeal. Affirmed.

Asp, Shartell & Cottingham, for appellants. Kenton & Cotterell, for appellee.

BURFORD, J. This was an action brought by Joe Baum against Coyle & Smith to recover damages alleged to have resulted to plaintiff's horses by feeding oats containing

castor beans, which he had purchased from the defendants. There was a trial by jury, and verdict for plaintiff for \$570. The jury also returned special findings of fact. Motion for new trial was made and overruled, and judgment rendered on the verdict. The defendants bring the case here upon a petition in error. The amended petition is as follows:

"Joe Baum, Plaintiff, vs. W. H. Coyle and H. S. Smith, Partners as Coyle & Smith, Defendants. Comes now the plaintiff, Joe Baum, in the above-entitled cause, and for his amended complaint in this cause against the defendants, W. H. Coyle and H. S. Smith, filed by leave of the court first had, says that the said defendants are, and have been for more than one year last past before the filing of this action on November 5, 1891, partners doing business at Guthrie, Oklahoma Territory, under the firm name of Coyle & Smith. That the said defendants have been during said time, and were on the — day of September, A. D. 1891, in the retail grocery and feed business, and engaged in the furnishing of groceries and provisions for domestic consumption, and in the sale and furnishing of hay, oats, corn, chop, and other provisions for the feed of horses, cattle, and other animals. The plaintiff further alleges that ever since the 22d day of April, 1889, he has been, and on the — day of September, 1891, he was, engaged in the livery business in the city of Guthrie, Oklahoma Territory, Logan county, and in the business of letting horses, teams, and buggies for hire, and for boarding and keeping the horses of any person who might apply, for pay. The defendants, Coyle & Smith, at all times herein alleged, well knew that the plaintiff was engaged in said business, that the plaintiff had, at divers and sundry times, and frequently during all times, purchased of said defendant feed, hay, corn, and oats for the feed of his horses and his boarding horses in his said business. That on the — day of September, 1891, the plaintiff purchased of the said defendants 20 bushels of oats at the agreed price of 35 cents per bushel, for which the plaintiff made payment to the said defendants, and the said defendants agreed to furnish for said money so paid by said plaintiff the said 20 bushels of oats, the said defendants at the time well knowing that the same was for the feed of plaintiff's horses, and other horses in his said livery business, and the defendants were bound to furnish to the plaintiff good and wholesome oats for his said feed. Plaintiff further alleges that the said defendants, instead of furnishing to the plaintiff the said 20 bushels of good and wholesome oats, furnished to the plaintiff 20 bushels of oats in which castor beans had been spilled in and among the said oats, through and by the carelessness and neglect of the said defendants and their employes in the handling of said oats and castor beans in their place of business; that the said de-

defendants and their employes, at the time they were sold and delivered to this plaintiff, well knew that the said oats and the said castor beans had been so placed together and intermingled in their said business that the said castor beans were liable to be in and were in the said oats, and that they sold said oats to the plaintiff, as aforesaid, without apprising the plaintiff of the fact that said castor beans had been so handled in said business as that the said beans were in and would be in said oats. The plaintiff further alleged that he had no knowledge whatever, at the time of the furnishing of the said oats by the said defendants to the plaintiff, that the said beans were in the said oats, and that he relied upon the said defendants, as he had often done, and as defendants well knew he was doing, to furnish to the said plaintiff the said oats in a good and wholesome condition, and suitable for feed to his said horses, and other horses in his said business. The plaintiff further alleges that the castor beans in said oats were a deleterious and poisonous vegetable substance, and were so scattered through the said oats that the same were not discovered by the plaintiff at the time of the purchase of the same, and could not be discovered without knowledge that the same were in said oats, and without making an unusual examination of the same. The plaintiff further alleges that in the due course of his said business he, without knowing that said castor beans were in said oats, fed said oats to his and other horses, in the course of his business, and that thereby his boarding horses were seriously poisoned; and one of his boarding horses died from said poison, and three of plaintiff's horses died from said poison. That by reason of negligence of said defendants and their servants and employes as aforesaid, and by reason of the said castor beans being in said oats as aforesaid, and the facts therein stated as aforesaid, the plaintiff has been by the said defendants greatly damaged, in the sum of \$964, as follows, to wit:

Boarding horse of Moses Weinberger which died from being poisoned by castor beans, and which was of the value of	\$150 00
Three horses of the plaintiff which died from being poisoned by said castor beans, and which were of the value of, each.....	75 00
Ten horses of the plaintiff which were damaged in the sum of \$30 each, total	300 00
Doctor's bill and medicine.....	39 00
Damage to the business of plaintiff by his being deprived of the use of his livery horses for two weeks, being so poisoned	250 00
	\$964 00

"The plaintiff further alleges that he was not guilty of any contributory negligence in said cause or matter, and that he did everything in his power to care for, doctor, and treat said animals, and prevent damage

thereto. The plaintiff further alleges that he had demanded of the said defendants payment of the said sum of money as aforesaid due the plaintiff, and which payment the said defendants refused to make. Wherefore the plaintiff prays judgment against the said defendants in the sum of \$964, with legal rate of interest from the date of the filing of their original complaint, and costs of this action, and all other proper relief. Bierer & Cotteral, Attorneys for Plaintiff."

The defendants answered said complaint: First, by general denial. Second, admitting that they were partners, and that they sold the oats to plaintiff as alleged in the complaint, but that he purchased the same upon his own judgment, and on his own view and inspection thereof at the time of said purchase; that the purpose of said purchase was unknown to the defendants, and that they had no knowledge of castor beans being in said oats, and deny that there were any beans in said oats; and that they did not sell said oats to the plaintiff under any promise, express or implied, that they would furnish oats of any kind or character, but that he bought the same upon his own judgment. Third. That, if said oats did contain any poisonous substance, it was placed therein after the oats left the custody and control of the defendants, and had been placed therein by the plaintiff or his servants in and about his livery barn. To these answers plaintiff files a general denial.

The uncontroverted facts were that the plaintiff purchased from the defendants 20 bushels of oats, for which he paid 35 cents per bushel, at the time of the purchase; that the defendants were at that time engaged in the feed business in Guthrie, in connection with the grocery business, and that plaintiff was, and for a long time had been, engaged in the livery business; that the oats were delivered him by the defendants on the day of the purchase, and placed in his livery barn; that his horses were fed from said oats that evening, three feeds the following day, and one feed on the following morning of the second day; that during the next day after the purchase of the oats some of his horses became sick; that he sent for a veterinary surgeon, who examined the horses, and found them suffering from poison. An examination was made of the oats the following morning, and they were found to contain considerable quantities of castor beans intermixed with said oats; that the plaintiff, on being informed of the fact that the beans were in the oats, went to the defendants' place of business and informed them that the oats which he had purchased from them had castor beans in them, and were unfit to feed his horses. They informed him that if he did not want the oats to bring them back, and they would pay him his money back. The unused portion of the oats were returned to Coyle & Smith's place of business, and they weighed them out and paid the plaintiff 35 cents per

bushel for the portion returned. Nothing was said at the time about the oats which had been used, nor was any express agreement made that the return of the oats and repayment of the purchase money should be in satisfaction of any damages resulting from the use of the oats which had been fed.

In addition to the general verdict, the jury returned the following special findings of fact:

"(a) Are castor beans a poisonous substance when fed to horses? Yes. (b) Were castor beans so handled in the business of Coyle & Smith, the defendants, as that they were liable to be and were mixed into the oats there kept for sale for feed? Yes. (c) Did the defendants, or their agents, notify the plaintiff at the time he made the purchase of the oats, or at any time prior to that time, that the defendants were handling castor beans and oats in such a manner that the castor beans were liable to be in the oats sold plaintiff? No. O. M. Wells, Foreman."

"(1) Did the defendants, on or about the 28th day of September, 1891, sell the plaintiff 20 bushels of oats at and for the agreed price of 35 cents per bushel? Yes. (2) Was it a part of the agreement between the plaintiff and defendants, at the time of the sale of such oats, that said oats were being sold to the plaintiff for the purpose of being fed to his livery horses? Yes. (3) Did the oats sold by the defendants to plaintiff contain, mingled therewith, castor beans? Yes. (4) Were the defendants, or either of them, at the time of this sale of such oats to the plaintiff, actually aware of the presence of the castor beans in said oats? Unable to answer. (5) Were such castor beans in such oats at the time of such sale? Yes. (6) Did the plaintiff see and inspect the oats purchased of the defendants prior to his purchase? No. (7) Did the plaintiff inform the defendants at the time of such purchase that he was buying such oats for the purpose of feeding his horses with the same? Unable to answer. (8) How much damage, if any, do you allow the plaintiff, for the loss of horses belonging to him. \$180. (9) How much damage do you allow the plaintiff for the injury of horses belonging to plaintiff? \$205. (10) How much damage do you allow the plaintiff for doctor's bills and medicine? \$35. (11) How much damage do you allow the plaintiff for injury to his business by being deprived of the use of his horses. \$150. (12) Did the plaintiff go into the bin containing the oats before his purchase and look at the oats? No. (13) Did he go into the bin with the clerk of the defendants at the time of the purchase, and look at the oats? No. (14) Did the defendants warrant the oats to plaintiff to be good, wholesome oats, or did the plaintiff rely upon his own judgment? The oats were warranted to the plaintiff. O. M. Wells, Foreman."

The petition in error contains eight specific assignments of error, all of which are embraced in the seventh, to wit, "error of the

trial court in overruling defendants' motion for new trial." The motion for new trial presented to the court below for review all the rulings complained of. Plaintiffs in error waive several of the alleged errors by failing to argue them in their brief.

The first ruling complained of is the action of the trial court in refusing to give instruction numbered 4, requested by the defendants. The instruction is as follows: "The buyer of an article upon an implied warranty of quality or fitness has two remedies upon the discovery of the breach thereof. He may either return the goods purchased, and demand the purchase money to be returned to him, or he may retain the goods and sue for his damages. The one remedy is exclusive of the other, and if you find from the evidence that the oats were sold by the defendants to the plaintiff upon the agreement or understanding that they were to be fed to the horses of the plaintiff, and that such oats contained castor beans, and that the plaintiff, after the discovery of that fact, returned said oats and received a return from the defendants of his purchase price, after knowing the dangerous consequences of their use, the plaintiff's election to receive a return of the purchase money for his oats would constitute a waiver of any right to prosecute this action for damages, and if you find such to be the fact, it will be your duty to return a verdict for the defendants." This instruction does not contain a correct exposition of the law, as applicable to the case at bar. The question as to whether or not the return of the unused portion of the oats and a repayment of the purchase price for them was a satisfaction of the entire claim of Baum was a question for the jury to determine from all the facts and the intention of the parties. If all the oats had been returned, and the entire purchase price repaid, it would have presented a different question. The sale, as to the portion of the oats used, was not rescinded, and could not have been. The damage was done by the portion used, and not by the portion returned. It was a new and independent agreement to take back the oats not used, and repay the consideration, and could only be a repudiation of the former agreement to that extent; and in the absence of an agreement to settle the damages occasioned by the breach of the warranty as to the used portion, and as to which the sale had become absolute, the right of action would still exist. The authorities cited by counsel for plaintiff in error do not support their position.

The case of Alden v. Thurber, 149 Mass. 271, 21 N. E. 312, is relied on by plaintiff in error. In that case, Thurber & Co. agreed to sell Alden about 10,000 pounds of raspberry jam. They sent the jam to Alden at Boston, and he remitted to them \$1,000 in part payment of the agreed price. After the receipt of the jam, Alden claimed that it was not pure raspberry jam, as his contract called for, and

wrote Thurber & Co. to that effect. Thurber & Co. insisted that the jam was the kind they had agreed to furnish, but wrote to Alden that, notwithstanding that fact, as they still desired to retain his trade, they were willing to receive the whole lot back, and credit it up to him, together with the freight charges, and in this way settle the matter. Upon receipt of this letter Alden sent back all the jam, except one keg that he had sold, and requested Thurber & Co. to remit his money at once. Thereupon Thurber & Co. credited Alden with the jam returned, and the expense of freight and cartage, and remitted him the balance of the \$1,000. The court said: "This was a mutual rescission of the contract. The letter of the defendants was an offer to settle and compromise the controversy between the parties. The acts and conduct of the plaintiff was an adequate acceptance of that offer. This was a waiver of the right to sue for any preceding breach of the contract. The performance by the defendants of the new agreement operated as an accord and satisfaction for any breach, and discharged the old contract. Such was clearly the intention of the defendants, and the plaintiff accepted their offer unconditionally, and this induced them to perform it." The court bases its conclusion in the above case upon the ground that, by the agreement of the parties, the new contract was to be an entire settlement of the matters between them, and amounted to an accord and satisfaction,—a compromise.

There are none of the elements of a compromise in the case at bar, nor does the evidence present any of the elements of an accord and satisfaction. There was no agreement to settle anything. Coyle & Smith proposed to repurchase the unused oats, they were returned, and they weighed them out and paid for them at the original price. Nothing was compromised, and there was nothing else surrendered on either side. Coyle & Smith got back the same oats they sold, at the same price per bushel, except the portion which had done the damage, and nothing was said as to this portion, or as to a settlement or compromise of anything. The payment of a portion of an undisputed debt, although accepted in full satisfaction, and a receipt in full is given, is not a satisfaction of the balance, and will not, where there is no new consideration, estop the creditor from recovering the remainder of such debt. *Railroad Co. v. Davis* (Kan. Sup.) 11 Pac. 421. In the case at bar there was no new consideration passed. The oats were presumably worth as much when returned as when originally purchased, and they were retaken at the original purchase price, and the exact amount returned, and no more paid for. Neither party mentioned the claim for damage occasioned by the portion not returned, and nothing was said as to a compromise, or a final or full settlement. To constitute accord and satisfaction, that which is

received by the creditor must be accepted by him in satisfaction, and whether there was such an acceptance is a question for the jury. *Frick v. Algeler*, 87 Ind. 256; *Hardman v. Bellhouse*, 9 Mees. & W. 506; *Hearn v. Kiehl*, 38 Pa. St. 147; *Telegraph Co. v. Buchanan*, 35 Ind. 429. The refused instruction states, as a proposition of law, that if Baum returned the oats, and received pay for same, such return and repayment was a bar to a recovery for damages. It did not submit the question to the jury, to be determined as a fact, whether or not there had been a compromise, or accord and satisfaction, and the court correctly refused to give it. *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. 122, cited by plaintiff in error, fully supports this doctrine. In that case the court says: "Whether the new agreement was substituted for the old, and thus operated as a rescission or discharge of it, must be determined by the intention of the parties to be ascertained from their correspondence and conduct." See, also, as supporting this position, *Peck v. Requa*, 13 Gray, 407; *Munroe v. Perkins*, 9 Pick. 298; *Holmes v. Doane*, 9 Cush. 135; *Cooke v. Murphy*, 70 Ill. 96; *Moore v. Locomotive Works*, 14 Mich. 260.

In the case of *Thornton v. Wynn*, 12 Wheat. 193, the question before the court was "not whether the purchaser of a horse which is warranted sound has a remedy over against the vendor upon the warranty, in case it be broken, but whether, in an action against him for the purchase money, he can be permitted to defend himself by proving a breach of warranty." And on this question the court held to the ancient but now obsolete rule that the vendee must pay the purchase money, and was put to his separate action upon the warranty for his damages, unless it was shown that the vendor knew of the unsoundness of the horse, and the vendee tendered a return of it within a reasonable time. There are some dicta in the discussion of the case that would seem to support counsel's position, but the law of the case is not in conflict with the views we have expressed in the case under consideration.

In *Chapman v. Searle*, 8 Pick. 38, after there had been a sale and delivery of goods, there was an agreement to take the goods back and return the consideration. This agreement was never consummated. It was contended that this agreement was a rescission of the contract of purchase. The court said: "It was contended on the part of the defendant that the contract was rescinded by the original parties before the plaintiff's title accrued. If our view of the case is correct, the contract was executed, and was not merely executory, and so it could not be considered as rescinded, which must be understood as discharging or canceling it while it remained to be performed. Finally, it was contended for the defendant that there was a resale of the property by Ludlow to Whitting before the plaintiff's title accrued. But

upon a careful review of the evidence, we can perceive only an agreement to reconvey at some future time, and upon certain conditions, which were never complied with before Ludlow was obliged to assign all his property to the plaintiffs." We find nothing in the case last cited to support the contention of counsel for plaintiff in error. Upon the contrary, it supports the theory that the sale of the oats was an executed contract; and, there being nothing further to be done under the contract of sale, it could not be rescinded, and that the agreement by which a portion of the oats were returned was a resale or new agreement. The warranty found to have been made at the time of the sale of the oats is a collateral agreement, and not a condition of the sale, and this action is for a breach of the warranty, and not an action to enforce the contract.

In *Prescott v. Wright*, 4 Gray, 461, an action of tort was brought for breaking and entering the plaintiff's close in Groton, and cutting and carrying away wood and timber. The defendant answered, setting up a license to enter, and a purchase of the wood and timber. The sale of the wood and timber was not denied, but the plaintiff offered to prove that, before the bringing of his action, he discovered that the defendants had made false representations and concealed the truth from him, whereby he was induced by fraud to enter into the contract of sale, and that he had seasonably tendered back the purchase money and a note executed in part payment for the wood and timber. The trial court held that the plaintiff, having made a sale of the timber, could not maintain his action, and took the case from the jury, and rendered judgment for the defendants. The only question before the supreme court was as to the correctness of this ruling, and the court held that the question of the fraud and rescission should have been submitted to the jury.

Park v. Richardson & Boynton Co., 81 Wis. 399, 51 N. W. 572, is a case relied upon by plaintiffs in error. This was an action by *Park et al. v. Richardson & Boynton Co.*, to recover damages for alleged defects in a furnace sold to plaintiffs, and placed in their storehouse for heating purposes. Under the contract of sale there was an express agreement that if the furnace failed to work satisfactorily the vendors would substitute a different size, or remove the furnace and refund the amount paid for same, at the election of the vendees. The furnace failed to work as agreed. The plaintiffs, in their petition, blended two causes of action, one for return of purchase money and the other for breach of warranty. The court held, on appeal, that the plaintiffs could not rely upon both remedies in one action; that they might rely upon their contract and return the property and recover their purchase money, or they could keep the property and sue for breach of warranty; that the two remedies

were alternative under the terms of his agreement. The court further held that keeping and paying for the property was no waiver of the right to sue for damages for a breach of warranty. We find nothing in this case to conflict with our view of the case at bar. The keeping and paying for the oats that had been fed before the discovery of their quality was not a waiver of any right to recover for damages occasioned by their use, and the resale of the unused portion to the original vendor, without any agreement or intimation by either party that such resale should be in satisfaction or settlement of such damages, is no bar to a recovery for breach of warranty. Every breach of warranty occasioning any damage or detriment gives a right of action to the party damaged, and such right of action continues in his favor until the same is satisfied, waived, or barred in some manner. There is nothing in the case at bar that shows any intent or purpose on the part of the parties to satisfy or waive this right, and we find nothing in the law or the acts of Baum that will bar such right.

Philadelphia Whiting Co. v. Detroit White Lead Works (Mich.) 24 N. W. 881, is another case relied upon by counsel for plaintiffs in error. We find nothing in the case to support their contention. The Philadelphia Whiting Company sold to the white lead works 300 barrels of the best commercial whiting, to be used in manufacturing putty. After using several barrels of the whiting in the manufacture of putty for their trade, they found it of an inferior quality, and so notified the vendors, and stored the remainder for the use of the vendors, and refused to pay for same. The vendors sued for the purchase price. The vendees set up the breach of contract and damages; and they recovered judgment against the vendors for \$500.20. The vendors appealed. The only questions determined by the appellate court were: (1) Where the contract for sale of goods is made by letter, such letter or letters are the only evidence that can properly be introduced to show what the contract between the parties was. (2) Where the character of the goods purchased is such that their quality cannot be determined by looking at and examining them, but by actual use only, the purchaser will be entitled to a reasonable time in which to test the goods and ascertain whether they are the kind ordered, and, until this question is determined, the retention of the goods does not amount to an acceptance thereof. Evidently the foregoing case treated of a conditional sale, where the ownership of the property never passed to the vendees, and on the discovery of the inferior quality of the goods they had a right to reject the goods and refuse payment. It was not a rescission of the contract, but a refusal to consummate a contract. In said case it was contended, on appeal, that the trial court should have allowed

ed the plaintiffs to recover for the value of the 42 barrels used by the vendees in testing the whiting, before they found out its inferiority. On this question the supreme court of Michigan said: "Had this been done, simple justice would have required the allowance to the defendant of the damages it sustained in the use it made of the plaintiff's goods in testing the quality, and this, according to the undisputed testimony, was at least \$1,000. So that it clearly appears the plaintiff has not been injured by the action of the court on this point. Certainly the defendant derived no benefit from the amount used." The principle announced above is applicable to the case at bar. Coyle & Smith received and retained pay for the portion of the oats that were used before their poisonous quality was discovered, and simple justice would require the allowance to Baum of the damages he sustained in the use he made of the oats that were fed to his horses.

We have reviewed or examined all the other authorities cited by counsel for plaintiffs in error, so far as the same are at our command, and fail to find any case announcing a doctrine or rule which, in our view of the case at bar, renders the action of the trial court erroneous in refusing the instruction requested by plaintiffs in error. The rule embodied in the refused instruction is the law as applicable to a certain class of cases, but would be misleading in the case at bar.

The next contention of plaintiffs in error is that the court erred in overruling their motion to require the plaintiff in the court below to elect whether he would proceed upon the ground of tort or of contract. The petition sets out a state of facts which might sustain an action for deceit, or one for breach of warranty. An action to recover damages for deceit is an action in tort, while an action to recover for breach of warranty, express or implied, is an action *ex contractu*. A motion to require the plaintiff to separately state and number his causes of action would have been the proper practice, but it does not appear that any objection was made to the petition for this cause. If the plaintiff relied upon his allegations that the defendants, by their negligence and carelessness, permitted castor beans to become intermixed with the oats being kept for feed of stock, and that he had no knowledge of such acts, or the condition of such oats, and that the defendant, knowing the condition and quality of the oats, and the poisonous quality of the beans, sold same to plaintiff, representing them to be good and fit for his horses to eat, then he should have brought his action for deceit, and it was immaterial about any warranty; or, on the other hand, if he intended to rely upon the implied warranty from the fact that he purchased and paid for oats, to be used for feeding his horses, which was known to defendants at

the time of sale, then it was immaterial whether the defendants knew of the beans being in the oats or not. It appears from the record, though, that this was tried in the court below upon the theory that it was an action to recover damages for a breach of implied warranty. The testimony was introduced on this theory. The court instructed the jury on such theory. The jury were requested to find specially on the question of warranty and did so find. It is a familiar rule of practice that parties must present and try their case upon some definite and settled theory, and an appellate court will look to that theory of the case to determine the question of whether error was committed. It is correct, as contended by counsel for plaintiffs in error, that it is not proper pleading or practice to blend tort and breach of contract in the same pleading, and if it appears that plaintiffs in error were prejudiced by this course the cause should be reversed. But in the special findings of fact the jury found in favor of the defendants on the question of negligence. The burden was on the plaintiff to prove this allegation, and a failure of the jury to find affirmatively in his favor on the question is equivalent to a finding for the defendants. The jury further found that there was a sale of the oats as claimed; that they were sold with a warranty; and they base the amount of damages upon the consequences of the breach, and make no finding of fraud or deceit. Hence, we think the defendants were not prejudiced or injured by the failure of the court to require the plaintiff to elect upon what theory he would proceed, and if error was committed it was harmless error. If there had been no special findings, and we were compelled to look solely to the general verdict for light, we might be warranted in concluding that the jury took the question of negligence into consideration in fixing the amount of the damages to be assessed, but the answers to the special findings exclude any such inference. We agree with counsel for plaintiffs in error in their argument that if there was a warranty either express or implied the plaintiff would have a right of action on the breach of same, whether the vendors were negligent or otherwise, and the measure of damages would be the same in either case, and the question of negligence or fraud should have been eliminated from the case; but, unless it appears that the vendors were injured thereby, they are in no position to complain.

The next contention is that the court erred in the instruction to the jury as to what constitutes a warranty. The jury found in answer to the special interrogatories that the defendants warranted the oats to the plaintiff to be good, wholesome oats. We must look to the evidence in the case and the instructions of the court to determine upon what this finding was based, or upon what theory of the law and facts the jury arrived

at this conclusion. The jury found specially that the defendants sold to plaintiff 20 bushels of oats at the price of 35 cents per bushel; that it was a part of the agreement at the time of the sale that said oats were being sold for the purpose of being fed to plaintiff's livery horses, and that said oats contained castor beans at the time they were so sold; that the plaintiff did not see or inspect the oats at or prior to the purchase, nor did he go into the bin where the oats were, and look at them, prior to the purchase. They further found that the defendants were handling castor beans as a part of their business, and they did not inform plaintiff of such fact. The general verdict was for the plaintiff, assessing his damages at \$180 for loss of horses by death; \$205 for injury to his other horses; \$35 for doctor bills and medicine; \$150 for injury and loss to his business by being deprived of the use of his horses, occasioned by their sickness. There is no evidence of an express warranty at the time of the sale, and hence the jury must have found the warranty implied from the sale itself, and the law as given by the court. The court on this question instructed the jury as follows: "(6) The court instructs the jury that, where goods are purchased from merchants in the usual course of business, said merchants warrant by sale thereof to one that buys for his own actual use, and not for the purpose of sale, that such goods are sound and wholesome for the use and purposes to which such goods are ordinarily put. If the jury find by a preponderance of the evidence that the plaintiff herein was engaged in the livery business, and that such fact was known to the firm of Coyle & Smith, or their agents and employes, and if you further find that the plaintiff in this case purchased of the defendants the oats alleged to have contained a mixture of castor beans, and that said defendants, knowing that the plaintiff intended to use such oats for the purpose of feeding his horses, sold the plaintiff oats containing a mixture of castor beans, and said plaintiff fed the same to his horses, and could not, by the use of ordinary care, have discovered that the oats contained the mixture of castor beans, and if the jury further find that such castor beans were intermingled with the oats at the time the same were sold to said plaintiff, then the court instructs the jury that the defendants in this case are liable in damages to the extent of the injury suffered by plaintiff by reason of the fact that the oats so purchased were by the plaintiff fed to the stock of plaintiff." The first general proposition embraced in the foregoing instruction is subject to some exceptions, and might be objectionable were it not followed by the portion applicable to the facts in this case, in which the jury are specifically directed as to their duty in case they find certain facts from the evidence. We think this instruction embodies the law

as supported by the greater weight of modern authority, regardless of any statute on the question. The findings of fact in this case show that the oats were sold by the vendors to the vendee without his inspection, for the particular purpose of being fed to his livery horses. The general rule in such cases, as supported by a respectable weight of authority, is that in sales of goods or chattels by description, when the buyer has not inspected the goods, there is an implied warranty that they shall be fit for the particular purpose to which they are to be applied, when that purpose is known to the vendor. *Morse v. Stock-Yard Co. (Or.)* 28 Pac. 2; *Best v. Flint*, 58 Vt. 543, 5 Atl. 192; *Jones v. Bright*, 5 Bing. 533; *Gerst v. Jones*, 34 Am. Rep. 773; *Divine v. McCormick*, 30 Barb. 116; *Canning Co. v. Metzger (N. Y. App.)* 23 N. E. 372; *Hoover v. Peters*, 18 Mich. 51; *Sinclair v. Hathaway*, 57 Mich. 60, 23 N. W. 459; *Shaw v. Smith (Kan. Sup.)* 25 Pac. 886; *Gammell v. Gunby*, 52 Ga. 504; *French v. Vining*, 102 Mass. 132; *Poland v. Miller*, 95 Ind. 387; *Rice v. Forsyth*, 41 Md. 389; *Howard v. Hoey*, 23 Wend. 350; *Van Wyck v. Allen*, 69 N. Y. 61; *White v. Miller*, 71 N. Y. 131. And the rule is without exception that when goods are sold for a particular purpose, and the buyer has no opportunity to inspect them, there is an implied warranty that such goods shall be suitable for the particular purpose for which they are sold. We think the plaintiffs in error have no room to complain of the instruction given.

It is next contended that the court erred in admitting proof and giving instructions as to the measure of damages. The court instructed the jury that if they found for the plaintiff the measure of his recovery would be: (1) The value of the horses which died from the effects of the poisonous substance in the oats. (2) Damages resulting from a permanent injury to the living horses, occasioned by eating the oats and beans. (3) The loss to plaintiff's business, for use of his horses during the time they were sick. (4) The amount of money expended by plaintiff in the proper treatment of the sick animals. This instruction is as favorable to the defendants as they could expect. All the elements of damage embraced in the instruction are traceable directly to the use of the castor beans, and are the actual and necessary results of feeding the horses the poisoned oats. The instruction is within the rule laid down by *Sutherland on Damages* (volume 1, p. 56). "There must not only be a legal connection between the injury and the act complained of, but such nearness in the order of events, and closeness in the relation of cause and effect, that the influence of the injurious act may predominate over that of other causes, and concur to produce the consequence, or be traced to those causes." The measure of damages in ordinary cases of injury of personal property, where the

property is not entirely lost or destroyed, or substantially so, but is only impaired in value or partially destroyed, is the difference between the value before the injury and immediately thereafter, and reasonable expense incurred, or value of time spent in reasonable endeavors to preserve or restore the property injured. *Field, Dam.* 621; *Eastman v. Sanborn*, 3 Allen, 594; *Harrison v. Railroad Co.*, 88 Mo. 625. And in case of injury, in addition to the above, the temporary loss of its use, and interest from date of action. *Railroad Co. v. Hudson*, 62 Ga. 679; *Jackson v. Railroad Co.*, 74 Mo. 526; *Meyers v. Railroad Co.*, 64 Mo. 542; *Railway Co. v. Johnston*, 74 Ill. 83. It is the duty of a party to protect himself from the injurious consequences of the wrongful act of another, if he can do so by ordinary care and effort, and at moderate and reasonable expense; and for such reasonable exertion and expense in that behalf the wrongdoer is liable. 3 Pars. Cont. 178. "Expenses incurred in good faith, in attempting a cure, may be recovered, in addition to the actual value of the animal at the time the injury occurred, in a suit for damages for an injury to an animal by which it was rendered entirely worthless; although the defendant was not consulted in relation to the matter of the attempted cure." *Ellis v. Hilton* (Mich.) 43 N. W. 1048; *Watson v. Lisbon Bridge*, 14 Me. 201; *Murphy v. McGraw* (Mich.) 41 N. W. 917; *Long v. Clapp*, 15 Neb. 417, 19 N. W. 467. "The damage to be recovered must always be the natural and approximate consequence of the act complained of," says Mr. Greenleaf, and those results are proximate which the wrongdoer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract. *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39. We find no objection to the instruction on the measure of damages, and, as the proof was limited to the character of damages embraced in the instructions, there was no error on this question.

It is next contended by plaintiffs in error that the court erred in admitting evidence of actual values, without showing there was no market value for the kind of horses alleged to have died. The evidence is confusing on this question, but, on an examination as a whole, we do not think the evidence susceptible of the construction and open to the objection urged. The witnesses testified as to their general knowledge of the horses in question; of their knowledge generally of the prices and values of livery stock at that time; that these horses were average livery horses; and that such horses were of such and such values. We think this fairly implies the market value at that time. The witnesses fixed no other basis of knowledge, and when one speaks generally of the values of chattels it means their value in the market. This is inferred unless a different basis of value is fixed by the witness, or it is apparent that the witness bases his value on a

different foundation. As to the injury to the horses that were sick, the veterinary in charge testifies as to the value of the horses before they were sick. He also testified as to the effect of castor beans upon the digestion and stomach of the horses, and the permanency or general effect of the injury on the particular horses that he treated, and then gave his opinion or judgment as to the damage done. This was in the nature of expert testimony, and he had a right to express his opinion. The rule that the damage is determined by the difference in value of the horses before and after the injury was not violated in his testimony, but was differently applied. He gave the value before using, and the damage done. The result was the same as if he had given the value before and the value afterwards. It was a matter of calculation as to the amount from either basis, and the result would not be different.

There are some of the proceedings that are properly subject to criticism, but, upon the whole, we think the verdict and findings reached were correct, under the pleadings and evidence, and that a correct conclusion was reached under the law; and although there may be errors, unless they have resulted in substantial injury or injustice to the complaining party, the judgment must be affirmed. We find no error in the record that will justify a reversal of the judgment. The judgment of the district court is affirmed, at the costs of plaintiffs in error.

DALE, C. J., having tried the case below, and BIERER, J., having formerly been of counsel in the case, not sitting.

PAPPE v. TROUT et al.

(Supreme Court of Oklahoma. July 27, 1895.)

PLEADINGS—EJECTMENT—ESTOPPEL OF TENANT TO QUESTION LANDLORD'S TITLE.

1. Where a complaint sets forth two causes of action, and a plea of abatement is filed which is good as to one cause, and not good as to the other, a demurrer to the plea should be sustained.

2. Under article 32, c. 70, Code 1890, ejectment will lie by a landlord to obtain possession of property for the nonpayment of rent.

3. Where it is shown that a tenant is in possession of property under a written lease and permission of his landlord, *held*, that he is estopped from setting up an adverse claim of title in himself in the property while he holds under such condition.

4. Where a lease is entered into for a period of six months, and a provision is inserted to the effect that after the expiration of such period, if the tenancy continues, it shall be deemed a tenancy from month to month, *held*, that after a tenant has continued to occupy the premises leased after the expiration of the six months, and paid rent as agreed in the lease, he will not be permitted to deny its validity.

5. A tenancy from month to month is created where parties enter into a lease which provided that after a certain period the lease

shall be so considered, and the tenant continues to occupy under such lease.

(Syllabus by the Court.)

Error to district court, Kingfisher county.

Action in ejectment by L. L. Trout and M. J. Kane against R. Pappe. Plaintiffs had judgment, and defendant brings error. Modified.

James A. Morris, for plaintiff in error. W. W. Noffsinger, for defendants in error.

DALE, C. J. 1. October 25, 1892, J. L. Trout and M. J. Kane instituted a suit in ejectment in the district court of Kingfisher county, and in their complaint alleged that they were the owners in fee simple and entitled to the immediate possession of certain real estate, situated in Kingfisher city. They further allege in their petition that on the 1st day of September, 1880, they leased the premises to R. Pappe, the defendant below, and that the condition of the lease had been broken by said Pappe, in that he had refused to pay the rent as prescribed in the lease, and refused to deliver the possession of the premises to the plaintiffs upon plaintiffs' request; that the defendant had notice to quit the same. As exhibits attached to the petition are copies of the lease and the notice to quit. Pappe answered by filing a plea in abatement, wherein he alleged, in substance, that the land described in the petition of plaintiffs belonged to the United States; that the same was settled upon as a town site; and that he (Pappe) claimed and occupied the same under the town-site laws from the 1st of March, 1890, and has continued ever since said date to so claim and occupy the property sued for as described in the complaint of the plaintiffs. He further alleges that he made his application to the board of town-site trustees for the tract in question, and, after the hearing and award by the town-site board, he appealed the case, and the same was then pending on appeal before the commissioner of the general land office. To this plea in abatement the plaintiffs filed a demurrer because said plea did not state facts sufficient to constitute a defense to plaintiffs' cause of action, which demurrer was sustained by the court. Afterwards, by leave, the defendant filed a counterclaim as occupying claimant, in which he alleged, in substance, that he settled upon the tract of land under the town-site laws of the United States on the 1st day of March, 1890, at a time when the same was a part of the public domain of the United States, and made valuable improvements thereon, under such circumstances as to give him good reason to believe, and in fact he did believe, that he had a right to claim, improve, and occupy the lot under the laws of the United States; that he had filed his application with the board of town-site trustees for a deed to the lot, and that a hearing was

had by said board, in which hearing the plaintiffs below and he (Pappe) were adverse parties; that he had improvements to the value of \$800 upon the lot, which improvements were placed there by himself in good faith; and that the value of the lot, apart from the improvements, was \$1,000; and he asked that his rights as an occupying claimant on said lot be adjudicated by the court according to law. To this the plaintiffs below filed a demurrer on the ground that the facts set forth were insufficient to constitute a defense to plaintiff's complaint, which demurrer was by the court sustained. And thereupon, the defendant failing to plead further, a hearing was had upon the complaint of the plaintiffs, and upon the evidence introduced in support thereof. As a part of the proof appears the notice to quit, heretofore referred to, which was served on Pappe August 13, 1891. Among other things, the notice stated that if he (Pappe) should continue to hold possession after the 31st day of August, 1891, he would be required to pay \$40 per month from the 1st day of September, 1891, until he vacated and gave possession of the premises. Also proof of the service of the notice, and evidence showing that Pappe had been in possession of the property since the 1st day of September, 1891, had paid rent thereon until the 1st day of April, 1892, and had failed to pay rent after said date. The court rendered judgment upon the complaint and the evidence offered in support thereof, wherein he adjudged that the plaintiffs below were the owners in fee simple and entitled to the possession of the real estate described in the complaint, and that defendant unlawfully held possession thereof, and that plaintiffs were entitled to recover, as set forth in their complaint, the sum of \$230 as rent.

There are three questions involved in this case: First. The sufficiency of the plea in abatement as against the demurrer. Second. Was it error to sustain the demurrer to the answer and counterclaim as occupying claimant? Third. Were the damages as rent properly assessed?

1. The complaint states two causes of action. This case was commenced under article 32, c. 70, Code 1890. This law provides for ejectment on the title and ejectment for nonpayment of rent. Viewed as an action by a landlord for failure to pay rent, the complaint stated a good cause of action. *Huffman v. Starks*, 31 Ind. 474; *Nelson v. Davis*, 35 Ind. 474; *Bethell v. McCool*, 46 Ind. 303; *Frakes v. Elliott*, 102 Ind. 47, 1 N. E. 195. And it was no defense to this character of an action to enter a plea in abatement, which runs only to the question of title. Such plea being insufficient as a defense, the court committed no error in sustaining the demurrer. The proper practice for defendant below to have followed was, first, by motion to separately state and number the causes of action. This being done, a plea in abatement to the

cause of action upon the title may have been sustained.

2. The occupying claimants' act, under the Code of 1890, can have no application. Under the pleadings in this case Pappe went into possession of the lot in controversy under a written lease. At no time is it shown that he surrendered possession to his landlord, or held by an adverse title; and where a tenant, under such circumstances, attempts to assert title to a tract of land, the doctrine of estoppel applies. Bigelow, Estop. (4th Ed.) 452. And, in so far as it relates to the question of possession, the courts will enforce contracts between individuals with reference thereto. The jurisdiction of courts over the subject-matter of possession obtains while the title to the land yet remains in the United States. In holding to the view that the courts of the territory may deal with the question of possession as between claimants upon the public lands, we follow the decision of the supreme court of the United States in *Marquez v. Frisbie*, 101 U. S. 473. In discussing the principle here announced, after a discussion of the conditions under which the court would not act while the title to land remains in the United States, we find the following: "We did not deny the right of the courts to deal with the possession of the land prior to the time of the issue of patent, or to enforce contracts between the parties concerning the land." In this case it is not necessary for us to determine whether or not the occupying claimants' act, approved June 1, 1874, and that of the Statutes of Oklahoma of 1890, are applicable to lands while the title to the same yet remains in the United States. It is sufficient to say that Pappe, being a tenant of the plaintiffs below, was, by operation of law, thereby prevented from asserting in the courts a claim of title in the land while holding under his lease.

3. The lease was entered into September 1, 1889, and among other recitals is the following: "It is hereby agreed that the party of the second part may * * * occupy and have the use of said part of said lot and buildings for the period of six months from this date at the monthly rental of fifteen dollars per month, to be paid each month in advance; and it is further agreed by and between the parties to this lease that at the termination of this lease that the same may be extended from month to month thereafter, in the consideration of payment of twenty dollars per month, in advance; provided, however, that the lease may terminate at the expiration of six months on notice being given by either party to this lease 30 days in advance of such termination. * * * August 13, 1891, the plaintiffs below served a notice upon Pappe, which is as follows: "Notice to R. Pappe. Kingfisher, Aug. 13, 1891. Notice is hereby given you to quit, vacate, and give peaceable possession of lot six in block eight in the village of Kingfisher City on or before the first day of Sept.,

1891. If you continue to hold possession after the 31st day of Aug., 1891, you will be required to pay forty dollars per month, in advance, from the 1st day of Sept., 1891, until you vacate and give possession of said premises. The terms, rent, and conditions specified in this notice, if you continue to hold over, shall operate and be effectual to create and establish a part of the lease under which you now hold. [Signed] J. L. Trout and M. J. Kane." Under these leases, as appears from the evidence, Pappe paid rent from September 1, 1889, to April 1, 1892. The court below rendered judgment against Pappe for rent at the rate of \$40 per month from April 1st, the date he ceased paying rent, to October 25th, the time when the suit was instituted; a total sum of \$230.

It is contended, first, that the court should have rendered a judgment for \$15 per month only, as that was the sum as specified in the original lease; that the clause, as appears in such lease, "may be extended from month to month thereafter at \$20.00 per month," is not, within itself, a contract leasing the premises after the expiration of six months from the date of the lease, but would require another contract to carry it into effect. Possibly counsel is right in his contention, but we have not that question to decide. Another contract was entered into when Pappe continued to hold beyond the six months, and to pay the rent. Having gone ahead, and complied with the contract, he cannot now complain that he did not agree to its terms. The second ground which counsel advances as a reason why the judgment for rent is erroneous is based upon the theory that no tenancy existed, and therefore the burden imposed under the statutes against a tenant holding over should not be imposed. Our statute (section 7, art. 5, c. 60) is as follows: "In all leases of lands or tenements, or of any interest therein from month to month, the landlord may, upon giving notice in writing, at least fifteen days before the expiration of the month, change the terms of the lease to take effect at the expiration of the month. The notice when served upon the tenant shall of itself operate and be effectual to create and establish a part of the lease, the terms, rent and conditions specified in the notice, if the tenant shall continue to hold the premises after the expiration of the month." No exception is taken to the sufficiency or legal effect of the notice, but it is claimed that it did not become operative, because Pappe was not a tenant from month to month. Going back to the original lease, we find therein an agreement to the effect that after the expiration of six months from the date of the lease, if Pappe continued, he should thereafter be deemed a tenant from month to month. He held then under an express agreement that he was a tenant from month to month. Having accepted the contract, he will not now be heard to complain of its terms.

The judgment rendered in this case which gives to the plaintiffs below the possession of the premises, with a judgment for \$230 rental for the use of such property, is approved. But we think the court below, in rendering judgment in this case to the effect that the plaintiffs below were the owners in fee simple of the property, went beyond its jurisdiction. The title to this property is in the United States. The courts have no jurisdiction over the question of title until the government parts with the same. Congress has created a tribunal for the purpose of determining to whom title in these lots should be awarded. Until such tribunal has finally adjudicated the question, the courts are not at liberty to take jurisdiction of or dispose of the title to town lots or other lands in Oklahoma. To the extent to which the court has rendered a judgment awarding the title in the land, the decision of the court below is modified, and set aside, but confirmed in so far as it awards the possession of the premises to the plaintiffs below, and gives to said plaintiffs judgment in the sum of \$230.

BURFORD, J., having presided at the trial of the cause below, not sitting; the other justices concurring.

(3 Okl. 504)

SCHULTZ v. JONES.

(Supreme Court of Oklahoma. July 27, 1895.)

PUBLIC LANDS—RIGHTS OF TOWN-SITE CLAIMANT—PLEADINGS—EFFECT OF OBJECTION TO EVIDENCE.

1. A claimant for town lots, by reason of settlement and occupancy under Act May 14, 1890 (26 Stat. 109), must comply with the laws of the United States and all reasonable rules and regulations of the secretary of the interior in relation thereto, in order to acquire title, and inability to procure funds is no legal excuse for failing to make the deposit for expenses of contest required by rule of the department.

2. On the trial of the cause, when the plaintiff offered his first testimony, the defendant objected to the introduction of any testimony on behalf of the plaintiff for the reason that the petition failed to state facts sufficient to constitute a cause of action, and for the reason that the court was without jurisdiction to hear the matter in controversy. *Held*, that such objection was equivalent to a demurrer to the petition, and should have the same effect.

3. A petition in equity, to have the holder of the legal title to town lots declared a trustee for one who claims as a settler or occupant, and to compel a conveyance, is insufficient which discloses on its face that the petitioner had failed to make the deposit required by the rules of the secretary of the interior to cover the expense of trial of contest, and a general demurrer should be sustained to such petition. *Twine v. Carey* (Okla.) 37 Pac. 1096, followed.

(Syllabus by the Court.)

Error from district court, Logan county; before Justice Frank Dale.

Action by Alexander F. Jones against John F. Schultz. Plaintiff had judgment, and defendant brings error. Reversed.

Keaton & Cotteral, for plaintiff in error.
H. R. Thurston, for defendant in error.

BURFORD, J. The defendant in error, Alexander Jones, filed his petition in the district court of Logan county in which he alleged: That he was a resident of Logan county and territory of Oklahoma, and a citizen of the United States, and that he did not enter the territory of Oklahoma and the lands opened to settlement by act of congress of March 22, 1889, and the president's proclamation thereunder, prior to 12 o'clock noon of the 22d day of April, 1889; that he was qualified and entitled to settle upon, occupy, and acquire title to lots in the town site of West Guthrie, which town site was located upon public lands of the United States; that on the 4th day of August, 1891, he purchased from one John H. Palmer lots 23 and 24, in block 10, of said town site, said lots being at that time inclosed with a good and substantial fence, and in a good state of cultivation; that, immediately after his purchase of said lots, he took possession of them as a town-site settler, and commenced to improve said lots by causing to be placed thereon a small house, and making other valuable improvements thereon; that he has occupied and lived upon said lots with his family to the time of bringing this action; that on the 1st day of August, 1892, he filed his application, with the town-site board appointed and assigned to said town by the honorable secretary of the interior, for said lots, according to the rules prescribed by said board, but at that time, and at the time his cause was assigned for trial, he was unable to make the deposit of \$25, required under the rules promulgated by the secretary of the interior, and that he made affidavit to such fact before such board, and, notwithstanding this fact, the lots in controversy were by said board awarded to the plaintiff in error, Schultz. He offered, in his complaint, to pay the costs and assessments, and prayed that the defendant in said action be declared a trustee for him, and that he be ordered to convey said lots to him by a proper deed of conveyance. The defendant, Schultz, answered by general denial, and also by an affirmative answer, in which he alleged that he purchased the lots in controversy from one Patterson on the 13th day of September, 1889; that at the time of said purchase Patterson was living in a tent on said lots, and that defendant knew of no adverse claimant; that at that time Patterson had a fence around said lots, consisting of two wires stretched upon posts; that Patterson held the certificate of settlement and residence from the city of West Guthrie, which certificate he purchased, and they were transferred to him; that in the fall of 1889 he placed lumber upon said lots, and began the erection of a building thereon, which said lumber was stolen and carried away by some one unknown to the defendant; that in the spring of 1890 he again refenced said lots, and plowed and planted said lots in potatoes, and set shade trees around said lots; that he made application before the town-site board for said lots, and that the same were awarded to him, and he paid all assessments thereon, and procured

a deed for same from said town-site board. To this answer a general denial was filed by way of reply. The cause was regularly tried to the court, and judgment rendered for the plaintiff in accordance with the prayer of his petition, to which judgment the defendant excepted, and filed his motion for new trial, which was overruled.

There are several assignments of error, but one of which it is important to consider. On the trial of said cause, and before the introduction of any material testimony, the defendant, Schultz, "objected to the introduction of any evidence in the cause for the reason that the complaint does not state facts sufficient to constitute a cause of action, and that the court has no jurisdiction of the subject-matter." This objection was overruled by the court, and exceptions saved by the defendant, Schultz. This motion was, as a matter of practice, equivalent to a demurrer to the petition, and should have been sustained. We held, in the case of *Twine v. Carey* (Okla.) 37 Pac. 1096, that: "A rule of the secretary of the interior, requiring a contestant before town-site trustees, appointed under the act of May 14, 1890, to make a reasonable deposit with the treasurer of the board before a cause would be heard, is a reasonable rule, authorized by law, and that a contestant or claimant failing to comply with such a rule cannot invoke the aid of a court of equity." It was further held in that case: "A court of equity has no jurisdiction when it is apparent from the petition that the plaintiff had a remedy at law, and failed to avail himself of it, and shows no good excuse for such failure." The petition in the case under consideration discloses the fact that the plaintiff failed to make the deposit required by the rules of the board, and the only excuse given for his failure was that, by reason of his poverty, he was unable to procure the funds to make such deposit. This excuse is not sufficient. When one takes public land by settlement or occupancy, and attempts to acquire title thereto, he must do so with full knowledge of the laws of the United States and the regulations of the departments under which he attempts to acquire title. He must pay the required price for the lands, the lawful fees and costs for making his entry and proof, and must comply with all reasonable rules of the department. A failure to comply with any of the provisions of the law or to make the required payments will forfeit any rights which he may have acquired, as against an adverse claimant. An inability to procure the funds to make the required deposit or payment is no excuse in law, and can only be relieved against by a repeal or modification of the law or rule under which such deposits or payments are required. *Maddox v. Burnham*, 156 U. S. 544, 15 Sup. Ct. 448. This case comes within the rule announced in the case of *Twine v. Carey*, supra, and on the authority of that cause must be reversed.

The judgment of the district court of Logan
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county is reversed, and cause remanded, with instructions to proceed in accordance with the views expressed in this opinion.

DALE, C. J., having decided the case below, not sitting.

PEOPLE v. COBLER. (No. 21,199.)

(Supreme Court of California. Aug. 21, 1895.)

EMBEZZLEMENT—SUFFICIENCY OF INDICTMENT—SUFFICIENCY OF EVIDENCE—PROOF OF OTHER EMBEZZLEMENTS—CHARGE—WEIGHT OF EVIDENCE—INTENT—REASONABLE DOUBT.

1. Under Pen. Code, § 967, providing that, in an indictment for embezzlement of money, the coin, number, denomination, or kind thereof need not be alleged, an indictment which alleges that defendant embezzled "the sum of \$12, lawful money of the United States," sufficiently describes the money.

2. An indictment for embezzlement which alleges that defendant, while deputy assessor of a certain county, and as such deputy, had in his possession and under his control, by virtue of his trust as such deputy, a certain sum, public funds of said county, which said money he had received as such deputy for the use and benefit of said county, sufficiently shows the manner in which defendant received the money, and the purpose for which he held it.

3. A deputy county assessor charged with embezzlement cannot set up as a defense that the assessor who appointed him never filed his official oath or bond as required by statute, it appearing that when the crime was committed the assessor was in the discharge of the duties of his office.

4. On trial of a deputy county assessor for embezzlement, proof that defendant was engaged outside taking statements and collecting personal taxes, and that he received from a firm their statement and collected from them taxes thereon (the moneys charged to have been embezzled), is sufficient to show that the moneys received were public funds, though he did not return the statements to the assessor's office, and no entry was made on the assessment books, it being his duty to return the statements and money to the assessor.

5. Such evidence sufficiently showed that he converted the money to his own use.

6. On trial of a deputy county assessor for embezzlement, evidence that he collected other taxes and failed to pay them over is admissible to show guilty intent in appropriating the money alleged to have been embezzled.

7. On trial of an indictment under Pen. Code, § 504, providing that any officer who fraudulently appropriates to any purpose not in the lawful execution of his trust any property which he has in possession by virtue of his trust is guilty of embezzlement, a charge that if the jury believe "beyond a reasonable doubt that defendant was a deputy county assessor, and that, as such, he collected from B. \$12 for personal property tax, and that he did not pay over said money to the assessor of said county, nor account for the same, but that he fraudulently appropriated the same or any part thereof to his own use, then you should find the defendant guilty," is not objectionable as passing on the weight of evidence.

8. Nor because it fails to state that the conversion must be made with intent to steal the money.

9. The instruction sufficiently charges that the jury must find all the facts stated therein beyond a reasonable doubt.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Al Cobler was convicted of embezzlement, and appeals. Affirmed.

McKeebe & Appel, for appellant. Atty. Gen. Fitzgerald, for the People.

BELCHER, C. The defendant was convicted of the crime of embezzlement, under section 504 of the Penal Code, and sentenced to imprisonment in the state prison for the term of five years. He appeals from the judgment and an order denying his motion for a new trial. The indictment charges that in the month of March, 1893, the defendant was a duly qualified and acting deputy county assessor in and for the county of Los Angeles, under F. E. Gray, who was then and there the duly elected, qualified, and acting assessor of said county, and as such deputy county assessor defendant then and there had in his possession and under his control, by virtue of his trust and as such deputy, "the sum of twelve dollars, lawful money of the United States, public funds of the said county of Los Angeles," which said money he had received as such deputy for the use and benefit of said county, and did fraudulently appropriate to his own use, etc. The defendant demurred to the indictment upon the grounds, among others, that it failed to state the kind of money, or specifically describe the money, alleged to have been embezzled, and also failed to state in what manner or for what purpose defendant received the said money, or how or in what manner the same was for the use and benefit of the said county. The court overruled the demurrer, and this ruling is assigned as error.

There was no error in the ruling complained of. Under our statute it is not necessary to specify in an indictment or information for the embezzlement of money, or prove at the trial, the coin, number, denomination, or kind of money embezzled. Pen. Code, §§ 1067, 1131; *People v. Treadwell*, 69 Cal. 237, 10 Pac. 502. Here the indictment sufficiently described the money (see *People v. Mahlman*, 82 Cal. 585, 23 Pac. 145, where the sum of money appropriated was described only as "lawful money of the United States"), and also sufficiently stated the manner in which defendant received the same, and the use and purpose for which he held it.

It is contended that the verdict was not justified by the evidence: First, because there was no sufficient showing that Gray was the county assessor, or that defendant was his deputy; second, because there was no sufficient showing that the moneys received by defendant were public funds; third, because there was no sufficient showing that the moneys received were converted by defendant to his own use.

Under the first of these objections it is urged that the statute required an assessor to file an oath of office and a bond for the faithful discharge of his duties, and that the record entirely fails to show that Mr. Gray ever filed such oath or bond, or was an as-

essor of the county of Los Angeles, or had authority to appoint a deputy. And it is said: "In order to show the relation existing between the defendant and the county, it became necessary to prove that he was acting by and through the authority of a legal appointment made as required by law, by an officer authorized to make appointment. And in cases of embezzlement this relation of trust must be clearly shown to exist, or no conviction can be had." It is further urged that, while it appears from the record that some papers were introduced in evidence showing the appointment of defendant to the office of deputy assessor, still it was not shown that he filed any oath of office or bond as required of a deputy. The judgment cannot, in our opinion, be reversed on this ground. It was clearly shown that Mr. Gray was acting as assessor of the county of Los Angeles during the year 1893, and the defendant was acting as his deputy. The law presumes "that a person acting in a public office was regularly appointed to it," and "that official duty has been regularly performed." Code Civ. Proc. § 1963, subsecs. 14, 15. If, therefore, the defendant, while acting as deputy assessor, received, as such officer, moneys belonging to the county, and fraudulently appropriated them to his own use, he was guilty of embezzlement, under the provision of section 504 of the Penal Code.

In answer to the second objection above noted, it is enough to say that it was clearly proved that defendant was a "field deputy outside, taking statements and collecting personal property taxes," and that he received from the firm of Blum & Lubin a statement of their taxable personal property, the assessed value of which was fixed at \$1,000, and collected from them the tax due thereon, which amounted to \$12, and is the money alleged to have been embezzled. He did not return the statement so received to the assessor's office, and, so far as appears, no entry of the assessment was made on the assessor's books. But that does not show or tend to show that the money collected did not constitute a part of the public funds of the county. On the contrary, the facts proved clearly show that it was the duty of the defendant to return both the statement and the money to the assessor, and that if he failed to do so and fraudulently appropriated the money to his own use he was guilty of a crime.

As to the third objection, that there was no sufficient evidence of the conversion of the money by defendant, it need only be said that it was proved, without contradiction, that neither the statement nor the money was returned to the assessor's office; and, if so, the jury was justified in finding that the money was converted by him to his own use as charged.

Evidence was admitted showing that defendant collected personal property taxes

from other parties, and failed to pay over or account for the money so collected. This evidence was admissible for the purpose of showing guilty knowledge and intent in the appropriation of the moneys alleged to have been embezzled here. *People v. Gray*, 66 Cal. 271, 5 Pac. 240; *People v. Neyce*, 86 Cal. 393, 24 Pac. 1091.

Numerous objections were taken to the admission of evidence, but we see no material error in any of the rulings complained of. And, as it would subserve no useful purpose to state the objections and rulings at length, we pass them by without further notice.

The court gave to the jury, among others, an instruction reading as follows: "If you believe from the evidence, beyond a reasonable doubt, that, at the time and place alleged in the indictment, the defendant was a deputy county assessor, as alleged in the indictment, and that as such deputy county assessor he collected from Julius Blum and Willa Lubin, copartners, doing business under the firm name of Blum & Lubin, the sum of twelve dollars for personal property tax, as therein alleged, and that he did not pay over said money to the assessor of said county, nor account for the same, but that he fraudulently appropriated the same or any part to his own use, then you should find the defendant guilty as charged." It is claimed that this instruction was erroneous for three reasons: First, because it tells the jury that if they find certain probative facts, then they may find the greater fact of guilt from these probative facts, and therefore passes upon the weight which should be given to the evidence, and invades the province of the jury (citing *People v. Carrillo*, 54 Cal. 63); second, because the instruction omits to state the intent with which the conversion of the money should be made, that is, that the conversion must be made with the intent to steal the money; and, third, because the instruction omits to state that these facts must be found by the jury beyond a reasonable doubt. In *People v. Carrillo*, *supra*, the court, after setting out the instruction there complained of, said: "This instruction is clearly erroneous, in that the jury are told that the failure of the prisoner to pay over the money, if unexplained, raises a presumption of a felonious appropriation which will authorize a verdict of guilty." The instruction here complained of is not obnoxious to any such criticism. It does not invade the province of the jury, but simply tells them that if they find from the evidence all the facts stated, and among others that defendant fraudulently appropriated the money to his own use, then they should find him guilty. Section 503 of the Penal Code declares that "embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." And section 504 declares that "every officer * * * and every deputy, clerk or servant of any such officer * * * who fraudulently appropriates to any use or purpose, not in the due

and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement." It was not error, therefore, for the court to tell the jury that, if they found from the evidence all the facts constituting the offense charged, they should return a verdict of guilty. Embezzlement is a statutory offense, and it was not necessary for the court to go beyond the statute, and tell the jury that the appropriation or conversion must be made with intent to steal the money. The instruction does not omit to state that the facts must be found by the jury beyond a reasonable doubt. On the contrary, it starts out with the statement that, "if you believe from the evidence, beyond a reasonable doubt," etc. And in other instructions given at the request of the prosecution and defendant the jury were several times told, in effect, that before they could find the defendant guilty they must find from a full and fair consideration of all the evidence, beyond a reasonable doubt, that he committed the offense charged.

The record discloses no prejudicial error, and the judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

108 Cal. 503

GLASSELL et al. v. VERDUGO et al.

(SCHERER et al., Interveners.

No. 19,508).

(Supreme Court of California. Aug. 9, 1895.)

PARTITION OF WATER RIGHTS—EFFECT OF DECREE—INJUNCTION—ENJOINING INNOCENT PARTIES.

1. Where a decree in partition adjudged that certain parties should have the use of the waters of a stream, the source of which is on the land of another party, the fact that, after the decree was made, the volume of water at the source of the stream increased, does not entitle the owner of the land to appropriate the increase, there being no evidence of its cause.

2. In an action to enjoin the pollution of a stream, defendants, who deny that they polluted or intended to pollute it, are not prejudiced by a decree enjoining them from doing so.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Andrew Glassell and others against Theodoro Verdugo and others to enjoin the obstruction and pollution of a stream. J. C. Scherer and others intervened. Judgment was rendered for plaintiffs and interveners, and defendants appeal. Affirmed.

Houghton, Silent & Campbell, for appellants. N. C. Burch and Albert M. Stephens, for respondents.

TEMPLE, J. The plaintiffs and the interveners claim the ownership of certain waters

in Verdugo cañon, in the county of Los Angeles, and complain that defendants are obstructing their use of the same and polluting the stream. The defendant, Theodoro Verdugo, owns the land upon which the water rises. The other defendants claim under him. All deny obstructing the flow of any water to which plaintiffs or interveners are entitled, or that they are polluting the stream. Judgment was against the defendants upon all points, and they appeal from the judgment and from a refusal of a new trial.

All the parties own, or claim under those who own, in severalty, various tracts of land, parts of the Rancho San Rafael. The lands included in the rancho were partitioned by a decree of the district court on the 29th day of November, A. D. 1871. By this decree the waters on the ranch were divided and assigned to the several parcels of land. The following extract from the statement found in the record shows all that is necessary to know in regard to said partition:

"That said referees in said partition suit made a report to the court of their proceedings as such referees, which was filed on the 21st day of November, 1871. That said referees in their said report set forth and described the various allotments made by them, and set off in severalty to the various parties in whom interests in said land had been found, as set forth in the report of said referee James H. Lander, heretofore referred to. That the tract referred to in the complaint as containing 2,620.01 acres of the Rancho San Rafael was allotted to Teodoro Verdugo, and is the same land shown upon the map attached to and referred to in the final decree of partition, and is the same land upon the map attached and referred to in the final decree of partition, and as shown upon the plaintiffs' Exhibit A, hereinafter referred to. Paragraph numbered fifteenth of said last-named report contains the entire report made by said referees in partition relating to the apportionment of water on Rancho San Rafael, and is as follows, to wit: 'Fifteenth. Your referees have carefully considered the questions in regard to water, deeming them of the most vital importance to the parties interested in the rancho; and, in granting lands, the practicability of irrigation has entered largely into the value of these tracts most accessible to the sources of water supply. And in order that as much of the lands as possible may be supplied, your referees have endeavored to so adjust the rights and proportions of the several parties owning the various tracts, as that, when one party is equally able to draw his supply from either one or another of the various sources, and the same can be used by him to greater advantage than by the other parties, they have considered it best and most equitable to confine such party to that stream which cannot be used by the other parties so advantageously as by him, and to restrict his enjoyment of the water in the other courses. Excluding those springs which can be naturally made available for irrigat-

ing the tract upon which they rise, the localities from which water may be obtained, without the employment of artificial means to raise it to the surface of the earth, may be set down as five in number. (1) The first is the stream that rises in the Verdugo cañon upon the tract of land assigned to Teodoro and Catalina Verdugo, as tenants in common, near the foot of a spur running down from the Cuchilla of Francisco Maria, east of and near to both the road that runs through the cañon and the house or "jacal," in which at present reside a family of Mexicans bearing the name of "Paco." (2) The second are the streams that rise west of the said road within the inclosure of the said Teodoro, and east of his house. These constitute and form by far the largest body of flowing water upon the ranchos, excepting the Los Angeles river, which forms one of the boundaries. (3) The third is a stream that rises near the south boundary of the 1,702⁶⁴/₁₀₀-acre tract assigned to P. Beaudry, near the Arroyo Seco, and within a short distance from the ruins of the old adobe house wherein one Joaquin Chabulla formerly resided. This stream flows naturally in a southerly direction. (4) The fourth is the Arroyo Seco. The supply from this, though at present only an undefined interest, may in the future be so developed and established as to be worthy of their notice. The probability of obtaining water from the Arroyo Seco did not affect the grades as established by us of those lands lying along it. (5) The fifth is the Los Angeles river, from which, by means of canals and ditches, it is the opinion of your referees that water can be conducted upon a large body of the lands lying along its east bank. Your referees therefore recommend, as the most economical, as well as just and equitable, disposition of the waters of these five sources, that the following be adopted by the court: That the said Teodoro Verdugo and Catalina Verdugo, so far as her interest is in common with the said Teodoro, be decreed to have, so far as their necessities require, the exclusive use and benefit of the first above mentioned stream of water; the surplus thereof to be turned into and to be permitted to flow into the second above mentioned stream or streams. That the waters forming the second, together with the surplus from the first, as above provided, belong to the several parties, Rafaela Verdugo de Sepulveda, Julio Verdugo, O. W. Childs, C. E. Thom, Maria Antonio Verdugo de Chabulla, Crisostomo Verdugo, Fernando Verdugo, Pedro Verdugo, Jose Maria Verdugo, Quirino Verdugo, Rafael Verdugo, Guillermo Verdugo, Vittorio Verdugo, Benjamin Dreyfus, Catalina Verdugo, Maria Sepulveda de Sanchez, Andrew Glassell, A. B. Chapman and P. Beaudry, and that these several parties be decreed to be entitled to use and enjoy said streams referred to as the second, and the surplus water from the first in the following proportions, which proportions have been calculated by your referees upon the basis of the number of irrigable land assigned to them, in this parti-

tion, to wit.' (The report here proceeds with the allotment made by the referees, of the waters from the Verdugo cañon, to the various parties other than Teodoro Verdugo and Catalina Verdugo, to whom lands were allotted in severalty in said Rancho San Rafael, as stated in the complaint of plaintiffs in this suit.) That there was attached to said report of said referees a map showing the lands and waters parceled between the parties in said action, and made a part of the referees' report; which map was introduced in evidence by plaintiffs, and which said map is hereto attached, as plaintiffs' Exhibit A. That the final decree in said partition suit was made and filed by said district court on the 29th day of November, 1871, and set forth the allotment of the lands of the said Rancho San Rafael in severalty to the parties to whom the same were allotted in and by the report of said referees in said partition, and allots to the said Teodoro and Catalina Verdugo the said tract of 2,629.01 acres, and which tract is designated by the said figures inscribed thereon on the map referred to in the decree of final partition. That said decree of partition contains the following clause with reference to the water rising upon the tract set off and allotted as aforesaid to said Teodoro and Catalina Verdugo, shown upon said partition map: 'It is further ordered, adjudged, and decreed that the defendants, Teodoro Verdugo and Maria Catalina Verdugo, so far as the interest of the said Catalina is in common with the said Teodoro, their heirs and assigns, do henceforth forever have, hold, and enjoy as an appurtenance connected with, and attached to, the said tract of two thousand six hundred and twenty-nine and 1-100 acres, and so far as the same is necessary to supply their necessities for water, for domestic and irrigating purposes and the demands of their stock and cattle, the sole and exclusive right to the springs of water that rise near the foot of a spur running from the Cuchilla Francisco Maria, east of the road that passes up the cañon, and near to the house wherein now a family of Mexicans of the name of Paco reside; provided, that all the surplus water of said springs, over and above that reasonably required by the said Teodoro and Catalina, their heirs and assigns, shall be permitted by them to flow, or be turned into the channel of those springs which rise within the inclosed field of the said Teodoro and Catalina, west of the said road, and to be used by the other parties as hereinafter next provided. And it is further ordered, adjudged, and decreed, that the waters rising within the said inclosed field of the said Teodoro and Catalina Verdugo, west of the said road and the west side of the Verdugo cañon, together with the surplus from the spring or springs of Catalina and Teodoro as aforesaid, belong to, and shall be held and enjoyed as an appurtenance attached to and running with, their respective tracts, irritable therefrom by the several parties herein-after named, their heirs and assigns, forever, in the following proportions, to wit.' (Then

follows in said decree the allotment of said waters to the persons and in the proportions as described in the complaint in this suit.) That said final decree has never been modified or reversed, and is the final decree in the said partition suit. Said map so filed and referred to by said referees in partition was referred to by the court in its final decree, and confirmed and made a part of said decree, and reference made thereto for descriptions of land and water."

The court in such an action is not required to adopt the report of the referees as a whole, or reject it, but may modify and change the division recommended. So far as concerns the division of the water in question here, however, it is evident, notwithstanding the use of different descriptive terms, that the court did adopt the division recommended, and endeavored to effectuate it in the findings and decree. Since the partition, defendant Teodoro Verdugo has acquired the interest in the tract of land, awarded to the two in common, of Catalina Verdugo. The water assigned to the use of that tract in the decree is the water first described in the report of the referees. Concerning it there is no dispute. It ran southerly along east of the road in Verdugo cañon. Verdugo lived on some high mesa land to the west of the cañon. He had an inclosed field to the south of a road called the "Cross Road," leading from the cañon to his house, and a field partly inclosed to the north of this road. Plaintiffs contend that both fields make one field, and constituted the inclosed field mentioned in the decree of partition, while the defendants claim that the lower field, which they call the parallelogram field, was the only inclosed field then on the land. The water west of the cañon road, which by the decree is given to the plaintiffs and interveners, flows in a gulch which opens into the cañon a mile or more below Verdugo's house. This gulch extends into Verdugo's mesa land from the south, passing along the lower field where it branches. In the easterly branch is the largest body of water. Both branches extend north of the cross road into the upper or northerly field. They are so delineated on the partition map. The partition map also shows the fields to the north of the cross road and that to the south as one field or inclosure, and this was the finding of the court. I think this must be held conclusive on this appeal.

The question is not whether there was a substantial inclosure, such as would constitute adverse possession, but simply what is the inclosed field referred to in the decree. The springs or water referred to were on the west of said road and west of the cañon, and the decree—construing it, in this respect, as a confirmation of the report—assumes to dispose of all the waters on the ranch, "excluding those springs which can be naturally made available for irrigating the tract upon which they rise." It was certainly intended

to give to plaintiffs the water running in these gulches. But the defendants contend that, even if the court finds that the inclosure mentioned in the decree includes the field northeast of Verdugo's house, still the plaintiffs cannot recover. They claim that the water in controversy was not there at the time of the partition, but had appeared since. It seems that there are now two swamps or marshes in this northerly field. They are divided from each other by a narrow ridge. The westerly one counsel call cienaga A, and the easterly cienaga L. A contains almost 15 acres; the other is larger. These cienagas, it is said, are fed by percolating water, and made their first appearance there not earlier than 1884. They are now found just north of the termination of the two branches of the streams as they are marked on the partition map. Dams have been erected just above the heads of the two streams and below the swamps or cienagas, and the water diverted for use on defendants' land. But for this obstruction and diversion, the water from the cienagas would flow into the channels of the streams as designated on the partition map. From the testimony of the witnesses it seems pretty certain that there is more water in the upper field than there was at the time of the partition. A mere increase, however, would not justify the defendants in appropriating the excess. The evidence does not show in what mode the water rises in these cienagas,—whether by percolation over the whole surface, or in one place,—and it is claimed that but for the dams there would be no marsh there. To sustain the contention of the defendants would be to establish a very dangerous doctrine. The memory of witnesses is little to be trusted on such subjects, and the owner of the land from which the water rises has a great advantage in that matter. Such increase is a very unusual occurrence, and the fact should be established very satisfactorily before the court would be justified in determining that there had been such increase. The cienagas are probably fed from the same source as the streams which were allotted to the plaintiffs. In fact, as defendants' counsel says, the decree designates the source of the water given plaintiffs as springs. There was evidence, aside from the map, that the water flowed from the upper field. Eaton, one of the referees who made the partition, is very positive about it, and thinks there was a swamp at the head of the easterly branch. Thom says there was some swampy ground in the north field. Andrew (Hasswell) testifies to the existence of swamps there two or three years after the partition, and since that they were there in 1877. It must be remembered that this is not a controversy between an appropriator and a riparian owner. By the decree it was competent for the court to dispose even of percolating water. Several witnesses testify that the lands of the upper field, or portions

of it, were springy, moist, spongy, or boggy prior to 1884. Considering the difficulty of proof in such a case, and that such occurrences as that claimed for defendants are quite unusual, I cannot think the conclusion reached by the trial court unreasonable. The court found the facts against the defendants, and there was certainly evidence to sustain the decision. Notwithstanding the implication, in the report of the referees, that the description of the various sources of water excluded such springs as could be made available to irrigate the lands upon which they rise, such springs, if clearly included in the allotment in the decree, passed to the parties to whom they were given.

The answer admits obstructing some of the waters claimed by the plaintiffs and interveners, and the fact was also proven. If some defendants have not polluted and do not propose to pollute the water, the fact that in this respect the injunction does not discriminate between them and the Chinamen who are doing so will do no harm. The order and judgment are affirmed.

We concur: HARRISON, J.; McFARLAND, J.

5 Cal. Unrep. 103

COCKINS v. COOK. (No. 19,515.)

(Supreme Court of California. July 31, 1895.)

PLEADING—VARIANCE.

Under Code Civ. Proc. § 469, providing that no variance between the allegation in a pleading and the proof is to be deemed material unless it has misled the adverse party, where a complaint by a judgment creditor of a corporation against a stockholder alleges that the debt was contracted on June 1st, proof that it was contracted on Aug. 20th is not a fatal variance.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by William W. Cockins against Joseph A. Cook to recover from defendant the proportion of a judgment against a corporation due from defendant as a stockholder thereof. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Cole & Cole, for appellant. White & Monroe, for respondent.

BELCHER, C. The Artesian Land & Water Company, a corporation, issued 20 bonds for \$1,000 each, dated June 1, 1888, and secured by a mortgage on its corporate property. The defendant, Cook, became the owner of 270 shares of the capital stock of said company on the 20th day of June, 1888, and he continued to be the owner thereof until the 20th day of November, 1888. The said mortgage was subsequently foreclosed by plaintiff, and under the decree rendered the mortgaged premises were sold. The sum realized from the sale was not enough to sat-

isfy the amount found due the plaintiff on the bonds, and thereupon a judgment against the said company for the deficiency was docketed in his favor. The plaintiff commenced this action to recover from the defendant his proportionate share of the said deficiency judgment, under section 322 of the Civil Code. The complaint alleges, among other things, that the bonds were "made, executed, and issued" on the 1st day of June, 1888, and that "at all of said dates and during all of said times, and during and at the time and respective times when said debt was incurred * * * and the said bonds and mortgage were made, executed, and delivered by said corporation aforesaid to this plaintiff, the said defendant, Joseph A. Cook, was a stockholder," etc. The answer alleges that although said bonds bear date on the 1st day of June, 1888, "yet the same were not made, executed, and issued, or made, executed, or issued, at the date herein last mentioned, nor were said bonds sold and negotiated, or sold or negotiated," prior to the month of October, 1889; and denies that defendant "was at the time of the commencement of this action, or at any time subsequent to the month of October, 1889, an owner and holder, or owner or holder, as original subscriber or otherwise," of any shares of the capital stock of said corporation. At the trial it was proved that the bonds "were not issued by the company or delivered to anybody, and no indebtedness was incurred upon them by the company until the 20th day of August, 1888, or a day or two thereafter, when they were delivered by the company," etc. And the court found that the bonds were delivered by the company on or about the 20th day of August, 1888, "and at that date the said company incurred an indebtedness on said bonds." Judgment was accordingly entered against the defendant for his proportion of the deficiency judgment, from which, and from an order denying a new trial, he appeals.

The appellant contends that there was a fatal variance between the allegations of the complaint and the proofs as to the time when the indebtedness was incurred; and this is the only point made for a reversal. We do not think this point can be sustained. The general rule invoked that the allegata and probata should correspond is undoubtedly correct, but it does not apply here. The Code provides: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Code Civ. Proc. § 469. The main issue at the trial was as to whether defendant was or was not a stockholder at the time the indebtedness was incurred, and it seems impossible that he could have been misled to his prejudice by the averment in the complaint that the bonds were "made, executed,

and issued" on the 1st day of June, 1888. The judgment and order should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

108 Cal. 300

PHILP v. DURKEE. (No. 19,458.)
(Supreme Court of California. July 31, 1895.)
COMPLAINT—SUFFICIENCY.

The complaint of one suing as assignee of F., averring that F. contracted with defendant to manufacture and erect certain iron gates for which defendant agreed to pay F. \$430; that F. manufactured the gates, and ever since has been able, ready, and willing to erect them in accordance with the contract; that the gates were specially adapted to the places for which they were made, and cannot be sold elsewhere without enormous loss, amounting to almost the entire contract price; and that at divers times F. requested defendant to accept the gates, and permit him to erect them, and to pay him therefor \$430, but defendant without cause refused; and that plaintiff, by reason of the premises, has suffered damages in the sum of \$430,—is insufficient; as, treated as a complaint in an action for the price of goods, there is no averment of delivery, or offer to deliver, sufficient to pass title to defendant, and, considered as a complaint in an action for damages, it is uncertain as to what the damages consisted of, or as to the extent thereof.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Harry Philp against J. E. Durkee. Judgment for plaintiff. Defendant appeals. Reversed.

Chapman & Hendrick, for appellant. Houghton, Silent & Campbell, for respondent.

TEMPLE, J. Defendant appeals from the judgment and from an order refusing a new trial. The complaint was demurred to, and the demurrer is insisted upon here. Plaintiff sues as assignee of Fruhling Bros., and avers in his complaint that: Fruhling Bros. contracted with Durkee to manufacture, out of materials to be furnished by them, and to erect upon foundations to be prepared and designated by Durkee, certain iron gates and lamps, for which Durkee agreed to pay Fruhling Bros. \$430. Also that Fruhling Bros. did construct and manufacture said gates and lamps, and the work of manufacture was completed about October 1, 1891, "and they have ever since been able, ready, and willing to erect the same in accordance with said contract." Further, the gates are specially adapted to the places for which they were made, and cannot be sold elsewhere without "enormous loss, amounting to almost the entire contract price." And that at divers times before the 20th day of April, 1892, Fruhling Bros. requested said Durkee to accept said gates and lamps, and to permit said Fruhling Bros. to erect them upon said

premises, and to pay them therefor the sum of \$430, but said defendant, without any cause therefor, refused to accept said gates and lamps, or any of them, or to permit the same to be erected, or to pay for the same, or any part thereof. The assignment was made to plaintiff April 29, 1892. It is averred that plaintiff, by reason of the premises, has suffered damages in the sum of \$430, with interest from the 1st day of October, 1891. The demurrer was not only upon the general ground of insufficiency of facts, but also for uncertainty; charging that it is uncertain upon what grounds plaintiff seeks to recover in this action, and in what the alleged damages consist of, or in what manner plaintiff has been damaged, or as to what is the value of said gates, lamps, and material.

The complaint, treated as in an action for the price of the goods, is insufficient, because there is no averment of delivery, or offer to deliver, sufficient to pass the title to Durkee. Considered as an action for damages for a breach of the contract, it does state a cause of action, but as such it is obnoxious to the objections raised by the special demurrer. It is uncertain as to what the damage consisted of, or as to the extent of the damage. It may be construed as asserting that the loss of Fruhling Bros. is enormous, and amounting to almost the entire contract price, because the goods would not be valuable for any other purpose. How much they are injured by the refusal of Durkee to permit them to complete the contract is nowhere stated, even in general terms. The final allegation that plaintiff has been damaged in the sum of \$430 is not material. Defendant did not contract with him.

It has been often held that there is nothing in the proposition that the court overruled the demurrer because the defendant failed to appear and present it. A demurrer raises an issue of law. To overrule the demurrer is to decide that issue. On appeal, if there was prejudicial error in the ruling, the case may be reversed for that reason. Even a rule of the superior court that a demurrer would be overruled for want of presentation would make no difference. The Code allows such issue to be made, and, unless the demurrer is waived, or gotten rid of in some lawful mode, the court must decide the questions raised. The demurrer itself presents the points. The judgment and order are reversed, and the cause remanded, with directions to the trial court to sustain the demurrer.

We concur: HENSHAW, J.; McFARLAND, J.

108 Cal. 365

GOULD v. ADAMS et al. (No. 10,572.)
(Supreme Court of California. Aug. 3, 1895.)

MORTGAGES—PRIORITIES—DELIVERY.

1. Defendant agreed with A. to sell him certain land, part cash, and balance secured by

mortgage. Defendant went with A. to a notary's office, where a deed was executed. While the mortgage was being prepared, A. said, "Let me see that deed," and took it from the table, and went, without defendant's knowledge, to plaintiff, from whom he negotiated a loan. A. then returned to defendant, paid him the money, and executed the mortgage, which defendant at once recorded. Prior to this time, plaintiff had the deed and A.'s mortgage to her recorded. *Held*, that defendant's mortgage was entitled to priority, as there had been no delivery of the deed to A. at the time he negotiated the loan from plaintiff. 32 Pac. 576, affirmed.

2. Defendant's negligence in allowing the deed to be removed from the room was not such as would justify an estoppel against a plea of nondelivery of the deed. 32 Pac. 576, affirmed.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Frederick Gould, executor of the will of Julia F. Gould, against Asa Adams, John Wise, and another, to foreclose a mortgage. From a judgment in favor of defendant Wise, plaintiff appeals. Affirmed.

For former reports, see 32 Pac. 576, and 33 Pac. 323.

Richards & Carrier and Geo. H. Gould, for appellant. H. H. Appel, F. R. Willis, and Houghton, Silent & Campbell, for respondents.

VANCLIEF, C. Action to foreclose a mortgage executed by defendant Adams to plaintiff's testatrix, in which John Wise was made a party defendant on the ground that he had a mortgage on the same land, alleged to be subsequent and subject to that of plaintiff. Wise answered, and also filed a cross complaint claiming that his mortgage was prior and superior to that of plaintiff, and praying that it be foreclosed as such. On the first trial of the cause the plaintiff prevailed, and the defendant appealed. This court reversed the judgment, and remanded the cause for a new trial. *Gould v. Wise*, 97 Cal. 532, 32 Pac. 576, and 33 Pac. 323. Upon the new trial the mortgage of defendant Wise was adjudged to be prior and superior to that of the plaintiff, and ordered to be first satisfied from the proceeds of the foreclosure sale. From this judgment the plaintiff brings this appeal on the judgment roll, containing a bill of exceptions as to matters of both law and fact.

On the former appeal the judgment was reversed on a state of facts fully set forth in the opinion of the court by Mr. Justice Garoutte. On the new trial the lower court again found the same facts, and nothing inconsistent with nor in avoidance of them. If these findings of fact on the new trial are justified by the evidence, as I think they are, it follows that the former decision is the law of the case.

Appellant complains that the court failed to find upon certain specified issues of fact, but, in view of the facts found, those issues were immaterial. A finding on each of them in favor of the plaintiff would not have ne-

cessitated any change in the judgment rendered.

It is further contended that the court erred in denying plaintiff's motion to strike out defendant's answer on the alleged ground that the amended answer is inconsistent with the original answer, in that the latter avers, and the former denies, that the deed from Wise to Adams was delivered. But there is no such inconsistency. The amended answer does not deny the delivery of the deed from Wise to Adams, but merely denies that it was delivered at the time of the execution of the mortgage from Adams to plaintiff's testatrix; and this was the effect of the original answer and cross complaint, as construed on the former appeal. The principal ground upon which the first judgment was reversed was that the deed from Wise to Adams had not been delivered at the time the mortgage from Adams to Julia F. Gould was executed. On the law of the case, as determined on the former appeal, the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

108 Cal. 345

SEABRIDGE v. McADAM et al. (No. 19,582.)

(Supreme Court of California. Aug. 3, 1895.)

MALICIOUS PROSECUTION—ADVICE OF COUNSEL—PROBABLE CAUSE.

1. In an action for malicious prosecution of plaintiff for willfully tearing down a fence to make a passage through an inclosure, it appeared that plaintiff was in possession of land under a lease providing that, if the lessor sold any part of the land on which there was a crop, such portion would be released by paying plaintiff a reasonable compensation for his labor on the crop. Defendant bought the land while there was a crop on it, and plaintiff refused to surrender possession till paid for his labor. Defendant nailed up the fence to a field at a place where plaintiff used to enter it, and told plaintiff, if he wanted law, he would give it to him. Plaintiff pried off the boards nailed up by defendant. The attorney who advised the prosecution of plaintiff testified that defendant told him that plaintiff had broken through the fence, and that he knew there was a dispute between plaintiff and defendant as to plaintiff's right to enter the field, but did not testify as to any other facts on which his advice was given. He stated that on the trial of plaintiff no facts were brought out of which he was ignorant. *Held*, that the evidence is insufficient to show probable cause.

2. In an action for malicious prosecution, where the facts are admitted, the question of probable cause is one of law.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Lee Seabridge against Robert McAdam and another for malicious prosecution. A verdict was directed for defendants, and from an order granting a new trial they appeal. Affirmed.

A. R. Metcalfe and J. H. Merriam, for appellants. Edwin Baxter, for respondent.

TEMPLE, J. This is an action to recover damages for malicious prosecution of a criminal action against plaintiff upon a charge that plaintiff did maliciously and willfully tear down fences to make a passage through an inclosure, under Act March 16, 1871-72, p. 384. At the close of the trial in the present action the court instructed the jury to find for defendants, on the ground that the evidence showed, without contradiction, that there was probable cause for the criminal prosecution, because defendants acted in good faith, under the advice of counsel, given upon a consideration of all the facts in the case. Verdict was accordingly rendered for defendants, and, upon a motion for a new trial, was set aside by the judge, presumably because he was convinced that he had erred in giving the instruction. This appeal is taken from the order granting a new trial.

It seems that plaintiff was in possession of a certain tract of land under a lease from an administrator. In the lease it was stipulated: "In case of sale by the party of the first part of any portion of said land before the same shall be in crop or use, such portion thereof shall be excepted from this lease, provided that all pasture land shall pay rent until so sold. In case of such sale of any portion of said land before the first day of July, 1890, with the crop thereon, to any person other than to said party of the second part, said portion shall be released by payment to said lessee of a reasonable compensation for his labor and expenditure in putting in of such crop and caring for the same until such sale." Plaintiff was a subtenant of a portion of the demised premises, and had corn growing upon the land on the 31st of May, 1893, when McAdam became the owner of the land through a sale by the administrator. There was evidence that tended to show that McAdam knew of plaintiff's rights before he purchased the land, and on the day of the confirmation of the sale he was shown a writing which contained the terms of the lease, and that he also knew of plaintiff's possession and rights. When he had received his deed he claimed that plaintiff must deliver to him the land, and look to the administrator for payment for his labor and expenditures. Seabridge merely persisted in holding on until he was paid. He was not paid the cost of putting in and caring for the crop, nor was anything ever tendered to him in payment. After several interviews between the parties and between McAdam and the administrator upon the subject, McAdam finally nailed up the fence where plaintiff had been in the habit of going into his field, and forbade plaintiff going into the field; and when plaintiff said he would do so as he owned the crop and had a right so to do, McAdam said: "If it's law you want, I will give you all you want, and stay with it as

long as you can." Plaintiff, having occasion to go to his field, pried off the boards which had been nailed on by McAdam, and went in. For this he was arrested, as stated.

The evidence produced by plaintiff made an undoubted case against defendant. There was no defense, except that defendants had acted upon the advice of counsel. In his testimony, McAdam made no attempt to state what he had told his counsel, or what his counsel knew about the facts. The attorney was a witness, and did not state upon what facts his advice was based. He merely stated that he had been the attorney for defendant McAdam; that he was informed that plaintiff had broken through the fence; that he knew there was a dispute between the parties, and that plaintiff claimed the right to go through the fence to the field; and, further, that he attended the trial of the case against plaintiff, and no facts were brought out at the trial of which he was ignorant when he gave the advice. He testified further that he had heard that plaintiff had made certain threats against McAdam, but had not heard, and did not know, that McAdam was aware of the fact, at the time of the confirmation of the sale, that plaintiff was the owner of the crop. This testimony was entirely insufficient to show probable cause, or to justify the instruction. It was not denied that plaintiff broke through the fence. The only question, then, was whether he did so in good faith, under a reasonable belief that he had a legal right so to do. If the facts had all been stated, no reputable attorney could have doubted that plaintiff acted under such belief. The facts detailed to the attorney, or the information which he had, should have been proven. It was then a question of fact, to be determined by the jury, and not by the court, whether the defendants had made a fair and full statement of the facts which were known to them. And even if, upon such a statement of facts, such advice was given, it was still to be determined by the jury whether defendants acted upon it in good faith, believing that plaintiff was guilty of the offense charged. And I think the jury would have been justified, in this case, in determining that they did not, if the facts were as shown by plaintiff's witnesses. Could even an intelligent layman believe, under the advice of counsel, that plaintiff, under the circumstances related, was not acting under a reasonable belief that he had a right to go through the fence? If so, it would not require a lawyer to determine that the act could not be malicious. Of course, I assume the facts to be as the plaintiff's testimony tended to prove them to be. This must be assumed in favor of the decision. They may not be as testified, and, of course, the attorney who gave the advice did not base his opinion upon such facts. There was evidence, however, which tended to prove that McAdam knew of them. Of course, if the facts are all admitted, the

question whether there was probable cause is a question of law, for the court. The rule in such cases is fully and correctly stated in *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937. The order is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

(108 Cal. 294)

CITY OF SANTA BARBARA v. ELDRED.
(No. 19,567.)

(Supreme Court of California. July 31, 1895.)

COMPLAINT—GROUNDS OF GENERAL DEMURRER—ASSESSMENT—DESCRIPTION OF LAND—SUFFICIENCY—NEW TRIAL—APPEAL—REVIEW—SUIT FOR TAXES—FAILURE TO PUBLISH DELINQUENT LIST.

1. That a complaint is ambiguous is not a ground of general demurrer.

2. That a complaint makes the essential facts appear only inferentially or as conclusions of law is not a ground of general demurrer.

3. An assessment record, in which the first column is headed "Description of Property According to Map Book of the City of S.," the second column "Lot," and the third "Block," and which, in the respective columns, describes the property as "City Lot," "2," "110," shows that it is in S.

4. A city assessment need not state that the taxpayer owned the property on the first Monday of March.

5. Nor need it state that the city had a map book.

6. A city assessment is not invalidated by slovenly entries thereof by the tax collector.

7. Where the statement on motion for a new trial does not allege that the evidence is insufficient to support a finding, a new trial will not be granted on that ground.

8. Where defendant specifies in his statement on motion for a new trial that the evidence does not justify a finding that interest was due, and nothing appears in the statement to justify the allowance of interest, the judgment will, on appeal, be modified by striking out the interest.

9. In an action to recover a tax, defendant cannot object that the delinquent list was not published as required by law.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by the city of Santa Barbara against A. Eldred to recover a tax. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

B. F. Thomas, for appellant. Thos. McNulta, for respondent.

TEMPLE, J. This is the second appeal in this case (see 95 Cal. 378, 30 Pac. 562), and is taken from the judgment and from a refusal of a new trial. The action was brought to collect a municipal tax, and to the complaint a general demurrer was interposed. It was overruled, and defendant answered. He now specifies a great many alleged defects in the complaint. Many of them are, in effect, that the complaint is ambiguous or uncertain. Such objections cannot be reached on general demurrer. Nor can the other objections—which merely

amount to criticisms upon the sufficiency of the statement, as that the essential facts appear only inferentially, or as conclusions of law, or by way of recitals—prevail on such demurrer. There must be a total absence of some material fact, to justify us in sustaining a demurrer of this character.

The only points which I think worthy of notice on the demurrer are the objections to the assessment. It is claimed that it is invalid, because:

1. It does not show that the real estate is situated within the city of Santa Barbara. The first column after taxpayers' names is headed "Description of Property According to Map Book of the City of Santa Barbara." The next column is headed "Lot," and the next "Block." In the first of these columns are the words "City Lot"; in the second, "2"; in the third, "110." I think this sufficient to show that the property is in Santa Barbara.

2. It is not essential to the assessment that it should state that the taxpayer owned the property assessed on the first Monday of March, or that the city had a map book.

3. The slovenly entries by the tax collector, intended to show that a portion of the tax had been paid, do no injury. Interpreted as claimed by appellant, they are meaningless, and would do no harm.

4. There is no uncertainty in the figures which show the total value of all property after equalization. Ordinance 113, which provides for the levy and collection of the tax, ought to have been more fully set out, at least in effect. The allegations are, however, sufficient to support a judgment, and, as no special demurrer was interposed, they are sufficient on this appeal.

The delinquent list as published stated that the tax and costs amounted to \$246.91, when, as it is contended, the correct amount was \$245.91; just one dollar too much. The common council of the city of Santa Barbara, as they were authorized to do under the ordinance, which provided for the levy and collection of taxes, passed a resolution to the effect, as to all assessments upon which taxes amounted to less than \$300, that where the property has been offered for sale at least once, and there is no purchaser in good faith, the tax collector shall proceed to collect the same by civil action in the name of the city. The complaint recites that all this has been done, and that, therefore, the tax collector brings this suit in the name of the city of Santa Barbara. In his statement on motion for a new trial the defendant has not charged that the evidence is insufficient to support this finding. We cannot, therefore, grant a new trial upon that ground.

A recovery was had of the sum of \$81.65 for interest. No interest is claimed in the complaint, and there is no allegation under which interest could be allowed. Furthermore, the defendant has specified in his

statement on motion for a new trial that the evidence does not justify the finding that interest was due. If, therefore, there was anything in the ordinance to justify the finding, the city attorney should have seen that it was in the statement. The objection to the allowance of interest must therefore be sustained. A new trial will not be necessitated thereby, for the judgment can easily be modified by striking out the allowance of interest.

The defendant cannot object that the requirements of the statute were not pursued in the contract for publishing the delinquent list. His liability is created by a valid assessment, and, if that was made, no irregularity in the attempt to collect the tax will discharge him from the liability. The publication was for the proper period.

I think there was no error in admitting the block books, and the remark of the witness Gutierrez, that it appeared from them that Alice Eldred owned lot 3, is of no moment.

The defendant admitted, by not denying, that he owned the property. Besides, the assessment put the burden upon him. Pol. Code, § 3900.

The case is remanded, with directions to the trial court to modify the judgment by deducting the interest allowed. In all other respects the judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

108 Cal. 326

Ex parte LACEY. (Cr. 33.)

(Supreme Court of California. Aug. 1, 1895.)

HEALTH ORDINANCES—VALIDITY.

An ordinance prohibiting the establishment or conducting of any steam shoddy or carpet-beating machine within 100 feet of a church, schoolhouse, or residence, passed under Const. art. 11, § 11, authorizing any city to make and enforce all such police and sanitary regulations as are not in conflict with general laws, is not unreasonable, and does not deprive any one of property without due process.

In bank.

Petition of James Lacey for writ of habeas corpus. Denied.

D. P. Hatch and R. B. Treat, for petitioner.
C. McFarland, for respondent.

GAROUTTE, J. The petitioner has been convicted and imprisoned for violating a city ordinance of the city of Los Angeles which provides: "No person or persons shall establish or conduct any steam shoddy machine, or steam carpet-beating machine, within one hundred feet of any church, schoolhouse, residence or dwelling-house." He now alleges the judgment void, upon the ground that the ordinance is void, and seeks his release by writ of habeas corpus. He claims the ordinance void upon the ground that it interferes with certain of his inalienable rights vouchsafed to him by the constitution. Upon the

part of the city, it is claimed that the passage and enforcement of the ordinance is but the exercise of a police power granted to it in terms, by the constitution of the state. The constitution of the state of California (article 11, § 11) provides: "Any county, city, town or township may make and enforce, within its limits, all such local, police, sanitary and other regulations as are not in conflict with general laws." It will thus be observed that Los Angeles city is vested with certain powers by direct grant from the constitution, and that grant of power is not confined within narrow limits, but is broad and far-reaching in its scope and effect. Under this grant of power the city had the right to pass this ordinance, unless it is in conflict with general laws; and we know of no general laws which conflict with it, unless it can be said to be violative of those general principles of constitutional liberty which form the very foundation of both the state and federal constitutions. We see nothing in the language of this ordinance contrary to these great principles of our government. We see nothing there depriving petitioner of any fundamental right. In the exercise of its police and sanitary power, the city has attempted to regulate the business of beating carpets by steam power. Under its constitutional grant, it had the right to regulate this business. The use of steam power, of itself, within municipal territory, has always been recognized as a proper subject of regulation; and, in addition, here it may well be assumed that the dust and other disagreeable and unhealthy matters arising in such quantities from the beating of carpets, as would naturally be indicated by the use of steam power, are a constant source of danger and menace to the good health and general welfare of the neighborhood where located.

Conceding the business covered by the provisions of this ordinance not to constitute a nuisance per se, and to stand upon different grounds from powder factories, street obstructions, and the like, still the case is made no better for petitioner. This is not a question of nuisance per se, and the power to regulate is in no way dependent upon such conditions. Indeed, as to nuisances per se, the general laws of the state are ample to deal with them. But the business here involved may properly be classed with livery stables, laundries, soap and glue factories, etc.,—a class of business undertakings, in the conduct of which, police and sanitary regulations are made to a greater or less degree by every city in the country. And in this class of cases it is no defense to the validity of regulation ordinances to say, "I am committing no nuisance, and I insist upon being heard before a court or jury upon that question of fact." In this class of cases a defendant has no such right. To the extent that it was material in creating a valid ordinance, we must assume that such question was decided by the municipal authorities,

and decided against petitioner and all others similarly situated. This court said in *Ex parte Shrader* 33 Cal. 284: "The legislature can add to the mala in se of the common law the mala prohibita, of its own behest. * * * The power to regulate or prohibit, conferred upon the board of supervisors, not only includes nuisances, but extends to everything expedient for the preservation of the public health and the prevention of contagious diseases. Now, there are many things not coming up to the full measure of a common-law or statute nuisance that might, both in the light of scientific tests and of general experience, pave the way for the introduction of contagion, and its uncontrollable spread thereafter. Slaughterhouses, as ordinarily, and perhaps invariably, conducted in this country, might, within the limits of reasonable probability, be attended with these consequences. A competent legislative body has passed upon the question of fact involved, and we cannot go behind the finding. So far as we can know by this record, the power conferred has been exercised intelligently, and in good faith." It must be borne in mind that the court was not discussing this question from the standpoint that the conduct of a slaughterhouse within municipal territory constituted a nuisance per se. In the case of *Johnson v. Simonton*, 43 Cal. 249, which involved the constitutionality of an ordinance of the board of supervisors of San Francisco prohibiting the feeding of still slops to milch cows, the court says: "If, indeed, it be a fact that the milk of cows fed in whole or in part upon still slop is unwholesome as human food, there can be no doubt of either the authority or the duty of the board to enact the ordinance in question, and the scientific correctness of the determination by the board of the matter of fact involved is not open to inquiry here." In the case of *In re Jacobs*, 98 N. Y. 98, the court declares the following rule for testing the validity of ordinances enacted under the police power of a municipality: "When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property, without due process of law, the courts must be able to see that it has at least, in fact, some relation to the public health; that the public health is the end naturally aimed at; and that it is appropriate and adapted to that end." Tried by this rule, the ordinance in question fairly and fully fills the requirements of the law. It cannot be urged that petitioner is deprived of his property without due process of law, for, as is said by Judge Dillon in his work upon *Municipal Corporations* (section 141), in speaking of police and sanitary regulations: "It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances.

They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." This ordinance is not unreasonable nor arbitrary nor discriminating. It treats all persons alike who are engaged in the business named therein. All have the same rights, and all are subject to the same burdens. It is not unreasonable in the limits of distance fixed. As to the location of the exact spot distant from a church or a schoolhouse or a dwellinghouse, where an ordinance would cease to be reasonable, it is not for this court now to say. The limits here prescribed are those with which we are to deal, and those limitations of distance may well be said to be reasonable. We see no substantial objection that can be made to the validity of this ordinance. Upon the contrary, the subject-matter covered by it is clearly one with which the city had the constitutional right to deal, and the businesses there enumerated are unmistakably those which the municipal authorities had the right to regulate, in the interest of the comfort and good health of the people of the city. The power is vested in the city, by direct grant from the constitution, to control and regulate business undertakings of the character here involved, and petitioner's constitutional rights have in no way been trespassed upon. It is therefore ordered that petitioner be remanded.

We concur: McFARLAND, J.; HARRISON, J.; VAN FLEET, J.; TEMPLE, J.

108 Cal. 135

GAROUTTE v. WILLIAMSON. (No. 15,955.)

(Supreme Court of California. Aug. 14, 1895.)

On petition for rehearing. Denied.

For former opinion, see 41 Pac. 35.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. Not because I think the plaintiff failed to prove facts entitling him to a judgment, but because, in my opinion, the cause was tried in the superior court, and has been decided here, upon an erroneous view of the law.

The issues of fact were submitted to the jury under instructions to the effect that if the bank held the warehouse receipt, properly indorsed by plaintiff's assignors, as security for a loan, at the time defendants purchased and took possession of the wheat, the plaintiff could not maintain the action. It is conceded in the opinion of the court that this theory was correct, but the judgment is affirmed on the ground that the defendants failed to prove the existence of the bailment at the date of the conversion. In

my opinion, the existence of such a bailment at the date of the conversion was no defense to an action to recover compensation for an injury to the reversionary interest of the pledgors commenced after payment of the debt and return of the pledge, and, therefore, I am satisfied that the actual result of the litigation is just. But I cannot assent to the grounds upon which the decision of this court is placed. If the theory of the defense was a sound one, it is clear to my mind that the facts were fully proved.

TEMPLE, J. I dissent from the order refusing a rehearing, because I am convinced that under the instructions the verdict is not warranted by the evidence. I agree with the chief justice as to the law which ought to have governed at the trial.

5 Cal. Unrep. 118

DOWLING v. ADAMS et al. (No. 15,913.)

(Supreme Court of California. Aug. 21, 1895.)

CERTIFICATE OF SURVEYOR—AUTHORITY OF CLERK TO SIGN.

Where a city surveyor is required to sign a certificate as to a public improvement, it cannot be signed by his clerk, who had no specific directions from him to sign it. *Rauer v. Lowe* (Cal.) 40 Pac. 337, followed.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Troutt, Judge.

Action by one Dowling against one Adams and others. Judgment was rendered for plaintiff, and defendants appeal. Reversed.

Horace W. Philbrook, for appellants. J. C. Bates, for respondent.

PER CURIAM. Action upon a street assessment. The testimony on behalf of the defendants showed that the certificate of the city and county surveyor, which was recorded in the office of the superintendent of streets, was not made by that officer, but that his name was signed thereto by a clerk in his employ, without any specific directions therefor. The testimony upon this point is almost identical with that given in *Rauer v. Lowe* (Cal.) 40 Pac. 337. Upon the authority of that case, the judgment is reversed.

108 Cal. 525

LEWIS v. CHAMBERLAIN et al. (No. 19,541.)

(Supreme Court of California. Aug. 21, 1895.)

SUPPLEMENTARY PROCEEDINGS—ORDER FOR EXAMINATION OF THIRD PERSON—DEBTOR'S EXAMINATION OF INDEBTEDNESS.

Code Civ. Proc. § 720, provides that if, in proceedings supplemental to execution, a person alleged to have property of the judgment debtor claims an interest therein adverse to him, the judge may authorize the judgment creditors to institute an action against such person for the recovery of such interest or debt. Section 719 provides that the judge may order any property

of a judgment debtor in the hands of any other person to be applied towards the satisfaction of the judgment. *Held* that, where an affidavit for the examination of the judgment debtor's wife alleged that she held property belonging to the judgment debtor which was conveyed to her to shield it from the judgment, and she filed a verified answer denying that she held any property belonging to the judgment debtor, or that any property was conveyed to her for the purpose stated in the affidavit, the judge could only authorize that suit be brought against her to recover the property claimed, and could not further proceed with her examination.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by William Frisbie Lewis against E. W. Morse and another. Judgment was rendered for plaintiff, and he obtained an order for the examination in supplementary proceedings of Myra I. Conklin and others. From an order dismissing the proceeding, plaintiff appeals. Affirmed.

Works & Works, for appellant. M. A. Luce and Conklin & Hughes, for respondents.

HAYNES, C. Appeal from an order dismissing proceedings supplementary to execution. Lewis obtained judgment in the superior court of San Diego county against E. W. Morse and N. H. Conklin for a large sum of money, upon which execution was issued, and returned nulla bona. He afterwards filed in said court an affidavit, entitled in said cause, alleging the foregoing facts, and further alleging, on information and belief, that defendant Conklin, for the purpose of avoiding payment of said judgment, conveyed a large amount of property owned by him to Myra I. Conklin, his wife, and to Ralph L. Conklin, his son, who hold said property in their own names, and are thereby aiding and assisting him to shield it from sale to satisfy plaintiff's said judgment. Like allegations were made of conveyances by defendant Morse to his wife, Mary C. Morse, and that she had conveyed part thereof to one Daniel Schuyler. And upon this affidavit he asked that an order be issued, requiring the said judgment debtors and Mary C. Morse, Myra I. Conklin, Ralph L. Conklin, and Daniel Schuyler "to appear and be examined as to the property of said Morse and Conklin, and for such other relief as is provided by law." Mrs. Conklin filed a written and verified answer to plaintiff's affidavit, specifically denying that she held any property belonging to her husband in her name or possession or control, and alleged "that she in good faith claims and owns in her own right all property now in her name or possession, or under her control, or that was in her possession or name or control when any of the papers in this cause were served upon her." She further denied that her husband had conveyed to her any property for the purpose charged in plaintiff's affidavit, and alleged that she then was, and since 1867 had been, the wife of said N. H. Conklin, and prayed that she be no further examined therein, and that she be discharged

with her costs. Mrs. Morse filed a similar verified answer. Upon the hearing, Mrs. Conklin was called by the plaintiff, and after testifying to her residence, that she was the wife of N. H. Conklin, and after giving the date and place of her marriage, was asked the following question: "What property, if any, did you have at that time?" Whereupon her counsel interposed the following objections: "(1) That Mrs. Conklin cannot be examined under the statute in this proceeding, because she is the wife of the defendant Conklin, and he objects to her being examined. (2) That—and, of course, we shall have to prove this by laying a predicate—that she claims all the property in her own right, and it is in her possession; and when she claims it the court cannot make examination in this proceeding, but suit can be instituted against her by plaintiff for the recovery of the property." The objections were sustained, and plaintiff excepted. The same objections were made to the examination of Mrs. Morse, the same ruling had, and exception taken. Defendants then consented that an order be made authorizing plaintiff to institute suit to recover said property, to which counsel for plaintiff replied that "he wanted the property turned over." Some other testimony was heard, and, the evidence being concluded, the court dismissed the proceeding; and this appeal is from the judgment of dismissal, the proceedings being embodied in a bill of exceptions.

Two questions are discussed by counsel for appellant: (1) Whether the wife was a competent witness, the husband objecting; and (2) whether any order could have been legally made by the court against Mrs. Conklin or Mrs. Morse other than one authorizing the plaintiff to bring an action against them for the recovery of the property alleged to have been conveyed to them by the judgment debtors, as provided in section 720 of the Code of Civil Procedure, they having, by their answers under oath, claimed ownership in good faith of the property conveyed to them respectively. The first of these questions need not be considered, as the judgment or order dismissing the proceeding must be affirmed under the second objection made by counsel for Mrs. Conklin and Mrs. Morse, plaintiff having declined to accept an order granting leave to bring an action for the recovery of the property.

This proceeding was brought under the provisions of the Code of Civil Procedure entitled "Proceedings Supplementary to the Execution," of which sections 717 and 720 are as follows:

"717. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, or upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or cor-

poration, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same."

"720. If it appear that a person or corporation, alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just."

Section 718 provides for the examination of witnesses "in the same manner as upon the trial of an issue"; and section 719 provides that "the judge or referee may order any property of a judgment debtor * * * in the hands of such debtor or any other person * * * to be applied towards the satisfaction of the judgment."

I think it entirely clear, upon the face of the statute, that no order could be legally made requiring Mrs. Morse or Mrs. Conklin to surrender the property mentioned in the affidavit of the plaintiff, and its application in satisfaction of his judgment, otherwise than upon their admission that it was the property of the judgment debtor. To make such order in relation to property which they claimed to own in their own right, if it could have any effect or operation, would be to deprive them of their property upon a summary proceeding, and without due process of law. If the plaintiff claims or believes their title under the conveyances mentioned in his affidavit to be invalid, an issue as to such ownership and title should be properly made and tried in an appropriate action, in which the verdict of a jury or the findings of a court may be regularly had determining those questions, and upon which a judgment could be regularly entered by which the parties would be conclusively bound. But this precise question has been decided by this court in *McDowell v. Bell*, 86 Cal. 615, 25 Pac. 128, where, under facts similar to those involved in this case, the court below granted the order subjecting the property to the satisfaction of the judgment, and this court held that in granting such order the court below exceeded its jurisdiction; that "his only power in the premises was to make an order authorizing the judgment creditor to institute an action in the proper court" for the recovery of the property,—and granted a writ of prohibition restraining the enforcement of the order. Counsel for appellant cite *Herrlich v. Kaufmann*, 99 Cal. 271, 33 Pac. 857, to the effect that the Code provisions for supplementary proceedings are a substitute for

a creditor's bill, and say: "To hold that because the party brought in to answer says, 'I claim this property in my own right,' he cannot be required to answer at all, and the court can only order that a suit be brought, would make the proceeding a mere farce, instead of a substitute for a creditor's bill." It is quite evident, however, that the Code provisions relating to proceedings supplementary to execution, without the provisions contained in section 720, could not take the place of a creditor's bill, where, as here, the judgment debtor had "conveyed" the property to a third person, who claimed title under such conveyance. The order dismissing the proceeding should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

108 Cal. 513

BANK OF LASSEN COUNTY v. SHERER.
(No. 18,394.)

(Supreme Court of California. Aug. 9, 1895.)

NOTE—EXECUTION—TRANSFER—JURY FEE.

1. There is no error in requiring a party, in accordance with a rule of court, to deposit jury fees as a condition to having a jury.

2. Validity of a note made payable to the order of the maker, and indorsed by him with proper spelling of his name, is not affected by the fact that in signing the note the "s" was omitted from his given name, "Josiah."

3. A note made payable to the order of the maker, and delivered by him indorsed, is thereafter transferable by delivery, like a note payable to bearer, without further indorsement.

Department 2. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by the Bank of Lassen County against Josiah Sherer. Judgment for plaintiff. Defendant appeals. Affirmed.

Spencer & Raker and F. C. Spencer, for appellant. Goodwin & Goodwin, for respondent.

McFARLAND, J. This action is upon three promissory notes made by defendant, Sherer, and judgment was rendered against him for the amount of the three notes. He appeals from the judgment and from an order denying a new trial.

The contest is only over the note for \$260.50, mentioned in the first count of the complaint, except so far as certain general objections hereinafter stated, to the validity of the judgment, cover the whole case. We will briefly notice the main points made for reversal.

1. As to the alleged disqualification of the judge who tried the case, it is sufficient to say that the transcript does not show that either he or his uncle, J. T. Masten, owned any stock of the corporation plaintiff at the time of the trial and decision of this case; while the affidavits filed at the hearing in this

court—in response to affidavit filed by appellant—show affirmatively that the judge never owned any of said stock, and that the uncle, who at one time had owned two shares of said stock, had sold it before the commencement of this action.

2. The judgment cannot be reversed on account of contradictory findings. It was averred in the complaint that the plaintiff is a corporation, and the appellant, for the purpose of a defense which was not tenable, also averred in the answer that the plaintiff is a corporation; and, as the court found that all the averments of the complaint are true, and all the averments of the answer are untrue, it is contended by appellant that the findings are contradictory, because they are to the effect that respondent is and is not a corporation. There is, perhaps, a possibility of this point being somewhat ingenious, but findings have no office to perform concerning a matter about which there is no issue.

3. The court did not err in requiring appellant, upon his demand for a jury, to deposit \$24, as required by a rule of the court. This was held in *Conneau v. Geis*, 73 Cal. 178, 14 Pac. 580, and we see no good reason for departing from the conclusion reached in that case. In the case at bar there is no doubt that the \$24 required by the rule to be deposited is for jury fees; and no suggestion was made by counsel for appellant, when he demanded a jury, that said money was for any other purpose.

4. The evidence supports the findings. The note was made by the appellant, Josiah Sherer, payable "to the order of myself," and was indorsed by him in blank; and the fact that in signing the note at the bottom he left the letter "s" out of the word "Josiah" makes no difference. In the indorsement the name was properly spelled. The proof that he made the note was entirely sufficient to support the finding on that point. Appellant delivered the note, indorsed as aforesaid, to one Fuller. It was delivered by Fuller to one Hawes, who was the manager of the company for which Fuller was acting, and by Hawes to respondent. Respondent became thus the legal holder of the note, with the right to bring an action thereon. It was like a note payable to bearer. *Curtis v. Sprague*, 51 Cal. 239. The evidence shows, we think, that respondent obtained the note before its maturity, but there was ample proof of consideration. There are no other points necessary to be noticed. Judgment and order appealed from affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

108 Cal. 522

HYDE v. BUCKNER, Sheriff, et al. (Sac. 4.) (Supreme Court of California. Aug. 19, 1895.)
WITNESS—IMPEACHMENT—TITLE OF GRANTEE—
DECLARATIONS OF GRANTOR.

1. On an issue between a grantee and a creditor of the grantor as to whether the deed

was given as security, where the creditor called the grantor, who testified that the sale was absolute, it was error to allow another witness for the creditor to testify that the grantor told him he conveyed the land as security.

2. The title of the grantee cannot be impeached by evidence of declarations of the grantor made many years after the conveyance.

In bank. Appeal from superior court, Kings county; Justin Jacobs, Judge.

Action by J. D. Hyde against W. V. Buckner, sheriff, and others, to restrain the sale of land under execution. Judgment was rendered for defendants, and plaintiff appeals. Reversed.

E. O. Larkins, W. B. Wallace, and U. T. Clothfelter, for appellant. Horace L. Smith and Bradley & Farnsworth, for respondents.

TEMPLE, J. This action was brought to restrain the sale, under execution against the property of Peter Van Valer, of certain lands conveyed by Van Valer to plaintiff in October, 1884. The question is whether that deed was intended to secure an indebtedness, and was, therefore, a mortgage. That it was given as security is affirmed by the judgment creditor and denied by the plaintiff. Defendant recovered judgment, and this appeal was taken by plaintiff from the judgment and from a refusal of a new trial.

The main contention here is that the evidence does not sustain the finding of the court upon the issue above stated. After a careful consideration of the evidence, as shown in the record, I do not think the conclusion reached upon that issue can be disturbed here. The evidence is voluminous, and discussion of it would not be useful.

I think, however, the court erred in permitting defendants to prove by the witness Mannheim statements made by Van Valer, nine years after the execution of the deed, impeaching the title conveyed thereby to plaintiff, by showing that it was given as security for a loan. Van Valer had been called by defendants, and, as their witness, had testified, in substance, that the transaction was a sale, and that the relation of debtor and creditor did not continue between himself and Hyde after the execution of the deed; and, further, that there was no understanding, express or otherwise, that Van Valer could repurchase for at least three months after the execution of the deed. Defendants then called Mannheim, and asked him to tell what Van Valer had said to him about the transaction in August, 1893. This was objected to as incompetent. The objection was overruled, the court saying: "I think the evidence is competent for the purpose of ascertaining what the intention of the parties was." The witness then proceeded to testify that Van Valer stated that he had conveyed the land to Hyde simply as security for a loan. This evidence was clearly incompetent to disprove or impeach the title which Hyde claimed to have acquired from Van Valer. It was admissible only to show why

the defendants had called a witness who was adverse to them, and not then, unless they were surprised by his testimony. Beyond this it was entitled to no weight whatever. It could have no force in making an affirmative case for the defendants. *Hall v. The Emily Banning*, 33 Cal. 522; *In re Kennedy's Estate*, 104 Cal. 429, 38 Pac. 96. In view of the reason given by the judge for the ruling, we cannot presume that the evidence had no weight in the determination of the principal issue.

The judgment and order are therefore reversed and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.; HARRISON, J.; VAN FLEET, J.

106 Cal. 535

WARREN et al. v. FERGUSON. (No. 15,941.)

(Supreme Court of California. Aug. 21, 1895.)

APPEAL—SERVICE OF NOTICE ON CODEFENDANT—CERTIFICATE OF CITY ENGINEER—AUTHORITY OF ASSISTANT TO MAKE.

1. Where, in an action against several parties to establish a lien on land, judgment is rendered against defendants, and the effect of an appeal by one defendant is to establish that there was no lien on which the judgment could be rendered, the appeal will not be dismissed for failure to serve notice thereof on the other defendants. *Insurance Co. v. Fisher* (Cal.) 39 Pac. 761, followed.

2. A certificate as to the regularity of assessment proceedings signed by an assistant in the city engineer's office by verbal appointment is not sufficient, under St. 1889, p. 168, making such a certificate by the engineer *prima facie* evidence of the regularity of the assessment. *Rauer v. Lowe* (Cal.) 40 Pac. 337, followed.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Troutt, Judge.

Action by Warren and others against Ferguson on a street assessment. Judgment was rendered for plaintiffs, and defendant appeals. Reversed.

T. Z. Blakeman and Benj. Healey, for appellant. J. C. Bates, for respondents.

PER CURIAM. Action upon a street assessment. The respondents have moved to dismiss the appeal upon the ground that a codefendant with the appellant was not served with the notice of appeal. It was held in *Insurance Co. v. Fisher* (Cal.) 39 Pac. 761, that when, in an action to enforce a lien upon a piece of real estate, judgment has been rendered against several defendants, if the effect of an appeal from that judgment is to establish that there was, in fact, no lien upon which the judgment could be rendered, a reversal of the judgment will not injuriously affect the other defendants, and, therefore, that the appeal will not be dismissed for a failure to serve them with the notice of appeal. The engineer's certificate, which the plaintiff offered in evidence, in connection with the warrant, assessment, and diagram,

was signed "Wm. M. Fitzhugh, City Engineer. Holcomb;" and the defendant objected to its introduction upon the ground that it did not purport to be signed by the city engineer, but by one Holcomb. The plaintiff thereupon introduced evidence substantially the same as that presented in *Rauer v. Lowe* (Cal.) 40 Pac. 337, from which it appeared that the certificate had never been signed by the city engineer or by any deputy of his, but that his name had been signed by Holcomb, who was merely an assistant in his office by virtue of a verbal employment. The defendant thereupon renewed his objections, but the court overruled them, and allowed the certificate to be read, and rendered judgment in favor of the plaintiff. Under the principles given in *Rauer v. Lowe*, *supra*, this was error. The rule in respect to the acts of an officer *de facto*, suggested by the respondent, has no application. The statute has declared that certain documents, one of which is the certificate of the engineer, shall be "*prima facie* evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action." St. 1889, p. 168. But for this provision of the statute, it would have been incumbent upon the plaintiff to establish every act of the municipality and its officers which is required in order to create the lien of the assessment. If, instead of so doing, the plaintiff would avail himself of the statutory privilege to establish his right of recovery by the *prima facie* evidence, he must offer competent evidence of every portion of the substituted proofs. In the present case it was essential that the plaintiff should produce a certificate of the city engineer as a part of the evidence which the statute has made a portion of the *prima facie* evidence necessary to establish his right of action. Upon his failure to do so, the court should have disregarded the evidence offered, and rendered judgment for the defendant. The judgment is reversed.

WILLIAMS v. CUNEO. (No. 15,747.)

(Supreme Court of California. Aug. 21, 1895.)

Department 1. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

Action by one Williams against one Cuneo on a street assessment. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Horace W. Philbrook, for appellant. J. C. Bates, for respondent.

PER CURIAM. Action upon a street assessment. The case of *Rauer v. Lowe* (Cal.) 40 Pac. 337, invoked on behalf of the appellant, has no application to the present case. The provision making the certificate of the city engineer a portion of the proof for establishing *prima facie*

cie evidence of the regularity and correctness of the assessment and prior proceedings was first incorporated into the statutes by the act of March 14, 1889 (St. 1889, p. 157), and the thirty-seventh section of that act provides: "Any work or proceedings commenced under the act of which this is amendatory shall in no wise be affected thereby, but shall in all respects be finished and completed thereunder, and this act shall in no wise affect said work or proceedings." The proceedings for the improvement for which the assessment herein was made were commenced October 29, 1888, and the sufficiency of the evidence is to be determined by the statutes then in force. The other points urged in support of the appeal have been determined adversely to the appellant in the cases of *Fletcher v. Prather*, 102 Cal. 413, 36 Pac. 658; *White v. Harris*, 103 Cal. 528, 37 Pac. 502; *Byrne v. Luning Co. (Cal.)* 38 Pac. 454; and *Rauer v. Lowe*, supra. The judgment and order are affirmed.

(108 Cal. 496)

WALSH v. COSUMNES TRIBE, NO. 14, IMPERIAL ORDER RED MEN.

(No. 18,377.)

(Supreme Court of California. Aug. 9, 1895.)

BENEFICIAL SOCIETIES—SICK BENEFITS—FURNISHING STATEMENT—INSANITY AS AN EXCUSE—WAIVER.

1. Under the provisions of the by-laws of a beneficial society that no sick benefits shall be granted to "resident brothers" for more than a week prior to application therefor, and an "absent brother" claiming benefits must send a statement of his case, attested by the sachem of a tribe near the place where he may be, one out of the jurisdiction of the tribe or lodge to which he belongs, is an "absent brother," without regard to the place of his legal residence.

2. Compliance with the requirement of the by-law of a beneficial society that a member claiming sick benefits must furnish a statement of his case is not excused by his insanity.

3. Evidence that, on application to a beneficial society for sick benefits, a point was raised that the member was not entitled to benefits, because he had brought on his sickness by drinking, and that the sachem of the tribe was appointed a committee to explain this to the member's wife, and that he did this, does not show that refusal of benefits was put on this ground alone, and that failure to comply with the society's by-laws requiring a statement of the member's case was thus waived.

Department 1. Appeal from superior court, Sacramento county; Matt. T. Johnson, Judge.

Action by Jane S. Walsh, administratrix of J. M. Walsh, deceased, against Cosumnes Tribe, No. 14, Imperial Order Red Men. Judgment for defendant. Plaintiff appeals. Affirmed.

C. W. Baker and McKune & George, for appellant. Johnson & Johnson, for respondent.

VAN FLEET, J. Action to recover sick benefits alleged to have accrued to plaintiff's intestate in his lifetime from defendant, and remaining unpaid at his death. The by-laws of the defendant provided: "Sec. 3. No benefits shall be granted to sick resident brothers for more than one week prior to application for same being received by this tribe or its officers, and only after a recommendation of at least a majority of the visiting and

relief committee. Sec. 4. An absent brother, claiming benefits under this article, must send to the sachem a true statement of his case, attested by the sachem under the seal of a tribe near the place where he may be. If no tribe be near, then his case, complaint, and its cause, shall be stated in writing by a regular physician, and attested by two respectable witnesses." The court found that when Walsh became a member of the defendant order he resided in Sacramento county, and continued there to reside until his death; that on July 23, 1881, he was, by the superior court of said county, declared insane, and was regularly committed to the asylum for the insane at Napa, where he remained until he died; that during all the years from July 23, 1881, up to his death, on February 17, 1893, he was sick, and unable to attend to his business; and that the defendant did not, during that time, pay him any sick benefits. The court further found, however, "that said J. M. Walsh, nor any one in his behalf, did not at any time send to the sachem of defendant a true or any statement of his case, attested by the sachem, under the seal of a tribe near said Napa, or any statement at all, nor did he, in writing, send to defendant any statement of a regular physician concerning his complaint or case at any time." From these facts the court concluded, as a matter of law, "that plaintiff is not entitled to recover any sick benefits for the illness of the said J. M. Walsh during the time he was in the insane asylum at Napa, because he was an absent brother, within the meaning of section 4 of article 5 of the by-laws of defendant"; and, upon this ground, plaintiff's right to recover benefits was denied.

Appellant contends that the findings do not warrant the conclusion and judgment. The argument of appellant is that, Walsh having been a resident within the jurisdiction of the defendant tribe at the time he became insane, his commitment and removal to a public asylum did not affect his legal status in this respect, and that, therefore, he continued to be a "resident brother," within the meaning of section 5 of the by-laws above quoted. This argument assumes that the term "resident," as there used, has reference to the legal residence of a member. We do not so construe the provision. The by-laws in question were designed to provide a just and convenient method of establishing, as between the tribe and its members, the rights of brothers claiming benefits; and having in view the contingency of brothers becoming sick or disabled while without the jurisdiction of the tribe, and the impracticability of having its relief committee visit such cases, it became necessary to provide some substitute means by which the genuineness and propriety of such claims could be shown. For this purpose the members are divided into two classes, "resident brothers" and "absent brothers," and appropriate methods provided for establish-

ing the claims of each class. It is with reference to this purpose alone that the terms employed are used. The term "resident brother" is simply intended to designate one who, at the time of his claiming benefits, is within the jurisdiction of the tribe. An "absent brother" is one who happens at the time to be either permanently or temporarily without the jurisdiction. The language is employed solely in this sense, and does not involve in any way the question of the legal residence of a member. When, therefore, plaintiff's intestate was removed from the jurisdiction of his tribe to the insane asylum, he became an "absent brother," within the intent and meaning of the by-laws, notwithstanding his legal status as a resident of Sacramento remained unaffected. But appellant would seem to contend that the insanity of Walsh in some way operated to exempt him from the necessity of complying with the provision in question. We find no such exception or exemption in the constitution or by-laws of defendant, and we are not referred to any principle or authority which, in the absence of such exception, makes the insanity of a member an excuse for noncompliance with the requirement. The requirement is a reasonable and proper one, and intended for the mutual protection of the tribe and its members. It forms a part of the contract between the tribe and its members, by which they are equally bound, and we perceive no good reason why it should not be held binding in this instance. The insanity of Walsh did not prevent a compliance. The act required was one that could be performed by a third party in his behalf, and, in fact, even in any ordinary illness not involving mental incapacity, would usually be so performed. The act would not, in its nature, be essentially different from the payment of an assessment or dues; and it has been repeatedly held that insanity or other disability does not excuse a member from the necessity of keeping up dues and assessments, for the reason that they may be paid for him by another. "Where there is no provision of the contract of insurance which declares, either expressly or by necessary implication, that sickness, insanity, or similar incapacity shall excuse the nonpayment of an assessment on the day it is due, the courts cannot grant relief against such contingencies." *Nibl. Mut. Ben. Soc. § 295*, and cases there cited; *Bac. Ben. Soc. § 384*. Such requirements do not call for the personal act of the member, unless specially so provided in the contract (*Nibl. Mut. Ben. Soc. § 272*), but may be done on his behalf, and even though he knew nothing about it, or be incapable of knowing (*Id. § 295*). In this instance there is no hardship in holding a compliance with the by-laws necessary. It appears that the intestate had a guardian, regularly appointed, for his person and estate. It was the duty of such guardian to look after the intestate's interests in the premises, and it was undoubtedly within the

scope of his authority to furnish to the defendant tribe the certificate required.

Appellant further contends, however, that defendant is estopped from relying on a want of compliance with the by-laws in question as a defense, for the reason, as she claims, that when application was made to the defendant for the allowance of benefits to plaintiff's intestate, after his commitment to the asylum, the defendant denied such application upon the sole ground that said intestate had caused his illness and insanity by his own immoral conduct, and that, having placed its refusal upon that ground, defendant is deemed to have waived all others. There is some considerable conflict in the authorities as to how far the principles of estoppel and waiver, as applied to regular life insurance companies, are applicable to beneficial societies of the character of the defendant, for a discussion of which subject, see *Bac. Ben. Soc. c. 13*. But, whatever the correct doctrine may be, it is not strictly pertinent to inquire, since in no event, in our judgment, do the facts upon which plaintiff relies bring defendant within the rule invoked. The facts relied upon as the basis for the alleged estoppel is the following entry, appearing in the minutes of the defendant tribe, under date of August 21, 1881: "A statement was made that, Bro. J. M. Walsh being now an inmate of the Napa Insane Asylum, his wife thought him entitled to sick benefits. A point was raised that, Bro. J. M. Walsh having brought on his sickness by an overindulgence in alcoholic beverages, under the law he was not entitled to sick benefits. Upon motion duly made and carried, the acting sachem is appointed a committee of one to call upon Mrs. J. M. Walsh, and explain to her the situation and law as to Bro. J. M. Walsh's eligibility to receive sick benefits." And the further entry in said minutes, under date of September 1, 1881, as follows: "The special committee previously appointed to interview Mrs. J. M. Walsh reported having discharged the duty imposed, and having explained to her the law and status of Bro. J. M. Walsh in the tribe." In the first place, it is doubtful if these entries show the making of any formal application for benefits on behalf of the intestate, or more than a mere suggestion looking to such application; but, assuming them to be sufficient in that regard, it does not appear that the application was denied on the ground contended for, or denied at all. It appears "a point was raised" that the brother had brought on his infirmity "by an overindulgence in alcoholic beverages," and on that ground was not entitled to sick benefits, but it does not appear that the tribe adopted this view. The sachem was appointed a committee to call on Mrs. Walsh, and "explain to her the situation and law" as to her husband's eligibility to receive sick benefits, which he did. It was the law that he could not be allowed benefits without furnishing the certificate required by the by-

law, and non constat that the sachem did not so inform her. These facts wholly fail to sustain the construction put upon them by appellant, and do not tend to estop defendant from now making the defense relied upon.

In view of this conclusion, the various other points discussed become immaterial. The judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

108 Cal. 529

McCULLOUGH et al. v. OLDS et al. (No. 19,413.)

(Supreme Court of California. Aug. 21, 1895.)

DEED—SUFFICIENCY OF DESCRIPTION—REFERENCE TO MAP—IDENTITY OF MAP.

1. A deed of two lots did not mention the state, county, or city in which they were located, but described them as lots 3 and 4, and as containing 10 acres each, in R.'s (the grantor's) subdivision of lot 1,103, said subdivision being recorded in a certain book and page in the records of S. county. In the book mentioned, at the page stated, was a map indorsed "Plan of lots in M. valley belonging to R. The foregoing survey of lots is a subdivision of 160 acres situated in M. valley, and being 1,103 on the official map of S." Lots 3 and 4 on the map were shown to be 10 acres each. *Held*, that the description in the deed was sufficient.

2. The mere fact that at the corner of a map was written a statement that one lot was "surveyed for J." at a date later than that at which the map was received for record, and signed by "P., County Surveyor," does not show that the entire map was a survey by P.

3. Where a deed describes the land according to a map "recorded" in Book 1, page 184, of the county records, proof of a map "pasted" on the page mentioned sufficiently identifies the map referred to.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; John R. Altken, Judge.

Action by D. S. McCullough and others against L. E. Olds and others to quiet title to land. Judgment was rendered in favor of defendant Olds, and from an order granting a new trial he appeals. Affirmed.

Works & Works, for appellant. Hunsaker & Britt and W. J. Hunsaker, for respondents.

BELCHER, C. This is an action to quiet the plaintiffs' title to two lots of land in the city of San Diego, described in the complaint as "Lots three and four, containing each ten acres of land, being a portion of pueblo lot 1,103, according to the official map of the pueblo lands of the city of San Diego made by Charles H. Poole, and also described as lots three and four, being in the ten-acre lot range of lot 1,103, according to the subdivision thereof, a plat of which is recorded in the office of the county recorder of San Diego county, in Book number one of Deeds, at page 184." All of the defendants except the appellant disclaimed any interest in the said lots. The appellant answered, denying the plaintiffs' ownership "of the real estate de-

scribed in plaintiffs' complaint, or any part thereof," and admitting that she claimed an interest "in the said real property adverse to the plaintiffs." The case was tried, and the findings and judgment were in favor of appellant. The plaintiffs moved for a new trial, and the motion was heard by the successor of the judge who tried the case, and granted. From that order this appeal is prosecuted.

At the trial, plaintiffs introduced in evidence a patent from the United States, which bore date April 10, 1874, and conveyed to the president and trustees of the city of San Diego certain lands which formerly constituted the Mexican pueblo of San Diego, and included the land in controversy. Plaintiffs next introduced in evidence a deed from the trustees of the city of San Diego to Joseph Reiner, which bore date July 25, 1853, and conveyed to the grantee that certain property lying and being situated within the limits of the city of San Diego, and known and described as lot 7 in the Mission valley, containing 160 acres, as indicated upon the map of the city made by Clayton & Hesse, civil engineers, in 1851. And thereupon it was admitted by appellant that lot No. 7 in Mission valley, containing 160 acres, according to the map made by Clayton & Hesse in 1851, was identical with pueblo lot numbered 1,103, according to the official map of the pueblo lands of San Diego made by Charles H. Poole. Plaintiffs next produced from the county recorder's office Book 1 of Deeds, and offered in evidence the map and entries found on page 184 thereof. The map was pasted on the page, and the entries or indorsements were as follows: "Original delivered to James Reiner February 4, 1853. Plan of lots in Mission valley belonging to James Reiner, Esq. County surveyor's office, San Diego, January 12, 1856. Wm. H. Leighton, deputy county surveyor. The foregoing subdivision or survey of lots is a subdivision of one hundred and sixty acres situated in Mission valley, and being numbered one thousand one hundred and three on the official map of San Diego. Joseph Reiner. Received for record January 28, 1858, at 10 o'clock a. m., and recorded February 4, 1858, at 4 o'clock p. m., at request of Joseph Reiner. Geo. A. Pendleton, Recorder." Across the map were lines dividing it into blocks or lots, four of which, extending through the center from left to right, were marked as 660 feet square, and numbered: "1, 10 acres," "2," "3," and "4." At the upper left-hand corner was a lot, marked "A, 10 acres," on which was written: "Surveyed for Joshua Sloane, June 15, 1868. James Pascoe, County Surveyor." Plaintiff next offered in evidence a deed from Joseph Reiner to Cave J. Coutts, dated February 10, 1858, and recorded April 15, 1858. By this deed the grantor remised, released, and quitclaimed to the grantee "lots number three (3) and four (4), containing ten acres each, in Reiner's

subdivision of lot 1,103, * * * said subdivision recorded in book one (1), page 184, records of San Diego county." Plaintiff also offered other deeds from Coutts and his grantee, through and under which they claimed title to the lots in question.

Appellant objected to the Reiner deed and the other subsequent deeds upon the grounds: (1) "That the deed from Reiner to Coutts does not sufficiently describe the property or any property, and that it does not state the state, county, or city in which the property is situated." (2) "That the map offered in connection with the deeds does not appear to be the map referred to in the deeds." (3) "That the deeds refer to a map recorded in Book 1 of the Records of San Diego, page 184, while the map offered in evidence is not recorded, but simply pasted in the book, and that no map is recorded in the book offered at page 184, or elsewhere." (4) "That the deed and map, taken together, do not sufficiently describe the property, or any property, and that they do not show the county, state, or city." (5) "That said map does not purport to be map of 1,103, but a map of a survey made for Joshua Sloane June 15, 1858." The court sustained the objection and refused to admit the said deeds in evidence, and thereupon, the case being submitted without further evidence, rendered its decision and judgment in favor of appellant. The new trial was evidently granted upon the theory that the trial court erred in excluding the offered deeds; and the only question presented here for consideration is, did the Reiner deed contain a description of the premises in controversy sufficient to pass the title thereto to Coutts, or was it void for uncertainty?

It is a general and well-settled rule of law that "a deed, for a description of the land conveyed, may refer to another deed or to a map, and the deed or map to which reference is thus made is considered as incorporated in the deed itself." *Devl. Deeds*, § 1020, and cases cited. So, also, it is a familiar rule that when a tract of land has been subdivided into blocks or lots, and a map thereof made on which the blocks or lots are designated by numbers, a description of the blocks or lots in a deed by the numbers so designated is sufficient, provided the map can be produced and identified. Of course the description of the premises in the deed must be sufficiently definite and certain to enable the land to be identified, or it will be void for uncertainty. But "if a surveyor, by applying the rules of surveying, can locate the land, the description is sufficient. And generally the rule may be stated to be that the deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed." *Devl. Deeds*, § 1012. And see 5 *Lawson, Rights, Rem. & Prac.* § 2285, where it is said, citing numerous authorities, that "if, notwithstanding an uncertain description, the in-

tention of the parties can be gathered from the deed, or from oral proof, the grant is not void."

The objection that the description in the deed to Coutts was void for uncertainty, because it did not state the state, county, or city in which the property is situated, is not tenable. Such a statement was not necessary, if without it the property could still be located and identified. *Beal v. Blair*, 33 Iowa, 318; *Kykendall v. Clinton*, 3 Kan. 85; *Atwater v. Schenck*, 9 Wis. 160; *Kille v. Yellowhead*, 80 Ill. 208; *Smith v. Crawford*, 81 Ill. 296; *Devine v. Burleson*, 35 Neb. 238, 52 N. W. 1112. The deed in question described the lots by numbers, and as containing 10 acres each in Reiner's subdivision of lot 1,103, said subdivision being recorded in Book 1, page 184, records of San Diego county. There was record evidence that Reiner owned lot 7 in Mission valley, and it was agreed that that lot was the same as lot 1,103. It seems clear, therefore, that Reiner in making his deed to Coutts had in mind and referred to the lot which he owned and had had subdivided and platted. Under these circumstances we do not think it can be said, as matter of law, that the description was so defective as to be void for uncertainty.

The objection that the map offered in connection with the deeds does not appear to be the one referred to in the deeds, but the map of a survey made for Joshua Sloane in June, 1868, is based on the indorsement found on the upper left-hand corner of the map. But that indorsement cannot have the effect claimed for it. At most it would seem to indicate only that in June, 1868, Pascoe, as county surveyor, made a survey for Sloane of the 10-acre lot "A," and then made the indorsement as a certificate of such survey.

The objection that the map, having been only pasted in the deed book and not recorded, could not be used to help out the description in the deed, is rested upon the authority of *Caldwell v. Center*, 30 Cal. 540, and *Cadwalder v. Nash*, 73 Cal. 43, 14 Pac. 385. In the case first cited the plaintiff produced a map from the recorder's office, and the defendants objected to it on the ground that "it was made with pencil and not with ink," and that "it is pasted in between the leaves of the book, but not recorded." This court, after conceding that the parties to a deed, instead of setting out in full the metes and bounds or other complete designation of the tract intended to be conveyed, may describe it in whole or in part by reference to some instrument, as a deed, map, etc., which contains or furnishes such a description of the land that it when read in connection with the deed will completely identify the land, said: "The objection should have been sustained. Had the deed referred to a map to be found in that place and condition, it would have been admissible in evidence, for it would have constituted in effect a part of the deed as much as if it had been copied into it. But the deed

calls for a map duly recorded in the recorder's office, and by the utmost stretch of liberality the one produced cannot be regarded as recorded. The act concerning county recorders provides that the several instruments entitled to record shall be recorded 'in large and strong bound books, and in a fair, large and legible hand.' The necessary implication from this provision is that the instrument must be copied into the proper book of record; and in view of the purpose to be subserved by the recording of the several classes of instruments mentioned in the act—the making and preservation of accurate and durable official copies of such instruments—a copy made in pencil or other materials that would not permanently remain would not be within the spirit of the act. The map should for these reasons have been excluded." In the second case cited the deed was held void for uncertainty, because it appeared that the reference to the map therein was equally applicable to two different maps, and it was decided that, in such case, parol evidence was inadmissible to identify the one referred to. Without commenting on the cases cited, it is enough to say that there was no statute in 1858, and is none now, so far as we are advised, providing for the recording of maps. It is, however, a matter of common knowledge that it has been customary to deposit maps in the office of the county recorder, and to refer to them as "recorded," or "of record," in that office. And, when such a map is thus referred to, it may be identified by extrinsic evidence, and the fact that it is not recorded or of record, within the ordinary meaning of those words, is wholly immaterial. In the case of *Saunders v. Schmaelzle*, 49 Cal. 59, the deed, for a description of the property to be conveyed, referred to another deed "recorded in Sacramento"; and it was held that the description in the deed given was not vitiated by the fact that the deed referred to was falsely stated to be recorded in the county where the property was situated. And in *Water Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878, a sheriff's deed described the property conveyed as the north half of block 36, Colton addition, a plat or map of which addition "is of record in the office of the county recorder of San Bernardino county, state of California." The map offered in evidence was found in a book of maps kept in the recorder's office, and it was objected that it was not admissible, as it was not acknowledged so as to entitle it to record. It was held that "a map thus deposited within the recorder's office is properly referred to in an instrument of conveyance as being 'of record' therein, and may be received in evidence, even though it be not acknowledged." The map offered in evidence in this case was not objected to; but, if it had been, we think it admissible, notwithstanding the deed referred to it as "recorded in Book one, page 184, records of San Diego county."

The other points discussed by counsel do not require special notice. The order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(108 Cal. 517)

JOSEPH v. AGER. (No. 18,336.)

(Supreme Court of California. Aug. 14, 1895.)

IRRIGATION DITCH—RIGHT TO MAINTAIN—QUESTION FOR JURY.

In an action to enjoin interference with an irrigation ditch, it appeared that plaintiff and his predecessors had for many years maintained a ditch on defendant's land to carry water from a creek. During a freshet the course of the creek was so changed that to connect plaintiff's ditch with it required the construction of 700 feet of new ditch, which plaintiff made against defendant's protest, though defendant offered to allow him to connect his ditch at a point where little damage would be done, and where the cost to plaintiff would have been less than that of the ditch he constructed. As constructed, the ditch damaged defendant \$1,000, and defendant filled up part of it. *Held*, that the right of plaintiff to maintain the ditch as constructed was a question of fact, and that a verdict for defendant would not be disturbed.

Department 2. Appeal from superior court, Siskiyou county; Edwin Shearer, Judge.

Action by Antone Joseph against Jerome B. Ager to enjoin interference with a ditch, and for damages. Judgment was rendered for defendant, and from an order denying a new trial plaintiff appeals. Affirmed.

James F. Farragher, for appellant. H. B. Warren and Gillis & Tapscott, for respondent.

McFARLAND, J. This action was for an injunction to restrain defendant from interfering with a certain ditch dug by plaintiff on the land of defendant, and for damages alleged to have been caused by the filling up of part of said ditch by defendant. The verdict and judgment were for defendant; and plaintiff appeals from an order denying his motion for a new trial.

The appellant owns land on a natural watercourse called "Willow Creek," and respondent owns land on said creek adjoining, and immediately above, said land of appellant; and for many years appellant and his predecessors have exercised the right of maintaining a ditch up through a part of respondent's land, in which they have carried water from the north side of said creek down to their said land. As, owing to the nature of the creek, it was difficult to keep the head of the ditch always at the same place, they, during the years prior to 1890, several times extended the ditch somewhat further up the creek, but always keeping on the north side. But from the effect of a freshet in 1890 the creek changed its course, leaving its ancient channel

at a point above the land of respondent, and running through the latter's land in a channel several hundred yards south of its old channel, and south of some land called the "Island," and beyond the reach of appellant's ditch. Thereupon, the appellant, notwithstanding the objection and protest of respondent, constructed a new piece of ditch from a point nearly 600 feet below the head of the old ditch, across respondent's land, to the new channel of said creek. This new piece of ditch is about 700 feet long; and after it had been dug, against respondent's objection, as aforesaid, respondent filled up a part of it, which act is the basis of this action. The evidence warranted the jury in finding that this new ditch, if maintained, would be a damage to respondent of at least \$1,000; that respondent offered to allow appellant to make a connection between his old ditch and the new channel by means of a new piece of ditch at other points on respondent's land, where but little damage would be done respondent by such connection; and that, by accepting respondent's offer, appellant could have re-established his ditch and water right, and enjoyed the use thereof as formerly, at less expense than he incurred by digging the said new ditch. The question whether or not the connection of appellant's old ditch with the new channel of the creek would be a substantial change of the servitude (*Allen v. Water Co.*, 92 Cal. 138, 28 Pac. 215), and therefore not maintainable, does not arise, because respondent did not make that point. The general law applicable to this case is therefore well settled. The right to take water from the land of another for use on the premises of the person taking it is an easement founded on a grant, or on a prescription which supposes a grant. Such an easement does not give its owner the right to commit a trespass upon the servient tenement, or to exercise the easement after any manner which happens to suit his pleasure. His right is measured by the terms of his grant; or, where the supposed original grant does not appear, by the prescriptive use. This, however, includes what are called "secondary easements," such as the right to enter upon the servient tenement and make repairs, and to do such things as are necessary for the full exercise of the right. But these secondary easements must be exercised only when necessary, and in such a reasonable manner as not to needlessly increase the burden upon the servient tenement. *Hargrave v. Cook* (Cal.) 41 Pac. 18; *Gale, Easem.* p. 235 et seq., and notes. "As every easement is a restriction upon the right of property of the owner of the servient tenement, no alteration can be made in the mode of enjoyment by the owner of the dominant heritage, the effect of which will be to increase such restriction. Supposing no express grant to exist, the right must be limited by the amount of enjoyment proved to have been had." *Id.* p. 237. And the authors, on page 246, further say: "The servi-

ent owner has likewise his rights. The dominant owner's encroachments can be justified only to the extent of his easement. As to all beyond that, his acts constitute a private nuisance, for which an action may be maintained. With regard, therefore, to all artificial easements, he is bound to keep his works in such a state that they will cause no incumbrance to his neighbor beyond that warranted by the easement; and if he neglects this he brings himself within the ordinary case of a violation of the rule, 'Sic utere tuo ut allenum non laedas,' and is, of course, liable to an action. The servient owner has in this, as in other cases of nuisance, the privilege of taking the remedy into his own hands." In *Ware v. Walker*, 70 Cal. 591, 12 Pac. 475, cited by the appellant, the court say that the plaintiff therein exercised his right "in a reasonable and proper manner, and, as found by the court, without damage to the defendant."

The court, we think, fairly gave the case to the jury, in view of the principles above stated, and we see no prejudicial error committed in its rulings. The case therefore resolves itself into questions of facts properly submitted to the jury, and, as there was evidence amply sufficient to sustain their verdict, there is no reason for disturbing it. The order denying the motion for a new trial is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(112 Cal. 214)

PACIFIC MUT. LIFE INS. CO. v. SAN DIEGO COUNTY. (No. 19,407.)¹

(Supreme Court of California. Aug. 21, 1895.)

TAXES—PAYMENT UNDER PROTEST—SUIT TO RECOVER.

Pol. Code, § 3819, as amended by St. 1893, p. 32, providing for actions against counties to recover illegal taxes paid under protest, does not authorize an action against a county for taxes collected by it for the use of a school district within the county.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the Pacific Mutual Life Insurance Company against the county of San Diego to recover taxes paid under protest. A demurrer to the complaint was overruled, and from judgment sustaining a demurrer to its answer defendant appeals. Reversed.

M. L. Ward, Dist. Atty., and Parrish & Mossholder, amici curiæ, for appellant. C. H. Rippey and Rippey & Nutt, for respondent.

BRITT, O. Action brought professedly under section 3819, added to the Political Code in 1893 (St. 1893, p. 32), for the recovery of alleged illegal taxes paid by plaintiff, under protest, to the tax collector of the defendant county. It is stated in the complaint that the taxes complained of were levied by the

board of supervisors of the county "as and for a special school tax for the city of San Diego school district." The illegality alleged is that the question whether such tax should be raised was not submitted to a vote of the electors of the district, as required by sections 1830-1835, Pol. Code. Defendant demurred to the complaint upon the special ground, among others, that the taxes paid by plaintiff "are neither county nor state taxes, nor any taxes under the control of the defendant." The court overruled the demurrer, and defendant answered, alleging, with other matters, that the levy was made pursuant to a certain judgment obtained by said school district which became final on appeal to this court. *San Diego School Dist v. Board of Sup'rs*, 97 Cal. 438, 82 Pac. 517. The court sustained a demurrer to the answer, and rendered judgment for plaintiff. We need not inquire whether the answer stated a defense.

The funds of the school district are not subject to the control of the county so as to allow a reimbursement of the county for the amount of the judgment, if it should be paid (Const. Cal. art. 11, § 16; Pol. Code, § 1837); and if said section 3819, Pol. Code, admits of a construction which would uphold an action of this character, its constitutionality in that particular would admit of debate, for the credit of a county cannot be pledged for the payment of the liabilities of municipal or other corporations. Const. Cal. art. 4, § 31. But it was held in *Elberg v. San Luis Obispo Co.* (decided in department 2 of this court August 8, 1895) 41 Pac. 475, that said section 3819, Pol. Code, was not designed to authorize the recovery from a county of illegal taxes collected for the use and disposition of a high school district within the county. This case differs from that in no particular favorable to plaintiff. See, also, *School Dist. No. 1 v. Town of Bridport*, 63 Vt. 383, 21 Atl. 570; *Stone v. Woodbury Co.*, 51 Iowa, 522, 1 N. W. 745; *Taylor v. Avon Tp.*, 73 Mich. 604, 41 N. W. 703. The judgment should be reversed, and the court below directed to sustain the demurrer to the complaint.

We concur: VANCLIEF, C.; SEARLES, O.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to sustain the demurrer to the complaint.

(27 Or. 260)

JOSEPHI v. FURNISH.

(Supreme Court of Oregon. July 20, 1895.)

ATTACHMENT—DISSOLUTION BY ASSIGNMENT FOR CREDITORS—CLAIM TO PROPERTY BY THIRD PERSON—ESTOPPEL—IMPEACHMENT OF WITNESS—REPLEVIN—FRAUDULENT SALE—PROOF OF VALUE.

1. Where goods are attached, one seeking to replevin them as owner cannot claim that, by reason of an assignment by defendant in at-

tachment for the benefit of his creditors, the attachment was dissolved.

2. Where, in replevin for goods seized in attachment, the attachment defendant testifies that his sale to plaintiff was bona fide, and is asked on cross-examination whether he did not state to a person, in defendant's absence, that the sale was only made to avert a blackmailing suit, and that the goods were still his, to which he answers "No," the person named may be asked, for purposes of impeachment, whether the witness made the statement.

3. A witness for defendant should not be allowed to give a conversation held 12 feet from plaintiff, who was on the other side of a vault, it not being shown that plaintiff heard the conversation.

4. In replevin for goods seized under attachment and claimed by plaintiff under a sale by defendant in attachment, which it is claimed was fraudulent, defendant may, in order to rebut plaintiff's testimony as to the reasonable value of the goods, show that they were worth more than the sum named in the complaint, though the answer admits their value as alleged.

Appeal from circuit court, Umatilla county; Morton D. Clifford, Judge.

Action of replevin by D. E. Josephi against W. J. Furnish. Judgment was rendered for defendant, and plaintiff appeals. Reversed.

R. Mallory, for appellant. Balleray & Carter, for respondent.

WOLVERTON, J. This is an action to recover the possession of a certain stock of jewelry seized on legal process as the property of one William Wilkinson, of Pendleton, Or. The defendant justifies the taking, as sheriff of Umatilla county, under several valid writs of attachment duly issued about November 7, 1893, in causes pending against Wilkinson, and alleges that Wilkinson was the owner of the property when it was attached. As a further defense he alleges that on or about the 15th day of March, 1893, Wilkinson made a pretended sale of said stock to the plaintiff, for the purpose of hindering, delaying, and defrauding creditors, setting forth facts attending the alleged pretended sale, and averring that it was and is fraudulent and void as against the creditors of Wilkinson. These allegations are denied by plaintiff, and, for the purpose of showing a dissolution of the attachments, he alleges in his reply that on January —, 1894, and prior to the entry of judgment in any of said causes, Wilkinson made a general assignment for the benefit of all his creditors. Upon the trial the verdict was for the defendant, and from the judgment rendered thereon plaintiff appeals, and contends:

1. That the assignment by Wilkinson for the benefit of his creditors, prior to the entry of judgments against him in said actions, dissolved the attachments proprio vigore, and the sheriff could no longer hold the property thereunder. To state the point briefly, suppose A. attaches the goods of B., B. assigns to D., and C., claiming under B., brings replevin against A. Now, A. justifies under the attachment, and C., to defeat the justification, pleads the assignment, claiming that there-

by the attachment is dissolved and the goods discharged from the lien thereof. Can such a plea avail C.? We think not. The plea of assignment does not go far enough. The plaintiff should have pleaded that the property in dispute went with the assignment, and that the assignee was the owner; but this would defeat his own action, hence it was not intended that it should be so stated. Yet the court is asked to give this effect to the assignment for the purpose of destroying the basis upon which the defense is founded. The proposition proves too much. And if it were tenable, every transfer of personal property in fraud of creditors would find ample support in the act of the debtor, against which there could be no relief. Unless the assignment carried the property with it, we are unable to see how it could affect the attachment, which gives a special property in the thing attached sufficient to maintain its possession against every person except the assignee and those claiming under him. If he or any of those so claiming was pursuing the property, then the assignment would become relevant; otherwise not, unless for the purpose of showing property in a third person. See *Tichenor v. Coggins*, 8 Or. 270.

2. At the trial evidence was offered tending to show that on March 6, 1893, the plaintiff purchased of Wilkinson the stock of jewelry, together with the notes and accounts connected with the business, and 160 acres of land, for \$4,500, and placed Wilkinson's watchmaker, one H. L. Hasbrouck, in charge thereof, who remained in possession for some two months, when Wilkinson was restored to and remained in possession from May until September, at which latter date Hasbrouck again resumed and was in possession at the date of the attachments.

William Wilkinson, being called as a witness for the plaintiff, gave testimony, as to the terms and circumstances attending the alleged sale by him to the plaintiff, tending to show that it was fair and bona fide, and for an adequate consideration. Upon cross-examination he was asked "whether or not he on the evening of March 6, 1893, being the day of the alleged sale to Josephi, about five o'clock in the evening, at Watson & Luhrs' planing mill, in the county of Umatilla and state of Oregon, didn't tell Mr. W. M. Brown that he had had Josephi come here, and he had given him a bill of sale to stop a blackmailing suit, and that Messrs. Leasure & Stillman were to sue him for Mrs. Nale, and that he only put the property out of his hands to stop that blackmailing suit, and that the property was his just the same, or words to that effect." To which the witness answered: "No. I showed Brown the receipt from Mrs. Nale. The consideration of the receipt was fifty dollars. I showed him the receipt in the store. I think we were standing near the stove. No one else was present. It is not a fact that at the time

and place I told Mr. Brown, and said to him that the store was mine again, the same as before, or words to that effect." Whereupon the question put to Wilkinson was repeated to the said W. M. Brown, who was called for defendant, and he was asked whether or not Wilkinson made the statements therein contained, to which he answered, "Yes, sir." Witness was further asked: "Did he say anything else about this transaction with himself and Josephi at that time?" A. "Yes, sir. I asked him if he owed that firm any money, and he said 'No.' He said the stock was clear, and it was his." And, again: "Did you ever have any other conversation with William Wilkinson on or about the transfer of the stock?" A. "Yes, sir. Later on, in April. He showed me a receipt where he had settled up with Mrs. Nale for the blackmailing suit for the sum of fifty dollars, and said that the store was his again." All these questions were objected to as irrelevant and incompetent for the reason that the declarations of Wilkinson made after the sale could not bind Josephi. The further objection was made to the first question that if it was asked for the purpose of impeachment it was touching an immaterial matter, and therefore incompetent. The overruling of these objections is assigned as error. It is undoubtedly true that a witness, not a party to the record, cannot be impeached by showing that he has made contradictory statements concerning matters immaterial or irrelevant to the issues in the case. As put by Wharton, "the statement which it is intended to contradict must involve facts in evidence." 1 Whart. Ev. § 551. It is also well settled that the declarations of a vendor of goods and chattels after he has parted with all interest and possession are inadmissible, in the absence of fraud and collusion, to impeach or overthrow the title of the vendee. *Krewson v. Purdom*, 11 Or. 266, 3 Pac. 822; *Manufacturing Co. v. Johnson*, 50 Iowa, 142; *Hirschfeld v. Williamson (Nev.)* 1 Pac. 201; *Turner v. Hardin (Iowa)* 45 N. W. 758. It is contended here that, as the question put to Wilkinson touching what he said to Brown at Watson & Luhrs' planing mill called for evidence which was incompetent to impeach the plaintiff's title, it could not form the basis even for the impeachment of the witness, and that defendant was bound by his answer. This is stating the rule too broadly, although there is some authority for the contention. When some matter that is immaterial or wholly irrelevant to the issue is elicited from the witness, it concludes the party examining him, and his credibility cannot be impeached by showing that he has at other times made contradictory statements touching the same matter. We do not understand the rule to extend to matter that is incompetent merely because it is so, unless it may be said at the same time to be immaterial or irrelevant. Testimony may be incompetent because from its nature parties ought not to

be bound by it, yet, if it was admissible, it would not be wholly irrelevant, for it would tend to establish some fact or facts under the issues. Immaterial and irrelevant testimony establishes nothing pertaining to the issues. *Foot v. Hunkins*, 98 Mass. 525, 526. "It is not irrelevant to inquire of the witness whether he has not on some former occasion given a different account of the matter of fact to which he has already testified, in order to lay a foundation for impeaching his testimony." 1 Greenl. Ev. § 449. Now the matter of fact about which Wilkinson had given an account in his examination in chief was the alleged sale to plaintiff. He stated the terms as he understood them, and related the attending circumstances. On cross-examination he was asked if he had not subsequently made contradictory statements to Brown touching the same transaction. The contradictory statements called for were incompetent to impeach plaintiff's title, because made subsequent to a transfer of the witness' interest and surrender of possession; but it was irrelevant to the issue, and if he had made contradictory statements touching the relevant matter about which he has testified it is well calculated to affect his credibility, and has an important bearing upon the establishment of a material fact in the case. The question so repeated to Brown was legally appropriate, and the court properly allowed him to answer it. The court should, however, have instructed the jury that the testimony was only pertinent to impeach the credibility of witness Wilkinson, and should be considered by them for that purpose only. *Trapnell v. Conklyn* (W. Va.) 16 S. E. 570; *Manufacturing Co. v. Creary*, 116 U. S. 166, 6 Sup. Ct. 369; *Turner v. Hardin*, supra; *State v. Fitzhugh*, 2 Or. 234. When the impeaching witness has answered the question put for the purpose of contradicting the witness whose credibility is in the balance, that is the end of his examination upon that subject, and it is inadmissible to allow the examination to proceed further, to the end that other statements, whether contradictory or not, may be elicited. Underh. Ev. 509; *Pence v. Waugh* (Ind. Sup.) 34 N. E. 860.

The subsequent questions herein noted as put to the witness Brown, and his answers thereto, were, therefore, incompetent, and ought not to have been admitted, and likewise other questions and answers of the same nature. The same observation will apply to the like character of testimony elicited from the witnesses Park and Carter. The conversation which Park relates that he had with Wilkinson took place within 12 feet of the plaintiff, but around the corner of a vault, and out of his sight, and Park could not swear that he did or could have heard the conversation. Hence plaintiff could not be bound by Wilkinson's admissions, unless it was shown that he heard them, and had an opportunity of correcting any statement inconsistent with the facts as they existed.

3. The complaint alleges the value of the property sued for to be \$5,000, and the answer admits it. On the trial testimony was offered by defendant, and admitted over the objections of plaintiff, showing the value of the stock of jewelry contained in the store about the time or subsequent to the commencement of this action to be from seven to ten thousand dollars, and this is assigned as error. The bill of exceptions shows "the testimony of the witnesses on part of plaintiff tended to prove that on the 6th day of March, 1893, plaintiff, D. E. Josephi, purchased of witness William Wilkinson a stock of jewelry then being contained in what is known as the 'Wilkinson Jewelry Store' in the city of Pendleton, Umatilla county, Oregon, tending to prove that the consideration for such purchase was \$4,500; that in said purchase, and covered by the same consideration, was a tract of land located in Union county, Oregon, valued at \$100, and the accounts and notes connected with said jewelry business, of the face value of \$1,500, but really of nominal value; and tending to prove that said \$4,500 was a reasonable value for the property purchased." We think this evidence was admissible, if for no other purpose, to rebut the testimony of plaintiff as to the reasonable value of the property at the time of the sale, and the court committed no error in allowing it to go to the jury. The further and separate defense setting up that the sale was pretended only and in fraud of the creditors, when construed as a whole and in the light of all the allegations therein contained, is deemed sufficient, especially as it is not tested by demurrer or motion.

In view of the foregoing considerations, the judgment must be reversed, the cause remanded, and a new trial ordered.

(1 Kan. A. 370)

ROUSE v. YOUARD.

(Court of Appeals of Kansas, Southern Department, E. D. Aug. 16, 1895.)

REVIEWING EVIDENCE ON APPEAL—INCONSISTENT FINDINGS AND VERDICT—LAYMAN AS AN EXPERT WITNESS—CARRIERS—LIABILITY FOR HANDLING DISEASED ANIMALS—CONSTITUTIONAL LAW.

1. Where there is evidence tending to prove each fact necessary to support the verdict of the jury, and the jury have rendered their verdict on such evidence, this court cannot disturb the verdict, although the court might have come to a different conclusion on the whole evidence.

2. When the special findings of fact returned by the jury are inconsistent with the general verdict, the special findings of fact are controlling, and the court should either render a judgment in accordance with the special findings, or set the findings and verdict aside and grant a new trial.

3. Where a person has been educated in a particular profession or trade, as a physician, surgeon, veterinarian, or engineer, or the like, he is presumed to understand thoroughly the questions pertaining to his profession or trade, he is termed an expert, and is qualified to give opinions on subjects coming within the scope of his profession or trade; but a witness who is not educated in any particular profession or

trade is not competent to give an opinion in any matter that requires science or skill to determine, although he may have frequently seen the treatment of diseases by physicians, or operations made by surgeons, and have assisted veterinarians in the treatment of stock for diseases, and have read extensively from books and papers treating on diseases of stock.

4. Common carriers in the transportation or handling of articles that are dangerous to health or property of others, where they have a knowledge of such dangerous character, or, by the use of due care, should have knowledge thereof, will not be relieved of the liability for damage done in consequence, or injury to others, by the transportation or handling of such dangerous articles.

5. The provisions of chapter 161, Laws 1881, as amended by chapter 191, Laws 1883, are not an intrusion on the interstate commerce clause of the constitution of the United States, but a legitimate exercise of the police power of the state which extends to the protection of life, limb, health, comfort, and quiet of all persons, and the protection of all property, within the state; following the decisions in the cases of *Patee v. Adams*, 14 Pac. 505, 37 Kan. 136, and *Railway Co. v. Finley*, 16 Pac. 951, 38 Kan. 554.

(Syllabus by the Court.)

Error from district court, Labette county; J. D. McCue, Judge.

Action by Anna Youard against Henry C. Rouse, receiver. Plaintiff had judgment, and defendant brings error. Reversed.

On the 13th day of January, 1890, Anna Youard filed a bill of particulars before J. D. Scott, justice of the peace in and for the city of Parsons, in Labette county, Kan., in which she stated as her cause of action that George A. Eddy and H. C. Cross were the duly appointed, qualified, and acting receivers of the Missouri, Kansas & Texas Railway Company, and as such are, and at the times hereinafter mentioned were, in possession and control of, and engaged in operating, the Missouri, Kansas & Texas Railroad; that, in the month of July, 1889, they unlawfully and negligently transported to, and unloaded, drove, fed, and littered at, their stock yards near Parsons, in Labette county, Kan., cattle afflicted with Texas splenic or Spanish fever, a large number of which died at said stock yards of said disease; that said defendants negligently drove said cattle into said stock yards, in said county, and negligently allowed the same to remain and die in said stock yards of said contagious disease, and thereafter negligently gathered up the litter in said stock yards, infected by said cattle with said disease, and placed the same upon and near the pasture of plaintiff, in which her cattle were feeding, by reason whereof four cows owned by the plaintiff, without any negligence on her part, became infected with said disease, and died, to her damage of \$200; and her pasture became dangerous and unfit for use for the pasturage of cattle, and she was deprived of the use thereof, to her damage of \$25; and prays judgment for the sum of \$225, her damages, and \$50, as attorney's fees for prosecuting her action. Defendants were duly notified of the filing of

said bill of particulars and the pendency of said action, by service of summons, and said cause was tried before said justice of the peace, and resulted in a judgment in favor of the plaintiff below; and the case was taken to the district court of Labette county, on appeal, and was tried in the district court by a jury. The jury returned a verdict in favor of the plaintiff below, and made and returned, with their general verdict, special findings of fact. Motion was made by defendants below for judgment against the plaintiff on the special findings of fact, notwithstanding the general verdict. Motion was overruled, and excepted to. Motion for new trial was filed, and overruled, and excepted to. Judgment for plaintiff below on verdict of the jury, and excepted to, and the case filed in the supreme court for review. Since the rendition of the judgment in the district court, and the filing of the case in the supreme court, the said George A. Eddy and H. C. Cross, receivers, have both died, and Henry C. Rouse has been duly appointed by the United States circuit court receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, and the action revived in the name of said Henry C. Rouse, receiver *de bonis non*. The case was duly certified by the supreme court down to this court for review, and both parties have appeared in this court and filed briefs, and argued said case before the court.

T. N. Sedgwick, for plaintiff in error. Kimball & Osgood, for defendant in error.

JOHNSON, P. J. (after stating the facts). The first error complained of, in the brief of counsel for plaintiff in error, is that the evidence on the trial was wholly insufficient to sustain the verdict of the jury or the judgment in favor of Anna Youard against the receivers of the Missouri, Kansas & Texas Railway Company. This court cannot disturb the verdict of the jury, or the judgment of the court founded thereon, unless there was an entire want of evidence to prove some material fact necessary to entitle the plaintiff below to recover. To do so would be to entirely disregard the right of trial by jury. The jury had the witnesses before them, had an opportunity to hear their testimony as it was delivered, and observe the demeanor of each witness on the stand and the manner of giving his testimony, and, in fact, had an opportunity to see and determine whether his entire conduct and manner of giving his evidence was such as to impress an impartial trier with the truthfulness of his statements. It is the province of the jury to determine the credibility of each witness, and to weigh and determine what the evidence proves on the trial of the case; and, where there is evidence tending to prove each material fact necessary to the findings of the jury, and the jury have rendered their findings thereon, this court cannot disturb

the verdict, although this court might have come to an entirely different conclusion upon the whole evidence. We have examined the evidence contained in the record, and find that there was some evidence tending to prove each material matter necessary to entitle the plaintiff below to a recovery; and the trial court having sustained the verdict this court cannot say that there was such lack of evidence to support the verdict as will authorize a reversal of the judgment for that reason.

The second error complained of by counsel for plaintiff in error, in his brief, is that, the jury having returned a general verdict and made special findings of fact, the findings of fact are so inconsistent with the general verdict that the court should have set the verdict aside. The two findings of fact that are alleged to be inconsistent with the general verdict are as follows: "No. 9. Did any of the plaintiff's cattle come in contact with any of the cattle shipped by the defendants to the stock yards at Parsons? A. No evidence. No. 10. How close did plaintiff's cattle come to the litter which she claims the employes dumped on her land? A. Evidence does not prove." These two facts were material to the right of plaintiff below to recover. Her action was based on the fact that defendants had negligently transported to, and unloaded, drove, fed, and littered at, the stock yards in Parsons, cattle afflicted with Texas splenic or Spanish fever, a large number of which died at said stock yards of said disease; that defendants negligently drove said cattle into said stock yards, and negligently allowed the same to remain and die in the said stock yards, of said contagious disease, and thereafter negligently gathered up the litter in said stock yards, infected by said cattle with said disease, placed the same upon and near the pasture of plaintiff, in which her cattle were feeding, by reason whereof her cows became infected with said disease and died, to her damage. In order to entitle her to recover, it was necessary for her to prove and satisfy the jury that her cows became infected with the Texas splenic or Spanish fever, by being communicated to them by either coming into contact with the diseased cattle or with the litter carelessly and unlawfully placed near her pasture. The charges were that all these things were done by the receivers of the railway company carelessly, and, by reason of the wrongful and careless acts of the receivers, the contagious disease was communicated to her cows; consequently they died, and she was damaged thereby; but, however unlawful and negligent the act of the receivers and their servants may have been, the plaintiff would have no cause of action against them unless their negligent and wrongful acts resulted in the communication of the contagion to her cows, and thereby resulted in their death and consequent loss to her. The mere fact that the cows of plain-

tiff below died from the same kind of disease that killed the cattle in the stock yards of the receivers would not give the plaintiff below a right of action, unless in some manner that disease was communicated to her cows from the diseased cattle in the stock yards, or by the litter placed by them near her pasture. It was the right of the receivers to have the jury, when they returned a general verdict, make special findings of fact; and, if the special facts as found by the jury were inconsistent with their general verdict, they were controlling, and judgment should have either been rendered in accordance with the special facts as found, or the verdict should have been set aside. Gen. St. 1889, c. 80, § 287. The jury determine what facts are proven by the evidence. Where the evidence is somewhat conflicting in regard to a question, the findings of the jury thereon are conclusive.

The third error complained of by counsel for plaintiff in error, in his brief, is that the court erred in permitting witnesses, over the objection of the defendant below, to give their opinions as to what disease the cows of plaintiff below died with, for the reason that such witnesses were not shown to be what is termed "experts"; that they were not persons educated or skilled as veterinary surgeons, who had made diseases of cattle a study, and could point out and describe the chief characteristics or symptoms that would distinguish the disease of Texas splenic or Spanish fever from murrain or any other disease. The witnesses Ed. Scheinbuer and Alfred Yesley were called, and each was permitted, over the objection of the receivers, to give his opinion as to what disease the cows of plaintiff below died of, and also to give his opinion as to the disease of the cattle in the stock yards. These witnesses were neither of them veterinary surgeons, and neither was shown to possess the legal qualifications of an expert. The opinions of witnesses are, in general, not evidence. Yet, on certain subjects, some classes of witnesses may give their own opinions; and on certain other subjects any competent witness may express his opinion. On the questions of science, skill, or trade, persons of skill or science, commonly called "experts," may not only testify to facts, but are permitted to give their opinions in evidence. A medical man may give his opinion as to the cause of disease or death. So a veterinary surgeon may give his opinion as to what cause produced diseases in animals, and whether the disease is contagious, and how the disease may become communicated to other animals, and also as to what disease an animal dies of, and may found his opinion on his own observation, or on the symptoms described by other witnesses. As a physician, surgeon, or veterinarian is presumed to understand thoroughly the questions pertaining to his profession, he is allowed to give his opinion respecting any subject that comes within his profession. But a per-

son not acquainted with the science of medicine, surgery, or veterinary, who may have had some experience in observing the treatment of diseases by physicians, or operations performed by a surgeon, or in the handling of stock, and in reading accounts of different diseases among animals, is not supposed to be possessed of the necessary qualifications of an expert; and it was error to permit these witnesses to give in evidence their opinions as to the disease the cattle were afflicted with, and from which they died. It was competent for these witnesses to state the symptoms that they noticed in the cattle, the conduct of the animals, and all the conditions that were observable when they first discovered the cattle were sick, the appearance of the animal, and length of time occurring before death, and the appearance on the post mortem. It is claimed by counsel for the receivers that there is no evidence that any of the agents or servants of the receivers, or the receivers themselves, had any knowledge that any of the cattle shipped or transported and unloaded into the stock yards at Parsons were infected with the disease known as Texas splenic or Spanish fever, or were capable of communicating the disease to native cattle. We think the evidence shows such condition of the cattle that it was sufficient to impart notice to the agents and servants of the receivers. The evidence shows that the cattle were generally wild and undomesticated, and that they were shipped by the receivers from Southern Texas, a region of country where it is declared to be *prima facie* evidence that the cattle are diseased and capable of imparting it to the native cattle. All cattle coming from the low lands in the Southwest, near the Gulf, bring with them a contagious disease, commonly known as Texas splenic or Spanish fever. It was also shown in the evidence that a large number of these cattle were diseased, and died in the stock yards at Parsons, and that, while said cattle were sick and dying from the disease in the stock yards, the agents and servants of the receivers, with wagons and teams, were engaged in taking up the litter that the diseased cattle had infected with the disease, and were placing it in and near the pasture of the plaintiff below, and also placing it in the stream of water which ran through her pasture, so as to communicate the disease to her cattle. The action was prosecuted by plaintiff, not for the mere fact that the receivers shipped diseased cattle to their stock yards at Parsons, but for the negligent handling of the stock infected, and carelessness about the stock yards.

It is also contended that there was no effort made, on the trial of the case, to show that the receivers had violated either the interstate commerce law or the law providing for a bureau of animal industry and regulation of the transportation of cattle through that portion of the South known as the infected area. We do not think it was neces-

sary to a recovery in this case to prove the violation of either the interstate commerce law or the law providing for a bureau of animal industry. If the agents and servants of the receivers were guilty of the negligence complained of in the bill of particulars of the plaintiff below, she was entitled to recover. If the agents and servants negligently and carelessly took the litter from the stock yards and placed it in such proximity to the pasture where her cows were kept, and her cows became diseased thereby, and were lost to her, in consequence of the wrongful and negligent act of the receivers or their agents and servants, then she was entitled to recover the full amount of damages sustained by her. A common carrier cannot be relieved of his liability for his negligence in exposing dangerous articles where they are known to be dangerous, or, by the exercise of due care, he ought to have known the dangerous character thereof.

The final contention of counsel for the receiver is that chapter 161, Laws 1881, as amended by chapter 191, Laws 1885, is in conflict with the clause in the constitution of the United States which provides: "Congress shall have power to regulate commerce with foreign nations and among the several states;" that the cattle shipped in the yards at Parsons by the receivers were interstate shipments, and were not destined to points in the state of Kansas. The plaintiff below did not base her action exclusively upon the statute, but upon the negligence of the receivers in the handling of diseased cattle while in the stock yards at Parsons, and the wrongfully and negligently taking the litter that was infected by the cattle with the disease of Texas splenic or Spanish fever, and carelessly and wrongfully placing it in and near the pasture where she was keeping her cattle, and in the stream of water running through her pasture. If she proved the allegation in her bill of particulars, she was entitled to recover under the common law, regardless of the statute. Her suit was based on the negligent and wrongful conduct of the receivers; but, if this were not so, we think she could still recover under the statute, if she could prove the necessary facts. The supreme court of Kansas has held that this statute is not in conflict with the clause commonly referred to as the interstate commerce clause of the constitution. *Patee v. Adams*, 37 Kan. 136, 14 Pac. 505; *Railway Co. v. Finley*, 38 Kan. 554, 16 Pac. 351. These acts were for the protection of cattle against contagious diseases. The act of 1881, by the first section, provided against the bringing into this state any cattle diseased with the disease known as the Texas splenic or Spanish fever, and makes the driving of them into the state, or into any county in the state, a misdemeanor, and provides that any person, on conviction thereof, shall be fined and imprisoned. The act also provides: "Any person driving or caus-

ing to be driven any cattle mentioned in the first section of the act in violation of the act to be liable to any party injured for all damages that may arise from the communication of the disease from the cattle so driven, to be recovered in a civil action." This act was amended in 1885 by chapter 191, which reads as follows: "No person shall between the first day of March and the first day of December in any year, drive or cause to be driven into or through any county or part thereof in this state, or turn upon or cause to be turned or kept upon any highway, range, common or uninclosed pasture within this state, any cattle capable of communicating or liable to impart what is known as Texas splenic or Spanish fever. Any person violating any of the provisions of this act shall upon conviction thereof be adjudged guilty of a misdemeanor, and shall for each offense be fined not less than one hundred dollars and not more than two thousand dollars or be imprisoned in the county jail not less than thirty days and not more than one year, or by both such fine and imprisonment." "Sec. 5. In the trial of any person charged with the violation of any of the provisions of this act, and in the trial of any civil action brought to recover damages for the communication of Texas splenic or Spanish fever, proof that the cattle which such person is charged with driving or keeping in violation of the law, or which are claimed to have communicated said disease, were brought into this state between the first day of March and the first day of December of the year in which the offense was committed or such cause of action arose, from south of the 37th parallel of north latitude, shall be taken as prima facie evidence that said cattle were capable of communicating and liable to impart Texas splenic or Spanish fever, within the meaning of this act, and that the owner or owners, or person in charge of such cattle, had full knowledge and notice thereof at the time of the commission of the alleged offense." These statutes are not an interference with the transportation laws of congress, known as the interstate commerce regulations, which are given exclusively to congress by the constitution. They are not intended to prohibit the transportation of all cattle coming from the region of country south of the 37th degree of north latitude, but only such as are diseased and capable of communicating disease to the native cattle of Kansas. It is only the rightful exercise of police regulation, for the protection of the native cattle of this state against a dangerous and deadly disease that, if not regulated, will result in great loss to the cattle owners of this state. Justice Strong, in delivering the opinion of the court in the case of Railroad Co. v. Husen, 95 U. S. 470, says: "We admit that the deposit in congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which

may properly be denominated police power. What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. As was said in *Thorpe v. Railway Co.*, 27 Vt. 149: 'It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state.' * * * The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property * * * as is injurious to the property of others. They are self-defensive." The police power is commensurate with the sovereignty of the state, and is of necessity despotic; and individual rights of property beyond express constitutional restraint must yield to its force. Under it, every one having property holds it under the implied liability that its use shall not be injurious to the equal enjoyment of others having an equal right of the community. 2 Kent, Comm. 338; Potter, Dwar. St. p. 444. In the case of *Railway Co. v. Finley*, supra, an action to recover damages against the railway company under the statute of Kansas for the protection of cattle against contagious diseases, Chief Justice Horton, delivering the opinion of the court (after commenting on the decision of the supreme court of the United States in the case of *Railroad Co. v. Husen*, which held that the statute of Missouri was void, for the reason that the same tends to place an embargo upon interstate commerce, and pointing out the difference between the provisions of the statute of Missouri and the statute of Kansas, and quoting from the opinion of the supreme court of the United States in the case of *Mugler v. State*, 123 U. S. 623, 8 Sup. Ct. 273, wherein the court says: "Property, under our form of government, is subject to the obligation that it shall not be used so as to injuriously affect the rights of the community. * * * It belongs to the legislative branch of the government to exert what are known as police powers of the state, and to determine primarily what measures are applicable or needful for the protection of the public morals, the public health, or the public safety"), says: "The decision is only the recognition of the doctrine that the police power of the state extends to the protection of the lives, limbs, health, and morality and quiet of all persons, and the protection of all property within the state. We have construed the acts upon which the alleged liability is founded in this case so that no recovery can be had against any person or corporation acting in good faith, unless such facts existed as to make the person or corporation chargeable with knowledge that the cattle driven or transported into the state

were diseased, or were of a kind liable to communicate disease to domestic cattle of the state. *Patee v. Adams*, 37 Kan. 133, 14 Pac. 505. As thus construed, we do not think the statute of Kansas an intrusion upon the exclusive domain of congress; and we think that the statute, aided by the testimony of the nature of Texas splenic or Spanish fever, and the peculiarities of Texas or Southern cattle so diseased, against which this legislation is directed, has for its substantial object the protection of the property of the citizens of the state, and therefore ought to be sustained. Clearly, the object of this statute is not to obstruct interstate commerce, but solely to exclude from the state cattle having contagious or infectious diseases, and therefore wholly for the immediate protection of the property of this state against the noxious acts of other persons, or such a use of their property as is dangerous and injurious to the cattle interest of the state. If this is not constitutional, and within the police power of the state, then the state is absolutely powerless to protect the property of the citizens. If this and similar statutes are in conflict with the constitution of the United States, the state is wholly disarmed and defenseless to exclude property from the state that is dangerous and injurious to the property of its citizens. We think the statute can be fully justified as the legitimate exercise of the police power of the state, and it is not usurpation of the power vested exclusively in congress. It is founded upon the law of self defense." The constitutionality of this law being fully sustained by former decisions of this court, it is unnecessary to state anything further in relation to this subject. For the errors pointed out in this opinion, the judgment of the court will be reversed, and the case remanded to the district court, with direction to set aside the verdict and special findings of fact by the jury, and grant a new trial. All the judges concurring.

KING v. MILES CITY IRRIGATING DITCH CO.

(Supreme Court of Montana. July 29, 1895.)

IRRIGATION COMPANIES—CONSTRUCTION OF DITCH—NEGLIGENCE.

An instruction, in an action for damages from the breaking of an irrigation ditch, that it is incumbent on an irrigation company to construct its flumes and ditches in such a reasonable and prudent manner that no damage shall result to the person whose lands are crossed, is erroneous, as making it an insurer.

Appeal from district court, Custer county; George R. Milburn, Judge.

Action by Louis King against the Miles City Irrigating Ditch Company. From an order granting a new trial, plaintiff appeals. Affirmed.

Middleton & Light, for appellant. Strevell & Porter, for respondent.

DE WITT, J. This action was brought by the plaintiff to recover damages caused to his ranch by the breaking of the defendant's irrigating ditch. The cause of action, as alleged, and sought to be proved, was the negligence of defendant in the construction and operation of its ditch, by reason of which the same broke and damaged the plaintiff. On a trial to a jury a verdict was rendered for the plaintiff. This verdict was by the court set aside, on motion for a new trial. From this order the plaintiff appeals. The motion was made upon two grounds: First, the insufficiency of the evidence to sustain the verdict; and, second, errors of law. It does not appear upon which ground, or whether upon both, the motion was granted.

The principal error of law complained of was that the court instructed the jury, among other things, as follows: "In this connection the court further instructs the jury that it is incumbent upon the defendant company to construct its flumes and ditches in such a reasonable and prudent manner as that no damage shall result to the person whose lands are crossed by the ditch." This instruction was clearly erroneous. The court undertook to lay down the measure of reasonable and prudent conduct on the part of the defendant. The court did not instruct that the care by the defendant should be either ordinary or extraordinary, but, on the other hand, instructed the jury that the degree of care should be such that no damage should result. The defendant was thus held, not only to the highest and most extraordinary degree of care, but was held to exercise such care that the plaintiff would not suffer any damage. In other words, the instruction made the defendant absolutely an insurer against all damages. It removed the question of negligence from the jury altogether, and practically instructed them that, if the damage occurred, the defendant was liable, without regard to its negligence. This, of course, was error, which error the district court properly corrected in granting the motion for a new trial, and on this ground the order granting the new trial must be affirmed. *Hopkins v. Commercial Co.*, 13 Mont. 223, 33 Pac. 817.

On the motion for a new trial, the court also had before it the question of insufficiency of the evidence to sustain the verdict. Upon a reading of the testimony in the case, we are not prepared to say that the court abused its discretion if it granted the new trial on this ground. We are not prepared to go further, however, and to say, from our point of view, that there was absolutely no showing of negligence which should have gone to the jury. There seem to be a few items of evidence tending to show negligence. Whether these were sufficient to justify the verdict is more properly a question in the sound discretion of the district court, who saw the witnesses and heard them testify. As remarked, we cannot find any abuse of discretion in granting the new trial on the ground of insufficiency of

the evidence. Any further views upon this subject we do not deem appropriate, from our point of view, to express. The order granting the motion for new trial is affirmed.

MATTHEWS v. YOUNG.

(Supreme Court of Oklahoma. July 27, 1895.)
TOWN-SITE LOTS—CONTEST—FAILURE TO MAKE DEPOSIT.

1. It is error to overrule a demurrer to a petition for want of sufficient facts to constitute a cause of action, which petition seeks to have the holder of the legal title to town lots declared a trustee for, and a conveyance decreed to, an adverse claimant by reason of settlement and occupancy, and which petition declares the fact that the plaintiff has failed, by reason of poverty, to make the deposit for expense of contest required by the rules of the secretary of the interior.

2. The financial condition of the claimant is something over which the trustees or adverse party could exercise no control, and his inability to comply with the rule requiring a reasonable deposit to meet the expense of a hearing is not a sufficient excuse to entitle him to the intervention of a court of equity.

(Syllabus by the Court.)

Error from district court, Logan county; before Justice Frank Dale.

Action by Francis M. Young against J. L. Matthews. Judgment for plaintiff, and defendant brings error. Reversed.

Keaton & Cotteral, for appellant. H. R. Thurston, for appellee.

BURFORD, J. Francis M. Young filed his petition in the district court of Logan county, in which he alleged that he was a citizen of the United States, and qualified under the laws of the United States to acquire title to lots in the town site of Capitol Hill; that in June, 1890, he selected and settled upon lots 13, 14, 17, and 18, in block 65, in Capitol Hill; that he erected a house upon said lots, and used the same for his home; that in 1892 he filed his application before the board of town-site trustees, within the time prescribed by the rules of said board. He further alleges that at the time his case was set for hearing before said town-site board, owing to his poverty, he was unable to make the \$32 deposit required by the rules promulgated by the secretary of the interior, and that by reason of his said failure the town-site trustees awarded said lots to the defendant, J. L. Matthews, and conveyed the same to him by deed; and he asks that said Matthews be declared to hold the title to said lots in trust for him, and that a commissioner be appointed to convey the legal title to him. To this complaint the defendant, Matthews, demurred upon the ground that the complaint failed to state facts sufficient to constitute a cause of action. The demurrer was overruled by the court, and exceptions saved. Afterwards an answer was filed, trial had by the court, and judgment rendered for the plaintiff as pray-

ed in his petition. From this judgment the plaintiff in error appeals.

The trial court erred in overruling the demurrer to the petition. The petition disclosed upon its face that the petitioner had failed to comply with one of the rules promulgated by the secretary of the interior, which rule required the adverse claimants to lots upon said town site, on or before the day set for hearing of such adverse claims, to make a deposit of a sufficient sum to cover the expense of one day's trial before said board. This was a reasonable and proper rule, and one which the petitioner was bound to comply with, unless prevented by some action of the adverse party or by the action of the trustees. He seeks to excuse himself from a compliance with said rule by alleging that, owing to his poverty, he was unable to make said deposit. Poverty is not recognized by law as an excuse for a failure to comply with the laws and regulations necessary to the acquirement of title to public lands or lots, and, as the petition fails to show a proper excuse or justification for the failure on the part of the petitioner to comply with the rules of the department, it failed to state facts sufficient to warrant the intervention of a court of equity. *Maddox v. Burnham* (Sup. Ct. U. S. March 4, 1895), 15 Sup. Ct. 448. The facts in this case are similar to those in the case of *Twine v. Carey*, 37 Pac. 1006, decided by this court, and we adhere to the ruling announced in that case. The judgment of the district court is reversed, and cause remanded, with instructions to sustain the demurrer to the petition, and for such further proceedings as may be in harmony with this opinion.

DALE, C. J., not sitting.

DOYE v. CAREY.

(Supreme Court of Oklahoma. July 27, 1895.)

VENDOR AND PURCHASER—PROTECTION FROM SECRET EQUITIES.

1. An innocent purchaser of real estate for value is protected against outstanding equities and secret trusts.

2. One who loans money to the holder of the legal title of real estate, and takes a mortgage upon such real estate to secure the same, is, to the extent of his claim, a purchaser of the land, and is entitled to the same protection from all secret equities of which he had no notice, at the time of taking the mortgage, as any other bona fide purchaser.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Dale.

Action by Peter Doye against Mollie Carey and William H. Twine. Judgment by default against Twine and in favor of Carey. Plaintiff brings error. Reversed.

Wisby & Horner, for plaintiff in error. Green & Strang, for defendant in error.

BURFORD, J. The plaintiff in error brought his action in the district court of

Logan county to obtain judgment upon a promissory note, and for the foreclosure of a mortgage upon certain real estate in the city of Guthrie. The note and mortgage were executed by one W. H. Twine, who held the legal title to the real estate at the time the mortgage was executed, and who was a party defendant in the cause. It is alleged in the petition that the defendant in error, Mollie Carey, claims some interest in the real estate junior to the mortgage lien, and she was made a party defendant to answer as to such interest. The defendant Twine made default, and judgment was rendered against him for the amount found to be due upon the note and mortgage. Mollie Carey filed her answer, in which she alleged that she settled upon the lots in controversy as a settler and occupant under the town-site laws of the United States, and was residing upon and claiming same at the date of the entry of the tract embracing said lots by the town-site trustees; that she had brought a suit to have Twine declared a trustee for her, and said cause was then pending; all of which was known to Doye at the time his mortgage was executed. A reply was filed to this answer, denying all the material allegations. Trial was had by the court, and judgment rendered in favor of the defendant Mollie Carey, and a decree entered canceling plaintiff's mortgage lien upon said real estate. From this judgment Doye appeals to this court.

Several errors are assigned, but we need notice but one. The evidence is in the record, and discloses the fact that there was absolutely no evidence or circumstances tending to show that Doye had any notice or knowledge that the defendant in error had or claimed any interest in said lots at the time he loaned the money and took his mortgage. The mortgagee testified that before he made the loan he required an abstract of title from Twine, which showed a deed from the town-site trustees to one Hubbell, and a deed from Hubbell to Twine, who held the legal title at the time his mortgage was executed; that he went and looked at the lots, and did not see the defendant in error, and did not know that any person other than Twine claimed any interest in the lots; otherwise he would not have made the loan. This testimony is not contradicted, and must be taken as conclusive. The evidence further shows that at the time Doye took his mortgage there were no proceedings pending affecting the title. Doye was an innocent purchaser for value to the extent of his mortgage debt, and was entitled to a foreclosure of his mortgage as against any equitable interest of Carey, of which he had no notice at time mortgage was executed. It is a settled principle that a mortgagee in good faith for value is entitled to protection against outstanding equities and trusts of which he had no notice at the time of taking mortgage. Jones, *Mortg.* §§ 458, 710; *Am. & Eng. Enc. Law*, p. 833. The learned judge who tried the case below was evidently

misled by admitting in evidence a judgment and decree in another cause between Mollie Carey and W. H. Twine, awarding her the title to said lots, to which proceeding Doye was not a party, and could not be bound thereby. This judgment was subsequently reversed by this court. *Twine v. Carey*, 37 Pac. 1096. The judgment of the district court is reversed, and cause remanded, with directions to proceed in accordance with this opinion.

DALE, C. J., not sitting, having tried the case below. BIERER, J., having previously been of counsel for Twine, not sitting.

(1 Kan.A. 355)

ROUSE v. REDINGER.

(Court of Appeals of Kansas, Southern Department, E. D. Sept. 6, 1895.)

RECEIVERS OF RAILROADS — LIABILITY FOR STOCK KILLED.

The act entitled "An act relating to the killing or wounding of stock by railroads," being chapter 94, Laws 1874, applies to receivers operating a railway under an appointment of a court of competent jurisdiction; and the same liability attaches to such receivers for the killing or wounding of stock in the operation of the railway as does to the company or corporation, the assignee or lessee of such railway company or corporation. *Rouse v. Harry* (Kan.) 40 Pac. 1007.

(Syllabus by the Court.)

Error from district court, Bourbon county; S. H. Allen, Judge.

Action by Peter Redinger against Henry C. Rouse, receiver of the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This action was commenced originally before William Margrave, a justice of the peace in the city of Ft. Scott, Bourbon county, Kan. The bill of particulars alleges that George A. Eddy and H. C. Cross had been appointed by the United States circuit court as receivers of the Missouri, Kansas & Texas Railway Company, and that the railway company owned the railroad running through Bourbon county, Kan., and on or about the 29th day of August, 1889, the plaintiff, Peter Redinger, was the owner of a red roan cow, of the value of \$75, and about that date the receivers, without any fault on the part of the plaintiff, ran over, against, and killed said cow, with their engine and cars, in operating said railroad, and at a place near Ft. Scott, in said county, on said railroad, where the railroad was not fenced, and where it was the duty of the defendants that said railroad should have been fenced; that more than 30 days prior to the filing of the bill of particulars the plaintiff, Redinger, notified the said defendants of the killing of the cow, and made demand for the payment therefor, which payment the receivers failed and refused to make,—and alleges that it was necessary for the plaintiff to employ attorneys to prosecute his suit, at an expense of \$75, and that

the attorneys' services were reasonably worth that sum, and demands judgment against the receivers of said railway company for the sum of \$150, with interest at 6 per cent. from August 29, 1889. Service was made on the agent in charge of the railway company's depot at Ft. Scott, Kan., in accordance with an order made by Judge Foster, of the United States district court for the district of Kansas. Trial was had before the justice of the peace, and judgment rendered for the plaintiff below. The case was taken to the district court on appeal, and there tried on an agreed statement of facts in words and figures as follows: "It is hereby agreed and stipulated that this case shall be tried upon the following facts, which are all of the facts in the case: (1) That the Missouri, Kansas & Texas Railway Company is a corporation, and legally organized and incorporated under and by virtue of the laws of the state of Kansas, and has been such corporation for more than fifteen years last past. (2) That the said Missouri, Kansas & Texas Railway Company now is, and for more than fifteen years last past has been, the owner of a line of railroad running into and through Bourbon county, Kansas, and during a large portion of said time said railroad company has been in active control and operation of said railroad line through said Bourbon county, Kansas. (3) That prior to November 1, 1888, in a certain action pending in the circuit court of the United States for the district of Kansas, wherein the Mercantile Trust Company of New York was plaintiff, and the said Missouri, Kansas & Texas Railway Company et al. were defendants, a suit to foreclose a mortgage theretofore executed by said company, which mortgage covered all of the property, rights, and franchises of said company, the defendants herein, Geo. A. Eddy and H. C. Cross were by Hon. David J. Brewer, the presiding judge of said court, duly appointed the receivers of the said Missouri, Kansas & Texas Railway Company. (4) That on November 1, 1888, the said Geo. A. Eddy and H. C. Cross, having been duly qualified as such receivers, took full and complete possession of the said Missouri, Kansas & Texas Railway Company, its property and franchises, including track, rolling stock, * * * engines, cars, etc. (5) That from and after November 1, 1888, the said Geo. A. Eddy and H. C. Cross, as such receivers, have been in the full and complete control and operation of said railway, its property, franchises, etc., and during all of said time have been operating said railway, for the carriage of freight and passengers, under the control of said circuit court of the United States for the district of Kansas, and were so operating said railway at the time of the injuries complained of by the plaintiff. (6) That on or about August 29, 1889, the employés of the receivers, while in the management and control of one of the trains, consisting of an

engine and passenger cars, on the said Missouri, Kansas & Texas Railway, and near the city of Ft. Scott, in Bourbon county, Kansas, and while in the operation of the same, run said engine and train of cars against and over one red cow, the property of the plaintiff herein, and thereby killed and destroyed said cow. (7) That said cow was of the value of seventy dollars, and was a total loss to said plaintiff. (8) That at the point where said cow was killed, and at the point where she got on the said right of way, said railroad track was not fenced with any fence whatever, but should have been fenced as required by chapter 94 of the Laws of 1874. (9) That more than thirty days prior to the commencement of this action the plaintiff demanded of B. N. Gilbert, the ticket and station agent of the receivers at the city of Ft. Scott, in said Bourbon county, Kansas, the full value of said cow, but that payment of the same was refused by said Gilbert. (10) That prior to the commencement of this action the plaintiff applied to the United States circuit court for the district of Kansas, and obtained the permission of said court to sue said receivers in the state court in this cause. (11) That in the prosecution of this action the plaintiff has been compelled to employ an attorney. (12) That the sum of sixty dollars is a reasonable attorney's fee for the prosecution of this action, if plaintiff is entitled to any judgment therefor in this cause. (13) That the employés of the receivers were not guilty of any negligence whatever in the operation of the train by the operation of which plaintiff's cow was killed. (14) That, in the estimate of attorney's fees in fact No. 12, ten dollars is estimated for the services in the United States circuit court, in obtaining its permission to sue the receivers in the state court in this cause. (15) That the receivers, personally, were not guilty of any negligence whatever in the killing of the plaintiff's cow." Judgment was thereupon rendered in favor of the plaintiff in the district court for the sum of \$136.60. Exceptions were taken by the defendants, and they filed their bill of exceptions, and bring the case into this court. Since the trial of the case in the district court the receivers George A. Eddy and H. C. Cross have both departed this life, and Henry C. Rouse was duly appointed receiver de bonis non by the United States circuit court, and said action has been revived in the name of said receiver de bonis non.

T. N. Sedgwick, for plaintiff in error. J. D. McCleverty, for defendant in error.

JOHNSON, P. J. (after stating the facts). This action is brought under the statutes of Kansas of 1874, entitled "An act relating to the killing or wounding of stock by railroads" (chapter 94, p. 143, Laws 1874):

"Section 1. Every railway company or corporation in this state and every assignee or

lessee of such company or corporation, shall be liable to pay the owner the full value of (and) every animal killed, and all damages to each and every animal wounded by the engine or cars of such railway, or in any other manner whatever in operating such railway, irrespective of the fact as to whether such killing or wounding was caused by the negligence of such railway company or corporation, or the assignee or lessee thereof, or not.

"Sec. 2. In case such railway company or corporation, or the assignee or lessee thereof, shall fail for thirty days after demand made therefor by the owner of such animal, or his agent or attorney, to pay such owner, or his agent or attorney, the full value of such animal if killed, or damages thereto if wounded, such owner may sue and recover from such railway company or corporation, or the assignee or lessee thereof, the full value of such animal or damages thereto, together with a reasonable attorney's fee for the prosecution of the suit, and all costs in any court of competent jurisdiction in the county in which such animal was killed or wounded.

"Sec. 3. The demand mentioned in section two of this act may be made of any ticket agent or station agent of such railway company or corporation, or the assignee or lessee thereof.

"Sec. 4. In all actions prosecuted under this act, it shall be the duty of the court, if tried by the court, or jury if tried by a jury, if the judgment or verdict be for the plaintiff to find in addition to their general findings for plaintiff the amount if anything allowed for attorney's fee in the case.

"Sec. 5. This act shall not apply to any railway company or corporation, or the assignee or lessee thereof, whose road is inclosed with a good and lawful fence, to prevent such animals from being on such road."

The only question involved in this case is, does this act apply to receivers who are operating a railroad in the state of Kansas under the orders and directions of a court of competent jurisdiction? It is claimed by counsel for the plaintiff in error that this act does not apply to receivers operating a railway under an appointment by a court of competent jurisdiction. The language is specific, and nothing is left to ambiguity or uncertainty. The statute, in terms, makes "every railway company or corporation in this state and every assignee or lessee of such company or corporation" liable, but does not extend the statute to receivers or individuals, unless such individual should be an assignee or lessee of a railway company or corporation. However much force there may be in the argument of counsel, the supreme court of Kansas has fully decided this question, in a decision made on the 6th day of July, the present year, in the case of *Rouse v. Harry* (Kan.) 40 Pac. 1007, in construing a statute of this state using the same language in relation to the liability of

a railway company for negligence of its employes, and the liability of a receiver under the statute; and, for the purpose of this opinion, it is only necessary to give the reason of the supreme court in the case of *Rouse v. Harry*, which, we think, is decisive of this case. Mr. Justice Allen, delivering the opinion of the court, says: "We now proceed to consider the most important question presented by the record in this case, namely, whether paragraph 1251 of the General Statutes of 1889 applies as well to receivers operating railroads as to railroad companies. The section reads: 'Every railroad company organized or doing business in the state shall be liable for all damages done to any employe of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employes, to any person sustaining such damage.' The trial court charged the jury that this section did apply in this case. It is contended with great earnestness, on behalf of the plaintiff in error, that this section of the statute does not, in terms, apply to receivers; that it gives a cause of action where none existed at common law; that it cannot be extended to embrace parties not included within its terms; that receivers are not railroad companies, but officers of the court, and cannot be held liable for injuries received by one employe through the negligence of another. The argument in support of this contention by the learned counsel for plaintiff in error is clear and forcible, and presents in all its strength, as it appears to us, that side of the question, and his position is sustained by decisions of the supreme court of Georgia and Texas under very similar statutes. It is contended that to include receivers is to interpolate, by judicial legislation, that which the legislature has omitted from the statute. Many authorities are cited denying to the court any such power. It is also urged that this court, in the case of *Beeson v. Busenbark*, 44 Kan. 670, 25 Pac. 48, has practically decided this question in accordance with that view. That was an action against *Beeson & Sheldon*, who were contractors engaged in the construction of a railroad. They used engines and cars for the transportation of materials, and other purposes connected with the construction of the road, and the plaintiff in that case was injured while employed in cleaning the ash box of an engine. The defendants were not a corporation, but a firm composed of private persons, and were not engaged in the operation of a railroad as common carriers, and it was held that they did not fall within the statute. We are entirely satisfied of the correctness of the decision in that case. The distinction between contractors employed in the construction of a railroad, or of some portion of a road, and a railroad company operating under a charter from the state, as common carriers of freight and passengers, is broad and well marked. The position of a receiver, how-

ever, is, in many respects, anomalous. He is not in any just sense the owner of the property, nor is he personally interested, except in the compensation he receives for his services. On the one hand, he represents the court by which he was appointed, and the property in his charge is, in some sense, at least, in the custody of the law. On the other hand, he represents the interest of the corporation and also of its creditors. The business which he carries on is public, so far as railways are highways open to the public; it is private, so far as the profits derived from it are concerned. It is somewhat anomalous for courts, through the instrumentality of receivers, to conduct private business for profit; yet the public exigencies and necessities for the continued operation of the great public thoroughfares of the country, no matter what the conflicting rights and interests of stockholders and creditors may be, have been regarded as of such force as to require the continued operation of railroads, through the instrumentality of receivers, while the rights of parties litigant are being adjusted through the medium of the courts. There is no transfer of interest from the corporation to the receiver, but only a transfer of management. The business is carried on, so far as owners and creditors are concerned, for the purpose of securing a profit. This profit goes into the hands of the receivers, to be applied in accordance with the principles of law, and paid to the parties justly entitled to it. The surplus, if any, over operating expenses, goes exactly where it would go if the business of the company was honestly conducted by its officers. There is still the same necessity for a multitude of employes to keep its properties in repair and working order, to operate its train service, to collect and disburse its revenues, to keep its accounts, and to protect its interests. Receivers must, in the first instance, always assume control and generalship over the army of workers they find in the employ of the company. While they have the power to employ and discharge, the general rule is that the force they find already organized is retained and used, except where found incompetent and inefficient. The receiver becomes, in effect, the general manager, charged with the general supervision of the interests of the company, not through election by the stockholders or board of directors, but by appointment of the court. He stands charged with the performance, then, of the corporate functions of the railroad company. He causes trains to be run, and freight and passengers, mails and express matter, to be transported, for hire. He collects all the revenues derived from the service. From them he pays all the employes for their services, and discharges all other operating expenses. In substance, then, the business of a railroad corporation in the hands of a receiver moves on as though under the direction of a general man-

ager, to accomplish the same public purposes, to perform the same services for its patrons, to obtain for its bondholders and stockholders the same revenues, as before. The receiver, when acting in pursuance of and in obedience to the orders of the court, incurs no personal liability, and has no personal interest in the profits or losses of the business. The substance, then, of the whole matter, is that the railroad corporation is neither dead nor dormant. It is, in fact, alive, active, and performing its proper functions, as much as before. Its properties are in existence, and utilized for the same purposes as ever. Does, then, the mere shadow of a receivership operate to completely transform the relations its employes sustain to each other and to the assets of the company? For the life and body of a corporation are its franchises, its business, and its property. It is not a sentient being, and has no tangible or personal existence. Suit against a receiver is, in form, against an individual; but in substance it is against the corporate property in his charge. It is, in all essential particulars, in substance, against the corporation itself. We think this is the view best sustained by the authorities, and most in consonance with reason and sound principles. 'It is not the words of the law, but the internal sense of it, that makes the law; and our law, like all others, consists of two parts, viz. of body and soul. The letter of the law is the body of the law, and the sense and reason of the law are the soul of the law. *Quia ratio legis est anima legis.*' *Intoxicating Liquor Cases*, 25 Kan. 703, citing *Eyston v. Studd*, 2 Plow. 465. The case of *Trust Co. v. Thomason*, 25 Kan. 1, was an action against the trust company, by an employe, to recover damages under the same section of the statute now under consideration; and, although the question as to the applicability of the statute to the case of a trustee operating the road is not much discussed in the opinion, the principle on which a liability was sustained in that case is very similar to that under consideration in this. The Union Trust Company was not a railway company, and therefore not within the letter of the statute; but it was operating a railroad, and the liability, which could arise only by force of the statute, was maintained in that case. In the case of *Hornsbey v. Eddy*, 5 C. C. A. 560, 56 Fed. 461, the identical question now before us was passed on by the United States circuit court of appeals for the Eighth circuit. The statute was held to apply, notwithstanding the Georgia and Texas cases, which are cited in the opinion. The case of *Trust Co. v. Thomason* was regarded as, in effect, a construction of the statute in favor of the liability of a receiver. This decision was on a demurrer to the petition. The case was afterwards tried, and a verdict and judgment rendered against the receivers for \$15,000, the case again taken to the court of appeals (*Rouse v. Horns-*

by, 14 C. C. A. 377, 87 Fed. 219), and the judgment affirmed. Judge Caldwell, in delivering the opinion, says: 'An elaborate brief is filed by the plaintiffs in error in support of the contention that the section of the Kansas statute referred to does not apply to receivers operating a railroad, and that, as to them, the fellow-servant rule as to the common law still obtains. This question was carefully considered when the case was first here. We are entirely satisfied with the result then reached.' Although the construction placed on the statute of this state by the federal court is not binding on us, the views of a court of such high character are entitled to most respectful consideration. The Iowa statute, which, in terms, applies not only to the corporation, but to lessees and other persons owning or operating railroads, was held by the supreme court of that state, in the case of Sloan v. Railway Co., 62 Iowa, 728, 18 N. W. 331, to include receivers. In the case of Railway Co. v. Cox, 12 Sup. Ct. 905, the supreme court of the United States held that, as the statutes of Louisiana authorized an action against the receivers of a railway company for wrongfully causing the death of a brakeman, an action might be maintained in Texas against the receivers for acts done in Louisiana, notwithstanding the decision of the supreme court of Texas in the case of Turner v. Cross, 18 S. W. 578. For other cases bearing more or less directly on this question, see Little v. Dusenberry, 46 N. J. Law, 614; Farrell v. Trust Co., 77 Mo. 477; Klein v. Jewett, 26 N. J. Eq. 476; Murphy v. Holbrook, 20 Ohio St. 137." The judgment of the district court is affirmed. All of the judges concurring.

(1 Kan.A. 374)

ATCHISON, T. & S. F. R. CO. v. O'MELIA.
(Court of Appeals of Kansas, Southern Department, E. D. Sept. 6, 1895.)

CONTINUANCE—ABSENCE OF WITNESS—CONFLICTING EVIDENCE—QUESTION FOR JURY
—INJURY TO PASSENGERS.

1. When a party in good faith complies with the provisions of paragraph 4412, Gen. St. 1889, and has used due diligence to procure the testimony of an absent witness whose evidence is material, a continuance should ordinarily be granted; but the matter of continuance on account of the absence of a witness whose testimony is material is within the sound discretion of the trial court, and a reversal of a judgment will not be granted for a refusal to continue on account of the absence of a witness unless there has been a clear abuse of discretion. We cannot say that there has been such abuse of discretion in the denial of the motion for a continuance in this case as will call for a reversal of the judgment.

2. When there is some evidence on each material fact tending to prove the claim of plaintiff for damages, and where there is great conflict in the evidence, the trial judge should submit the facts to the jury for their verdict, under proper instructions.

3. The cause of action in this case and the cause of action in the case of Railroad Co. v. Hughes (decided by the supreme court on July

6, 1895) 40 Pac. 919, both originated at the same time, and both out of the same failure of the train on which the parties were passengers to stop at its station at Peterton. Each party leaped from the moving train. Hughes was killed, and suit was brought by his widow for the recovery of damages for wrongfully and negligently causing his death. O'Melia was injured, but survived. The cases were both tried in the same court, before the same judge, one on the 13th day of November and the other on the 14th of November. The same instructions were given in both cases in relation to the question of negligence. Hughes recovered judgment for over \$2,000, and the case was decided by the supreme court. O'Melia recovered less than \$2,000, and this case was duly certified down by the supreme court to the appellate court for its decision. The construction put upon the instruction of the trial court by the supreme court followed.

(Syllabus by the Court.)

Error from district court, Osage county; William Thomson, Judge.

Action by James O'Melia against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

This was an action to recover damages for personal injury alleged to have been sustained by James O'Melia, while a passenger on one of the Atchison, Topeka & Santa Fé passenger trains, while being conveyed from Scranton, Kan., to Peterton, on the 20th day of March, 1890, at about 2 o'clock a. m.

April 5, 1890, plaintiff filed his petition in the office of the clerk of the district court of Osage county, Kan., to which petition the defendant 'nterposed a demurrer, and at the November term, 1890, the demurrer was sustained, and the plaintiff was given leave to file an amended petition. Plaintiff, for his amended petition, alleges the following facts as his cause of action: "(1) The Atchison, Topeka & Santa Fé Railway Company is a corporation duly organized under the laws of the state of Kansas. That the plaintiff is sixty years of age; a coal miner and laborer by occupation. Had always enjoyed the best of health, and was well and stout, and had been all his life until he received the injuries complained of in his petition. That he could always do a good day's work before he received the injuries complained of. That he had been engaged as a coal miner for several years in the coal mines in Osage county, Kansas, and he was so engaged at the time he received the injuries. He further says: That he was in the town of Scranton, Osage county, Kansas, on the 19th day of March, 1890, and he, with others, desired to go by rail from Scranton to Peterton, and that on said day he purchased one first-class passenger ticket of defendant's ticket agent at Scranton, Kansas, and on the morning of the 20th of March, 1890, at one o'clock a. m., he boarded the defendant's regular west-bound passenger train westward to the town of Peterton, arriving at Peterton at about two o'clock a. m. That at the time when the train arrived at the station in Peterton there was no light in the ticket office, nor elsewhere about the station.

That the plaintiff was in company with several others, who also had tickets from Scranton to Peterton on the same train. That the conductor took up ticket of plaintiff, as well as tickets of his companions who were with him on the train. When the train came near the station of Peterton, the same being a regular station on defendant's line of road, the conductor in charge of said train gave said plaintiff, James O'Melia, and his companions who were with him, to understand and be informed that said train would not stop still at the station, or elsewhere in Peterton, but would slacken its speed, so that plaintiff could safely alight from and leave said train at the said station of Peterton; this being a train advertised and scheduled to stop at said station, and accustomed so to stop. That the conductor came to the plaintiff, and requested him and commanded him to be quick, as he, the plaintiff, must get off; and requested and made the plaintiff hurry, and invited, requested, and commanded him to get off. That the train was not stopped at the station of Peterton. That the train was slowed up, and just as the plaintiff was in the act of leaving the train the conductor gave the signal with his lantern, and the speed of the train was greatly increased, and the plaintiff, as he left the train, was thrown down and hurt. That at the time of the plaintiff's leaving the train, before the sudden start was given it, the speed of the train was not apparently or obviously unsafe to the plaintiff; and, the plaintiff at the time believing from the assurances, invitations, and commands of the conductor that the same was safe for him to alight, in compliance with the order, command, solicitation, and request of said conductor, this plaintiff and all his said companions did leave said train at Peterton, as commanded and instructed so to do by said conductor, who was in charge of said train as aforesaid. And this plaintiff says that he had had little or no experience in traveling on railroad cars, and had had no experience whatsoever in alighting from a moving train, and, in consequence of said want of knowledge and experience on his part, he depended and relied wholly on the command and direction to him by the conductor to get off of said train, and at the time he did leave and get off of said train said conductor then and there assured him that he could do it in perfect safety; that said statements were made to said plaintiff by said conductor, and were made to his companions, in his presence and hearing. And this plaintiff further says that his eyesight and hearing is and was somewhat impaired on account of age, which was also known at that time to said conductor, and that said plaintiff says that the said conductor well knew that the plaintiff and his companions were desirous to and intending to get off said train at the station of Peterton, and were alighting from and

getting off said train; that said train was running at an unsafe and dangerous rate of speed for passengers, and especially of the age of this plaintiff, to alight and get safely off said train, when plaintiff and his companions were alighting and did alight from said train, but the speed of said train was unknown to said plaintiff, but was well known to said conductor; that said plaintiff and his companions got off said train on the depot platform at the station of Peterton at two o'clock a. m. on the 20th day of February, 1890, and it was very dark at that time in the depot at Peterton, and also on the platform of said depot; that said plaintiff was commanded and solicited to get off said train at the time he did by the conductor in charge of said train, and that in getting off said train this plaintiff used due care and diligence in all respects, but, on the contrary, the defendant was grossly negligent in not stopping its train at the platform, or elsewhere, in Peterton, and in not having any lights lit in the depot or elsewhere, or on said platform, and was further negligent by said conductor commanding, soliciting, and requesting this plaintiff to get off said train when the same was in motion, and that said defendant company was further grossly negligent by reason of said conductor telling this plaintiff that the plaintiff could alight from said moving train in safety, which statement so made by said conductor was believed by this plaintiff, and relied on and acted on by him; that when said plaintiff alighted on said platform he was thrown down on said platform, and was permanently injured in his arm, legs, and spine, and head; that he has suffered great bodily injury, and has suffered great pain, and that said injuries are permanent, incurable, and lasting, to the plaintiff's damage in the sum of \$10,000, and prays damages for that sum." To this amended petition the defendant railroad company filed its answer in the following words: "Comes now the defendant in the above-entitled cause, and for answer to plaintiff's amended petition filed in said cause says that it denies each and every, all and singular, the allegations in said amended petition contained."

Upon these issues the parties proceeded to the trial of said cause before a jury, and during the trial there were several objections and exceptions taken to the ruling of the court in the admission of testimony and in the refusing to permit certain other testimony to be given. After the evidence had all been concluded, and at 4:30 p. m., the defendant asked that the case be continued until the next morning at 8:30 a. m., and filed its affidavit showing that it was taken by surprise by the absence of William W. Hopkins, a competent witness for the defendant, and to enable the defendant to procure the personal presence and attendance of said Hopkins as a witness for defendant; and in support of said motion defendant filed an affidavit in which

it set out that the witness Hopkins resided at Osage City, in Osage county, and about eight miles distant from where the court was being held; that the defendant had only learned the day previous that the said Hopkins would be a material witness on the trial of said cause, and that as soon as it was learned that Hopkins would be a material witness the attorney representing the defendant railroad company filed its praecipe and caused a subpoena to be issued for said witness, and placed in the hands of the sheriff to be served; that the attorney representing the defendant on the next day saw the sheriff, and was informed that the subpoena had been served, and was also informed by persons who were acquainted with the witness Hopkins that they had seen Hopkins in the town of Lyndon, the county seat of Osage county, during the day on which the case was being heard, but when the time came to call the said Hopkins he was not to be found, and not until after the evidence was closed did the counsel for the railroad company discover that Hopkins was not present in town in obedience to the subpoena; that Hopkins was in town, and had been there on business; that the service of the subpoena had been by leaving a copy at his residence at Osage city after Hopkins had departed from his home, and Hopkins knew nothing of the fact that he had been served as a witness until he returned home, in the evening after the trial was over. The affidavit sets forth such state of facts that shows that Hopkins' testimony would have been material on the trial of the cause, but the court overruled the motion to continue the case until the next morning, to enable counsel to procure the presence of the said witness, and required counsel to proceed with the argument of said case, commencing at 7 o'clock in the evening and completing the argument during the night. To the action of the court in refusing to continue the case until the next morning, attorney for the railroad company duly excepted. After the testimony was closed, and the court had denied the motion of the railroad company to continue, the court proceeded to instruct the jury, in writing, on the law in relation to said case, stating to the jury generally the issues presented to them for trial, on whom rests the burden of proof, giving to the jury, also, the definition of the phrases "ordinary care," "slight negligence," and "gross negligence." The third paragraph of the instructions of the court to the jury is as follows: "The court instructs the jury that, while a person is bound to use reasonable care to avoid an injury, yet he is not held to the highest degree of care and prudence of which the human mind is capable; and to authorize a recovery for an injury he need not be wholly free from negligence, provided his negligence is slight, and the other party be guilty of gross negligence in comparison therewith, as defined in this instruction." (4) "The court further instructs the jury that if they believe from the evidence that the plain-

tiff was exercising ordinary care and prudence at the time in question, and was guilty of only slight negligence which contributed to the injury, and that the conductor of the train, being a servant of the defendant, was wanting in the care and prudence which a very careless man would ordinarily exercise under the same circumstances, then the defendant was guilty of gross negligence; and if the jury further believe from the evidence that such gross negligence was the cause of the injury in question, as charged in the petition, and that the negligence of the plaintiff was but slight when compared with the negligence of the defendant, then they should find for the plaintiff." (5) "You are instructed that in determining the question of negligence in this case you should take into consideration the situation and conduct of both parties at the time of the alleged injury, as disclosed by the evidence, and if you believe from the evidence that the injury complained of was caused by the negligence of defendant's servants, as charged in the petition, and without any greater want of care and prudence on the part of the plaintiff than was reasonably to be expected from a person of ordinary care and prudence in the situation in which he found himself placed, then the plaintiff is entitled to recover." (7) "You are instructed that, in determining the question of negligence in this case, you should take into consideration the conduct of both parties at the time of the alleged injury, as disclosed by the evidence, and if you believe that the injury complained of was caused by the negligence of the defendant's servants, as charged in the petition, and without any greater want of care and prudence on the part of the plaintiff than reasonably to be expected from a person of ordinary care and prudence in the situation in which he found himself placed, then the plaintiff was entitled to recover." (8) "The court instructs the jury that though they believe from the evidence that the defendant was guilty of negligence upon the occasion in question, and that negligence contributed to the injury complained of, yet if the jury further believes from the evidence that the plaintiff was also guilty of an equal or nearly equal degree of negligence, directly contributing to the injury, and without which it could not have occurred, then the jury should find for the defendant." (9) "In this case, if you believe from the evidence that the plaintiff and the agents and servants of the railway company were guilty of gross negligence, contributing to the injury complained of in this action, then you should find in favor of the defendant." The defendant requested the court to give the following instructions to the jury: "I charge you that if the plaintiff was guilty of any want of ordinary care and diligence, however slight, which contributed directly to produce the injury of which he complains, then he cannot recover in this case, and your verdict should be for the defendant." The court refused to give this instruction.

and the defendant duly excepted. After the case had been argued the jury returned into court with their verdict in favor of the plaintiff for \$650, and made the following special findings: "Q. 1. Is it not a fact that on the morning of the 20th of March, 1890, the Atchison, Topeka & Santa Fé Railroad passenger train on which plaintiff was being carried, and which said plaintiff had boarded at Scranton, in Osage county, Kansas, did come to a full stop at Peterton station on said road, in said county? A. No. Q. 2. Was not said plaintiff at Mrs. Gibson's, in Scranton, a place where intoxicating liquors were kept, for some hours before he boarded the passenger train of defendant at Scranton? A. No. Q. 3. Was not Alex O'Melia, James Hughes, grandson of plaintiff, John Hughes, and plaintiff all at Mrs. Gibson's place in Scranton for some hours before they boarded the train of defendant at Scranton for the purpose of going to Peterton? A. No. Q. 4. If you find that the defendant or the employés of defendant company were negligent, and that the injury of the plaintiff was caused by the negligence of defendant or its employés, please state what such acts of negligence were. A. (1) Neglect to stop the train; (2) neglect to attend passengers who arrive at their destination in the dark hours, and light the same until their embarkation is safely consummated. Q. 5. State in what the negligence of the defendant or defendant's employés consisted, if you find that the injury of plaintiff was caused by fault of defendant or defendant's employés. A. (1) Neglect to stop the train; (2) neglect on part of the defendant to attend plaintiff with light in his departure from the train. Q. 6. Were the mental faculties of plaintiff free from the influence and effect of alcoholic liquors at the time he was injured at Peterton on the morning of March 20, 1890? A. Yes. Q. 7. Was not plaintiff under the influence of intoxicating liquors at the time of his injuries at Peterton on the morning of March 20, 1890? A. The testimony does not establish the fact of said influence. No." Defendant filed motion for new trial, setting forth 11 of the statutory grounds for new trial. The motion was overruled, and judgment rendered, according to the verdict of the jury, for \$650. The railroad company makes a case for the supreme court, and brings the case here for review, and alleges various errors on the part of the court.

A. A. Hurd, George R. Peck, Robert Dunlap, W. Littlefield, and O. J. Woods, for plaintiff in error. Henry B. Hughbanks, Joseph G. Waters, and Frank A. Hay, for defendant in error.

JOHNSON, P. J. (after stating the facts). The first error complained of was the overruling of the motion of the railroad company for a continuance of the case from 4:30 p. m. until the convening of the court the next morning, to enable the defendant below to

procure the evidence of W. W. Hopkins, who resided in the county, within eight miles of where the court was being held. The affidavit of the attorney for the railroad company sets out fully all the facts in relation to the efforts made to procure the presence of the witness and the materiality of his testimony, and that he would be able to procure the attendance of the witness at the convening of the court the next morning. Where a party in good faith complies with the requirements of paragraph 4412, Gen. St. 1889, and has used due diligence to procure the testimony of an absent witness whose evidence is material, a continuance should ordinarily be granted; but the matter of continuance on account of the absence of a witness whose testimony is material is within the sound discretion of the trial court, and a reversal of a judgment will not be granted for the refusal to continue on account of the absence of witnesses unless there has been a clear abuse of such discretion. We cannot say that there has been such abuse of discretion in the denial of the motion for a continuance in this case as will call for a reversal of the case. This motion, coming as it did near the usual hour for adjournment of the court for the day, and the party only desiring until the convening of the court next morning, ought to have appealed strongly to the court in granting the short time asked to secure witness.

The second error complained of in the brief of counsel for the plaintiff in error is that the judgment was rendered for O'Melia when, under the evidence and the law, the verdict and judgment should have been for the railroad company. We have examined the evidence in this case very carefully, and are unable to say as a matter of law, under all the evidence, that the court should have directed the jury to return a verdict in favor of the railroad company. There is great conflict in the evidence, which it is unnecessary for us to point out or discuss in this opinion, but it was a question of fact as to whether the railroad company was liable for the injury sustained by O'Melia. There was some evidence on each material fact tending to prove the plaintiff's claim for damages, and it was the duty of the trial judge to submit the facts to the jury under proper instructions.

The third error complained of by the plaintiff in error is in the instructions given by the court to the jury. The charge of the court is quite full, and contains 19 separate paragraphs. The particular instructions claimed to be erroneous are found in the third, fourth, eighth, and thirteenth paragraphs. It is insisted by counsel that these instructions lay down the doctrine of comparative negligence, and ignore entirely the rule of contributory negligence. The writer of this opinion is disposed to agree with counsel of the plaintiff in error, and is of the opinion that these instructions are on the border line

of comparative negligence, and that they seem to ignore the rule of contributory negligence. The doctrine of comparative negligence has been repudiated by the supreme court of this state. *Railroad Co. v. Peavey*, 29 Kan. 180; *Howard v. Railway Co.*, 41 Kan. 408, 21 Pac. 267; *Railway Co. v. Morgan*, 31 Kan. 77, 1 Pac. 298. Beach, in his work on *Contributory Negligence* (section 26), says: "The doctrine of comparative negligence, being so entirely at variance with the accepted rule of law concerning contributory negligence, has very naturally provoked much sharp criticism, and the courts of other states repudiate it with emphasis." In the case of *O'Keefe v. Railway Co.*, 32 Iowa. 467, Cole, J., delivering the opinion of the court, says: "The well-established law of this state is that in an action to recover damages for the negligent act of the defendant the plaintiff will not be entitled to recover if his own negligence contributed directly to the injury. In other words, this court recognizes and applies the doctrine of contributory negligence, and not the doctrine of comparative negligence. The latter doctrine obtains only in Illinois and Georgia, while the former obtains in the other states." In the case of *Railway Co. v. Jones*, 95 U. S. 442, Justice Swayne, delivering the opinion of the court, says: "One who by his own negligence has brought the injury upon himself cannot recover damages for it. Such is the rule of the civil and common law. The plaintiff in such cases is entitled to no relief; but where the defendant has been guilty of negligence also in the same connection the result depends upon the facts. The question in such case is (1) whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened." We are met in this case with the approval of these instructions by the supreme court in the case of *Railway Co. v. Hughes* (decided by the supreme court of Kansas on July 6, 1895) 40 Pac. 919. The cause of action in both of these cases originated at the same time, and each happened on account of the failure of the railroad company to stop its train at the station of Peterton, and each of the parties leaped from the moving train. Hughes was killed, and suit was brought by his widow to recover damages on account of the wrongful and negligent act causing his death. O'Melia was injured and survived, and brought this action for the injuries sustained. Both cases were tried in the same court, before the same judge. This case was tried on the 13th day of November, 1890, and the Hughes Case on the 14th day of November, and the same instructions were given in each case, so far as they related to the question of negligence. Hughes re-

ceived over \$2,000 damages, and his case was retained in the supreme court. In the case of O'Melia the judgment was for less than \$2,000, and was duly certified by the supreme court down to this court for its decision, and we feel bound to adopt the construction put upon the charge of the court by the supreme court. Johnston, J., delivering the opinion of the court, says: "It is next insisted that the court erred in its instructions to the jury by requiring the application of the rule of comparative negligence, in its instruction in regard to gross negligence, and in other respects in the giving and refusing of instructions. The court in its charge stated the rules which govern where there is mutual or concurring negligence. It also recognized different degrees of negligence, and, in doing so, to some extent seemed to place the gross negligence of the company against the slight negligence of the deceased. Evidently, the trial court had in mind some of the decisions of this court where it is held that a slight inattention to duty, which is not the proximate cause of the injury, does not bar a recovery for injury resulting from the negligence of another. Although some of the language employed was objectionable, it is clear that the court did not indorse the doctrine of comparative negligence, nor give the jury to understand that, if Hughes was guilty of ordinary negligence contributing to his death, there might be a recovery, because the company was guilty of greater negligence. The passenger is required to exercise ordinary care, and his failure to exercise the highest or extraordinary care will not preclude a recovery for an injury caused by the gross or ordinary negligence of the railroad company. It is conceded that extraordinary care is not required of a plaintiff who brings an action of negligence, and that slight negligence on his part will not defeat a recovery. In the case of *Railway Co. v. Peavey*, 29 Kan. 180, cited by plaintiff in error, it is said that: 'It is settled in this state that a party may recover for injuries done to him or his property caused by the negligence of another, even if his negligence is slight.' While this view was adopted, and degrees of negligence were recognized, at the same time the court plainly instructed the jury, and kept it before them throughout the charge, that, if Hughes failed to exercise ordinary care and prudence in jumping from or leaving the train, there could be no recovery for his death. Taking all the instructions together, we think the jury was not misled by the language of the court which is complained of, and that, under the decisions, it cannot be held that prejudicial error was committed in charging the jury as to the care required of the company and of the deceased. *Railway Co. v. Rollins*, 5 Kan. 107; *Sawyer v. Sauer*, 10 Kan. 466; *Railway Co. v. Pointer*, 14 Kan. 37; *Railway Co. v. Young*, 19 Kan. 488; *Railway Co. v. Richardson*, 25

Kan. 301; *Railway Co. v. Peavey*, 29 Kan. 170; *Railway Co. v. Henry*, 36 Kan. 505, 14 Pac. 1. The testimony which was introduced warranted the court in stating the rule of gross negligence to the jury, and, after an examination of the entire charge, we are satisfied that the remaining objections to the rulings upon the instructions given and refused are not substantial, nor can error be predicated on them."

Plaintiff in error insists that, under the special findings of facts of the jury, it appears that there was no negligence on the part of the railroad company and its employees in charge of the train. Substantially the same findings of facts were made in the *Hughes Case*, just referred to, and the supreme court sustained the judgment of the district court over these objections. The court, in relation to the special findings, says: "Some objections are made to the answer given by the jury to the special question submitted, but we find nothing substantial in them." We think there was testimony to sustain the findings that were made, and we can see no such inconsistency in the findings as will justify a reversal. The judgment of the district court is affirmed. All the judges concurring.

(4 Ariz. 326)

TERRITORY v. BLEVINS.

(Supreme Court of Arizona. April 30, 1895.)
BRANDING ANIMALS OF ANOTHER—INDICTMENT—SUFFICIENCY.

An indictment under Pen. Code, par. 969, making it unlawful for any person to mark with his brand any animal belonging to another, with intent to convert the same to his own use, which fails to allege defendant's intent to convert the animal, is demurrable.

Appeal from district court, Gila county; before Justice Owen T. Rouse.

Henry Blevins was convicted of placing his brand on the calf of another, and appeals. Reversed.

Kibbey & Israel, for appellant. E. J. Edwards, for appellee.

BETHUNE, J. On the 28th day of October, 1894, defendant and appellant was accused of a felony under an indictment, the charging part of which is as follows: "Henry Blevins is accused by the grand jury of the county of Gila, territory of Arizona, duly impaneled and sworn, by this indictment, found this 28th day of October, 1894, of the crime of felony, committed as follows: The said Henry Blevins, on or about the 1st day of August, 1894, and before the finding of this indictment, at the county of Gila, territory of Arizona, did willfully and unlawfully and feloniously one certain red and white bull calf, an animal of the value of five dollars, and the property of Nick Egan, brand with a certain LL brand, such LL brand being then and there the brand of him, the said Henry Blevins, and not the recorded brand of him, the said Nick Egan,

the owner of said bull calf." Defendant demurred to this indictment on the grounds that it does not state facts sufficient to constitute a crime against the laws of the territory, and that it does not comply with paragraph 969 of the Revised Statutes of the Penal Code of Arizona, and it is therefore insufficient in law. Paragraph 969 of the Penal Code of this territory, under which this prosecution was brought, is as follows: "Any person who shall brand or mark, or cause to be branded or marked, with his brand or any other brand not the recorded brand of the owner, any animal being the property of another, or who shall efface, deface or obliterate any brand or mark upon any animal with intent to feloniously convert the same to his own use is punishable in the territorial prison not less than one year nor more than ten years, and shall also be liable to the owner of such animal for three times the value thereof: and in no case shall the payment of the penalty herein mentioned entitle the person so branding, defacing or obliterating a brand to the property in the animal so branded, or upon which the brand was effaced, defaced or obliterated; but such animal shall be surrendered to the proper owner." The demurrer of defendant was overruled, and he was convicted, and appealed to this court. The demurrer should have been sustained, as the indictment failed to state one of the essential elements of the offense to punish which section 969, Pen. Code, was enacted, to wit, the intention of defendant to convert the animal branded to his own use. Judgment reversed and cause remanded, with instructions to the lower court to sustain the demurrer to the indictment.

BAKER, C. J., and HAWKINS, J., concur.

STATE v. WHITE.

(Supreme Court of Washington. Jan. 14, 1895.)
HOMICIDE—MISCONDUCT OF COURT—INSTRUCTIONS.

1. The court sustained an objection to a question put to a witness by counsel for the defense in a murder trial, without waiting for the counsel to support it; and thereupon words passed between the court and counsel, resulting in the court ordering counsel to be fined, and stand committed to jail till the fine was paid. *Held* not sufficient ground for a new trial. Per Hoyt and Scott, JJ., dissenting.

2. Where the evidence showed that one charged with murder did not do the killing, but abetted it, it was not error to charge that, if the killing was shown to have been the act of defendant, then such killing was murder, unless circumstances were shown justifying it, without a qualification that the kind of murder presumed from the mere fact of homicide with a deadly weapon is murder in the second degree. Per Hoyt and Scott, JJ., dissenting.

Dissenting opinion. For majority opinion, see 39 Pac. 160.

HOYT, J. (dissenting). I am unable to agree with the conclusions of the majority of the court, as stated in the foregoing opinion.

There are only two of the reasons for reversal that I think of sufficient importance to require attention. One of these is the action of the court in imposing a fine upon counsel for defendant during the progress of the trial. I agree with what is said by the majority as to the impropriety of the proceeding. There is nothing disclosed by the record sufficient to justify the court's action in that respect. On the contrary, if the facts stated therein were all that induced such action, it was entirely unwarranted. It does not follow, however, that the people of the state should be put to the expense of a retrial of the cause. It does not sufficiently appear that it was prejudicial to the defendant to warrant a reversal. In my opinion such action, instead of injuring the cause of the defendant with the jury, would have a tendency to excite their sympathy in his behalf.

The other alleged error as to which I desire to say a word is the one founded upon instruction No. 10. In my opinion this instruction stated the law. An instruction similar to this, only that it stated that the presumption would be that it was murder in the "second degree," was sustained by this court in the case of *State v. Payne*, cited in the foregoing opinion. If it was "murder in the second degree" it was "murder," and the instruction stated only a fact deducible from our former decision. It is claimed, however, that the jury might have assumed that the facts stated would warrant the presumption that murder in the first degree had been committed. If the instruction stood alone it might have been so construed, but taken in connection with the other instructions it could not. Such other instructions clearly defined murder in the first degree, and such definition, compared with what was said in the instruction under consideration, so limited and qualified it that it was not possible that the jury could have been misled thereby. An instruction identical with this one was sustained by the supreme court of the state of Missouri in *State v. Evans*, 65 Mo. 574, and I am content to follow the authority of that learned court, especially when, under all the circumstances, I am satisfied the defendant could not have been injured by the instruction. The evidence introduced upon the trial satisfies me that no other verdict could have been rightfully rendered. Such being the fact, the judgment should not be reversed unless it appeared from the record that error had been committed of such a nature as to have probably tended to the injury of the defendant.

SCOTT, J., concurs.

FARWELL, OZMUM, KIRK & CO. v. CASHMAN et al.

(Supreme Court of Montana. July 22, 1895.)

PARTNERSHIP—RETIRED MEMBER—NOTICE.

In order to exempt a retiring member of a firm from liability for subsequent dealings

of the firm with those who dealt with it, prior to his withdrawal, with knowledge of his membership, notice, actual or constructive, of his withdrawal must be brought home to such persons.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by Farwell, Ozmun, Kirk & Co. against J. E. Cashman and others. There was a verdict for defendants, and from an order granting a new trial defendant Talbott appeals. Affirmed.

M. M. Lyter, for appellant. Samuel Stephenson, for respondent.

PER CURIAM. Action for goods sold and delivered by plaintiff to defendants between December 9, 1891, and January 12, 1892. The defendant Talbott answered for himself alone, denying that the defendants were co-partners, and denying that he was indebted to plaintiff in the sum alleged or at all. The case was tried to a jury. The testimony of plaintiff was that the goods had been sold and delivered to defendants in December, 1891, and January, 1892, as alleged; that the defendant Talbott was a member of the firm of J. E. Cashman & Co., and formally withdrew therefrom by an instrument in writing, whereby he sold his interest to Cashman, on November 23, 1891; that the plaintiff sold the goods sued for to the firm upon the strength of the fact that Talbott was a member of the firm; that plaintiff had had other previous dealings with said firm while defendant Talbott was a member thereof. In September, 1891, the firm of J. E. Cashman & Co. notified plaintiff that it was made up of J. E. Cashman, G. W. Talbott, and S. Allen, and stated to plaintiff that the assets of the firm amounted to over \$10,000, with liabilities not to exceed \$1,000. Plaintiff never had any knowledge of any kind brought to it of the dissolution of the firm until long thereafter. There was no denial by the defendant of the fact that he had not notified the plaintiff of the dissolution of the firm. The court instructed the jury, in part, as follows: "Where a person has had dealings with a firm (former dealings), it is the business of the party who retires to bring notice to the parties with whom he has dealt, and in such a case the notice must be brought home to the dealer directly, or it must appear that facts came to the knowledge of the dealer in such a way as to advise him, or give him reason to believe, that the dissolution had taken place, and that the party had retired from the firm." The jury rendered a verdict for the defendants. On motion of plaintiff, the court granted a new trial. From this order the defendant Talbott appeals.

The district court granted the motion for a new trial upon the ground that there was no evidence upon the part of the defendants showing that the notice was ever brought home to the plaintiff in this case of the fact of the dissolution of the firm of J. E. Cash-

man & Co., but, on the contrary, the testimony showed that plaintiff had never received any notice of the dissolution thereof. There is no complaint by the appellant that the law as to notification by a retiring partner was incorrectly stated. Our examination of the case is therefore limited to the sole question of whether, under the testimony, the plaintiff did have any knowledge of the dissolution of the firm, and of Talbott's withdrawal. We can come to no conclusion other than that reached by the district judge, namely, that it positively appears that they did not have any such knowledge. The order of the district court is affirmed.

PEOPLE v. EVANS. (Cr. 1.)

(Supreme Court of California. Aug. 29, 1895.)

HOMICIDE — VERDICT — WHEN DISTURBED — EVIDENCE—APPEAL—OBJECTIONS WAIVED — HARMLESS ERROR.

1. Where, in a murder case, the only dispute is as to the identity of the murderer, and there is a sharp conflict in the evidence, the supreme court will not disturb the verdict because not entirely satisfactory.

2. A verdict of guilty will not be set aside because of the erroneous admission of evidence which is not injurious to defendant.

3. On trial for the murder of T., it was not error to admit evidence that, some time before the murder, defendant, referring to the killing of a certain girl, said that the man who killed her did not intend to kill her; that he was very sorry for killing the girl; that he meant to kill T., and he would have him yet before he stopped.

4. Where it appears deceased was shot, and there is evidence that defendant, when arrested, said he could not shoot a rifle, or had not shot a gun for a long time, it is proper to admit evidence that he is an expert with the rifle.

5. The people and defendant consented that the preliminary evidence as to the admissibility of an alleged written confession by defendant and a fellow prisoner, and the argument on defendant's objections, should be heard in the absence of the jury. *Held*, that the action of the court in proceeding in accordance with such arrangement would not be reviewed, in the absence of objection and exception in the trial court.

6. Where the defense is alibi, it is not error to allow the people, in rebuttal, to contradict the witnesses who testified to the alibi, by disproving the collateral facts testified to by them on their direct examination as a means of fixing the time when they saw defendant at the place distant from the scene of the crime.

7. It is not error to permit the people to rebut the circumstances called out on cross-examination of the witnesses to an alibi, though no foundation is laid for contradiction, where no objection is made on such ground.

In bank. Appeal from superior court, Amador county; John F. Davis, Judge.

William Evans, convicted of murder, appeals from the judgment and from an order denying a new trial. Affirmed.

F. E. Dunlap, D. B. Spagnoli, and J. G. Swinnerton, for appellant. Atty. Gen. Fitzgerald, for the People.

BEATTY, C. J. The defendant was convicted of murder, and appeals from the judg-

ment and an order denying him a new trial.

It was clearly proved that on June 15, 1893, Michael Tovey, a messenger for Wells, Fargo & Co., while seated by the side of the driver on a stage going from Lone to Jackson, in Amador county, was shot and killed by a man who stood behind and was partly concealed by a buckeye tree growing within 10 or 12 feet of the roadside. The circumstances leave no doubt that the killing was premeditated, and that the crime was murder of the first degree; the only dispute being as to the identity of the slayer. He was distinctly seen, at a distance of not more than 20 feet, by the driver of the stage, and by a passenger who sat behind the driver on top of the stage; but his face was blackened with charcoal, and the lower part of it concealed by the foliage of the tree behind which he stood, and, while the stage driver testified positively that the defendant was the man, the passenger was equally positive that he was not. To corroborate the driver, the prosecution introduced evidence of remarks in the nature of threats by the defendant against the deceased, made prior to the killing; evidence that the defendant, after the killing, spoke of it with apparent pleasure; evidence of similarity of the clothes worn by the defendant and the man who fired the fatal shot; evidence of similarity of walk (a sort of limp) and of general appearance; and evidence of statements and admissions by the defendant implying his guilt, besides other circumstances having some slight tendency, perhaps, to connect him with the killing. On the part of the defense, evidence was introduced to explain or contradict most of the evidence for the people, and, in addition, there was very strong and positive testimony of a number of witnesses to the effect that at the time of the killing the defendant was at a farm many miles distant from the scene. As to the alleged statements and admissions of the defendant, they rested upon the uncorroborated testimony of a man who was confined in jail with him, and there was evidence that he and the officers in charge had conspired, by the administration of whisky and opium, to induce the defendant to sign a written confession under circumstances so questionable that the court would not admit it in evidence. In rebuttal, the people offered evidence contradictory of the witnesses who had been called to prove the alibi. And the result was a case presenting a sharp conflict of evidence on every material point, except the mere corpus delicti, which was fully proved. Under these circumstances, we cannot assume to overrule the verdict of the jurors, who saw and heard the witnesses, upon the ground that the proofs do not seem to be entirely satisfactory to us.

During the trial many exceptions were reserved to rulings of the court upon objections to testimony, but, if any of the rulings

complained of were technically erroneous, they were clearly not injurious to the defendant. The stage driver, for instance, while testifying for the people, was asked the question, "Has your stage ever been robbed, Mr. Radcliffe?" to which the defendant interposed the usual formal and general objection that it was incompetent, irrelevant, and immaterial. The objection being overruled, the witness answered, "Yes, sir." This is all that the bill of exceptions shows in regard to this matter; and, while it does appear that the evidence was irrelevant, it is equally apparent that it was of no consequence.

Mrs. McNeill, a witness for the people, was allowed to testify, over the same general objection by defendant, that, some time previous to the killing of Tovey, the defendant, referring to the killing of the Rudosini girl, had said that the man who killed her did not intend to kill her; that he was very sorry for killing the girl; that he meant to kill Tovey, and he would have him yet before he stopped. The court did not err in overruling the objection to this testimony. If true, it proved a claim on the part of defendant to an intimate knowledge of the feelings, motives, and intentions of the slayer of the Rudosini girl, and might justify the inference that he was himself the person who had slain her, in an attempt to kill Tovey, and that he was the person who intended "to have him before he stopped." In short, it was a threat which indicated a motive for the commission of the crime.

When the defendant was arrested, he stated—at least it was testified that he stated—that he could not shoot a rifle, or that he had not shot a gun for a long time. It was not error to allow proof that he was an expert with the rifle.

When the people offered in evidence the written confession which the defendant was alleged to have made, and the admissions and statements testified to by his fellow prisoner, the people and the defendant both consented that the preliminary evidence and the argument upon the defendant's objections to the offered evidence should be taken and heard in the absence and without the hearing of the jury. It is now claimed that the order and action of the court, taken in conformity with this consent, was error, and highly injurious to the defendant. It is not necessary to consider whether the action of the court in this matter would have been proper if objected to. It was not objected to at the time, there was no exception taken at the time, and there is nothing to review.

It was not error to allow the people in rebuttal to contradict the witnesses who had testified to the alibi by disproving the collateral facts testified to by them on their direct examination as a means of fixing the time when they saw the defendant at a place distant from the scene of the homicide. These circumstances were an essential part

of their testimony, and highly material. The same is true of the circumstances called out on the cross-examination. As to some of these matters, it may be true that no sufficient foundation was laid for contradiction, but no objection was made on that ground in the one or two instances in which it should have been sustained; as, for instance, in the testimony of Wenzelberger in contradiction of Lucas.

The instruction complained of (No. 5 given by the court) is free from error. If the defendant desired a fuller instruction, he should have requested it.

There are other exceptions specified in the record, but the foregoing are all that were mentioned or referred to in the argument, and all that call for special notice. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.; HARRISON, J.; GAROUTTE, J.; HENSHAW, J.; VAN FLEET, J.

108 Cal. 582

SAN LUIS OBISPO COUNTY v. FARNUM et al. (No. 19,488.)

(Supreme Court of California. Aug. 27, 1895.)

BOND OF COUNTY AUDITOR—BREACH.

Where a county auditor's bond was conditioned that he should "well and faithfully perform all official duties required of him by law," and another officer paid over to the auditor certain moneys collected for licenses, which the law required to be paid directly to the county treasurer, the sureties on said bond are not liable for the auditor's default, though he himself is.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the county of San Luis Obispo against C. A. Farnum and others on a bond. Plaintiff had judgment, and defendants appeal. Affirmed as to Farnum, and reversed as to the others.

Graves & Graves and Wilcoxon & Bouldin, for appellants. F. A. Dorn, for respondent.

HAYNES, C. This action is upon the official bond of C. A. Farnum as county auditor of said county. The other defendants are R. E. Jack and J. P. Andrews, the sureties of Farnum upon said bond. The complaint alleges that Farnum, as such auditor, at divers times between January 2, 1891, and January 3, 1893, received from the license-tax collector of said county divers sums of money collected for license taxes due said county, the sum of \$1,218.16 of which he, said Farnum, had failed and refused to pay to the county; alleged the making and approval of the bond; and attached a copy of the bond to the complaint. The bond is in the statutory form, conditioned that he should "well and faithfully perform all official duties now required of him by law, and shall well and faithfully execute and perform all duties of such office of auditor of

San Luis Obispo county required by any law to be enacted," etc. A general demurrer was interposed by the defendants, which was overruled, and the defendants answered. The cause was tried by the court, and a finding that all of the allegations of the complaint were true (except that the amount was reduced to \$1,187.06) was filed, and judgment entered against all the defendants therefor; and from this judgment all appeal upon the judgment roll.

The demurrer should have been sustained as to the sureties, and the judgment must be reversed as to them, because no cause of action is stated against them, nor are any facts found which support the judgment. A cause of action is stated against Farnum, independently of the allegations relating to the bond, which may be treated as surplusage. That the money in question, having been collected by the tax collector for licenses, belonged to the county, is not questioned; but that it came to the hands of defendant Farnum as auditor is a conclusion of law wholly unsupported by the facts found. There is no provision of law authorizing the auditor to receive it, nor any authorizing the tax collector to pay over such moneys to him, or to any one except the county treasurer. Having received the money, it was Farnum's duty to pay it over to the treasurer; but such duty did not arise out of his office, nor was it at all different from the duty which would have rested upon him to pay it over had he been a plain citizen, not holding any county office. Farnum did not even receive the money *colore officii*, for under no circumstances was he authorized or required by law to receive it. The condition of the bond sued upon is not that Farnum should be personally honest, or pay his personal debts, or discharge those private duties and obligations which he may have assumed; but the condition is that he "shall well and faithfully perform all official duties required of him by law." The "official duties" here specified are the duties required by law of the county auditor, and none other. "A surety cannot be held beyond the express terms of his contract. * * *" Civ. Code, § 2836. In the conclusions of law filed by the court below there is copied section 16 of article 11 of the constitution of this state, to the effect that all moneys belonging to or collected for the use of the county coming into the hands of any officer thereof shall be immediately deposited with the treasurer; and apparently the court concluded that because it was county money, and because Farnum was a county officer, a failure to pay it over was a breach of official duty, for which his sureties were liable. But the constitutional provision only relates to those officers who rightfully or officially receive money for the county. Under this provision of the constitution, as well as under the provisions of the Political Code relating to licenses, it was the official duty of the tax collector to pay the money over to the treasurer, and his payment of it

to the auditor was unauthorized, and a breach of official duty for which he and his sureties were liable on his bond; but the sureties of Farnum surely never contemplated that the tax collector would pay money to the auditor in violation of law, and never undertook to be liable therefor.

The case of *Best v. Johnson*, 78 Cal. 217, 20 Pac. 415, is conclusive of the question here. We may properly add, however, an extract from *People v. Pennock*, 60 N. Y. 421, 426. That was a suit upon the bond of a town supervisor. The supervisor was authorized to receive and disburse certain of the town's money. Certain other funds for the temporary relief of the poor, for which there was a special tax levy, were required to be paid by the tax collector to another officer. In this instance, however, the warrant for the collection of the taxes directed the tax collector to pay it to the supervisor, and that was done; and the action upon the bond was for the recovery of that money, the supervisor having failed to account for it and pay it over to the proper officer. The condition of the bond was for the faithful discharge of his official duties as supervisor, and that he would account for and pay over "all moneys belonging to his town and coming into his hands as such supervisor." The court said: "The condition of the bond must be construed, and the liability of the sureties limited, in reference to the statutes making the supervisor a custodian of public moneys. The statutes make a part of the contract of the surety. When he undertook that his principal should account for and pay over all moneys that should come to his hands as supervisor, the intentment is that such moneys as should, pursuant to law, be received by him in his official capacity, and in virtue of his office, were referred to, and not such as he might receive by color of office, or because he was supervisor, but without right, and of which some other official was the legal recipient and disbursing agent, having the right to receive them directly from the collector. The principal of the appellant was an intruder in respect to the moneys collected for the support of the poor, and of roads and bridges, and acted, in taking them into his hands, officiously, and not officially. Liabilities of sureties are strictissimi juris, and cannot be extended by construction or enlarged by the acts of others." There is nothing in *San Luis Obispo Co. v. Pettit* (Cal.) 34 Pac. 1082, cited by counsel for respondent, inconsistent with the views we have expressed. The judgment should be reversed as to the defendants Jack and Andrews, with directions to dismiss the action as to them, and as to defendant Farnum the judgment should be affirmed.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed as to the defendants Jack and Andrews,

with directions to dismiss the action as to them, and as to defendant Farnum the judgment is affirmed.

SAN LUIS OBISPO COUNTY v. FARNUM et al. (No. 19,490.)

(Supreme Court of California. Aug. 27, 1895.)

Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the county of San Luis Obispo against C. A. Farnum and others on a bond. Plaintiff had judgment, and defendants appeal. Affirmed as to Farnum, and reversed as to the others.

Graves & Graves and Wilcoxon & Bouldin, for appellants. F. A. Dorn, for respondent.

PER CURIAM. This is an action upon the official bond of C. A. Farnum as county auditor, the other defendants being his sureties on said bond. The breach alleged is the failure to pay over to the county treasurer certain moneys said Farnum received from the tax collector, which said last-named officer had received for county licenses. The only distinction between this case and No. 19,488 (Same Plaintiff v. Farnum [this day decided] 41 Pac. 445), is that the moneys were received in a subsequent term of office of said Farnum as auditor, for which the bond in suit in this action was given. The same findings and judgment were made and entered as in the former case, except as to amount and names of the sureties, and it is submitted on the same briefs. Upon the authority of *San Luis Obispo County v. Farnum* (this day filed) 41 Pac. 445, it is ordered that the judgment appealed from be affirmed as to the defendant Farnum, and as to all the other defendants it be reversed, with directions to dismiss the action as to them.

108 Cal. 567

SAN LUIS OBISPO COUNTY v. FARNUM et al. (No. 19,491.)

(Supreme Court of California. Aug. 27, 1895.)

LIMITATIONS—ACTIONS FOR MONEY RECEIVED BY OFFICERS WITHOUT AUTHORITY.

Where money belonging to the county is received by the county auditor, his liability therefor being not on his bond, but for money had and received, action against him is barred in two years, under Code Civ. Proc. § 339, subd. 1, prescribing the limitation of an action on a liability not founded on a writing.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the county of San Luis Obispo against C. A. Farnum and others. Judgment for plaintiff. Defendants appeal. Reversed.

Graves & Graves and Wilcoxon & Bouldin, for appellants. F. A. Dorn, for respondent.

HAYNES, C. This is an action upon the bond of C. A. Farnum, as county auditor of the county of San Luis Obispo, to recover the sum of \$896.10, alleged to have been received by him, as auditor, from the license-tax collector of said county, the same being moneys collected for license taxes due the county from various individuals, and which Farnum had failed to pay over to the county treasurer; the other defendants and appellants, R. Jack and I. Goldtree, being the sureties upon said bond. The complaint alleges

that said moneys were received by Farnum at divers times, unknown to plaintiff, between January 2, 1889, and January 3, 1891, which dates cover and include the entire term for which said bond was given. This action was commenced May 29, 1893. The defendants demurred to the complaint: (1) That the facts stated do not constitute a cause of action; and (2) that the cause of action stated is barred by the provisions of section 337, and subdivision 1 of section 338, and subdivision 1 of section 339, of the Code of Civil Procedure. The demurrer was overruled, the defendants answered, denying all the allegations of the complaint, and alleging that the cause of action is barred by the provisions of the Code above mentioned. The court found for the plaintiff, and entered judgment against all the defendants for the sum of \$739.80. This appeal is by all the defendants from said judgment upon the judgment roll.

As to the liability of appellants Jack and Goldtree as sureties upon the bond of Farnum, as auditor, this case cannot be distinguished from the case of *San Luis Obispo County v. Farnum* (No. 19,488; this day filed) 41 Pac. 445, and upon the authority of that case this judgment must be reversed as to the sureties upon said bond. In that case it was held, however, that, treating the allegations of the complaint in relation to the bond as surplusage, there was, nevertheless, a cause of action stated against Farnum; and that, though he did not receive the money in his official capacity as auditor, it was money belonging to the county which he had no right to retain, and therefore affirmed the judgment as to him. In that case, however, there was no question made upon the statute of limitations, while here it is directly pleaded. The court below could not have found the sureties liable unless he concluded that Farnum was liable upon his bond, and, if so, the limitation of four years under section 337, Code Civ. Proc., applied. But the money having been received by Farnum without authority of law, and not officially, no liability upon his bond was created. If he were liable upon the bond, his sureties must have been liable also. But it was money belonging to the county which he had no right to receive, but, having received it, he was liable personally in an action for money had and received, and that action was barred in two years, under subdivision 1 of section 339, Id. Assuming, therefore, that the money was received on the last day of his term of office, January 3, 1891, the action was not brought within two years, and the demurrer should have been sustained upon that ground as well as upon the first. The judgment should, therefore, be reversed as to all the defendants.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed.

108 Cal. 589

SCHWERDTLE v. PLACER COUNTY et al.
(No. 18,436.)

(Supreme Court of California. Aug. 27, 1895.)

DEDICATION OF HIGHWAY—ADVERSE USER—ABANDONMENT—JUDICIAL NOTICE.

1. Adverse user of land as a highway by the public for 30 years establishes the presumption of a dedication.

2. Where the public have acquired an easement in land for a highway by adverse user, the taxation and payment of taxes on the same will not constitute an abandonment.

3. Placing gates, with consent of a member of the board of supervisors, across a highway, and maintaining the same for the statutory period of limitations, does not establish an abandonment of the easement by the public.

4. Judicial notice cannot be taken that title to land is in the public.

5. Judicial notice is taken by courts of the statutes of their own state and of the United States.

Department 2. Appeal from superior court, Placer county; Matt. F. Johnson, Judge.

Action by Dorothea Schwerdtle against the county of Placer and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Isaac Joseph and D. E. Alexander, for appellant. A. K. Robinson, L. L. Chamberlain, and F. P. Tuttle, for respondents.

HENSHAW, J. Appeal from the judgment alone. Action to quiet title to a strip of land, and to restrain defendant Glines from committing threatened acts of trespass upon the property.

The land in dispute is claimed by the county as a public highway, and Glines is one of its road overseers. The defendant county pleaded "that for more than twenty years last past prior to the filing of the complaint that certain piece of road * * * known as the 'Dotan's Bar and Carrolton Road,' as it ran through and across the lands described in plaintiff's complaint, was, and is now, a public highway, known, recognized, and treated as such by the road officers of Placer county, and duly constituted such in the manner required by law." Upon this somewhat vague averment trial was had, and the court found: "That the plaintiff is the owner in fee, and as such owner was in the possession, of said real property, for more than five (5) years continuously prior to the commencement of this suit. That during said five years prior to the commencement of this suit state and county taxes were regularly levied upon all of said real property; all taxes have been paid by plaintiff within said five years; and during all of said time said real property was and now is inclosed by substantial fences. That prior to the erection of said fences by plaintiff the country in the neighborhood of said real property was an open country, and that persons that traveled over it could travel in any direction, and cattle could roam over the entire country at will. That across said property there passes a road known as the 'Dotan's Bar and Carrol-

ton Road.' That from the year 1850 down to about the year 1887 the said road was continuously open, and notoriously used by the public in general, adversely to the plaintiff, without let or hindrance, as a public highway for all purposes, and was during all of said times entirely open and unobstructed. That in the year 1887 plaintiff asked permission of one of the members of the board of supervisors to place gates across the road at the inlet and outlet of the same, which said permission was granted by said member, without authority of the board. That thereafter, and for a period of about five years, the public in general continued to use said road openly and notoriously, and without let or hindrance, other than the opening and the closing of said gates. That the said road, from about the year 1855 to 1887, was the common traveled road in going from Sacramento and Folsom to Dotan's Bar; that in the early days stages carrying the United States mail constantly traveled said road, and at intervals during said time the road master of the road district in which said road is situated performed work and labor upon the same where the same crosses the property of plaintiff. That plaintiff and her grantors, for a period of about twenty years prior to the closing of said gates, as herein-after found, were in possession and occupancy of said land, and had full knowledge of the use of said road by the public as a highway for all purposes, and up to the time of the said closing of said gates offered no let or hindrance to the use of said road by the public as a highway, and in no way, manner, or shape, or form objected to the same." The court concluded as matter of law that the road was a public highway, and judgment passed accordingly. The answer is objectionable in averring as a conclusion of law that the land in controversy is a public highway. No facts are pleaded, and it cannot be determined whether the defense rested its claim upon dedication and acceptance, or upon rights acquired by user under the rules of prescription.

From the opinion of the trial judge, embodied in the brief of respondents, it appears that he based his decision upon the facts that the land until after the year 1870 was part of the public domain, and had been continuously used as a highway since 1850; that in 1866 the United States granted rights to lay out public highways over its lands (Rev. St. U. S. § 2477); that in 1870 the legislature of the state, by an act especially applicable to Placer county, accepted this right by declaring all roads in that county which had been used as public highways for two years or more before the passage of the act to be public highways (St. 1870, p. 457); that this act, operating with the statute of the United States, amounted to an acceptance of the grant or offer of dedication of the latter, and established the status of the land in controversy, then public land, as a highway,

so that when it passed into private ownership it was taken subject to the easement.

Under the facts above recited, the reasoning and conclusion of the court are perfectly sound. *McRose v. Bottyer*, 81 Cal. 125, 22 Pac. 393. The difficulty of adopting them is that we have not the same facts before us. They are not set forth in the findings, and the opinion of the learned judge forms no part of the record. We take judicial notice of the statutes above adverted to, but cannot judicially know, and the findings do not disclose, that the land in controversy was a part of the public domain until 1870. It is, however, found that the public, from the year 1850 to the year 1887, used the road openly, notoriously, and continuously, and adversely to plaintiff. In the absence of any statute, the common-law rule as to the presumption of dedication by adverse user will apply in this state. Pol. Code, § 4468. The time of user at common law was not a fixed period. Five years, six years, and twenty years, depending on the varying circumstances, have been severally held sufficient. *Elliott, Roads & S.* p. 124. "A dedication may be made by deed or other overt act, or may be presumed from the lapse of time or acquiescence of the party. There is no precise limit of time from which dedication may be presumed. In some cases it has been decided that twenty years were necessary to raise the presumption of dedication, while in others it has been held that a much shorter period was sufficient." *City of San Francisco v. Scott*, 4 Cal. 114. The language of *Hope v. Barnett*, 78 Cal. 9, 20 Pac. 245, cannot be construed as conflicting with this universally accepted rule of the common law. This court there says: "Where the dedication is sought to be established by user as a highway, it must appear that such user was with the knowledge of the owner, with his consent, or without objection on his part." In that case the findings showed a use for only eighteen months or two years. If a dedication is sought to be established by a use which has continued a short time,—not long enough to perfect the rights of the public under the rules of prescription,—then, truly, the actual consent or acquiescence of the owner is an essential matter, since without it no dedication could be proved, and none would be presumed; but where this actual consent and acquiescence can be proved, then the length of time of the public use ceases to be of any importance, because, the offer to dedicate and the acceptance by use both being shown, the rights of the public have immediately vested. But where the claim of the public rests upon long-continued adverse use, that use establishes against the owner the conclusive presumption of consent, and so of dedication. It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license. Indeed, some of the courts have insisted that the rule is broader even

than as above stated, while no court or text writer has confined it to narrower limits. Thus, in New York, under a statute declaring that all roads which have been used as public highways for 20 years or more shall be deemed public highways (1 Rev. St. N. Y. p. 521, § 100), it has been held that the intention of the owner is not material, and that such a user makes it a public highway, though the owner be a lunatic, an infant, or married woman, and has no knowledge thereof during the entire time. *Devenpeck v. Lambert*, 44 Barb. 599. And the soundness of this view of the law is not only stoutly supported by the authors of *Elliott, Roads & S.* (page 123 et seq.) but has received some approval from this court in the cases of *Bolger v. Foss*, 65 Cal. 250, 3 Pac. 871, and *Freshour v. Hihn*, 99 Cal. 443, 34 Pac. 87.

These cases, however, were decided, the first under section 2619 of the Political Code, since repealed, and the second under a statute exclusively applicable to Santa Cruz county. Their law is not pertinent to this case, nor do we by this affirm the rule there laid down. It is sufficient here to emphasize the fact that no declaration in *Hope v. Barnett* was meant or can properly be construed to declare a different rule from the one which is above set forth, and which finds abundant, and, indeed, universal, recognition from the authorities. Thus, *Washb. Easem.* (4th Ed.) p. 199, § 5: "If the user is permissive or by license, it will not ripen into a prescription." "The use of a way by the public for twenty years gives a prescriptive right of a public as well as a similar user does of a private way, and this right, when once established, continues until it is clearly and unmistakably abandoned. * * * And if the only evidence of a dedication be a public user, with the acquiescence of the owner, a user of the term of twenty years must be proved, or a time corresponding to the period of limitations in the state in which the land lies." *Beall v. Clore*, 6 Bush (Ky.) 680. In *Com. v. Coupe*, 128 Mass. 63, it is said: "Ways by prescription and ways by dedication rest upon entirely different principles. The first is established upon evidence of user by the public, adverse and continuous, for a period of twenty years or more, from which use arises a presumption of a reservation or grant and the acceptance thereof." *Jennings v. Tisbury*, 5 Gray, 73. And in *Dill. Mun. Corp.* (4th Ed.) p. 753, § 637: "Such intent [to dedicate] will be presumed against the owner where it appears that the easement in the street or property has been used and enjoyed by the public for a period corresponding with the statutory limitation of real actions. But where there is no other evidence against the owner to support the dedication but the mere fact of such user, so that the right claimed by the public is purely prescriptive, it is essential to maintain it that the user or enjoyment should be adverse." Says *Thomp. Highw.*

p. 48: "Where the acts of the owner are not so specific in their nature as clearly to prove his intention that the public should acquire a right of way, they are frequently aided by collateral evidence, and the circumstance of most common occurrence which is considered sufficient to support the claim of the public is the length of time during which they have had the uninterrupted use and enjoyment of the privilege." So Elliott, *Roads & S.* p. 123: "What the original intention of the owner was ceases to be of importance after the lapse of the limitation prescribed by the statute. Twenty years' use by the public, under claim of right evidenced by use, will give a right to the road or street, * * * no matter what may have been the owner's intention." And Ang. *Highw.* § 131, quotes the language of Shaw, C. J., in *Reed v. Northfield*, 13 Pick. 94: "We think it clear upon principle that public easements, as well as others, may be shown by long and uninterrupted use and enjoyment, upon the conclusive legal presumption that they were at some anterior period laid out and established by competent authority." Says Kent (3 Kent, Comm. p. *451): "If there be no other evidence of a grant or dedication than the presumption arising from the fact of acquiescence in the free use and enjoyment of the way as a public road, the period of twenty years applied to incorporeal rights would be required, as being the usual and analogous period of limitation." In this enunciation of the rule, framed with his wonted wisdom and conservatism, the learned chancellor was dealing with the common-law period for the acquirement of prescriptive rights. Under our law the statute of limitations for the commencement of actions affecting title to realty, and the period of time for the acquisition of title thereto by adverse possession, or of acquiring a prescriptive right to an easement, has been shortened to five years, which period would, by analogy, be made the time requisite for the acquirement by the public of such right. The rule thus being that the adverse user conclusively establishes the presumption of dedication to the public,—as, in the case of the individual, the prescriptive right establishes the presumption of a grant,—the finding of such adverse user for over 30 years is more than sufficient for this purpose, unless, as contended, the other findings are contradictory, or show an abandonment. *Pol. Code*, §§ 2619, 2631; *Civ. Code*, § 806; *McRose v. Bottyer*, 81 Cal. 122, 22 Pac. 393.

The finding in this case differs from that discussed in *Cooper v. Monterey Co.*, 104 Cal. 438, 38 Pac. 106. Here the adverse user is expressly set out. There, as was said, the language of the finding did not negative the idea that the use might have been under mere license. The placing of the gates in 1887 was rather an acknowledgment than a denial of the public right, since permission to erect them was first asked of a

member of the board of supervisors. The payment of taxes was upon the whole tract, which included the strip in dispute, and is thus within the rule of *Smith v. City of San Luis Obispo*, 95 Cal. 463, 30 Pac. 591. See, also, *San Leandro v. Le Breton*, 72 Cal. 170, 177, 13 Pac. 405. The judgment is therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

108 Cal. 546

WEAVER v. McKAY et al. (No. 18,445.)
(Supreme Court of California. Aug. 24, 1895.)
SALE OF MORTGAGED PREMISES — ASSUMPTION OF DEBT—EVIDENCE.

1. Where the grantee of mortgaged premises accepted the conveyance providing for his payment of the "mortgaged debt," he cannot avoid a deficiency judgment against him on foreclosure by showing that the contract for the purchase provided for a conveyance merely subject to the "mortgage," in the absence of fraud by the grantor in making the conveyance.

2. That the contract of purchase of mortgage premises provided merely that the conveyance should be subject to the "mortgage" is not evidence of fraud by the grantor in inserting in the deed an agreement by the grantee to pay the "mortgage debt."

3. A certified copy of the record of a deed containing a recital that it was made subject to a mortgage debt on the land conveyed is admissible to prove the assumption of the mortgage debt by the grantee.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by N. M. Weaver against McKay, McCann, and others, to foreclose a mortgage. From a judgment for plaintiff, some of the defendants appeal. Affirmed.

Milton E. Babb, for appellants. J. H. McGoffey and E. W. Risley, for respondent.

TEMPLE, J. This action was brought to foreclose a mortgage executed by Margaret Griffith and R. B. Johnson to secure the payment of their note for \$4,500 to plaintiff. After the mortgage was executed and recorded, appellants purchased the premises, and took a deed from R. B. Johnson, who had become the sole owner, in which was contained the following: "This conveyance is made subject to that certain mortgage made by Margaret M. Griffith, a married woman, and R. B. Johnson, to N. M. Weaver, dated February 10, 1891, for the sum of \$4,500, and recorded in volume 79 of Mortgages, at page 433, records of Fresno Co., Cal., which said mortgage, and the note secured thereby, and the interest due and to grow due thereon, the grantees herein hereby assume, and agree to pay, discharge, and satisfy, and to hold grantees [grantors] herein harmless therefrom, as a part of the consideration of this conveyance." The deed was executed January 17, 1893, and was in performance of an agreement between Johnson and appellants made December 20, 1892. In that agreement it was stipulated that Johnson should receive from appellants a described

tract of land, in consideration of which, and of \$1,000 cash, he would convey to appellants various tracts, and among them the mortgaged premises. Some of the other tracts were also incumbered. As to one, it was stipulated that it should be conveyed subject to a mortgage of \$1,850; as to the mortgaged premises in question here, that it should be conveyed "subject to the indebtedness thereon."

It is contended that the deed does not accord with the agreement, in this: that, by the agreement, appellants were to take the land subject to the mortgage, whereas by the deed they are made to assume the payment of the mortgage debt, and thereby to become liable to pay a judgment for deficiency, if the land does not sell for enough to pay the debt. They aver in their answer that they were induced to accept the deed containing this stipulation by the fraudulent assurance of Johnson that it was exactly like the other deed, which was only subject to the mortgage. Upon this issue the court found for the plaintiff, and the finding is abundantly sustained by the evidence.

Appellants' counsel contends, however, that because the agreement is set out in the answer in *hæc verba*, and its genuineness is not denied, it overcomes all other testimony upon the subject. If it be conceded that the stipulation contained in the agreement did not require that appellants should assume the payment of the mortgage debt, still, if they knowingly accepted as performance such a deed, it was no fraud upon them, and they have no claim for relief. Upon the issue as to whether they were induced to accept the deed by fraud, the written agreement is not evidence. I cannot understand the claim that setting out the contract in the answer tendered or made a distinct issue upon which there should have been a finding. It is set out as a part of the charge of fraud, and upon that issue there is a finding.

Exception was taken to the offer of the deed in evidence to prove the assumption of the mortgage debt by appellants, on the ground that such portion of the deed was no part of the conveyance, and did not need to be recorded, and therefore a certified copy of the record is not evidence. The construction contended for is too narrow, but, even had the stipulation been contained in a separate instrument it would be entitled to record under section 1158, Civ. Code. The judgment and order are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

108 Cal. 581

PEOPLE v. RYAN. (Cr. No. 16.)

(Supreme Court of California. Aug. 27, 1895.)

JURY—BIAS OF SUMMONING OFFICER—HOMICIDE—EVIDENCE.

1. Pen. Code, § 1064, provides for challenging a panel formed from persons drawn on a

special venire on account of bias of the officer who summoned them. *Held*, that a deputy sheriff who admitted that he once had an opinion as to the guilt of defendant, but that his opinion had since been dispelled, is not disqualified by bias.

2. Where a deputy sheriff who has summoned jurors on a special venire is challenged for bias under Pen. Code, § 1064, he may be asked by the court whether, if he were sworn as a juror, he could and would give defendant a fair trial.

3. On a trial for murder, evidence that a witness for the state employed counsel to defend himself on a previous trial for killing defendant's father in the affray wherein defendant killed deceased was irrelevant and inadmissible.

4. On a trial for murder, a witness for the state was asked, without objection, whether he was acquainted with defendant's reputation for "truth, honesty, or integrity." The witness was then asked whether it was good or bad, which question was objected to generally. *Held* that, as the court's attention was not properly called to the form of the first question, and as defendant had opportunity on cross-examination to find what qualities the witness was testifying about, there was no error in overruling the objection.

5. An attorney for the people should not ask inadmissible questions for the purpose of exciting suspicions in the minds of the jurors prejudicial to defendant; nor repeat a question to which an objection has been sustained; nor, during the progress of the trial, make remarks unjustly injurious to defendant.

6. Where defendant and his father, on one side, and the deceased and others, on the other, engaged in an altercation, and in the midst of the quarrel defendant went out and got a pistol, but the testimony was conflicting as to whether defendant fired the first shots, and as to whether defendant's father had been shot before defendant first fired, the conclusions of the jury thereon will not be disturbed on appeal, though the evidence be susceptible of doubt as to the guilt of defendant.

In bank. Appeal from superior court, Kings county; Austin Jacobs, Judge.

William Ryan was convicted of murder in the second degree, and appeals. Affirmed.

Maurice E. Power and Rowen Irwin, for appellant. Atty. Gen. Fitzgerald and C. H. Jackson, for the People.

McFARLAND, J. Appellant was accused by information of the murder of one James McCaffery, and was convicted of murder in the second degree. He appeals from the judgment and from an order denying his motion for a new trial.

1. The first alleged error relied on for a reversal is the refusal of the court to allow the challenge of appellant to the panel of jurors summoned on a special venire, upon the ground that the deputy sheriff who summoned said jurors was disqualified under section 1064 of the Penal Code. Under the circumstances shown by the testimony on this point, it would have been, perhaps, more becoming in the sheriff to have selected some person other than the deputy in question to summon said jurors; but we cannot say that the court erroneously decided, on the evidence, that the said deputy was not disqualified by bias. It is true that, in one part of

the testimony of the deputy when on the witness stand, he did give an affirmative answer to the question whether or not he had an opinion as to the guilt or innocence of the appellant; but he afterwards said: "I have not formed or expressed any opinion as to the guilt or innocence of this defendant. I have no bias or prejudice against him. * * * I say that I had some sort of an opinion, but it has since been dispelled. * * * I simply had an opinion that McCaffery had been killed. As to whether or not he had been killed in a justifiable manner, or whether the party who took his life was justifiable or not, I had no opinion, and never have had. I have no opinion now." In answer to the question, "Have you any opinion now, of any kind or character, or have you had since the next day after the trouble, as to the guilt or innocence of this defendant?" he answered, "No, sir." He also said: "I mean that I had an opinion that he [defendant] was the man that shot McCaffery. Whether he was justified in it or not I don't know." (There was no real contention in the case that appellant did not kill McCaffery; but he was killed by a shot aimed by appellant at one George McCord, which shot appellant claims he was justifiable in firing.) Looking at all the evidence, we cannot see that the denial of the challenge was erroneous. As the witness did not base whatever opinion he may at one time have had upon public rumor or newspaper statements, as mentioned in section 1076, Pen. Code, it is contended by appellant that the court erred in asking him this question: "If you were impeached and sworn as a juror to try this cause, could you and would you give the defendant a fair and impartial trial? But the provisions of section 1076 do not make it improper to ask that question in any case when the court is endeavoring to find out the real state of the juror's mind.

2. On the occasion at which the appellant killed McCaffery, the appellant's father, James O. Ryan, was killed by one of the party called by some of the witnesses the "McCord faction"; and, when George B. McCord was a witness for the prosecution, appellant's counsel, on cross-examination, asked him this question: "Did you employ an attorney to defend you with reference to the action that you took in the killing of James O. Ryan?" An objection by the prosecution to this question was sustained, and this is claimed by appellant to have been error. We do not think that this ruling was erroneous. If he had been asked, "Did you employ counsel to prosecute the defendant?" the question would have been proper, as showing his feeling as a witness; but employing counsel to defend himself on another charge would be an act not relevant to the case on trial.

3. The prosecution called several witnesses to impeach the appellant and one of his witnesses; and each of them was asked this question: "Are you acquainted with his gen-

eral reputation in the community where he lives for truth, honesty, or integrity?" No objection was made to this question; but, the witness having answered in the affirmative, he was then asked, "What is it, good or bad?" and to this second question appellant objected, and his objection was overruled. Appellant's contention here is that the second question was improperly allowed because the said first question was in the disjunctive; the word "or" having been used between "honesty" and "integrity." It does not appear that the attention of the court below was called to the form of the first question; the objection to the second question being merely that it was "irrelevant, immaterial, and incompetent, and that no proper foundation was laid therefor." If, when the second question was asked, the attention of the court had been called to the fact that the first question was in the disjunctive, the attorney for the prosecution would probably have been required to state which, or how many, of the characteristics mentioned in the first question he was inquiring about. Moreover, appellant could not have been prejudiced by the mere form of the question, for he had ample opportunity upon cross-examination to find out what qualities or characteristics the witnesses were testifying about; and the whole matter is too unimportant to warrant a reversal of the judgment.

4. Appellant contends for a reversal on account of misconduct of counsel for the prosecution. This contention of appellant is certainly not frivolous; for the conduct of counsel for the people, in some of the instances pointed out by appellant, is, at least, censurable. An attorney for the people should not ask inadmissible questions for the purpose of exciting suspicions in the minds of the jurors prejudicial to the defendant; nor repeat a question to which an objection has been sustained; nor, during the progress of the trial, make remarks unjustly injurious to the defendant. Such conduct prevents a defendant from having that fair trial to which, whether really innocent or guilty, he is entitled. Moreover, it may defeat the punishment of crime by jeopardizing a conviction when the defendant is clearly guilty. Some allowance, however, must be made for the infirmity of human nature as exhibited by counsel in the heat of a trial; and in the case at bar, while, as before stated, the conduct of counsel was not free from blame, yet we do not think that it was of such gravity and importance as to warrant a new trial. The facts are not nearly on a level with those upon which the judgment was reversed in *People v. Wells*, 100 Cal. 459, 34 Pac. 1078, or in the other cases referred to in the opinion in that case.

5. The gravest question in this case is whether the evidence warranted a conviction of murder. The homicide occurred at a primary election held in a schoolhouse. Appellant's father, J. O. Ryan, who was a small man, over 50 years old, and a permanent crip-

ple, was one of the officers of the election. The appellant, who was between 21 and 22 years old, and at the time also a cripple, on crutches, was the second person offering to vote. There were present three of the McCord family, and McCaffery, who was a son-in-law of one of them. We infer from the evidence, although it does not expressly appear, that there was something of a feud between the McCords and McCaffery on the one side and the two Ryans on the other. When appellant offered to vote, one of the McCords challenged his vote upon the ground that he had sworn some time before, at an election in the city of Hanford, that he resided there, and demanded that he be sworn. His father directed him to swear his vote in, and he said he would do so. At that junction the McCords charged appellant with perjury. As to the exact language used, and as to how many joined in the charge, the testimony is conflicting. George McCord testified that he himself said: "Yes, I don't think you have any regard for your oath, and I believe that you would swear to anything." Other witnesses swore to much rougher language. In reply to the remark of George, the appellant called him a liar, there also being a conflict as to the exact language used by him. George then advanced towards appellant, who, George says, had raised his crutch above his head, and had advanced as if he intended to strike. This the appellant denies. Before George had advanced more than a step or two, he was caught by a man named Beckerlie, and for a few moments George and Beckerlie engaged in a tussle which resulted in both falling on the floor among the school desks. In the meantime another of the McCord party had struck appellant over the head with one of his crutches with such force as to break the crutch, and another had knocked the father, J. O. Ryan, down, for the alleged reason that he had put his hand towards his hip pocket, and it was supposed that he was about to draw a pistol. J. O. Ryan was struck and kicked several times, and was very roughly handled. The appellant, after quite a fight with others of the party, finally got out of the schoolhouse, having freed himself from McCaffery, who was on his back, by rubbing against the casing of the door. When appellant got out of the house, he went to his wagon, which stood a short distance away, and, getting a pistol from under the cushion, returned to the front of the house. At this time J. O. Ryan was outside of the house. Appellant testified that, as he approached the house from the wagon, a shot was fired from the house, and that his father told him that he was shot, and that George McCord had shot him, and for him (appellant) to shoot, and "pop it" to George McCord. Several shots were then interchanged between appellant from the outside of the house and George McCord from the inside, or at the door. One

of appellant's shots penetrated some part of the woodwork of the building and killed McCaffery. One of George McCord's shots hit J. O. Ryan, making a wound which caused his death a day or two afterwards. There is a great conflict of testimony as to whether the first shot was fired from the house, by McCord, or at the house, by appellant. George McCord testified that he heard shots before he got loose from Beckerlie; that he heard McCaffery say that he was shot before he went to the door; that he went to the door after three shots had been fired from the outside, and saw appellant raising his pistol to fire again; that he (George), after getting to the door, fired his first shot at appellant; that he then saw J. O. Ryan with a pistol in his hand, and heard him telling appellant to fire; and that he (George) then fired at J. O. Ryan. Soon afterwards appellant and J. O. Ryan went away. There is a conflict of evidence as to whether or not J. O. Ryan had a pistol at any time during the *melee*.

The foregoing is a mere skeleton statement of the affray. The filling up would be an immense quantity of conflicting testimony on many material points. An examination of the mere cold, lifeless transcript tends to leave a doubt in the mind as to whether or not appellant was properly convicted, or whether, at the most, he was guilty of any crime higher than manslaughter. If, as he returned from the wagon,—knowing how his father had been treated in the house,—a shot was fired from the house, and he was told by his father that he was shot, he had reasonable grounds for believing that the life of his father and himself was in danger, and he had the right to defend either. If, however, when he returned from the wagon, the affray was over; if no shot was fired from the house until after he had himself shot; and if his father and himself could have walked away without further danger, and he shot out of revenge,—then he was guilty. The determination of these questions depended upon a variety of absolutely contradictory evidence given by numerous witnesses; and in such a case the conclusions of the jury, and of the judge who refused a new trial, must be taken as final. They not only had better opportunities than we have to pass upon the credibility of witnesses, and to weigh the evidence, but it is their exclusive province to do so, under the law, when there is a mass of evidence to both sides of an issue. We could not rightfully set aside a verdict merely on account of a doubt which we might have of its correctness. We could set it aside only when it clearly appeared to us to be wrong; and this we cannot say of the verdict in the case at bar. Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.; TEMPLE, J.; VAN FLEET, J.

108 Cal. 101

TEBBE v. SMITH. (Sac. 19.)

(Supreme Court of California. July 12, 1895.)

ELECTION CONTEST—EVIDENCE—INTRODUCTION OF BALLOTS—MARKING BALLOTS—CONDUCT OF ELECTION.

1. Where a statute prescribes a mode of preservation of ballots, on proof by a contestant of a substantial compliance therewith, the ballots are admissible to overcome the prima facie correctness of the official canvass.

2. Where, in a contested election case, the ballots are admitted in evidence on proof by the contestant of a substantial compliance with the statute prescribing the mode of preservation, the burden is on the contestee to show that the ballots have in fact been tampered with, or have been exposed so that they might have been tampered with, and a naked showing that it was possible for one to have molested them is not sufficient.

3. Where, in a contested election case, the ballots are introduced in evidence, the question whether they have been tampered with is one of fact, for the jury.

4. Pol. Code, § 1197, provides for a margin on ballots one-half inch wide, at the right hand of the names, so that the voter may clearly indicate, in a manner afterwards provided, the candidate for whom he votes, and directs the clerk to have printed on it, "To vote for a person, stamp a cross (x) in the square at the right of the name." Section 1211 provides that any ballot not made as provided in the act shall be void, and shall not be counted. Section 1205 provides that the voter shall prepare his ballot by making a cross after the name of the person for whom he intends to vote. Section 1215 provides that no voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him. *Held*, that ballots with crosses placed opposite the candidate's name, but without the square, should be counted as votes for the candidate opposite whose name the mark is placed.

5. Under Pol. Code, § 1215, providing that no voter shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him, a ballot with the letter "J" written in pencil in the blank space left for the insertion of the name for justice of the peace is void, and should not be counted.

6. Pol. Code, §§ 1160, 1162, provide that the polls must be opened at sunrise, and kept open until 5 p. m., and that a ballot box must not be removed from the polls, or the presence of bystanders. *Held*, that the votes cast at a precinct where the polls were not opened till 10 a. m., and the ballot box was taken by the election officers with them to dinner, are void, and should not be counted.

7. On all the ballots cast at a certain election there appeared, written on the blank space under the office of justice of the peace, "G. G. Brown—Republican." The evidence showed that the writing was all done by the same person, but did not show who did the writing, nor whether it was upon the tickets when they were put in the voters' hands, and that there was but one person in the precinct lawfully assisted in marking his ballot. *Held*, that under Pol. Code, § 1211, providing that any ballot which is not made as provided in this act shall be void, and shall not be counted, all the ballots, except the one of the voter lawfully assisted, should be rejected.

In bank. Appeal from superior court, Siskiyou county; J. F. Ellison, Judge.

Action by George A. Tebbe against Clarence S. Smith, contesting defendant's election to the office of county superintendent of schools. From a judgment for plaintiff, defendant appeals. Reversed.

Warren & Taylor and L. F. Coburn, for appellant, cited the following authorities: McCrary, Elect. 291-293; Cogan v. Beard, 67 Cal. 303, 7 Pac. 738; Kreitz v. Behrensmeyer (Ill. Sup.) 17 N. E. 242; Fenton v. Scott (Or.) 20 Pac. 98; Albert v. Twohig (Neb.) 53 N. W. 583; Powell v. Holman (Ark.) 6 S. W. 505; Bechtel v. Albin (Ind. Sup.) 33 N. E. 970; Kirk v. Rhoads, 46 Cal. 398; Whitlam v. Zahorik (Iowa) 59 N. W. 61; In re East Coventry Election (Pa. Quart. Sess.) 3 Pa. Dist. R. 377; Louck's Case, Id. 127; Sego v. Stoddard (Ind. Sup.) 36 N. E. 204-208; Taylor v. Bleakley (Kan. Sup.) 39 Pac. 1045; Richardson v. Jamison, Id. 1050; State v. Walsh (Conn.) 25 Atl. 1; Kearns v. Edwards (N. J. Sup.) 28 Atl. 723; Spurgin v. Thompson (Neb.) 55 N. W. 299; People v. Seale, 52 Cal. 71, 621; Russell v. McDowell, 83 Cal. 70, 23 Pac. 183; Attorney General v. McQuade (Mich.) 53 N. W. 944; People v. Board of County Canvassers of Onondaga Co., 129 N. Y. 395, 29 N. E. 327.

Gillis & Tapscott and James F. Farragher, for respondent, cited the following authorities: Hartman v. Young (Or.) 20 Pac. 17; People v. Livingston, 79 N. Y. 288; O'Gorman v. Richter (Minn.) 16 N. W. 416; 6 Am. & Eng. Enc. Law, 425; People v. Holden, 28 Cal. 133; Dorey v. Lynn (Kan. Sup.) 3 Pac. 558; Cogan v. Beard, 67 Cal. 306, 7 Pac. 738; Blankenship v. Israel (Ill. Sup.) 24 N. E. 615; McCrary, Elect. 291-293; People v. Burden, 45 Cal. 241; Cogan v. Beard, 65 Cal. 58, 2 Pac. 737; Kreitz v. Behrensmeyer (Ill. Sup.) 17 N. E. 235, 242; Fenton v. Scott (Or.) 20 Pac. 98; Albert v. Twohig (Neb.) 53 N. W. 583; Powell v. Holman (Ark.) 6 S. W. 505; Bowers v. Smith (Mo. Sup.) 20 S. W. 101; In re Vote Marks (R. I.) 21 Atl. 962; In re Sharon Hill Election (Pa. Com. Pl.) 3 Lack. Jur. 286; Lay v. Parsons (Cal.) 38 Pac. 447; Spurgin v. Thompson (Neb.) 55 N. W. 299; State v. Russell (Neb.) 51 N. W. 465; Sego v. Stoddard (Ind. Sup.) 36 N. E. 204; Parvin v. Wimberg (Ind. Sup.) 30 N. E. 790; Ingalls v. Shepherd, 67 Cal. 469, 8 Pac. 5; Louck's Case (Pa. Quart. Sess.) 3 Pa. Dist. R. 127; Coffey v. Lyman, 92 Cal. 137, 28 Pac. 91; Coffey v. Edmonds, 58 Cal. 521; Wyman v. Lemon, 51 Cal. 273; People v. Board of Sup'rs of Dutchess Co. (N. Y. App.) 32 N. E. 245; State v. Saxon (Fla.) 12 South. 218; Sprague v. Norway, 31 Cal. 174; Minor v. Kidder, 43 Cal. 237; Preston v. Culbertson, 58 Cal. 209; People v. Seale, 52 Cal. 71, 621; Russell v. McDowell, 83 Cal. 70, 23 Pac. 183; People v. Cook, 59 Am. Dec. 468; Cleland v. Porter, 24 Am. Rep. 273; Piatt v. People, 29 Ill. 54; Board of Sup'rs v. People, 65 Ill. 360; Fry v. Booth, 19 Ohio St. 25; Soper v. Board (Minn.) 48 N. W. 1112; Farrington v. Turner (Mich.) 18 N. W. 544; Whitley v. McKune, 12 Cal. 360; State v. Nicholson (N. C.) 9 S. E. 545; McCrary, Elect. § 128; Finlay v. Walls, 4 Cong. Elect. Cas. 378; Bragdon v. Navarre (Mich.) 60 N. W. 277; Lindstrom v. Board (Mich.)

54 N. W. 280; *Allen v. Glynn* (Colo. Sup.) 29 Pac. 670; *Schneider v. Bray* (Nev.) 89 Pac. 326.

HENSHAW, J. Appeal from the judgment, taken within 60 days after its rendition. The evidence is brought up for review by bill of exceptions. By the official canvass of the supervisors, Smith was declared elected over Tebbe to the office of county superintendent of schools of Siskiyou county at the last general election, by a plurality of one vote. Tebbe then instituted this contest. The result of the judicial count was to increase contestant's total vote by three, no change being made in the number of votes accredited to contestee, and accordingly the judgment of the court declared contestant to be duly elected.

1. The first point urged is that the court erred in overruling contestee's objection to receiving the ballots in evidence. The evidence showed that the ballots and returns reached the county clerk through the proper channels. The sealing wax on some of the packages was broken when they were received from the express office. Other seals were broken in handling. The packages were placed on top of a large case in the clerk's office, and there remained, in the condition in which they had arrived, until the completion of the canvass by the supervisors, when they were put into three gunny sacks, each sack securely bound and sealed, and placed under the clerk's desk, where they remained until produced in court. Upon being opened, they were found to be in the same condition as when they were sealed by the clerk. There had been no opportunity for any one to tamper with the ballots, and in fact they had not been disturbed. They were left alone only when the office was closed and locked. During office hours they were never left alone, excepting upon one occasion, when the deputy stepped out for "a minute and a half," leaving one Robertson in the office. At that time the ballots were in the gunny sacks, and neither the sacks nor the ballots had been disturbed. Tebbe, the contestant, was a deputy clerk during this time; but he was never left alone in the office, and was given no key to it. We cannot see anything suspicious in this last circumstance. Upon the contrary, it reflects credit upon the prudence of the clerk, and the fair dealing of all concerned. Knowing of the impending contest, they took all reasonable precautions to avoid exposing either the ballots, or contestant's connection with them, to any suspicion. The principles of law and the rules of evidence governing cases such as this have been so often declared that a review of the many authorities is unnecessary. Those curious or interested in pursuing the subject will find in the reporter's notes, preceding, many instructive cases collated by the industry of counsel. Suffice it here to say that while

the ballots are the best evidence of the manner in which the electors have voted, being silent witnesses, which can neither err nor lie, they are the best evidence only when their integrity can be satisfactorily established. One who relies, therefore, upon overcoming the *prima facie* correctness of the official canvass by a resort to the ballots, must first show that the ballots, as presented to the court, are intact and genuine. Where a mode of preservation is enjoined by the statute, proof must be made of a substantial compliance with the requirements of that mode. But such requirements are construed as directory, merely, the object looked to being the preservation inviolate of the ballots. If this is established, it would be manifestly unjust to reject them merely because the precise mode of reaching it had not been followed. So, too, when a substantial compliance with the provisions of the statute has been shown, the burden of proof shifts to the contestee, of establishing that, notwithstanding this compliance, the ballots have in fact been tampered with, or that they have been exposed under such circumstances that a violation of them might have taken place. But this proof is not made by a naked showing that it was possible for one to have molested them. The law cannot guard against a mere possibility, and no judgment of any of its courts is ever rendered upon one. When all this has been said, it remains to be added that the question is one of fact, to be determined in the first instance by the jury or trial judge; and, while the ballots should be admitted only after clear and satisfactory evidence of their integrity, yet, when they have been admitted, this court will not disturb the ruling unless we, in turn, are as well satisfied that the evidence does not warrant it. In this case we do not think the ruling was erroneous.

2. Nine ballots were received and counted by the court for contestant, which were marked with a cross, not in the square at the right of his name, but in the marginal space to the right, thus:

120	George A. Tebbe.....X.....Democrat
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It is urged against the ruling that the ballots were not marked as required by statute, and that the marks so placed served as distinguishing marks, and rendered the ballot void. Pol. Code, §§ 1215, 1211. The provisions as to the marking of ballots are, in their nature, mandatory. *Attorney General v. McQuade* (Mich.) 53 N. W. 944; *People v. Board of County Canvassers*, 129 N. Y. 395, 29 N. E. 327; *Taylor v. Bleakley* (Kan. Sup.) 39 Pac. 1045; *Ellis v. May* (Mich.) 58 N. W. 483; *Lay v. Parsons*, 104 Cal. 661, 38 Pac. 447; *Whittan v. Zahorik* (Iowa) 59 N. W. 57. But as is said in *Bowers v. Smith*, 111 Mo. 45, 20 S. W. 101, "all statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his

favor." If we should find a provision in our statutes requiring the voter to mark the cross in the square to the right of the candidate's name, we would feel constrained to adopt the rule and reasoning of the supreme court of Indiana, where such a provision exists, construing which the court said: "If we hold this statute to be directory only, and not mandatory, we are left without a fixed rule by which the officers of election are to be guided in counting the ballots." *Parvin v. Wimberg*, 30 N. E. 790. But our statutes contain no such mandatory provision. So far as they are pertinent to this discussion, the provisions are that "there shall be a margin on the right-hand side of the names, at least one-half of an inch wide, so that the voter may clearly indicate in the way hereafter to be pointed out the candidate and candidates for whom he wishes to cast his ballot." The clerk is, in printing the ticket, to place upon it the following: "To vote for a person, stamp a cross (X) in the square at the right of the name." Pol. Code, § 1197. The mandatory provisions as to voters are found in sections 1205 and 1215 of the same Code: "He shall prepare his ballot by marking a cross after the name of the person or persons for whom he intends to vote * * * and, in case of a constitutional amendment or other question submitted to the vote of the people, by marking in the appropriate margin a cross (X) against the answer he desires to give." Pol. Code, § 1205. "No voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him." Id. § 1215. It will be noted that these sections make no mention of the square, and that there is not even an express direction to the clerk to place a square opposite the names of the candidates. The voter is only commanded to place the cross in the marginal space to the right of the candidate's name, and when he has done this he has complied with the mandatory provisions of the law. True, the statute contemplates, at least inferentially, the making of a square, and that the square is the proper place for the marking of the cross; but it has not made the doing of this a prerequisite to the casting of a legal ballot. The intention of the voter is as plainly indicated by the one marking as by the other, and, as was said by the supreme court of Rhode Island in construing a similar law: "Our opinion is that a cross placed in the margin of the ballot on the right of the names of the candidates, opposite a candidate's name, should be counted as a vote for the candidate opposite whose name it is placed, whether the margin have any square in it, or not, and, if there be a square in it, even though the cross is without, or partly without, the square. All that chapter 731 [Laws 1880] requires, to make the cross effective as a vote, is that it shall be inscribed in the right-hand margin, opposite the name of the person intended to be voted for." *In re Vote Marks* (R. I.) 21 Atl. 962. As to the last contention

upon this point, that the marks served to distinguish the ballots, it need but be suggested that it would not require much ingenuity or intelligence to place the cross, even within the square, in such a manner as would enable the ballot to be distinguished. When a legal mark is placed upon the ballot in a legal place, the ballot cannot be rejected because the mark, as placed, may serve some ulterior purpose. Section 1215 of the Political Code, in forbidding marks, does not include the cross legally placed. The ballots were, therefore, properly received.

3. The ballot from Sawyer's Bar precinct (Exhibit F) should have been rejected. It bore upon it the letter "J," written in pencil in the blank space left for the insertion of the name for justice of the peace. Doubtless, it may have been the intention of the voter to write a name, and he may have abandoned his intent after setting down the initial letter; but doubtless, also, the mark could serve as a distinguishing mark, and, being one having no lawful right upon the ballot, it renders it void. The case differs from *Rutledge v. Crawford*, 91 Cal. 526, 27 Pac. 779, where this court held that the impression (of printer's ink) upon the back of the ballot was as attributable to accident as design. Here the writing of the letter was an affirmative act of the voter. He had his remedy, having improperly marked his ballot, by calling for the issuance to him of a fresh ticket. Pol. Code, § 1207.

4. The account of the election at Lake precinct is a breeze from Arcady. The polls should have opened at 6:31 a. m. Smith received 13 votes in this precinct; Tebbe, 20. William Otey, called for contestant, testified: "On November 6th, last, I was at the polls of Lake election precinct, on the Fairchild ranch. * * * I got there between eight and nine o'clock in the morning. Served on the election board in my father's place. When I got there, Fairchild, Henry Seale, and the hands working on the ranch were there. I do not remember any one else. The polls were opened, I should judge, some time near ten o'clock. We took an adjournment when we went to dinner. Took the ballot box with us. Fairchild, the old gentleman, carried it. He was one of the election officers. * * * The other materials—ballots and everything—we left in the poll room when we went to dinner. We left the ballot box on the table while eating dinner,—on same table. That ballot box did not pass into the hands of other persons. I think there were bystanders around the polls at the time we went to dinner. * * * The house is about a hundred yards from the polling place. Between the house and schoolhouse there were some men. Some had voted, and some were working on the ranch. I think some other people took dinner with the board. When we were through, Fairchild carried the box back. No person was deprived of voting because the polls

were not opened earlier. I know that no one came there without voting that was entitled to vote." The law provides that the polls must open at sunrise, and be kept open until 5 p. m., and that the ballot box must not be removed from the polling place, or presence of the bystanders. Pol. Code, §§ 1160, 1162. It is the rule that mandatory provisions for the holding of an election must be followed, or the failure will vitiate it, while a departure from the terms of a directory provision will not render it void in the absence of a further showing that the result of the election has been changed, or the rights of the voters injuriously affected, thereby. Code Civ. Proc. § 1112; *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183. But the rule as to directory provisions applies only to minor and unsubstantial departures therefrom. There may be such radical omissions and failures to comply with the essential terms of a directory provision as will lead to the conclusive presumption that the injury must have followed. A substantial compliance with the terms of directory provisions is, after all, required. And such a substantial compliance is not had by strictly following some provisions, while essentially failing to observe others. There must be a reasonable observance of all the prescribed conditions. It is the duty of the courts so far to adhere to the substantial requirements of the law in regard to elections as to preserve them from abuses subversive of the rights of the electors. And, under this view, the question becomes a broader one than can be disposed of by answering that in the individual case no harm resulted. Thus, in *Knowles v. Yeates*, 31 Cal. 82, the contention of appellants was that, admitting that there was no fraud, and that the votes were cast by qualified electors, still the fact that in certain precincts the polls were opened, without reason, at long distances from the appointed places, was enough in itself to call for the rejection of the votes; and this court so held. Likewise, in the case of *People v. Seale*, 52 Cal. 71, where no question of fraud or injury was involved, but where, at an election called for voting a school tax, the polls were opened at 1 o'clock p. m., and closed at 6, instead of being opened at one hour after sunrise and kept open until sunset, as the law then required, this court, without hesitation, declared the election invalid. In this case we are quite willing to believe that the misconduct of the officers of Lake precinct was prompted by nothing worse than ignorance, and lack of appreciation of the responsibilities of their positions, and we may say, further,—for such is the evidence,—that no harm is shown to have resulted from their conduct; but, looking to the purity of elections and integrity of the ballot box, we are constrained to hold that conduct like this amounts, in itself, to such a failure to observe the substantial requirements of the law as must

invalidate the election. And, while reluctant so to hold in this instance, we are confirmed in the opinion by consideration of the fact that any other interpretation would add grave perils to the safe conduct of our elections, which are already harassed by dangers enough. The votes of Lake precinct should, therefore, have been rejected.

5. Upon all the ballots cast in Cecilville precinct there appeared the following, written in the blank space under the office of justice of the peace: "G. G. Brown—Republican." The evidence discloses that this writing was all done by the same person, and, further, that there was but one person in the precinct lawfully assisted in the marking of his ballot, under the provisions of the Code. Pol. Code, § 1208. The record, unfortunately, does not disclose who did the writing, nor whether it was upon the tickets when they were put into the voters' hands. Left, then, to the presumption of the performance of duty by public officers, it must be held that the officers put legal tickets into the hands of the electors, and that the writing was afterwards put upon them. But an elector unable to write can, under our present laws, have a name inscribed upon his ballot in only one legal way, and that is by pursuing the method prescribed by section 1208 of the Political Code. This requirement is clearly mandatory, since it is further declared that "any ballot which is not made as provided in this act shall be void, and shall not be counted." Pol. Code, § 1211. In *Ellis v. May* (Mich.) 58 N. W. 483, the supreme court of Michigan, construing a similar statute, held that inspectors of election had no right to assist in the marking of ballots, except in the manner provided by law, and that ballots marked in any other than the prescribed manner were void. In the present state of the evidence, only the ballot of the voter lawfully assisted should be counted. It must be held, therefore, that the other ballots of Cecilville precinct should not have been counted. What is here said is addressed to the evidence as it appears in the record. It may be that, upon a new trial, additional evidence will remove the objections now found.

The other points do not require consideration. They are either covered by what has been said, or do not involve error. But for the foregoing reasons the judgment is reversed, and the cause remanded.

We concur: TEMPLE, J.; VAN FLEET, J.; HARRISON, J.

McFARLAND, J. (concurring). I concur in the judgment, and also in the opinion of Mr. Justice HENSHAW, except as to the Cecilville precinct. It will be observed that there is no evidence tending to show when "G. G. Brown—Republican," was written on the ballots. If there be a distinguishing

mark on a ballot when it is voted, the ballot should not be counted; but, if the mark be placed on the ballot after it had been properly voted, then, at the trial of a contest, it should be counted. Now, upon the trial in court of an election contest, if a marked ballot be found, and there is no evidence as to the time of the marking, must the court presume that it was marked before it was voted? Such a rule would afford an evil-disposed person, who could get temporary access to the ballots after they had been counted, an easy and safe method of changing the result in a close contest, by simply marking—and thus invalidating—a few ballots in which the votes were for the prevailing party. Of course, fraud should be carefully guarded against; but it seems to me that the rule contended for would be much like closing a wicket and leaving open a barn door. I do not see that there are any presumptions upon which the problem can be solved. If we presume that the ticket was not marked when the election officers gave it to the voter, we must also presume that it was not marked when those officers counted it; and, if we are also to presume that the ballots were afterwards so securely kept that no one could get access to them, it is evident that all the presumptions, taken together, afford no aid in the solution of the question. In the case at bar it is not contended that there was any actual fraud committed, even in the matter of voting for justice of the peace; and, before throwing out votes honestly cast for superintendent of schools, I am inclined to think that there should have been some evidence tending to show that the marking of the votes for justice of the peace was done before the ballots were voted. And it is quite probable that such evidence could readily have been obtained. The returns should show whether or not the said ballots were counted for Brown, and the election officers ought to be able to throw some light upon the question whether the ballots were marked when they were examined during the process of counting.

I concur: GAROUTTE, J.

108 Cal. 331

BURRIS v. KENNEDY et al. (No. 15,634.)
(Supreme Court of California. Aug. 2, 1895.)
PROBATE SALE OF LAND—VALIDITY OF DECREE—
PRESUMPTIONS—IRREGULARITIES—
QUIETING TITLE.

1. There are the same presumptions in favor of the validity of a decree of the superior court, sitting in probate, in proceedings, for the sale of a decedent's lands, as a judgment at common law.

2. Under Code Civ. Proc. § 1537, providing that a petition for the sale of a decedent's land must, among other things, contain a general description of all the land of which decedent died seised, and the value thereof, but that a failure to set forth the facts showing the sale

to be necessary will not invalidate the subsequent proceedings if the defects be supplied by proofs on the hearing, and the general facts showing such necessity be stated in the decree, a sale is not invalid merely because the petition failed to describe all the land deceased died seised of, to give the value thereof.

3. In a proceeding for the sale of a decedent's land, the order to show cause was returnable on April 4th, and the proofs were made and a decree for a sale entered on that day. On April 11th another decree for a sale was made, reciting that the decree theretofore made had been vacated for error. *Held*, that a sale under the second decree was valid.

4. The sale of a decedent's land is not invalid because the administrator's bond, which was approved after a second decree of sale was made, referred to a former decree of sale, which had been set aside as erroneous.

5. A sale of a decedent's land is not void because the court erred in ordering a private instead of a public sale.

6. Where land was sold by an administratrix to a third person, who reconveyed it to her, the grantee of the heir of decedent cannot maintain an action against her to quiet his title to the land, on a complaint which fails to allege any facts showing fraud on her part.

7. In an action to quiet title by the grantee of an heir of a decedent against one who, as administratrix of decedent's estate, sold the land, and then procured a reconveyance to herself, defendant, by setting up as a defense the ratification of the sale to her, and that, if the sale to her is held void, she is entitled to be subrogated to the rights of creditors of the estate whose claims were paid out of the proceeds of sale, did not admit that her title was obtained by fraud, where she rested her defense on plaintiff's want of title.

In bank. Appeal from superior court, Alameda county; John Ellsworth, Judge.

On rehearing. Reversed.

For former report, see 38 Pac. 971.

Hutchinson & Campbell, for appellants.
Sharp & Bolton, for respondent.

TEMPLE, J. This is an action to quiet title, and the complaint contains only the allegations that plaintiff is the owner of the demanded premises, and the defendants claim title to the same adversely to plaintiff. Defendants claim under a probate sale. Plaintiff's grantor, Annie Church, now Mrs. Spaulding, and defendant Mrs. McNeil, were practically sole heirs of James Kennedy, deceased, from whom both parties derive title. I say practically, for James Kennedy died intestate, leaving a widow, Mrs. Spaulding's mother, who took one-half the estate, and, before the administration was closed, herself died testate, leaving Miss Church sole devisee. Her will was probated, and all her estate distributed to Miss Church. It is argued that plaintiff simply represents Miss Church, who is interested in this suit as plaintiff. Mrs. McNeil is the sole surviving child of James Kennedy, deceased, and his sole heir. She was also administratrix upon his estate. Respondent contends that the probate sale under which the defendants claim is void, because:

1. Neither the petition for the sale nor the order of sale contains a statement of the jurisdictional facts. The determination of

this question depends somewhat upon the nature of the tribunal. The order was made by the superior court of Sonoma county, in 1887. That court has general jurisdiction derived from the constitution. We have in this state no probate court, but superior courts are given jurisdiction of all matters of probate, just as they are given jurisdiction of cases at law and in equity. The grant of jurisdiction in regard to matters of probate is contained in the general definition of the jurisdiction of the court. After stating various classes of cases, or matters of which the court has jurisdiction, it is said, "And of all such special cases and proceedings as are not otherwise provided for." The court is not, therefore, while sitting in probate, a statutory tribunal, and does not derive its power from the act of the legislature; nor are probate proceedings classed by the constitution as special proceedings. If the administration of an estate can be called a "judicial remedy," then it is classed as a special proceeding in the Code, which divides all "remedies" into adversary actions and special proceedings. It is a proceeding in rem which is not, in the technical sense, such a special proceeding, unknown to the framework of the common law, as will change the presumptions which attach to the action of the court, making it *pro hac vice* a court of inferior and limited jurisdiction. If this was ever a matter of doubt it was set at rest by the case *In re Burton*, 93 Cal. 459, 29 Pac. 36. It was there said: "No distinct 'court of probate' has been created or recognized by the present constitution of this state. The constitution has created superior courts, and has given them original jurisdiction of the subject-matter of various classes of actions and special proceedings, more or less distinct from each other; among which are 'all actions at law which involve the title or possession of real property,' and 'and all such special cases and proceedings as are not otherwise provided for,' and 'all matters of probate.'" It is further said: "The superior court, while sitting in matters of probate, is the same as it is while sitting in cases in equity, in cases at law, or in special proceedings; and, when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment." It is true the court, although deriving its authority from the constitution, is controlled in the mode of its action by the Code, and so it is, to the same extent, when foreclosing a mortgage, or trying an action on a promissory note. In both cases it is pursuing the mode prescribed by a statute, but in neither does it derive its power from the statute. Indeed, while the legislature may regulate the mode in which the court shall exercise its jurisdiction, it cannot circumscribe its powers. This

was not the case in former constitutions. By the constitution of 1849 a separate tribunal was created. The county judge was directed and authorized to perform the duties of surrogate and probate judge. And it was held that the legislature could grant only a special and limited power to a county judge when acting as probate judge; that it had and could be vested with none of the jurisdiction conferred upon other courts, unless by express authority found in the constitution. Such courts were said to have only a special and limited jurisdiction, and it was required that its records should show a strict compliance with the law directing and authorizing their action. This rule was found intolerable, and in 1858 an act was passed directing that the same force and effect and the like presumption should attach to their proceedings as to the proceedings in the district courts. This act has been held valid, and probate orders made since its passage can be collaterally attacked only on such grounds as would have been valid against like orders made by the district court. *Irwin v. Scriber*, 18 Cal. 499; *In re Sprigg's Estate*, 20 Cal. 121; *Halleck v. Moss*, 22 Cal. 266. The amendment of 1862 still left the probate court a separate and special tribunal, which did not have full probate jurisdiction. *Bush v. Lindsey*, 44 Cal. 121. In the constitution of 1879 all this was changed. The jurisdiction was given to the highest court in the state having a general common-law jurisdiction. The same presumption must now attach to decrees in probate proceedings upon collateral attack as to judgments in cases at common law or in equity, and the sufficiency of the proceedings or petition will be tested by the same liberal rule which applies to the pleadings in an ordinary action upon such attack.

From the view I take of the matter it is not important to determine whether the application to sell real estate is a step in the administration or not, although I do not doubt that it is. What is meant when it is said that it is an independent proceeding is simply that it is essential that the application should be made substantially as provided by statute; otherwise the court has no power to order the sale, or the administrator to sell. This I admit, claiming only that in entertaining the application and in passing upon it the court is not acting as a special tribunal to which a matter is referred, but is in the exercise of its general jurisdiction over the subject-matter, derived from the constitution. One prominent purpose of administration is to pay the debts of the estate from the real and personal property of the deceased. The administrator is, by law, charged with this duty. To sell real estate to pay the debts, when there is not sufficient personal property, is as plainly a step in the administration as is the sale of personal property for the same purpose. But, although it is within the scope of the administration to sell either real or personal proper-

ty, the legislature has the power to direct how this shall be done. I think the legislature could have authorized the administrator to do so without any order or decree of the court, or might have authorized the court to make the order without petition or notice. It has, however, prescribed that a petition shall be filed, and that notice should be given, and an opportunity for a hearing shall be afforded. Since the procedure is one in which there are no adversary parties present at all times in court, it is reasonable to hold, as has always been held, that these acts are essential to the power on the part of the court to order the sale. In that sense the petition and notice are jurisdictional. As in all other similar matters, however, if the court has by the petition and notice acquired jurisdiction, errors afterwards in the exercise of it, however gross, will not render the decree invalid. I think there has been no time since 1858 when a sale of real estate would have been held void because it omitted to give a description of all the real estate of which the deceased died seised, or the value or condition of the different parcels. Such are the alleged defects in this case. But, whatever strictness was formerly required, there can be no question since the amendments to section 1537 made in 1874.¹ As the statute now reads, no sale is invalid on account of the omission to state in the petition any of the matters enumerated, provided the general facts showing that a sale is necessary are proven and found. Section 1537 expressly requires the statement of some facts which have no bearing upon the question of the necessity of the sale. The description of the real estate or its value can throw no light upon that matter. These and some other matters are required to be stated to enable the court to exercise its discretion more intelligently, after it has determined the sale to be necessary. General facts showing that a sale is necessary are set out in the petition, and the decree imports a finding of their truth, and that evidence to that effect was given at the hearing. The facts showing that a sale is necessary are that there are debts; that an allowance has been made for the support of the family; or that there are expenses of administration, and there is not sufficient personal property with which to pay them. Such facts are alleged in the petition, and, though erroneous, the decree is not void, nor the sale invalid on that ground.

2. Many irregularities in the proceedings in the probate court are pointed out and insisted upon as rendering the sale void. If the court

had jurisdiction, errors in the exercise of it, however gross, would not render the decision invalid. It is charged that no order to show cause was made or published; that no bond was given; that a private sale was ordered when no appraisal had been made within the year, and that the records show that a sale was not necessary. The only points here sufficiently serious to require notice are the two first mentioned,—that no order to show cause was made, and no bond executed. They depend upon the same facts. The return day mentioned in the order to show cause was the 4th day of April, 1887. On that day a hearing was had and proofs made. A decree directing a sale was also made on that day. On the 11th—seven days later—another decree or order of sale was made, referring to the same petition, and reciting that the order theretofore made in the matter had been vacated for errors. Under this order made on the 11th the sale took place. It is not in form a nunc pro tunc order, but I think it sufficiently appears that it is such. It was evidently in lieu of the order made on the 4th, and must be regarded as the decree then rendered, although, by mistake, a different decree was then entered. The bond refers to the order as made on the 4th. The decree, as above stated, is actually dated as of the 11th, but sufficiently shows that its true date would have been the 4th. The bond was approved May 27th, long after the first order had been vacated and the nunc pro tunc order substituted. If the court erred in ordering a private sale rather than a public sale, or in determining that a sale was necessary, this was mere error, and does not affect the validity of the sale.

3. But it is contended that the sale is void for another reason. After the sale had been made, and two days before the confirmation, Mrs. McNeil, the administratrix, and a Mrs. Kennedy, contracted with Potter, who purchased at the administrator's sale, to purchase the property from him, or to make an exchange for other lands belonging to them. In pursuance of the contract, Potter, at the same time, conveyed the land to Mrs. McNeil and Mrs. Kennedy by grant. This was a violation of section 1576, Code Civ. Proc., and is therefore, respondent claims, void. There is no evidence, nor is it found, that the sale was made to Potter for the benefit of Mrs. McNeil and Mrs. Kennedy; but, supposing that until the date of the deed Potter was acting for himself, still Mrs. McNeil had no right to be interested in the purchase. Her duty as administratrix had not ended. It was incumbent upon her to prevent the confirmation if a better price could be obtained, or if a sale was not necessary. Yet, considering the sale as made to the administratrix per interpositam personam, it was not void. This was decided in *Boyd v. Blankman*, 29 Cal. 20, after an elaborate consideration, and that conclusion has never been overruled or modified. It was there

¹ Code Civ. Proc. § 1537, provides that a petition for the sale of decedent's land must, among other things, contain a general description of all the land of which decedent died seised, and the value thereof, but that a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defects be supplied by proofs on the hearing, and the general facts showing such necessity be stated in the decree.

said: "We are of opinion that, by holding the sale to be void at the election of heirs or other persons interested in the estate, the mischief intended to be prevented by the statute will be obliterated, and at the same time those who, in good faith and without notice of the constructive fraud of the administrator, had acquired the title through the agent who purchased the property for the use of the administrator, will be protected from losses." If the sale were absolutely void, as an illegal transaction, innocent purchasers would not be protected. Under the rule laid down, the unfaithful trustee may be prevented from making a profit from his violation of duty, and yet the beneficiary cannot avail himself of money laid out for his use, and keep the property too. He must rescind, and in doing so restore to the purchaser the money which has been paid to him as a consideration. Respondent claims that this case was overruled in *Jones v. Hanna*, 81 Cal. 507, 22 Pac. 883. Counsel are misled by the dissenting opinion rendered in that case in which that view was taken. In the opinion of the court that idea is expressly repudiated, and the point adjudged was very different from that raised in this case or in *Boyd v. Blankman*. There the administratrix had the personal property of the estate sold at auction. She asked the auctioneer to bid them in for her. He consented to do so, but demanded security for the price and for his commissions. Bihler, who was the appellant in *Jones v. Hanna*, became such surety, giving to Jones, who was to purchase for Mrs. Hanna, his note. The suit was on this note, and the court held it void, as against public policy. It was given to secure Jones upon his contract to assist Mrs. Hanna to violate her trust. The sale to Jones for Mrs. Hanna was not declared void. A simple illustration will show the difference in the cases. A. desires to defraud B. by inducing him to sell to A. his land for half its value. He employs C. to assist in deceiving and defrauding B., and for such services promises him \$1,000, and gives his note for that amount. The fraud having been consummated, the court will not aid C. in the collection of his note, but will hold it void. But B. cannot assume that his deed is void and sue A. in ejectment to recover the land. He must rescind, and bring his action, alleging the acts of fraud. In *Jones v. Hanna*, plaintiff was suing on such a note,—at least the court so held. *Bergin v. Haight*, 99 Cal. 52, 33 Pac. 760, has no application. There it was charged that the administration itself was a fraud. Administration was not sought to pay debts or to pass the property to heirs, but as means of a fraudulent acquisition of the property by the plaintiff. No debts were paid, and no costs which benefited the heirs. There was no occasion for rescission. And, besides, no such point was raised or attempted to be. It is said that, inasmuch as the deed was

made before the decree of confirmation, the sale was directly to the administratrix, and therefore not within the rule laid down in *Boyd v. Blankman*. The title passed to Mrs. McNeill by inurement when it passed to Potter. It was the exact case, then, of a purchase by the administratrix per interpositam personam, as in the case of *Boyd v. Blankman*. In such cases the sale is always virtually to the administrator, and it is that fact which renders it voidable. In *Burris v. Adams*, 96 Cal. 664, 31 Pac. 565, which was an action by the same plaintiff, and in which the attorneys on both sides were the same, it was held that a complaint in all respects similar to that in the case at bar was insufficient, because the facts constituting the fraud were not averred. There is no reason why that rule should not apply to this case. Plaintiff sues upon the theory that he is the owner; not to have a title which defendant has procured by fraud declared fraudulent and therefore void. Counsel says the objection cannot prevail here, for all the facts are set out in the answer. The answer contains several defenses, but in none of them is it admitted that the title of defendant was obtained by fraud. One defense consists in a denial of plaintiff's title. This was all the answer defendant required. The other defenses were that plaintiff was estopped; that the sale had been ratified; and that the defendants, in case the sale was held void, were entitled to be subrogated to the rights of creditors of the estate whose claims they had paid. The facts were alleged with reference to these last defenses, and were material only to them. Until plaintiff showed his title, they were not material, and even then defendants need not rely upon them. They could prove, as they did, under the denial of plaintiff's title, that plaintiff never had title, by showing that they had it themselves. The fact that the action was brought to quiet title rather than to recover possession does not require any different pleading on the part of defendants. It is not a bill of discovery, and defendants are not required to state the nature of their claim for the benefit of plaintiff, or simply to have it passed upon by the court. As the record stands, defendants are entitled to recover upon the first issue made by them, to wit, the denial of plaintiff's title. But in no event would the answer change the theory of plaintiff's action or constitute notice that he relied upon fraud. He would have been compelled in this case not only to set up the fraud, but to seek a rescission of the fraudulent sale. Perhaps he would not have been required to make a tender, as prescribed in the Code. It may sometimes be impossible to do that. In such cases a party desiring to sue to enforce a rescission must at least offer, as a condition, to make such restitution as the court shall direct; and if the parties cannot be placed substantially in statu quo

this court may refuse the relief. The judgment and order are reversed, and a new trial awarded.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.; HENSHAW, J.; VAN FLEET, J.

McFARLAND, J. I concur in the judgment. I also concur in the opinion of Mr. Justice TEMPLE, as I understand it. I do not understand that opinion as declaring anything more on the subject of jurisdiction than this: that while the superior court, when dealing with probate matters, is to be considered as a court of general jurisdiction, with the same presumptions attaching to its acts as in any other action or proceeding over which it has jurisdiction, still, a proceeding to sell real property of an estate must be instituted as provided by statute; and that the court has no more jurisdiction to decree a sale without a petition than it would have to render a judgment on a promissory note where no action had been instituted by the filing of a complaint. As thus understood, the opinion is not in conflict with *Pryor v. Downey*, 50 Cal. 398, and the long line of cases there cited, and referred to in *Richardson v. Butler*, 82 Cal. 174, 23 Pac. 9, which hold that "though the proceeding for the sale occurs in the general course of administration, it is a distinct proceeding in the nature of an action in which the petition is the complaint and the order of sale is the judgment." *Pryor v. Downey*, *supra*. After the act of 1858 the old county court was, as to probate proceedings, treated as a court of general jurisdiction; and the fact that the present constitution gives jurisdiction of probate proceedings to the superior court does not affect the rule as there stated. The petition for a sale is a necessary prerequisite to the jurisdiction of the court to order a sale; and I do not understand the opinion in this case to hold otherwise. In all other respects I fully concur in the opinion.

5 Cal. Unrep. 94

BANK OF ESCONDIDO v. THOMAS et al.
(No. 19,580.)

(Supreme Court of California. July 25, 1895.)
PARTY WALL—ENJOINING USE—ACTION FOR COST.

1. In an action to enjoin defendants from using a certain wall as a party wall, the answer alleged that said wall rested in part on defendants' land. *Held*, that the issue as to whether plaintiff's building extended over the dividing line was sufficiently raised by the pleadings.

2. Where a board of directors consented to allow defendants to use a wall of the corporation's building as a party wall, and the defendants erected a building with the knowledge and acquiescence of said directors, the corporation will be estopped to assert that defendants have no interest in the wall; but its remedy, if any, is an action for the recovery of a proportionate part of the cost of said wall.

3. Where plaintiff's wall projects over defendants' land, equity will not enjoin defendants' use thereof as a party wall.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Bank of Escondido to enjoin W. W. Thomas and another from using a certain wall as a party wall. Defendants had judgment, and plaintiff appeals. Affirmed.

Cassius Carter, David L. Withington, and Withington & Carter, for appellant. E. W. Britt, for respondents.

BELCHER, C. The plaintiff is a corporation engaged in the business of banking. In 1887 it acquired the title to, and erected a two-story brick building on a lot in the town of Escondido, county of San Diego. The defendants owned the two adjoining lots on the west, and shortly after the completion of the bank building they commenced the erection of a two-story brick building thereon, and completed the same early in 1888. To lay the foundation for the west wall of its building, the plaintiff excavated a trench 3 feet deep and 3 feet wide, which extended over its line, and upon defendants' land, 11½ inches. In this trench the foundation was laid, covering the whole space at the bottom, but narrowing towards the surface of the ground. The wall erected on this foundation was 13 inches thick, and it projected over the plaintiff's line to the extent of ½ inch at the ground, 1½ inches at the second-floor joists, and 2½ inches at the top joists. When defendants were erecting their building, they claimed the right to use the plaintiff's wall as a party wall, and they inserted therein the joists for each of the three floors of the building, and also plastered the wall without lathing. They also, with plaintiff's consent, cut a doorway through the wall, on the second floor, so that free passage might be had between the said buildings. After the opening of this doorway the plaintiff was required to pay an additional rate of insurance on its building by reason thereof, and it claimed that defendants should pay such increased insurance, which they did for about a year. Then they put an iron door in the opening, after which no increased insurance was charged. By design, the defendants' building, in finish and general appearance, was made the same as the plaintiff's building; and when finished the two together presented "the appearance of virtually a single building," and ever since they have been known as the "Escondido Bank Block." Later, some time in 1892, it would seem,—the plaintiff, by one of its directors, presented to the defendants a bill for \$300, "for materials and work in partition wall." The bill was not paid, and thereupon, in June of that year, plaintiff commenced this action, alleging "that it is the owner and entitled to the possession" of its described lot of land; that defendants, and each of them, claim some

estate or interest in said real property adverse to the plaintiff; and that their claims are without right,—and praying that it be adjudged that defendants have no estate or interest whatever in or to said real property, or any portion thereof, and that they be forever enjoined from asserting any claim to the same adverse to the plaintiff. By their answer the defendants disclaimed any right, title, or interest in the land described in the complaint, except the right to use the said wall as a party wall. The case was tried, and the court found, among other things, that the west wall of plaintiff's building was erected, extending over the dividing line of the lots, as before stated; that, with the knowledge and consent of plaintiff, the defendants inserted the joists of their building into the said wall, and used the same as a party wall, and that no objections were at any time made by the plaintiff to such use, until the commencement of this action; that said wall is, and since the construction of defendants' building has been, a party wall, and that plaintiff agreed with defendants that they might use it as such; that, with the consent of plaintiff, the defendants caused a doorway to be opened through the said party wall, and afterwards, to save extra insurance, placed an iron door therein, as above stated; and that defendants claim no interest in the lot of plaintiff, except for the support of said wall, and their right to use the same as a party wall. Judgment was accordingly entered that defendants have an easement of support in the said land of plaintiff, of and for the said wall, which stands partly on the plaintiff's lot and partly on the defendants' lot, and that defendants have a right to use such wall as a party wall, and "that defendants have not, nor have any of them, any right, title, or interest in or to the land of plaintiff, except as herein expressly adjudged." From this judgment, and an order refusing to grant a new trial, the plaintiff appeals.

1. In support of the appeal, it is claimed that the finding to the effect that plaintiff's wall extends over the dividing line of the lots to the extent of from $\frac{1}{2}$ an inch to $2\frac{1}{2}$ inches is not within the issues raised by the pleadings. We see nothing in this point. The answer sets up the facts in regard to the construction of the two buildings, and alleges "that the said wall of the plaintiff's building has, ever since the construction thereof, about the 1st day of July, 1887, as aforesaid, rested, and does yet rest, in part, on the said land of the defendants, and that the said wall is a party wall, and ever since about the 1st day of March, 1888, has been used as a party wall" by the defendants and the plaintiff. This was quite sufficient to raise the issue passed upon.

2. It is unnecessary to consider at length all the points made in the case, and discussed by counsel. It was shown that during all the time of the construction of the

defendants' building the plaintiff was occupying its banking house, immediately adjacent, and its officers, without raising any objection, daily saw and knew what was being done by defendants. In January, 1888, at a meeting of its board of directors, the subject of the use of the wall by defendants was considered. What was then said and done is thus epitomized in the testimony of Mr. Watson, one of the directors: "Mr. Thomas stated that they were going, or had commenced, to put up a building. He stated it was to be of the general finish of the bank, and wanted to join on our wall. I think either Mr. Graham or myself made a motion that we allow them to do that; that we considered the building would enhance the value and appearance of the bank sufficiently to reimburse the bank for the use of the wall. My impression is there was unanimous consent. I think this was while the board was in session. I am not positive there was any motion, but it was the tenor of the conversation, and I understood it was agreed to on that basis." There was other testimony of like effect, clearly showing that defendants' right to use the wall as a party wall was recognized and acquiesced in by the plaintiff and its officers until after it presented its \$300 bill "for materials and work in partition wall." The officers of the plaintiff were its agents, and the rule is that notice to an agent is constructive notice to the principal; and the rule applies to corporations as well as individuals. *Jefferson v. Hewitt*, 103 Cal. 624. It is true that the defendants were two of the seven directors of the bank during all the time the buildings were being constructed, but that fact is not material, and cannot affect the conclusion reached. Under the circumstances shown, we think the plaintiff should be held estopped from claiming that defendants have no right to use the wall as a party wall, and that its remedy, if any it had, was an action to recover from defendants their just proportion of the cost of the materials and labor used in the construction of the wall. And, in support of this view, see *Zelninger v. Schnitzler*, 48 Kan. 63, 65, 28 Pac. 1007.

3. There is another ground on which the judgment should be affirmed. It was held in *Guttenberger v. Woods*, 51 Cal. 523, that he who seeks equity must do equity; and therefore, so long as the plaintiff's wall, laid on his own land, projects over the defendants' land, the court will not compel the defendants to desist from using it as a party wall. The rule declared in that case is applicable here, and should be followed. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

108 Cal. 247

MASON v. CULBERT, County Clerk. (No. 18,426.)

(Supreme Court of California. July 27, 1895.)

JURY FEES.

Under Act March 1, 1872, declaring that jurors shall receive three dollars per day "for attendance upon courts of record," a juror who has been impaneled for trial of a case is not entitled to fees for days that he is excused from attendance on account of continuance of the case.

Department 1. Appeal from superior court, Amador county; John F. Davis, Judge.

Application of Mason for mandamus to Culbert as county clerk. Application denied, and petitioner appeals. Affirmed.

Chas. H. Crocker, for appellant. R. C. Rust, for respondent.

HARRISON, J. The appellant was one of a jury of 12 persons who were impaneled in the superior court of Amador county for the trial of William Evans on a charge of murder, October 16, 1893. The trial proceeded from day to day to and including October 28th, when two of the jurors became sick and unable to perform their duty as jurors, and the trial of the cause was continued from that day to November 4th; and upon November 4th, the two jurors being still sick and unable to attend, the cause was again postponed until November 11th, and from the latter date, for a similar reason, until November 27th, when, the two jurors still being sick and unable to attend court, the cause was continued for the term, and the jury finally discharged. All of the jurors impaneled were present in court each day until October 28th, and also upon the several days to which the cause was continued, until they were finally discharged; but on the days on which the continuances were granted on account of the sickness of the jurors they were all excused from attendance, and permitted to go to their respective houses and business during the intervening periods. Upon their discharge the jurors received warrants for the 16 days during which they were actively engaged in the trial, and were paid thereon, but they insisted that they were entitled to compensation for each of the 43 days from the time they were impaneled until they were finally discharged. The other jurors assigned to the appellant their alleged claims for jury fees, and he subsequently demanded of the respondent, as county clerk of Amador county, that he issue certificates of attendance for the days during which the trial had been suspended on account of the sickness of the two jurors; and, upon his refusal, asked for a mandate of the court directing him to do so. The court refused his application, and the present appeal is from this order.

The statute regulating the fees of jurors in Amador county was enacted March 1, 1872 (St. 1871-72, p. 188), and provides that they shall receive three dollars per day "for attendance upon courts of record." It was

held in *Jacobs v. Elliott*, 104 Cal. 318, 37 Pac. 942, that, under this statute, a juror is entitled to be paid for only the days in which he is actually in attendance upon the court; and the only respect in which that case differs from the present is that in the present case the jurors were excused from attendance after they had been impaneled to try a cause, whereas, in the *Jacobs Case*, when the juror was excused from attendance, he had not been so impaneled. We are of the opinion, however, that the principles upon which that case was decided must govern this. A juror may be in attendance upon court without being impaneled to try any cause, and for every day of such attendance the statute authorizes him to be compensated. The per diem provided by the statute is not intended to be in the nature of a salary for the time that he is serving as a juror, or as wages for trying a cause, but rather as a compensation for the time during which he is withdrawn from his ordinary avocation and in actual attendance upon the court. After he has been drawn as a juror he may be excused from attendance for a definite period, and, after a jury has been impaneled and sworn, the remaining jurors may be excused from attendance until some future day. In such cases they are not "in attendance upon the court" during the period for which they are excused. Neither are the jurors who have been impaneled and sworn to try a cause in attendance upon the court during any period that they are excused therefrom, with the opportunity to be engaged in ordinary avocations, any more than if they had been relieved from attendance at their own request, or because the court may have taken an adjournment for its own convenience. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

5 Cal. Unrep. 92

Ex parte CORRAN. (Cr. 9.)

(Supreme Court of California. July 24, 1895.)

LIEN FOR COMMISSIONERS.

The petitioner was employed to superintend a canvass for subscriptions to a publication, and held the subscriptions as security for wages and commissions due to the solicitors and himself; but it appeared that all wages were in fact paid, and that the commissions were not to be paid to the solicitors until the publication was issued. *Held*, that the petitioner had no right to hold such contracts as against the receiver.

In bank.

Petition for writ of habeas corpus, ex parte Corrán. Writ denied.

John H. Dickinson, for petitioner.

HARRISON, J. In the action of Painter v. Painter, for the dissolution of a partnership, pending in the superior court of the city and county of San Francisco, a receiver had been appointed to take charge of the assets of the firm, and an order was made by the court, directing the petitioner herein

to deliver to the receiver certain contracts belonging to the firm, which were in its possession; and upon his refusal to comply with the order he was adjudged guilty of contempt, and ordered to be imprisoned in the county jail until he should have complied with said order. The circumstances upon which the order of the court was made were as follows: Painter & Co. were engaged in publishing Langley's San Francisco Directory, and, by virtue of a contract entered into between them and the firm of Francis & Valentine, the latter firm was interested in the publication of the directory, to the extent of 20 per cent. on all copies thereof that should be sold by Painter & Co. In October, 1894, the receiver being without funds to proceed with the preparation for publishing the directory for the succeeding year, Francis & Valentine and J. Milton Painter, a member of the firm of Painter & Co., employed certain solicitors to make a canvass for the directory, and to secure contracts of subscription and of advertisements therein, and also employed the petitioner to manage and superintend the canvass. For this purpose, Francis & Valentine delivered to the petitioner and said solicitors a number of printed blanks for subscription to the directory and for advertisements therein, and under this employment the solicitors procured a number of contracts, which were turned over to the petitioner, and which are the contracts he was directed to deliver to the receiver. The petitioner resisted the motion in the superior court to compel him to turn over the contracts, upon the ground that he had a right to retain them as security for his claim for services in their procurement, and urges in his present application for a discharge that for this reason the court had no jurisdiction to pass upon the conflicting claims of title between him and the receiver, or to adjudge him guilty of contempt for refusing to part with the contracts. The power of the court to pass upon a controverted question of title to property in proceedings in this nature does not, however, arise in this case. The petitioner does not claim to be the proprietor of the contracts, but merely claims that the contracts are held by him "as security for commissions earned by the said solicitors, and wages due them in connection with the said contract, for salary due me as superintendent of such solicitors, and for moneys advanced by J. Milton Painter in connection with the securing of the contracts." He does not, however, state that any wages were due to the solicitors, and although the solicitors made affidavits in his behalf, in which they stated that the contracts were turned over to him in October, 1894, to be held by him until they should be paid their wages, at the rate of \$2.50 per day, during the time they were employed, together with any commissions remaining due on account of their employment, they do not state that they have not since been paid the

full amount of their wages; and it was shown by the affidavit of Francis that, with the exception of the commissions, the petitioner and said solicitors have been paid the full amount due them for their services in making said canvass. It was also shown to the court, and not disputed, that the solicitors were not entitled to receive any commissions that may have been earned by them until after the directory had been published, and the amount due for said subscriptions and advertisements had been collected. Under these facts, it cannot be claimed by the petitioner that the solicitors had any right to retain the contracts as security for their commissions. The petitioner does not claim that he was ever authorized by J. Milton Painter to retain the contracts as security for any moneys advanced by him. The court was therefore fully authorized to find that the reason assigned by the petitioner for retaining the contracts, so far as he claimed to hold them on behalf of the solicitors, had no foundation in fact, and was without merit. His claim to retain them as security for salary due him as superintendent of the solicitors was equally unfounded. We know of no principle of law which authorizes an employé to take or retain property of his employer until his wages shall have been paid. That the contracts were the property of Painter & Co. cannot be controverted. Although the petitioner, as well as the solicitors, state in the affidavits presented by them that they were not employed by Painter & Co., or by any one on their behalf, they do not either of them state by whom they were employed; and the affidavit of Francis shows with particularity by whom they were employed, and that the employment was on behalf of Painter & Co. It was immaterial to the petitioner whether the contracts could be utilized by the receiver, or whether the withholding of them would be without injury to him or to Painter & Co. If they were the property of Painter & Co., the receiver was entitled to their possession. The writ is discharged, and the prisoner remanded.

We concur: GAROUTTE, J.; McFARLAND, J.; TEMPLE, J.

108 Cal. 173

O'CONOR v. ROARK. (No. 19,556.)

(Supreme Court of California. July 18, 1895.)

ATTACHMENT—AFFIDAVIT.

1. An affidavit for attachment, entitled in the action of "O., receiver," against, etc., stating that O., being sworn, alleges that he is the plaintiff in the above-entitled action, and that defendant therein is indebted to "him," shows that the indebtedness is to him in his character of receiver, within Code Civ. Proc. § 538, requiring it to show that defendant is indebted to plaintiff.

2. Under Code Civ. Proc. § 538, requiring the affidavit for attachment to specify the amount of indebtedness, it is enough to state

the principal indebtedness, without mention of interest and costs, for which, without stating amount, the complaint makes demand.

3. A statement, in an affidavit for attachment, of the amount of the indebtedness, over and above all set-offs "and" counterclaims, is a sufficient compliance with the requirement that it state the amount of the indebtedness over and above all set-offs "or" counterclaims.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by Andrew J. O'Connor, receiver of the Consolidated National Bank of San Diego, against Ellen Roark. Defendant's motion to discharge a writ of attachment was denied, and she appeals. Affirmed.

Trippet & Neale, for appellant. V. E. Shaw, for respondent.

VANCLIEF, C. This appeal is from an order denying defendant's motion to discharge and quash a writ of attachment issued in the above-entitled action, on the ground that the affidavit upon which the writ was issued is defective and insufficient. The following is a copy of the affidavit: "In the Superior Court of the County of San Diego, State of California. Andrew J. O'Connor, Receiver of the Consolidated National Bank of San Diego, Plaintiff, vs. Ellen Roark, Defendant. State of California, County of San Diego—ss. Andrew J. O'Connor, being duly sworn, says that he is the plaintiff in the above-entitled action; that the defendant, Ellen Roark, in the said action, is indebted to him in the sum of seven thousand seven hundred and fifty dollars, over and above all legal set-offs and counterclaims, upon an express contract for the direct payment of money, to wit, an assessment and requisition of \$100.00 per share upon the shareholders of the Consolidated National Bank of San Diego, levied and made October 25, 1893, by James H. Eckels, comptroller of the currency, under and by virtue of the laws of the United States of America, and against the defendant, Ellen Roark, as one of the stockholders in said bank, and who was on June 21, 1893, and ever since has been, and now is, the owner and holder of seventy-seven and one-half (77½) of the capital stock of said Consolidated National Bank of San Diego, and that the said defendant is a non-resident of this state. That the said attachment is not sought, and the said action is not prosecuted, to hinder, delay, or defraud any creditor or creditors of the said defendant. Andrew J. O'Connor." The grounds of the motion will be stated and considered in the order in which they are presented.

1. It is contended that the affidavit does not show that the defendant was indebted to the plaintiff in his representative character as receiver. The title of the action, prefixed as a heading to the affidavit, characterizes the plaintiff as "receiver of the Consolidated National Bank of San Diego"; and, referring to this heading, the affidavit states that the

affiant, Andrew J. O'Connor, "is the plaintiff in the above-entitled action." This means that he is Andrew J. O'Connor, receiver of the Consolidated National Bank of San Diego. The next statement, "that the defendant in said action is indebted to 'him,'" plainly means that defendant is indebted to Andrew J. O'Connor, as characterized in the title of the action. The pronoun "him" relates to and stands for Andrew J. O'Connor, receiver of the Consolidated National Bank of San Diego,—the plaintiff in the action,—else it is not true, as stated in the affidavit, that Andrew J. O'Connor is the plaintiff in said action. It follows that the affidavit complies in this respect with the requirement of the Code of Civil Procedure (section 538) that it shall show "that the defendant is indebted to the plaintiff." As said by this court in *Bank of California v. Boyd*, 86 Cal. 388, 25 Pac. 20, "the indebtedness to the plaintiff is the principal element required in the affidavit, and when that appears by direct statement, and there is nothing in the affidavit inconsistent with such direct statement of indebtedness, the affidavit as to such indebtedness should, in our judgment, be held sufficient." In that case it is further said: "The same particularity of statement * * * is not required in the affidavit for the issuance of a writ of attachment as in the complaint." See, also, *Flagg v. Dare* (Cal.) 40 Pac. 804.

2. It is contended that the affidavit is fatally defective in that the sum of indebtedness therein specified differs from the amount of plaintiff's demand as stated in the complaint and in the writ; the sum of indebtedness specified in the affidavit being \$7,750, whereas the amount of plaintiff's demand as stated in the complaint and also in the writ is \$7,750 "with interest thereon from November 25, 1893, at 7 per cent. per annum." While section 540 of the Code of Civil Procedure requires the writ of attachment to command the sheriff to attach so much property "as may be sufficient to satisfy the plaintiff's demand," and to state the amount of such demand "in conformity with the complaint," there is no requirement that the affidavit shall specify the amount of the indebtedness in conformity with plaintiff's demand as stated in the complaint, nor that the writ shall state the amount of plaintiff's demand in conformity with the affidavit. Yet the nature of the indebtedness is sufficiently stated in the affidavit to show that it draws legal interest from the date of its maturity; so that, in legal effect, there is no substantial difference between the affidavit and the complaint in respect to interest. The indebtedness, the amount of which the statute (parenthetically) requires to be specified in the affidavit, is the principal thing, to which the right to legal interest pertains as a mere incident. An assignment of the principal debt, without reference to interest, would pass the incidental right to interest. However, I think it a sufficient answer to the

objection under consideration that the statute requires the affidavit to specify only the amount of the indebtedness, and not the amount of plaintiff's demand, in the complaint, which may be, and in this case is, for the principal debt, interest, and costs. It is to be observed, however, that the amount of neither the interest nor the costs for which judgment is demanded is stated in the complaint; and that the amount of neither could have been estimated at the time the affidavit was made, since such amount of each depended upon future contingencies.

3. The statute requires the affidavit to specify the amount of the indebtedness, "over and above all legal set-offs or counterclaims." But the language of the affidavit in this case is, "over and above all legal set-offs and counterclaims." And it is contended that the substitution of the conjunction "and" in the affidavit for that of "or" in the statute is such a departure from the statutory requirement as makes the affidavit ineffectual as the foundation for the writ of attachment. Counsel for appellant say: "There is a distinction between set-offs and counterclaims. * * * Counterclaim embraces both set-off and recoupment, and is more comprehensive than either." Conceding this, and that the word "or," in the statute, is used in its ordinary disjunctive sense (which I do not admit), still the affidavit must be held sufficient; for, if it be sufficient to state that the amount of indebtedness is over and above either set-offs or counterclaims, it must be sufficient to state that the amount is over and above both set-offs and counterclaims. Where a statute authorizes an act to be done upon the existence of any one of several distinct conditions, the existence of all such conditions would surely be sufficient to justify the act. I think the order should be affirmed.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

108 Cal. 214

SECURITY LOAN & TRUST CO. OF
SOUTHERN CALIFORNIA v. KAUFF-
MAN et al. (McCALLISTER, Intervener.
No. 19,497).

(Supreme Court of California. July 22, 1895.)

DECLARATION OF HOMESTEAD—RIGHTS OF WIFE—
MORTGAGE FORECLOSURE—VENUE—INTERVEN-
TION BY INSANE WIFE OF MORTGAGOR.

1. A declaration of homestead, properly executed and acknowledged by a married man, as the "head of a family," as authorized by Civ. Code, §§ 1260-1263, when filed for record, immediately inures to the benefit of his wife, whether she has knowledge thereof, or not, and though she is at the time insane.

2. The fact that a woman other than the mortgagor's wife joined in the execution of a mortgage on the homestead does not prevent the mortgagor's lawful wife from claiming the mortgage to be void as to the homestead.

3. Const. art. 6, § 5, requires all actions for Cal. Rep. 41-44 P.—10

the enforcement of liens to be commenced in the county in which the land is situated. Code Civ. Proc. § 392, provides that actions for the foreclosure of liens and mortgages on land must be tried in the county in which the subject of the action is situated, subject to the power of the court to change the place of trial. *Held*, that where an action for the foreclosure of a mortgage was commenced in the county in which the land was situated, and subsequently the portion of the county in which it was situated was organized into a new county, the court in which the action was commenced did not lose jurisdiction for trial of the action.

4. Where, in an action on a note, and to foreclose a collateral mortgage, defendant does not deny the execution of the note, plaintiff is entitled to judgment on it, though the mortgage, being on the homestead, is void because executed without consent of the wife.

5. Where an insane wife could, under Code Civ. Proc. § 387, intervene in an action for the foreclosure of a mortgage of land selected by her husband as a homestead, the appointment of a guardian ad litem for the wife before filing her complaint in intervention is proper.

6. An objection to the sufficiency of the proof on which a guardian ad litem was appointed for an insane wife on intervention in a suit to foreclose a mortgage on a homestead cannot be considered, in the absence from the record of the evidence upon which the original appointment was made.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Security Loan & Trust Company of Southern California against Jules Kauffman, Ezra McCallister, and others, on a note, and to foreclose a mortgage securing it. Amanda Fisher McCallister intervened. From a judgment for defendants and intervenor, and an order denying a new trial, plaintiff appeals. Judgment as to defendant husband Ezra McCallister, on the note, reversed. As to other defendants and intervenor, affirmed.

Jefferson Chandler and Shirley C. Ward, for appellant. Daney & Wright, for respondents.

HARRISON, J. The plaintiff seeks by this action to foreclose a mortgage purporting to have been executed to it by the defendants Ezra McCallister and Mary McCallister, "his wife." The execution of the mortgage and note was not denied by either of these defendants. The defendant Ezra, in his answer, alleged that his codefendant Mary was not his wife; that he was married in February, 1867, to one Amanda Fisher, and that she had ever since that date been his lawful wife; that on June 5, 1883, he was residing with his family upon the premises described in the mortgage, and on that day made and filed with the county recorder a declaration in which he claimed the said premises as his homestead; that the land was community property of himself and his said wife, Amanda; that the homestead had never been abandoned, and that the said Amanda did not join in the execution of the mortgage; and that she was a necessary party to the action. A guardian ad litem was appointed by the court for Amanda, upon the ground that she was in-

sane and incompetent; and by leave of the court a complaint in intervention was filed on her behalf, in which the same facts were alleged as were alleged in the answer of Ezra. Upon the trial of the cause the court found in accordance with the allegations of this answer, and rendered judgment in favor of the intervener. The plaintiff has appealed.

1. The declaration of homestead filed by the defendant Ezra McCallister was as follows: "Know all men by these presents: That I do hereby certify and declare that I am the head of a family, and that I do now, at the time of making this declaration, actually reside with my family on the land and premises hereinafter described [here follows a description]. That my family consists of myself and my four minor children, to wit, Lawrence McCallister, aged eleven years; Annie, aged fourteen years; Eliza, aged twelve years; and Rhoda, aged six years. That it is my intention to use and claim the said lot of land and premises above described, together with the dwelling house thereon, and its appurtenances, as a homestead, and I do hereby select and claim the same as a homestead. That the actual cash value of said property I estimate to be two thousand dollars." It is contended on behalf of the appellant that, inasmuch as he failed to state in the declaration that he was a married man, he is precluded from claiming the privileges incident to the homestead of a married man, and that the homestead must be considered as that of "another person," provided for in chapter 3 of the title in the Civil Code relating to homesteads. The mode in which a homestead is to be created, as well as the legal incidents which attach to its existence, are purely statutory. Section 1260 of the Civil Code declares that a homestead, not exceeding \$5,000 in value, may be selected and claimed "by any head of a family"; and in section 1261 the phrase "head of a family" is declared to include the husband, when the claimant is a married person. The homestead authorized by chapter 3 is for any person "other than the head of a family." Section 1262, Civ. Code, declares that the husband, or other head of a family, must execute and file with the recorder a declaration, which, by section 1263, must contain "a statement showing that the person making it is the head of a family." In *Jones v. Waddy*, 68 Cal. 457, 6 Pac. 92, it was held that a statement by the declarant that he is the head of a family is a statement of the ultimate fact required by this section, and is sufficient. It must be held, therefore, that the above declaration was sufficient to impress the land with the incidents of a homestead. McCallister was the head of a family, and so stated in his declaration, and he was also the husband of a living wife; and the property selected was the community property of himself and his said wife. As he was not required to

state in his declaration whether he was married, or who were the members of his family, the statement or omission of those facts did not impair the sufficiency of the declaration, or prevent its inurement to the benefit of his wife. By filing the declaration for record, the land therein described was impressed with all the legal incidents which the statute gives to a homestead, one of which is an exemption from forced sale. Civ. Code, § 1240. The exception to this exemption which is provided in section 1241 has no application to the present case, for the reason that the mortgage set forth in the complaint was not executed "by the husband and wife," nor was McCallister, at the time of its execution, "an unmarried claimant." A declaration of homestead, properly executed and acknowledged by a married man, when filed for record, immediately inures to the benefit of his wife, whether she is ignorant thereof, or is fully acquainted with the transaction. Nor does the fact that she is insane deprive her of its benefits, or give to the husband any greater interest in the estate, or authorize him to incumber it, except in the mode provided by statute. St. 1873-74, p. 582. The filing of the declaration for record is a notice to all who may thereafter deal with the property that, if the declarant is a married person, the homestead cannot be conveyed or incumbered "unless the instrument by which it is conveyed or incumbered is executed or acknowledged by both husband and wife." Civ. Code, § 1242. Whether the declarant is a married person, or not, is a question of fact, which must be determined by whoever would take a conveyance or incumbrance of the property; and no statement or act of the husband alone can obviate the necessity of the wife's uniting in the instrument of conveyance or incumbrance, or deprive her of her estate in the property. The record of the declaration is a sufficient notice to all persons to put them upon inquiry; and if they fail to make such inquiry, or to take such steps as will protect them in their dealings with the husband, the loss should fall on them, rather than on the wife, who has in no respect contributed thereto. Inasmuch as the plaintiff procured Mary McCallister, who is described as the wife of Ezra, to unite with him in the execution of the mortgage, it cannot contend that it relied upon the recorded declaration as affording a presumption that McCallister was unmarried. The representations by McCallister that she was his wife, whether such representations were by direct statement, or the presumption arising from their having lived together as husband and wife, were but self-serving declarations and representations on his part, and could not, in any respect, bind or affect the respondent. Whether Mary was in fact the wife of Ezra, or whether she personated his wife, was to be determined by the plaintiff at its risk;

and its reliance upon any statements or information to that effect given by Ezra cannot serve as a protection against the claim of Amanda, or be a substitute for the truth. Whether Ezra would be estopped from denying the validity of the mortgage, if he alone were affected, need not be considered. See, however, *Gagliardo v. Dumont*, 54 Cal. 499. It is very clear that Amanda is not estopped from asserting the invalidity of the mortgage by any act of her husband, or from claiming to be his wife by the fact that he has recognized another woman as such.

2. At the time the action was commenced the land described in the complaint was situate in the county of San Diego, and the action was commenced in the superior court of that county, and was tried in that court January 11, 1894. Subsequent to the commencement of the action the county of Riverside was organized, under an act of the legislature approved March 11, 1893 (St. 1893, p. 158), and the land is included within the boundaries of that county. After the cause had been submitted to the court, and the court had orally announced its decision, the plaintiff moved the court to transfer the cause to Riverside county for trial, upon the ground that by the organization of that county the superior court of San Diego county had lost jurisdiction to proceed further in the case.

The constitution (article 6, § 5) declares that, "all actions for the enforcement of liens" shall be commenced in the county in which the real estate, or some portion thereof, is situated; and at the time this action was "commenced" the property was situate within the boundaries of San Diego. The constitution does not, however, require that the action shall be "tried" in the county in which the property is situated; and the statutory provision in section 392, Code Civ. Proc., that actions "for the foreclosure of liens and mortgages on real property" must be tried in the county in which the subject of the action, or some part thereof, is situated, "subject to the power of the court to change the place of trial," shows that "the place of trial" is not an element going to the jurisdiction of the court, but is a matter of legislative regulation. The provision for the transfer of certain actions to the superior court of the county of Riverside, which is contained in section 12 of the act providing for the organization of that county, shows the extent of this regulation which the legislature deemed necessary, and implies that only the actions there designated were to be transferred for trial.

3. There was no error in the appointment of a guardian ad litem for Amanda Fisher McCallister. She had an interest in the matter in litigation, and also an interest in the success of the defendant Ezra McCallister. The court was therefore authorized by section 387, Code Civ. Proc., to permit her to become a party to the action. Having been

thus permitted to become a party to the action, and being insane, she could appear only by a general guardian, or a guardian ad litem. The court had the same authority to appoint a guardian ad litem for her before the filing of her complaint in intervention that it has to appoint a guardian ad litem for an infant plaintiff before the action is commenced. As this appointment is a traversable fact, which must be alleged in the complaint (*Crawford v. Neal*, 56 Cal. 321), it follows that it must be made before the complaint is filed. The objection to the competency or sufficiency of the proof of her insanity cannot be considered, as there is no record before us of the evidence upon which the original appointment was made. The evidence at the trial was sufficient to justify the court in finding that she was insane.

4. That portion of the judgment "that the plaintiff take nothing by this action" is not sustained by the other portions of the record. The defendant Ezra McCallister did not deny the execution of the note set forth in the complaint, and the plaintiff is entitled to a judgment thereon against him.

The judgment in favor of the intervener, Amanda Fisher McCallister, and the order denying a new trial as to her, are affirmed. That portion of the judgment that the plaintiff take nothing by this action is reversed, so far as the same applies to the defendant Ezra McCallister, and the superior court is directed to enter a judgment against him upon the promissory note set forth in the complaint. The costs of this appeal will be taxed against Ezra McCallister.

We concur: GAROUTTE, J.; VAN FLEET, J.

106 Cal. 235

KOEBIG v. SOUTHERN PAC. CO. et al.
(No. 19,558.)

(Supreme Court of California. July 25, 1895.)

VERDICT—ASSESSMENT OF DAMAGES.

Where plaintiff's testimony showed that the loss sustained was the amount claimed in the complaint, and defendants' counsel admitted the value of the property as alleged, it was error for the jury to assess damages in a less amount.

Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by Julius Koebig against the Southern Pacific Company and others to recover damages for the loss of certain goods. From the judgment therein rendered, and an order denying a new trial, plaintiff appeals. Reversed.

E. S. Pillsbury, Stephen M. White, and White & Monroe, for appellant. A. B. Hotchkiss, for respondents.

VAN FLEET, J. Action to recover of defendants \$34,891.26 as damages alleged to

have been occasioned by the destruction of certain brandies, wines, liquors, and other personal property, swept away by the Los Angeles river during high water, by reason, as alleged by plaintiff, of said river being obstructed and diverted by a railroad bridge constructed by the predecessor of defendants, and maintained by the latter, and which bridge, it is alleged, was so faultily and negligently constructed and maintained as to constitute a dangerous nuisance, in that it was not of sufficient space or size to admit of the flow of the waters of the river beneath it, whereby they were dammed up and caused to leave their banks and wash away and destroy the property in question. The cause was tried by a jury, which rendered a verdict for plaintiff of \$500. From the judgment entered thereon, and an order denying a new trial, plaintiff appeals.

There is but one question necessary to be noticed. It is contended by plaintiff that there was no evidence to support the finding of the jury as to the amount of damage suffered by plaintiff, and that the verdict in that regard is against the instruction of the court, and therefore contrary to law. The court instructed the jury, among other things: "It is conceded that the property described in the complaint as having been destroyed was of the value stated in the complaint; and, if you find that said property was destroyed in the manner and under the circumstances as stated in the complaint, it will be your duty to render a verdict for the admitted value thereof." It is claimed by plaintiff that this instruction was based upon the fact that the evidence given, on the part of plaintiff, as to quantity and value of goods destroyed, clearly established the damages as alleged in the complaint, and that this evidence was wholly without conflict, and contradicted by defendants, who not only put in no evidence on the question, but admitted at the trial that, if liable at all, they were liable for the damages alleged in the complaint. Defendants deny this. They claim that the evidence given by plaintiff as to the quantity of goods destroyed was not direct or positive, or such as the jury were bound to believe; that there was no admission by defendants of the quantity of goods destroyed, but only as to the value per gallon of the goods which plaintiff should prove to have been eventually lost; and, further, that the instruction quoted does not, and was not intended to, charge the jury that the quantity of goods lost was admitted, but that the jury were at liberty to find, on that question, either for or against plaintiff's evidence. The position of defendants is not supported by the record. The evidence on the part of plaintiff was such as, in the absence of any countervailing proof by defendants on the subject, left the jury no room to find that any of the property was destroyed, if not all. The testimony of the witness Kohler was sufficiently direct and positive. He testified explicitly

and in detail as to the various items lost, and their value, and then stated: "The total loss was \$34,891.20. The various items which I have enumerated, composing that sum total, constitute, in my opinion, a fair and moderate estimate of the loss sustained," etc. The construction attempted to be put upon the testimony of the witness that he was then stating the quantity and value of goods originally swept away, and not what was actually lost, over and above the amount eventually recovered, is not borne out by an examination of the witness' whole testimony. But, furthermore, we think the record fully establishes plaintiff's claim that defendants admitted, not only the value, but the quantity, of the goods lost, to be as claimed by plaintiff. We can put no other construction upon the statements of defendants' counsel that will make them consistent with his conduct of the trial. During the examination of a witness by one of plaintiff's counsel on the subject of the lost property, it was suggested that he ask the witness as to value. Counsel for defendants thereupon said: "There is no dispute about the value. I concede that the valuation is reasonable, if we are liable at all." Were it not for what followed there might possibly be room for the claim of defendants that this admission referred only to the value per gallon, and not to quantity of goods lost. At a later stage in the trial, however, when a question arose between counsel as to the materiality of certain evidence, one of plaintiff's counsel said: "But we are suing for specific damages anterior to this time; specific and defined. It is not the damage to the freehold, but the damages described in the complaint for a list of articles which you admit yourself,"—to which defendants' counsel replied: "If we are liable at all." It is perfectly obvious from this that defendants' admission went to the quantity and value of the property, as alleged, and thereby covered the damages as claimed. Furthermore, that the court so understood counsel's position is apparent. This is clearly indicated by the instruction quoted, which is in no way modified by other parts of the charge. The jury are not left free to assess the amount of damages suffered by plaintiff in the event they find for the latter. As claimed by plaintiff, the only question left to the jury was whether the property was destroyed in the manner and under the circumstances alleged. If they found that issue in the affirmative, they were bound, under the court's instruction, to assess the damages at the amount claimed in the complaint. That they did so find is necessarily implied from the verdict, since a verdict in favor of plaintiff was a finding for him upon all the material issues. The verdict, however, not only ignores the admitted facts as to the amount of damages suffered, but plainly disregards the charge of the court upon that point. It is therefore, in that regard, both unsupported by the evidence and contrary to law. The judgment and order

denying a new trial are reversed, and a new trial ordered.

We concur: HARRISON, J.; GAROUTTE, J.

108 Cal. 222

WHITNEY v. DAGGETT et al. (No. 19,415.)
(Supreme Court of California. July 25, 1895.)

JUDGMENT BY DEFAULT—VACATING—RECITAL OF SERVICE.

1. A motion to set aside a judgment by default merely because the judgment roll did not show that a copy of the summons by publication had been deposited in the post office was properly denied, where the entry of default and the judgment recite that defendant had been regularly summoned, and where no request was made for leave to answer, nor a defense on the merits exhibited.

2. Though the recital in a judgment that defendant was duly summoned is, in the absence of the affidavit of service, only prima facie evidence of that fact when the judgment is directly attacked, it must be rebutted before the judgment will be set aside.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by W. W. Whitney against Henry Daggett, C. J. Beauvais, and others, to foreclose a mortgage. From an order denying his motion to vacate the judgment therein rendered, C. J. Beauvais appeals. Affirmed.

Wm. Humphrey, for appellant. Parish & Mossholder, for respondent.

VANCLIEF, C. Action to foreclose a mortgage, in which C. J. Beauvais was made a party defendant on the ground that he "has, or claims to have, some interest in or lien upon" the mortgaged premises, as purchaser, mortgagee, judgment creditor, or otherwise, but which, whatever it may be, is subject and inferior to the lien of said mortgage. Judgment by default was entered against all the defendants on October 14, 1892. On November 10, 1893, C. J. Beauvais, alone, moved the court for an order setting aside and vacating the judgment and decree so far as the same refers to or concerns, and so far as the same affects, his interest in the property described in the judgment. The ground of the motion is, not that summons was not duly served on Beauvais, but "that the papers on file and records in said action fail to show that he was ever served with summons in said action." It appears that the court ordered summons to be served on Beauvais by publication; and the judgment roll contains a proper affidavit for such publication, in which it is stated that the residence of Beauvais was then at Phoenix, in the territory of Arizona. The judgment roll also contains an order for such publication, in which, besides all other

requisites, it was ordered that a copy of the summons and complaint in the action be forthwith deposited in the United States post office at San Diego, Cal., postpaid, directed to said defendant at his place of residence, and also contains sufficient proof, by affidavit of the printer, of publication of the summons according to the order of the court, but contains no evidence that a copy of the summons or complaint had been deposited in any post office. Yet it is stated in the entry of his default, and recited in the judgment, that the defendant Beauvais had been "duly and regularly summoned to answer unto plaintiff's complaint herein," and had made default in that behalf, and that such default had been duly and regularly entered. At the hearing of the motion the mover offered no evidence except the judgment roll, and the plaintiff offered no evidence whatever. Nor did Beauvais offer or ask leave to answer the complaint, or pretend that he had any defense thereto. Nor did he show or claim that he ever had any interest in or lien upon the mortgaged property, nor that he was or would be at all affected by the judgment of foreclosure. The court denied the motion, and from the order denying it the defendant Beauvais brings this appeal.

There is no ground for any pretense that the motion was made under, or is warranted by, section 473 of the Code of Civil Procedure, since it was not made within a year after the entry of the judgment, and no showing of any defense to the action, or injury to the mover, was made. Therefore the motion was properly denied, unless the judgment appears, upon its face, to be void. *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 890; *People v. Harrison*, 84 Cal. 608, 24 Pac. 311. "A judgment void upon its face is one that appears to be void by an inspection of the judgment roll. The mere absence from the roll of a paper—for example, the return of the officer showing a service of the summons—cannot invalidate the judgment, when the judgment itself recites the fact that the defendant was duly served with process." *People v. Harrison*, supra. To the same effect is *Freem. Judgm.* § 130. In such case, however, the recital in the judgment is only prima facie evidence of service when, as in this case, the judgment is directly attacked, and is never conclusive except where the attack is collateral. *McKinlay v. Tuttle*, 42 Cal. 571. But in the case at bar there is no evidence, either in or dehors the record, having the slightest tendency to rebut the recitals in the judgment. I think the order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(108 Cal. 261)

**LAKESHORE CATTLE CO. v. MODOC
LAND & LIVE-STOCK CO.**

(No. 18,330.)

(Supreme Court of California. July 27, 1895.)

**CHANGE OF VENUE—REFUSAL OF MOTION—PAPERS
CONSIDERED—REVIEW.**

1. Refusal to change the place of trial will not be disturbed where the allegations of the complaint show the action to have been brought in the proper county, though these facts are controverted by the affidavit presented by defendant on the motion for change.

2. On motion to change place of trial, the court may look into the complaint to see if there is any reason for retaining the cause, though it is not offered as an affidavit in reply to papers read in support of the motion, especially where the notice of motion states that it will be based on affidavits and "all the papers" in the action.

Department 1. Appeal from superior court, Modoc county; C. L. Clafin, Judge.

Action by the Lakeshore Cattle Company against the Modoc Land & Live-Stock Company. Defendant moves to change the place of trial. Motion denied, and defendant appeals. Affirmed.

Spencer & Raker and C. A. Raker, for appellant. Farrett T. Richards, G. F. Harris, and H. L. Spargur, for respondent.

HARRISON, J. Appeal from an order denying a motion to change the place of trial. The defendant is a corporation, whose principal place of business is in the city and county of San Francisco, and the present action was brought against it in the superior court for the county of Modoc. After the summons had been served upon the defendant, it made a motion to have the place of trial changed to San Francisco, upon the ground that that was the county of its residence. The motion was denied, and the defendant has appealed.

The facts alleged in the complaint show that the obligation of the defendant to the plaintiff arose in the county of Modoc, and, under the provisions of section 16 of article 12 of the constitution, the action was properly brought in that county. At the hearing of the present motion, the defendant attempted to controvert these averments of the complaint by the affidavit of Bayley, who was its president at the time of the alleged transactions, and urges that, as it appeared from this affidavit that the averments in the complaint were false, the court erred in denying this motion. Without determining whether a court would be authorized in any case to determine that the affidavits presented to it upon a motion of this nature were sufficient to overcome the allegations of the complaint, or to permit those allegations to be determined by affidavits, it is sufficient to say that there is a direct conflict between the affidavit of Bayley and the complaint in the present action, and that we cannot set aside the decision of the court thereon.

The appellant, however, urges that the

court was not authorized to look into the complaint for the purpose of determining whether there was any reason for retaining the cause, and that the affidavit should alone have been considered in determining the motion, inasmuch as the plaintiff did not offer the complaint as an affidavit in reply to the papers read in support of the motion. The defendant, in its notice of motion, had stated that it would be based upon certain affidavits, "and upon all the papers, files, records, and proceedings in the above-entitled action," and at the hearing read this notice of motion, and also its demurrer to the complaint, in which reference was made to the allegations therein. After the moving papers had been read, the plaintiff's counsel, in the course of his argument, read the complaint to the court, and, to the query of the counsel for the defendant whether he was reading the complaint merely by way of argument, replied that he was. There was no error by the court in examining the complaint, even if it had not been read on behalf of the plaintiff. It was made a part of the record on the motion by the act of the defendant; and without such act, since it was a part of the records in the case, the court was authorized to examine it for the purpose of determining the motion. *Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872. The order is affirmed.

We concur: **GAROUTTE, J.; VAN FLEET, J.**

(108 Cal. 250)

CARDENAS v. MILLER. (No. 10,412.)

(Supreme Court of California. July 27, 1895.)

**UNRECORDED CHATTEL MORTGAGES—VOID AS
AGAINST CREDITORS.**

An attachment is prior to a chattel mortgage executed before, but recorded after, issuance of the attachment, though the attaching creditor had actual knowledge of the mortgage; Civ. Code, § 2957, declaring that an unrecorded chattel mortgage shall be void as against creditors and subsequent purchasers and incumbrancers in good faith, not being modified by section 1217, providing that an unrecorded instrument is valid as between the parties thereto and those having notice thereof, the latter section being part of a chapter relating to the recording of transfers of real estate. 39 Pac. 783, affirmed.

In bank.

On rehearing. For former opinion, see 39 Pac. 783.

PER CURIAM. Upon further consideration of this cause upon rehearing, we are satisfied with the conclusion reached in department, as expressed in the opinion of Mr. Commissioner SEARLS. The supposed conflict between the opinion of the department and the case of *Fette v. Lane* (Cal.) 37 Pac. 914, urged in the petition for rehearing, does not exist. The court were there considering the rights of a subsequent mortgagee taking with notice of a prior unrecorded mortgage, and the question as to the rights

of an attaching creditor against the holder of such a mortgage was not involved. It is true that the learned commissioner who wrote the opinion in that case suggests, in passing: "Nor could the attachment of the property by defendant, after notice of plaintiff's mortgage, affect his lien, even if the attachment had not been dismissed." But the question of the effect of an attachment was not before the court, and what is there said with reference thereto was not necessary to a determination of the case. It is therefore to be regarded as mere dictum, and, as it announces a doctrine which we regard as inconsistent with the plain meaning and effect of our statute, it cannot be permitted to affect our consideration. Our statute makes a very plain distinction between creditors and subsequent purchasers and mortgagees. The latter are protected against the prior unrecorded mortgage only when they take their conveyances "in good faith and for value"; and, of course, they do not take them in good faith if they have actual notice of the prior mortgage. But not so as to creditors. As to them, good faith is not made a condition, but such a mortgage is declared void without qualification. As to them, the question of actual notice is made wholly immaterial, under the statute, and consequently knowledge on their part of the existence of such unrecorded mortgage will not protect its holder against their claims. The plain import of the statute is that nothing but a compliance with its terms will protect a mortgagee of chattels against creditors. This construction is in accord with that given to the statutes of a number of other states wherein a similar distinction is made in the law between creditors and subsequent purchasers and mortgagees. See Jones, Chat. Mortg. § 318, and cases cited. Our statute is expressed in language so clear and unequivocal, indeed, as to be susceptible of no other reasonable construction, unless the explicit terms of section 2957, Civ. Code, are to be regarded as modified by the provisions of section 1217; but, for the reason stated in the opinion of the department, it is clear to our minds that the latter section has no application. The judgment and order appealed from are affirmed.

108 Cal. 350

CARPENTER v. SHINNERS. (No. 19,551.)
(Supreme Court of California. Aug. 3, 1895.)

QUIETING TITLE—PLEADING AS EVIDENCE—CONCLUSIVENESS OF TAX DEED—NOTICE OF SALE.

1. Under Code Civ. Proc. § 448, making failure of a party to deny by affidavit the genuineness and due execution of a written instrument made a part of an adverse pleading an admission of the same, the failure of plaintiff in an action to quiet title to deny by affidavit the genuineness and due execution of a tax deed set out in the answer is an admission only of the due execution and genuineness of it, and not of its legal effect.

2. Pol. Code, § 3786, makes a tax deed prima facie evidence that the assessment was made according to law, of the nonpayment of the taxes, of the sale at the proper time and place, and execution of the deed by the proper officer, and that the property has not been redeemed; section 3787 makes such deed conclusive evidence of the regularity of all proceedings from assessment to execution of the deed; Act March 13, 1883 (St. p. 93), requires the board of trustees of cities of the sixth class to provide by ordinance a system for the collection of its taxes corresponding as nearly as possible to the state system; and section 871 of the act declares that deeds on sale of lands for taxes due such cities shall have the same effect in evidence as deeds on sale for state taxes. *Held* that, when a deed of land sold for taxes of such city contains no recital of the ordinance, such ordinance must be proved before the deed will become prima facie evidence of compliance with its requirements.

3. A notice of tax sale published on February 11th for a sale on March 3d is a 20-day notice.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Henry W. Carpenter against M. Shinnars. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Graves & Graves, for appellant. Wilcoxon & Bouldon, for respondent.

SEARLS, C. This is an action to quiet the title of plaintiff to lots 1 and 2 in block No. 132 in the city of El Paso de Robles, county of San Luis Obispo, state of California. The answer of defendant denied the allegations of the complaint, and, as a further defense to the action, set up title in himself under a tax deed, a copy of which is attached to the answer. Plaintiff failed to deny the genuineness and due execution of the tax deed by affidavit, as provided by section 448 of the Code of Civil Procedure. At the trial it was admitted that plaintiff was the owner of the land described in the complaint, unless the tax deed set out in defendant's answer defeated the plaintiff's title. The cause was submitted to the court upon the admission aforesaid and the tax deed, without further evidence. Written findings were waived, and judgment was thereupon entered in favor of the plaintiff, from which judgment, and from an order denying a motion for a new trial, defendant appeals.

The question presented relates to the sufficiency of the tax deed upon its face to defeat plaintiff's title. The contention of appellant may be summarized thus: (1) The admission of the genuineness and due execution of the tax deed, by failing to deny it as required by section 448, Code Civ. Proc., is an admission that it was duly executed by the party who signed it, and in the capacity in which he appears to have acted; that it is an admission that the deed is what it purports to be upon its face; and that the matters recited therein are true. (2) That such tax deed, except as against actual fraud, is con-

clusive. In support of the first position we are referred to *Sloan v. Diggins*, 49 Cal. 38, and *Peterson v. Taylor* (Cal.) 34 Pac. 724 (not reported in California Reports). The second proposition is supported by reference to *Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58.

The effect of an admission of the genuineness and due execution of an instrument pleaded by a defendant, and not denied as provided by section 448 of the Code of Civil Procedure, is to avoid the necessity of proof of its genuineness and due execution, and nothing more; and, whether it is proven or its execution is admitted, its terms and legal effect are to be determined by an inspection of the instrument. It stands as an exponent of the facts therein set out, to be construed by the court, and the conclusions of law are to be deduced therefrom. *Burnett v. Stearns*, 33 Cal. 468. The question then remains, does the tax deed upon its face show a state of facts from which to conclude as matter of law that the legal title to the premises vested in defendant? The tax deed in question purports to be a conveyance of real estate sold for the nonpayment of city taxes for the year 1890 and 1891, is executed by Misenheimer, tax collector of the city of El Paso de Robles, county of San Luis Obispo, and most of the recitals in the deed indicate that the property therein described was sold for delinquent taxes levied by said city, yet, among the recitals of the deed, it is said: "Levy was duly made according to law upon the property of which description is first hereinafter given for taxes due to the state of California and to the city of El Paso de Robles for the year 1890," etc. There is no explanation of this statement in the record or in the brief of appellant. We can only surmise that it is a mistake arising from the use of a blank deed prepared for the collector of state and county taxes, and that the word "county" was erased and the "city" substituted, while the words "due to the state of California" were inadvertently left in the deed.

We pass the question involved in this statement for the reason that we think there is another and potent reason why the judgment and order appealed from must be affirmed. By the act to provide for the organization, incorporation, and government of municipal corporations, approved March 13, 1883 (St. 1883, p. 93), authority is given to "the board of trustees" to provide by ordinance a system for the assessment, levy, and collection of all city or town taxes, which system shall conform as nearly as may be to the provisions of the state laws on the same subject, except as to dates and the officers by whom the several acts are to be performed; and by section 871 of the same act it is provided that "all deeds made upon any sale of property for taxes or special assessments, under the provisions of this charter [chapter 7, relating to municipal corporations of the sixth class], shall have the same force and

effect in evidence as is or may hereafter be provided by law for deeds for property sold for non-payment of state or county taxes." Under section 3786 of the Political Code tax deeds are made primary (prima facie) evidence that: "(1) The property was assessed as required by law. (2) The property was equalized as required by law. (3) The taxes were levied in accordance with law. (4) The taxes were not paid. (5) At a proper time and place the property was sold as prescribed by law, and by the proper officer. (6) The property was not redeemed. (7) The person who executed the deed was the proper officer. (8) Where the real estate was sold to pay taxes on personal property, that the real estate belonged to the person liable to pay the tax." By the next section the tax deed is made conclusive evidence (except in case of actual fraud) of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed. These provisions were upheld by this court in *Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58. These presumptions of the regularity of the proceedings leading up to the execution of a tax deed proceed upon the theory that the revenue laws of the state provide the methods whereby property is assessed for taxation, taxes levied, and that when not paid the real estate upon which such taxes become a lien may be sold to realize the amount due. Of these laws courts take judicial notice, and, if the tax deed recites the performance of the acts required by law, the burden of proving a noncompliance is cast upon those who attack the regularity of the several essential acts. But we cannot take judicial notice of the ordinances of municipal corporations, or of the time when, if passed, they take effect. *Lucas v. San Francisco*, 7 Cal., at page 475; *Harker v. Mayor, etc.*, 17 Wend. 199; *Haven v. Asylum*, 13 N. H. 532; *City of Napa v. Easterby*, 61 Cal. 517. So far as appears from the record, the tax proceedings were unsupported by any ordinance of the municipal corporation, and entirely without authority of law. We are of opinion that the passage and existence of an ordinance authorizing the tax proceedings should have been proven as a prerequisite to the deed becoming prima facie evidence of a compliance with such proceedings.

Again, if we assume that the recitals in the deed are prima facie evidence, not only of the facts they recite, but of laws authorizing the performance of such acts, then we must assume from such recitals that notice of the sale for delinquent taxes was required to be given not less than 21 and not more than 28 days, as is provided by section 3768 of the Political Code in cases of sales for state and county taxes. Yet, while the recital in the deed states that the notice as given was not less than 21 nor more than 28 days, still, when it gives the date of the first publication of such notice, which was Feb-

ruary 11, 1891, and the date of sale, which was to occur and did occur on the 3d day of March, 1891, it may be seen that a notice of only 20 days was given of the sale. That the sale occurred on the 3d day of March is further verified by the certificate of sale, which bears the last-named date.

For these reasons, we are of opinion the judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELOHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(108 Cal. 351)

DICKERSON v. DICKERSON. (No. 19,397.)

(Supreme Court of California. Aug. 3, 1895.)

OBJECTIONS TO EVIDENCE—REVIEW—DIVORCE—CUSTODY OF CHILDREN.

1. A ruling on evidence, to which no exception has been taken, will not be considered on appeal.

2. An order denying a petition for custody of children, in proceedings for divorce, will not be disturbed unless it clearly appears from the evidence that the denial was an abuse of discretion.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action for divorce by Laura Dickerson against Warren C. Dickerson. Judgment for plaintiff, in which custody of the children was awarded plaintiff. From an order denying his petition for custody of one of the children, defendant appeals. Affirmed.

J. Marion Brooks, for appellant. Sweet, Sloane & Kirby, for respondent.

HAYNES, C. In the above-entitled action a divorce was granted the plaintiff on October 28, 1891, and by the decree she was awarded the custody of all the children of said parties,—three in number. On May 9, 1893, said defendant, Warren C. Dickerson, filed in said cause his petition praying that the custody of Artemus, the oldest of said children, then eight years of age, be taken from his mother, and awarded to the petitioner, upon the ground of the poverty and consequent inability of the mother to properly care for and educate him, and further charging that the plaintiff then was, and for a long time past had been, living with one Charles H. Davis, as his mistress, and alleged his own financial ability to properly care for and educate said boy. The answer denied all the material matters charged against her in the petition; alleged her marriage to Davis, and the unfitness of petitioner to have the custody of the child. The matter was heard May 13, 1893, and appellant's petition was denied. A bill of exceptions was afterwards settled and filed, in

which the first assignment of error is to a ruling of the court sustaining an objection made by respondent to a question put by appellant to a witness. No exception was taken to the alleged erroneous ruling, and it will therefore not be considered here. *Keenan v. Griffith*, 34 Cal. 580; *Russell v. Dennison*, 45 Cal. 337; *Lucas v. Richardson*, 68 Cal. 618, 10 Pac. 183.

The remaining specifications go to the sufficiency of the evidence to justify the dismissal of appellant's petition. It is not necessary to review the evidence contained in the bill of exceptions. Applications of this character are addressed to the sound legal discretion of the court below, and its conclusion will not be disturbed unless it clearly appears that such discretion has been abused. So far from finding in the record such abuse of discretion, we think the conclusion reached was right. The serious charges made against the respondent were not sustained. Indeed, if appellant believed them, the fact that he did not petition for the custody of all the children is incomprehensible. So too, if the mother, because of her alleged poverty, was unable to properly maintain the child in question, we should have expected the father, who alleges his financial ability to provide for him, to have manifested his regard for his child by contributing something for his comfort and welfare, especially as he did not oppose that provision in the decree of divorce which gave respondent the custody of all the children, and in which he silently acquiesced for nearly two years. These things do not very strongly commend appellant's fitness for the important trust he seeks, nor indicate that the learned judge who heard the petition erred as to these matters of fact. The order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(112 Cal. 316)

ELBERG v. SAN LUIS OBISPO COUNTY.

(No. 19,548.)

(Supreme Court of California. Aug. 3, 1895.)

SCHOOLS—ILLEGAL TAXATION—LIABILITY OF COUNTY.

Where several school districts, under St. 1891, p. 182, united for the formation of a high-school district, and taxes were levied by the board of supervisors, collected by the tax collector, and placed by him in the county treasury, but the county had no interest in or control over the fund, the county is not liable for moneys in said fund illegally collected.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Mark Elberg against the county of San Luis Obispo to recover back certain

taxes. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

Wm. Shipsey and Graves & Graves, for appellant. F. A. Dorn, for respondent.

BRITT, C. Action to recover certain payments of taxes of the fiscal year 1893-94, made under protest, in July, 1894, to the tax collector of San Luis Obispo county, for the support of a high school in the San Luis Obispo union high school district,—a district assuming to be organized under the act to provide for the establishment of high schools, approved March 20, 1891 (St. 1891, p. 182). The levy of such taxes is claimed to have been illegal, in several respects. It appears from the complaint that 13 adjoining school districts in said county united for the formation of the high-school district, and the taxes in question were levied by the board of supervisors in September, 1893, at the request and upon the certified estimate of the majority of the clerks of said constituent districts, convened and jointly acting; that the moneys sued for, when paid to the tax collector, were by him placed in the county treasury, where they yet remain, in a fund called the "San Luis Obispo Union High School Fund." It is not alleged that the county has or asserts any interest in this fund, or the money sued for, or any right to control the same. Plaintiff prays judgment for \$820.02, which amount includes the sums paid by him, and also by a number of other persons who have assigned to plaintiff their respective claims to recover the same. The action seems to be brought in consequence of the permission contained in the new section (3819) added to the Political Code in 1893. The court below sustained a demurrer to the complaint, interposed on the ground that the same does not state facts sufficient to constitute a cause of action against defendant, and rendered judgment dismissing the action.

The demurrer was rightly sustained. The county, as such, has no interest in the funds of the high-school district, nor any control over the same in the county treasury. St. 1893, p. 272. And we do not think it was the legislative intent, by the enactment of section 3819, Pol. Code, to permit an action against a county to recover taxes paid to and held by its officials, not for the benefit of the county, nor subject to its disposition, but for the use of, and to be disbursed by, a distinct organization,—a local district within the county. If judgment is obtained in such an action against the county, then it must be paid by the county; and no provision is made by which it may have recourse upon the district for the amount thus paid, as it has against the state in the case of enforced repayment of taxes which have already reached the state treasury. Pol. Code, § 3819. Manifestly, this would be unjust to those parts of the county not within the district, and we should not attribute to the legislature a design to allow such a result unless that con-

struction is required by the terms of the statute,—as it is not in this instance. The judgment should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

108 Cal. 446

KAUFMAN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. No. 10.)

(Supreme Court of California. Aug. 5, 1895.)

EFFECT OF APPEAL—STAY OF PROCEEDINGS.

An appeal from an order reinstating a cause which was previously dismissed stays all further proceedings thereon, within the meaning of Code Civ. Proc. § 946, providing that "whenever an appeal is perfected * * * it stays all further proceedings in the court below." *Livermore v. Campbell*, 52 Cal. 75, followed.

In bank.

Petition for writ of prohibition by C. H. Kaufman against the superior court of city and county of San Francisco and the Judge thereof. Writ granted.

Garber, Boalt & Bishop, for appellant. Frank Shay, for respondents.

McFARLAND, J. Petition for a writ of prohibition commanding the superior court of the city and county of San Francisco, and the judge thereof, to desist and refrain from any further proceedings on a motion in said court for an order requiring the petitioner to pay certain money into said court. The application for the writ was submitted here upon an objection by respondents, in the nature of a demurrer, to the sufficiency of the petition; and, for the purposes of the decision, the averments of the petition must be taken as true.

The petitioner in May, 1889, commenced an action in the nature of an interpleader in said superior court, entitled "Kaufman vs. Shain et al." The complaint in the said action was subsequently amended, and its averments were substantially these: That plaintiff (Kaufman, petitioner herein), as assignee of one Mackenzie, an insolvent, was in possession of \$5,769.52, assets of said insolvent, which was claimed by various persons in hostility to each other, who are made parties defendant; that litigation was pending in which the rights of some of the defendants to said money was involved; that plaintiff claimed no interest in said money, and was willing to pay the same into court, and had done so. The prayer was that defendants be required to interplead, etc., and that plaintiff be discharged from all liability to defendants for said money upon his paying the same into court, or to such person as the court should declare entitled to the same. The defendants, Herrlich, Hanlon, and Davis, filed demurrers to

the complaint. On October 10, 1890, the judge of said court caused to be entered on the minutes of said court an order sustaining the demurrer of said Herrlich and Hanlon, and adjudged further as follows: "It is further ordered that this cause be, and the same is hereby, dismissed." Thereafter, on March 14, 1894, on the application of defendant Davis, judgment of dismissal in pursuance of said order of October 10, 1890, was entered; which judgment, after a recital of said order of October 10, 1890, is as follows: "Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that C. H. Kaufman, plaintiff, do take nothing by this, his action, as against Joseph E. Shain et al., defendants, but that a judgment of dismissal be, and the same hereby is, entered herein that said defendants have and receive their costs incurred herein, amounting to the sum of \$——. Judgment recorded March 14, 1894, B. 19, p. 433." Afterwards, on May 1, 1894, defendant Davis filed and served a notice of motion to amend the said order of October 10, 1890, by striking therefrom the words: "It is further ordered by the court that this cause be, and the same is hereby, dismissed;" and also, on said May 1, 1894, served a notice of motion to amend the said judgment of dismissal entered March 14, 1894, so as to make it affect only Herrlich and Hanlon alone, and not Joseph E. Shain et al. These motions were afterwards heard and submitted, and on August 20, 1894, the court made the following order: "The minute order of October 10, 1890, is amended by striking out the words, 'It is further ordered by the court that this cause be, and the same is hereby, dismissed,' and the judgment entered in the clerk's office, and recorded there on the 14th day of March, 1894, is set aside. August 20, 1894. [Signed] William T. Wallace, Judge." From this order of August 20, 1894, the said Kaufman, plaintiff in said action and petitioner in this proceeding, duly appealed to this court, and his appeal is now here pending. After the said order of October 10, 1890, dismissing said action, viz. on August 18, 1891, the judge of said court made an order authorizing Kaufman to withdraw from the county treasury, where it had been deposited, the said sum of money, less a small amount levied against it for taxes; and in pursuance of said order Kaufman withdrew said money. Before said appeal had been taken as aforesaid, the said Davis gave notice of a motion for an order requiring said Kaufman to pay said money into court, with interest; and said motion came up for hearing after said appeal had been taken, when the judge of said court, respondent herein, announced that as an appeal had been taken from the order of August 20, 1894, he would not proceed with the hearing of said motion, adding that he would not proceed unless compelled to do so

by the supreme court of this state. Thereupon the said Davis, on September 21, 1894, petitioned the supreme court for a writ of mandate to compel the said judge to proceed with the hearing of said motion; and this court on January 5, 1895, after a hearing, denied said writ, and dismissed the proceeding. Nevertheless, the said Davis on February 1, 1895, again called up said motion to compel the said payment of said money into court; and after argument the judge (respondent herein) announced from the bench that he would entertain said motion, would consider it as submitted, and would grant the order for the said payment of said money into court; but that he would give petitioner sufficient time, before entering said order, to petition this court for a writ of prohibition. Thereupon the petitioner, Kaufman, commenced this present proceeding.

There can be no doubt that the writ should issue. The case is clearly within the rule of *Livermore v. Campbell*, 52 Cal. 75, and that case furnishes an answer to the positions taken by counsel for respondents. The order of August 20, 1894, setting aside the former judgment of dismissal, was undoubtedly an appealable order, as expressly held in *Livermore v. Campbell*; and, as was said in that case, "until such appeal is heard this court will not inquire whether the court or clerk had or had not jurisdiction to enter the judgment. The case being in this court by appeal, the court below cannot proceed in it until the appeal is heard and determined. Code Civ. Proc. § 946." As we said when the petition for a writ of mandate to compel the respondents to proceed with the motion was before us, "whether the appellant was really a 'party aggrieved'" is a question which we cannot determine on this proceeding. *Davis v. Wallace* (Cal.) 38 Pac. 1107. Let a peremptory writ issue as prayed for.

We concur: BEATTY, C. J.; VAN FLEET, J.; HENSHAW, J.; HARRISON, J.; GAROUTTE, J.

106 Cal. 431

YORE et al. v. SUPERIOR COURT OF
CITY AND COUNTY OF SAN
FRANCISCO. (No. 15,690.)

(Supreme Court of California. Aug. 5, 1895.)

DISSOLUTION OF CORPORATION—APPOINTMENT OF
RECEIVER—ESTOPPEL BY PLEADING—
LACHES.

1. Code Civ. Proc. § 565, provides that, upon the dissolution of any corporation, the superior court may appoint a receiver therefor; section 803 provides that a person usurping any franchise may, in an action by the attorney general, be excluded from such franchise. *Held* that, after judgment, in an action to oust a corporation from usurping certain privileges and franchises not conferred upon it by its charter, had been entered excluding it from such franchises, the corporation itself was not dissolved, and the court, therefore, acquired no jurisdiction

tion, under section 565, to afterwards appoint a receiver therefor.

2. Petitioners for a writ of prohibition to restrain the court from taking any further proceedings with respect to a receiver are not estopped from denying the jurisdiction of the court to appoint said receiver by reason of the fact that they, in an action against them by the receiver to determine their claims to a certain fund, answered, setting up their judgment against the corporation; nor because, in an action by them against the corporation, the receiver was substituted as defendant therein; nor by the fact that in said action a deposition was taken wherein the deponent described himself as the receiver of said corporation; nor because the petitioners did not move the court to desist from taking any further proceedings under the appointment until the receiver refused to satisfy their judgment against the corporation out of the funds in his hands,—the petitioners not having been parties to nor having any knowledge of the pleadings in the action wherein said receiver was appointed.

3. Nor are the petitioners guilty of such laches as destroys their right to apply for said writ.

Department 2.

Petition for writ of prohibition by Eliza Yore and others against the superior court of the city and county of San Francisco. Writ granted.

Mastick, Belcher & Mastick, for petitioners. W. J. Barnett, Aylett R. Cotton, and Atty. Gen. Fitzgerald, for respondent.

McFARLAND, J. In the superior court, in an action entitled "The People, upon the relation of W. H. H. Hart, Attorney General, vs. Bankers' and Merchants' Mutual Life Association of the United States et al.," numbered on the register of said court 32,100, the court made an order appointing one A. G. Booth receiver; and this present proceeding is an original petition here for a writ of prohibition commanding the said superior court, substantially, to refrain from taking any further proceeding with respect to said receiver, upon the ground that the said court had no jurisdiction to appoint a receiver in said action. An answer was filed by the respondent here, and, upon a stipulation as to the facts, the case was submitted.

Prior to said action numbered 32,100, another action, numbered 30,718, had been commenced by the attorney general in the name of the people against said Bankers' & Merchants' Mutual Life Association, in the complaint in which said action it was averred that said association was a corporation duly organized under the laws of the state of California, having for its objects, as set forth in its articles of incorporation, the following: "To associate together for the purpose of equalizing the risk of death, and to pay to the nominee of such members as may die stipulated sums of money, to be collected of surviving members, upon the assessment or co-operative plan, and to do any and everything requisite, necessary, or convenient for accomplishing the said purposes." It is then averred in said complaint that said corporation had usurped certain

other privileges and franchises, to wit: "Making contracts of insurance upon the lives of persons during life and for stated periods;" "of being an incorporated and organized mutual life, health, and accident insurance company or association for profit;" "of actually issuing contracts or policies of life insurance, to subsist both during life and for stated periods, as a regular business for profit," etc.; "of making and issuing written contracts in the form and after the manner of contracts of life insurance;" and certain other franchises in said complaint enumerated. The prayer of the complaint was for judgment that said corporation had intruded into the franchises thereinbefore enumerated, and that it be ousted from the franchises "so usurped and abused." Judgment was entered that the defendant was guilty of usurping and exercising "certain franchises, rights, and privileges, as charged and alleged in the complaint in said action," and that it be "wholly excluded from such rights, privileges, and franchises." It was further adjudged that said corporation pay a fine of \$300 to the people of the state. After said judgment had been entered, and on the same day, the said action first above named, numbered 32,100, was commenced, and it was averred in the complaint therein that, by the judgment in said action numbered 30,718, the said corporation had been dissolved, and the said fine of \$300 had been imposed; that the assets of said corporation were in danger of being squandered, and that it was necessary to appoint a receiver in order to protect the same, and to provide for the satisfaction of the people's said judgment of \$300, and also to preserve and distribute moneys due from said dissolved corporation to other persons. The complaint prayed for the appointment of a receiver, and thereupon the said Booth was appointed by the court.

Jurisdiction to appoint the said receiver is given, if at all, by section 565 of the Code of Civil Procedure; and respondent rests the jurisdiction mainly upon that section. Something is said in the briefs about section 564; but the appointment of a receiver under that section is merely auxiliary to an action which "is pending," whereas, the said action numbered 32,100 is an independent action brought for the very purpose of the appointment of a receiver. It is based upon section 565 upon the theory that the state, having a judgment for a fine, is a creditor of the corporation. It is not necessary for us to determine whether the state, on account of its judgment for a fine, is a creditor within the meaning of that section, or whether it was definitely determined in the Havemeyer Case, 84 Cal. 327, 24 Pac. 121, that in such a case the state is not such a creditor, because the proceeding authorized by section 565 can be commenced only "upon the dissolution of any corporation," and the theory of the respondent that by said action num-

bered 30,718 the said corporation was dissolved cannot be maintained. In section 399 of the Civil Code it is declared that the involuntary dissolution of corporations is provided for in the Code of Civil Procedure from section 802 to section 810, inclusive; but it is rather singular that in turning to those sections of the Code of Civil Procedure we find no express provision about the dissolution of a corporation, or any mention of a corporation at all. The mind of the legislature, as expressed in those sections, seems to have been occupied almost entirely with a consideration of the usurpation of a public office. However, it is provided that a person usurping any franchise may, in an action brought by the attorney general, be excluded from such franchise by the judgment of the court; and it has been held that under this provision a corporation may be dissolved. But evidently it could be dissolved only by a judgment excluding it from exercising the franchise of being a corporation; and, in order to reach that result, there must be an averment of the usurpation of the franchise of being a corporation, and a judgment excluding the defendant from exercising said franchise, that is, from assuming to be a corporation. Now, in said action numbered 30,718 there was no such averment or judgment. The complaint does not allege that the defendant therein was usurping the franchise of being a corporation, and the judgment does not exclude the said defendant from exercising the franchise of being a corporation, and does not undertake in any way to dissolve the corporation. The complaint merely avers that the corporation has been illegally exercising certain enumerated franchises; and the judgment merely declares that the defendant is guilty of usurping rights and franchises, "as charged and alleged in the complaint," and adjudges that the defendant be excluded from "such rights, privileges, and franchises." The judgment, therefore, in that case, does not dissolve the corporation, and does not undertake to do so. The said corporation, therefore, not having been dissolved, the court acquired no jurisdiction to appoint a receiver under said section 565 of the Code of Civil Procedure; and the appointment of said Booth as such receiver was without any authority, and void.

The only other question in the case is whether or not the petitioners herein, Yore et al., are by certain of their acts, admitted by the stipulation to have been done, estopped from denying the jurisdiction of the court to appoint said receiver, or have been guilty of such laches as prevents them from maintaining this present application. The facts with respect to this part of the case are these: (1) Alexander Vensano and others commenced an action against said Booth, as receiver, to recover a claim against said corporation out of the funds in his hands; and in that action petitioners herein intervened and

set up their prior claim to the fund. (2) An action was commenced by Booth, as receiver, against a number of claimants, including these petitioners, to determine their several claims to the fund; and in that action these petitioners answered, setting up a judgment which they had recovered against the said corporation, and asserting its priority over all other claims. (3) These petitioners commenced an action in Yuba county against the said corporation, in which, on the motion of said corporation, the said Booth, as receiver, was substituted as a defendant in the place of said corporation. (4) Until the 10th day of February, 1894, neither the petitioners nor their attorneys had seen or examined any of the papers or proceedings in said action numbered 32,100, nor had any information concerning the same beyond what was imparted, if anything, by the pleadings, papers, and proceedings in other actions mentioned in the stipulation. (5) In the said action of these petitioners against said corporation in Yuba county, the deposition of said Booth was taken on the 9th day of March, 1892, at the taking of which deposition the petitioners herein were represented by their attorneys, and in said deposition it was mentioned that said Booth was the receiver of said corporation, and was examined in respect to the papers of said corporation, etc. The petitioners herein obtained judgment against the said corporation, in said action brought in Yuba county, for \$13,826.66, on the 3d day of May, 1893; and on the 15th of January, 1894, a writ of execution was issued on said judgment, a copy of which was delivered by the sheriff to said Booth, together with a notice that all debts, credits, etc., and personal property, in his possession and owing to said corporation, were attached; and said Booth answered to the sheriff that whatever money he had belonging to said corporation was held by him as receiver, and that he would not pay over any of the same unless ordered to do so by the superior court by whom he was appointed. Thereupon petitioners herein served a notice upon the attorney general, and also upon Booth, that they would move the court to desist from taking any further proceeding under said appointment of Booth as receiver, upon the ground that the court had no jurisdiction to appoint said receiver, which motion was afterwards heard by said court, and denied.

We do not think that by the acts just stated petitioners are precluded from maintaining the present proceeding. Of course, jurisdiction of the subject-matter of an action cannot be obtained by consent; and the conduct of petitioners, as above narrated, does not include the necessary elements of estoppel, at least as to future action. Neither do we think that they have been guilty of such laches as destroys their right to apply for the writ sought in this proceeding. They never appeared in the original action in which the

receiver was appointed, except to move that the court desist from further proceedings therein. As to the other actions, Booth was acting as de facto receiver, and had the assets of the corporation in his possession, and said assets were about to be disposed of in said actions; and, under these circumstances, the appearance in said actions by petitioners for their own safety was not a concession of the validity of Booth's appointment as receiver, or a ratification thereof. They were not bound in those proceedings to attack Booth's right to the possession of the assets, even if it be conceded that an opportunity to do so was there presented. But, really, petitioners were not in a position to attack the validity of Booth's appointment as receiver until they were brought into a hostile attitude to him by the levy of their execution. The case of *Smith v. Superior Court*, 97 Cal. 348, 32 Pac. 322, cited by respondent, is not in point. In the first place, that case was certiorari; and as certiorari seeks mainly to annul something that has been already done, and is in its nature appellate, the general rule is that the application must be made within the time allowed for an appeal; while the main purpose of prohibition is to restrain future proceedings. In the second place, in *Smith v. Superior Court*, the petitioner had intervened in the original action in which the receiver had been appointed, had procured himself to be joined as plaintiff in said action, and had prayed judgment against the defendant therein, and demanded that the property of said defendant be sold by the receiver, and the proceeds applied by the receiver to the debts of the said defendant; and then, three years after the appointment of the receiver, he sought to have the appointment annulled. No such facts appear in the case at bar.

Under the above views, there are no other points necessary to be noticed. Let a peremptory writ issue as prayed for in the petition.

We concur: GAROUTTE, J., HENSHAW, J.

108 Cal. 440

PEOPLE v. LEYSHON. (No. 21,200.)

(Supreme Court of California. Aug. 5, 1895.)

FORGERY—INFORMATION—VERDICT—SUFFICIENCY OF EVIDENCE—CONTINUANCE.

1. Pen. Code, § 470, provides that every person who, with intent to defraud another, falsely makes any notes, etc., or utters, or attempts to pass as true, any of the above-named forged matters, knowing the same to be false or counterfeited, with intent to defraud any person, is guilty of forgery. *Held*, that an information which charges defendant with having forged the name of certain persons to a note set out in the information, with intent to defraud one G., and with having knowingly, etc., uttered, and passed as true and genuine, the said note, with intent to defraud said G., etc., does not charge two offenses.

2. Where defendant was granted one con-

tinuance of 60 days on the ground of absence of a witness, it was not error to refuse to grant him a second continuance because of the absence of the same witness; defendant's affidavit showing that the witness has left the state, and that he "is informed," only, that such witness will, on a specified day, return to the place where the trial is to be had.

3. Pen. Code, § 686, provides that the deposition of a witness, taken, as therein provided, at a preliminary examination, may be read at the trial upon its being satisfactorily shown to the court that the witness is dead, or cannot, with due diligence, be found within the state. Section 1345 provides that such depositions are to be taken subject to like objections to the questions and answers contained therein as if the witnesses had been examined orally in court. *Held*, that where the court refuses a continuance on the ground of the absence from the state of a witness whose deposition was taken on the preliminary examination, defendant is not entitled to have such deposition admitted on the trial as absolutely true.

4. On trial of a person charged with forging the names of H. and C. to a note, there was a conflict in the evidence as to whether defendant had, or supposed he had, authority to sign H.'s name; but there was no evidence tending to show he had any authority, or upon which to found a belief of authority, to use C.'s name on the note. The making of the note by defendant, and the signing of the names of such persons, were admitted on the trial. *Held*, that a verdict of guilty was supported by the evidence.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

J. G. Leyshon was convicted of forgery, and appeals. Affirmed.

Zue G. Peck, for appellant. Atty. Gen. Fitzgerald, for the People.

SEARLS, C. Information for forgery. The defendant was charged with having forged the name of Mrs. Maggie Henry and Eliza J. Clark to a certain promissory note, set out in the information, with intent to defraud one A. J. Graham, and to have knowingly, willfully, feloniously, etc., uttered, passed as true and genuine, the said promissory note, with intent to defraud said A. J. Graham, etc. Defendant demurred to the information upon the ground that it charges two offenses, viz., the crime of forgery committed April 23, 1894, and also the crime of passing a forged note on the 24th day of April, 1894. The demurrer was overruled, and the ruling is assigned as error. Section 470 of the Penal Code provides that "every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any * * * note * * * or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above-named false, altered, forged or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged or counterfeited, with intent to prejudice, damage or defraud any person * * * is guilty of forgery." As was said in *People v. Frank*, 23 Cal. 507: "Where, in defining an offense, a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be

charged in a single count; for the reason that, notwithstanding each act may, by itself, constitute the offense, all of them together do no more, and likewise, constitute but one and the same offense." To like effect are *People v. De la Guerra*, 31 Cal. 459; *People v. Harrold*, 84 Cal. 567, 24 Pac. 106; *People v. Gosset*, 93 Cal. 641, 29 Pac. 246; *People v. Smith*, 103 Cal. 563, 37 Pac. 516. The information charged but one offense, and the demurrer was properly overruled.

The second error assigned relates to the action of the court in refusing a continuance upon the application of defendant. The record shows that the cause was originally set down for trial on the 29th day of August, 1894. On the last-named day a continuance was asked by defendant upon the ground of the absence of August Wodecki, a witness on behalf of defendant, who had been duly subpoenaed, and the cause was continued by the court to October 26, 1894. On the last-named day the cause was again called for trial, whereupon counsel for defendant moved for a continuance until January 15, 1895, on account of the absence of the said witness, August Wodecki, who was shown by affidavit to have left the state of California, and to be at Phoenix, Ariz., and from which place, the affiant is informed, "he will return to Los Angeles on or about January 10, 1895." The witness in question testified on the preliminary examination of defendant, and his deposition there taken is referred to in the affidavit, and made a part thereof. The substance of the showing was that Mrs. Maggie J. Henry, one of the persons whose name was charged to have been forged by defendant, had employed said defendant to transact for her various matters of business, and had declared the latter to be her adviser, and the manager of her outside business, etc. The affidavit also showed that, upon the failure of the witness to attend court in August, a writ of attachment had issued against him, but was never served. The court overruled the motion for a continuance, giving as a reason therefor that it was not satisfied "that the witness will ever be back here, or that he has not gone permanently from the state," and held that the defendant was entitled to use the deposition taken upon the preliminary examination in his favor as evidence in the case. Counsel for defendant contended that the prosecution should not only admit the deposition in evidence, but that the facts stated therein should be conceded to be absolutely true. This was not conceded by the prosecution, and the contention of appellant is that under such circumstances it was error to deny the continuance. The granting or refusing a continuance in a criminal case is a matter in which much must be left to the discretion of the trial court, and it is only in cases where it is apparent that such discretion has not been wisely exercised that this court

will reverse its action. Where, as in this case, a second continuance is asked for upon the ground that a witness for the defendant is absent from the state, and hence beyond the jurisdiction of the court, it should be made to appear with reasonable certainty that the witness will return to the jurisdiction within such reasonable time as to prevent an unusual delay in the trial of the cause. The showing here as to the return of the witness is only that defendant is informed he will return. The sources of defendant's information are not given, and no reasons are assigned for his belief that he will return, if such be entertained. Indeed it is not stated in the affidavit that defendant believed the witness would return, but only that he was so informed. Under such circumstances, no surprise is felt that the court below failed to be convinced that the presence of the witness would be secured by a continuance. *People v. Ashnauer*, 47 Cal. 98; *People v. Francis*, 38 Cal. 188; *People v. Ah Yute*, 53 Cal. 613.

The contention of appellant, that the deposition of Wodecki, taken at the preliminary examination of defendant, should have been admitted as absolutely true, cannot be maintained. Under section 686 of the Penal Code, the depositions of witnesses, taken, as therein provided for, at the preliminary examination, may be read at the trial upon its being satisfactorily shown to the court that the witness is dead or insane, or cannot, with due diligence, be found within the state. *People v. Curtis*, 50 Cal. 95. These depositions, like those taken on behalf of the defendant conditionally, and in cases where witnesses are without the state, are to be taken subject to like objections to the questions and answers contained therein, as if the witness had been examined orally in court. Pen. Code, § 1345. There is nothing in the Code requiring other or different credence to be given to them than is accorded to the sworn testimony of witnesses who appear personally in court. This question is not regarded as being of much importance in the present case, for the reason that the showing was not sufficient to call for a continuance, had there been no deposition in the case.

The verdict cannot be set aside for the want of evidence in its support. The making of the promissory note by defendant, and the signing by him of the names of Mrs. Maggie Henry and Eliza J. Clark thereto, was admitted repeatedly during the trial. The defense interposed was that the business relations between defendant and the two women whose names appeared upon the note were such that defendant either had authority, or supposed he had authority, to sign their names thereto. As to Mrs. Maggie Henry, there was evidence tending to show some foundation for the position assumed by defendant; but there was a conflict in the evidence on this point, and, upon well-rec-

ognized principles, the verdict cannot, under such circumstances, be set aside for such cause. As to the name of Eliza J. Clark, signed by defendant, we find in the record not an iota of evidence tending to show in the defendant any authority, or upon which to found a belief of authority, to use her name upon the promissory note. As to her, the case presented a bald case of forgery, not relieved by any pretext worthy of consideration. The proof that defendant forged the name of Eliza J. Clark to the promissory note described in the information is sufficient alone to uphold the verdict, and for that reason the several rulings of the court upon the admission and rejection of testimony touching the business relations existing between defendant and Mrs. Maggie Henry need not be considered; for, if erroneous, such rulings do not, under the circumstances, call for a reversal.

The other errors assigned are either unimportant or unfounded. The judgment and order denying defendant's motion for a new trial, from which he appeals, should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying defendant's motion for a new trial, from which he appeals, are affirmed.

108 Cal. 460

CITY AND COUNTY OF SAN FRANCISCO
v. BURR et al. (No. 15,326.)

(Supreme Court of California. Aug. 6, 1895.)

STREETS—DISCONTINUANCE.

The adoption of an ordinance, and its subsequent ratification by the legislature, declaring a map to be the plan of a certain part of a city in respect to location and establishment of streets, works a discontinuance and abandonment of streets formerly existing in that part of the city, but not appearing on such map.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the city and county of San Francisco against E. W. Burr and others to have a certain space declared an open public street. Judgment for plaintiff. Defendants appeal. Reversed.

J. C. Bates, for appellants. H. T. Creswell, for respondent.

HARRISON, J. In 1847, Leavenworth, as alcalde of San Francisco, granted 26 100-vara lots in that portion of the pueblo which is called the "Laguna Survey." These lots were granted by reference to a map kept in the alcalde's office, on which they were designated by numbers. Upon this map there is delineated a space corresponding to a street, upon one side of which are located lots 4, 7,

9, and 21, and on the other side of which are located lots 3, 6, 12, and 22. The territory thus surveyed and mapped is situated west of Larkin street, and was disconnected with the other portion of the then town of San Francisco, and the open space between the two rows of lots aforementioned was not a prolongation of any of the streets then existing, nor did it intersect or connect with any of those streets. The present action is brought to have this space declared to be an open public street.

This delineation upon the map created the easement of a right of way in favor of the grantees' lots abutting thereon, and indicated an intention on the part of the town to dedicate the space as a highway, and a subsequent user thereof would have been regarded as an acceptance by the public sufficient to complete the dedication. The grantees of the lots might, however, lose or surrender the easement created for them, and the public could also abandon or discontinue the highway after its dedication had been complete. The street, when dedicated, became the property of the whole state, which, by its legislature, could deal with or dispose of it at its pleasure. "That the legislature possesses competent power to vacate a street in a city; that the legislature may delegate or commit such power to the municipal authorities of the city; that its exercise by the municipal authorities is dependent on the will and subject to the control of the legislature; and that, after such power has thus been committed to the municipal authorities, the legislature may revoke it in part, as well as in whole, or, without an express revocation, may itself exercise it in any particular instance,—are propositions about which there can be no controversy in this state. The plenary power of the legislature over the whole domain of streets is well illustrated by the decisions of this court in the litigation respecting Kearny, Second, and Beale streets in the city of San Francisco." Polack v. Asylum, 48 Cal. 492. The Van Ness ordinance, which was passed in 1855, provided for a plan for the location and dimensions of streets to be laid out within the city limits west of Larkin street and southwest of Johnston (now Ninth) street; and in pursuance of these provisions the plan or map known as the "Van Ness Map" was prepared, and by ordinance, October 16, 1856, "declared to be the plan of the city in respect to the location and establishment of streets and avenues, and the reservations of squares and lots for public purposes, in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnston streets." This ordinance was ratified and confirmed by an act of the legislature approved March 11, 1858 (St. 1858, p. 52), and the streets delineated upon the Van Ness map became thereby open public highways. Sawyer v.

San Francisco, 50 Cal. 370. The space that had been delineated as a street upon the map of the Laguna survey does not appear upon this map, but, in lieu thereof, there are other streets, forming continuations of streets then existing, and running at a different angle with Larkin street. In *Brook v. Horton*, 68 Cal. 555, 10 Pac. 204, it was held that certain streets that had been dedicated as public highways by the adoption of the Van Ness map were superseded by streets that were laid out on the city engineer's map which was prepared under the acts of 1862 and 1864 (St. 1862, p. 407; St. 1863-64, p. 460); that the effect of the delineation of the streets upon the engineer's map under the provisions of these statutes was to discontinue and abandon the former streets. Under the principles of that case it must be held that by the adoption of the Van Ness map, and its confirmation by the legislature, the above-described space upon the Laguna survey map ceased to be a public highway. See, also, *Seaman v. Hicks*, 8 Paige, 655; *Com. v. Railroad Co.*, 150 Mass. 176, 22 N. E. 913. The judgment is reversed.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN FLEET, J.; HENSHAW, J.

108 Cal. 450

In re LEVINSON'S ESTATE. (No. 15,916.)
(Supreme Court of California. Aug. 6, 1895.)

ADMINISTRATOR—ACCOUNTING—JUDGMENT—SUFFICIENCY OF EVIDENCE—SPECIFICATION OF ERROR—ALLOWANCE FOR EXPERT WITNESSES AND COUNSEL.

1. On settlement of an account of an administrator, an order allowing the administrator's account, with the exception of one item, is not a judgment, within Code Civ. Proc. § 939, requiring an appeal to be taken "within 60 days after the rendition of the judgment," to entitle appellant to have the evidence reviewed. *Estate of Rose*, 22 Pac. 86, 80 Cal. 163, followed.

2. On appeal by legatees from an allowance of an administrator's account, the appellants claimed in the specifications of error that the evidence was "insufficient to justify the decision, in each and every one of the following particulars, respectively: (1) Allowing \$500, or any sum, for H. & M.; (2) allowing \$343.91, or any sum, to said administrator for commissions; (3) allowing said item of \$50, alleged to have been paid to B." etc. *Held*, that such specifications of error were sufficient, under Code Civ. Proc. § 648. *Estate of Page*, 57 Cal. 238, distinguished.

3. On the settlement of the account of an administrator, the court need not make findings of fact, though such findings are not waived, under Code Civ. Proc. §§ 590, 633.

4. Where a second administrator resigns, and is succeeded by a new administrator, and the first administrator has been paid commissions in a sum nearly equal to the amount allowable by Code Civ. Proc. § 1618, on the entire estate, such second administrator is not entitled to any allowance for commissions until the final settlement of the estate.

5. On the settlement of an administrator's account, it appeared that he engaged in litigation on behalf of the estate against deceased's former partners, and employed expert accountants to examine the books of the partnership for

the purposes of the litigation, and he claimed credit of \$673.30 for the services of such experts. As a witness, he stated that he had no explanation to give of a receipt signed by him, and produced by the legatees, acknowledging the receipt from them of \$240 towards payment of expenses on behalf of the legatees "in expediting the books of" such firm. *Held*, that \$240 should be deducted from the amount claimed to have been paid.

6. It is error to allow an administrator \$50 to pay a doctor for attendance one day, as a witness, on a motion for a receiver in an action instituted by such administrator, the amount fixed by the statute being \$2 per day.

7. The appellate court will not disturb an allowance of attorney's fees for services rendered an administrator, where the claim is that the services were of no value, and the evidence on such question is conflicting.

8. Where, on settlement of the accounts of an administrator, an allowance is made for services of attorneys, rendered the administrator, it is error to direct payment to be made to such attorneys, who are strangers to the proceeding, but the allowance should be simply to the administrator.

9. Where, on the settlement of the accounts of an administrator, he is charged with misfeasance by the legatees, and the court finds the charge false, it is proper to allow him a credit of \$100 to pay for assistance of counsel in defending him against such charge.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Judicial settlement of the accounts of J. W. Goodwin, administrator with the will annexed of John Levinson, deceased. From an order allowing the account, with the exception of one item, Fannie Levinson and others, legatees, appeal. Modified and affirmed.

Horace W. Philbrook, for appellants. Morrison, Stratton & Foerster, Barclay Henley, and J. W. Goodwin, for respondent.

PER CURIAM. Appeal by certain legatees named in the will of John Levinson, deceased, from an order settling the account of J. W. Goodwin, administrator with the will annexed of the estate of said deceased. The administrator was charged with misconduct in the discharge of his trust, and was cited to show cause why his letters should not be revoked. Thereupon on February 14, 1893, he filed the account in question, and tendered his resignation of his office of administrator. The order appealed from declared the charges against respondent to be without foundation, allowed his account as presented,—with the exception of a single item,—and directed that upon the production of a receipt for the balance of funds of the estate in his hands, ascertained to be the sum of \$4,729.94, from one Ira P. Rankin, who was appointed special administrator to succeed him, the respondent be discharged from further liability.

1. The legatees filed their exceptions to the account March 3, 1893. A hearing was had upon the objections thus made, and on September 12, 1893, the court orally announced its decision, stating the terms of the order

to be drawn allowing the account. Such order was signed by the judge and filed with the clerk September 16, 1893, and was entered in the minute book of the court October 6th, following. The appeal was taken December 4, 1893. Respondent insists that the order is a judgment (*Miller v. Lux*, 100 Cal. 609, 35 Pac. 345, 639), that the appeal was not taken "within sixty days after the rendition of the judgment" (Code Civ. Proc. § 939), and hence that the evidence upon which the decision rests cannot be reviewed. But this question has been made the subject of investigation by the court in *Estate of Rose*, 80 Cal. 166, 22 Pac. 86; and, on the authority of that case, we consider that the evidence here is open for examination.

2. Respondent further contends that the specifications of insufficiency of the evidence to justify the decision, appearing in appellant's bill of exceptions, are not stated so as to answer the requirements of section 648, Code Civ. Proc. The specifications supposed to be faulty are set out in this manner: "The evidence is insufficient to justify the decision in each and every one of the following particulars, respectively: (1) Allowing \$500, or any sum, for Henley & MacSherry; (2) allowing \$343.91, or any sum to said administrator for commissions; (3) allowing said item of \$50, alleged to have been paid to Dr. C. F. Buckley," etc. We think the specifications are sufficient. The account is itself a bill of items, and, when the respondent was informed by the specifications of the several items which appellants deemed to be unsupported by the evidence, he certainly was advised of the particulars wherein he should take note whether the evidence, if any, sustaining the account appeared in the bill of exceptions when proposed; and this we understand to be a main object of the requirement of such specifications by the statute (Code Civ. Proc. § 648). The case differs obviously from *Estate of Page*, 57 Cal. 238. There no attempt was made to specify any deficiency of evidence.

3. Findings of fact were not waived, and the court made none. Appellants claim that for this reason the order should be reversed. The manner in which the account of an executor or administrator is usually made up, and the manner in which objections thereto are usually presented (and this case shows no exception), do not at all conduce to the development of issues such as arise upon the pleadings in a civil action, and to which findings are required to be responsive. Code Civ. Proc. §§ 590, 633. And it has been said here obiter, but, we think, correctly, that "in such a proceeding it is not incumbent upon the court to make and file express findings." *Miller v. Lux*, 100 Cal. 613, 35 Pac. 345, 639.

4. The court allowed to the respondent the sum of \$343.91 as commissions. It appears that he was preceded in the administration

of the estate by one S. W. Raveley, named executor in the will of the deceased. Raveley had been, on the settlement of his account, credited with the sum of \$15,441.98, of which \$700 was for his own commissions; he paid over to Mr. Goodwin, his successor, the respondent here, the balance in his hands belonging to the estate, amounting to \$6,254.91; respondent received from other quarters \$223.34; making the total funds of the estate coming to his hands \$6,478.25, and the total value of the estate accounted for \$21,920.23. On this sum the commissions allowable under section 1618, Code Civ. Proc., amount to \$997.60, while the sum of \$1,043.91 has actually been allowed, and the administration is yet unclosed. It is suggested by counsel that the presumption should be indulged that the allowance made to respondent included something for extraordinary services, under section 1618, Code Civ. Proc. But his account makes no claim for such services, and it is expressly stated in the order that he "is entitled to \$343.91 as commissions." The presumption does not arise. *Estate of Moore*, 96 Cal. 526, 527, 31 Pac. 584. Under the circumstances disclosed by the record, nothing can be allowed respondent for commissions until the final settlement of the estate. See *Estate of Barton*, 55 Cal. 87, and cases there cited.

5. Respondent engaged in litigation on behalf of the estate against William J. and Benjamin Newman, former partners of decedent in the firm of Newman & Levinson, and employed certain expert accountants to examine the books of the partnership for the purposes of such litigation. He claimed credit for \$673.30 paid for the services of said experts. The payments to them, as shown by the account, were made in sums ranging from \$25 to \$80, beginning in January, 1892, and continuing at intervals for nearly a year following. Testimony was given that at first the money to pay said experts was furnished by the legatees. On cross-examination of the administrator as a witness at the hearing, contestants produced a paper writing signed by him, dated March 2, 1892, and acknowledging the receipt from one of them of \$240 towards payment of expenses on behalf of the legatees "in expediting the books of Newman & Levinson." Being asked to explain the receipt, the witness said he had no explanation to give. He also said that he had given no credit in his account for said \$240. The court allowed the full sum claimed for compensation of experts. We think the administrator mistook, and that the circumstances were such as to require him to explain that the money had by him as evidenced by the receipt was used to pay for services different from, or in addition to, those specified in his account, or for other reason was not chargeable to him, and that failing so to do his credits should have been reduced by said sum of \$240. The allowance of the further sum of \$433.30, paid to said accountants, was a

matter committed to the sound discretion of the court. There is no proof that such discretion was abused. See *Estate of Moore*, 72 Cal. 336, 13 Pac. 880.

6. The following credit item appearing in the account was allowed: "Dr. C. F. Buckley, services, \$50.00." The administrator testified that payment thereof was made to Dr. Buckley for attendance as a witness on a motion for a receiver in a certain action instituted by the administrator; that he attended one day. The statute fixes the fees of witnesses at \$2 per day. Why the further sum of \$48 was paid, does not appear in the record. Its allowance was therefore erroneous.

7. The order appealed from directs that the sum of \$500 be paid out of the estate to the law firm of Henley & MacSherry "for services rendered the estate and the administrator in the management of the estate." The services referred to were rendered in the conduct of the respondent's suit against the Newmans. The claim is stated in the account as among the "bills outstanding," no sum being named, but at the hearing said attorneys presented a statement claiming an allowance of \$1,000 for their services. The principal contest in the court below seems to have concerned the allowance of this item. Appellants make two points in this connection: (1) That the services were of no value; and (2) that an order directing payment to counsel, who are strangers to the proceeding is void. As to the first, it suffices to say that the evidence was conflicting. While it pretty clearly appears that there was a wide divergence of opinion between Messrs. Henley & MacSherry, and counsel associated with them, as to the policy to be pursued in the later stages of the trial of that cause, and that they (Henley & MacSherry) then entertained small hope of ultimate success, and so were insistent (as was the administrator) on a proposed compromise, which, if effected, would have given the estate little, if anything, more than the expenses of the action, yet it does not appear but that the course they recommended comported with the proper discharge of professional obligation. In the light of the event, it seems that it would have been most to the interest of the estate; and, without signifying approval of all the methods employed by them and by the administrator in the effort to bring about such compromise, it ought to be said that the evidence does not substantiate appellants' charge that they and the administrator "became traitors to the interests of the decedent's estate, and treacherously exerted themselves to bring about a judgment for the defendants." There was error, however, in the direction that the payment be made to the attorneys. Like other necessary expenses incurred in course of administration, the fees of counsel are to be allowed out of the estate to the executor or administrator. Such is the reading of the statute (Code Civ. Proc. § 1016),

and the effect of the decisions of this court. In *re Ogier's Estate*, 101 Cal. 385, 35 Pac. 900; *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230; In *re Blythe's Estate*, 103 Cal. 350, 37 Pac. 392; *Pennie v. Roach*, 94 Cal. 515, 29 Pac. 956, and 30 Pac. 106; *Sharon v. Sharon*, 75 Cal. 38, 16 Pac. 345.

8. Since the court found that the charges of misfeasance against the respondent were false, it properly allowed him credit for the item of \$100 paid for assistance of counsel in defending himself against the same. It would be otherwise if the charges were sustained. *Woerner, Adm'n*, § 516.

The cause is remanded, with instructions to the superior court to modify the order appealed from in these particulars, viz.: (1) Striking out therefrom all allowance for commissions, with leave to respondent to move for an allowance of his reasonable proportion of commissions upon the final settlement of the estate. (2) Allowing to respondent \$500 for services of his attorneys, Henley & MacSherry, and striking out the allowance to said attorneys. (3) Allowing for services of experts \$433.30, instead of \$673.30. (4) Allowing for payment of Dr. Buckley \$2, instead of \$50. And as thus modified the order will stand affirmed.

(108 Cal. 468)

In re GARRITY'S ESTATE.

Appeal of BUCKLEY. (No. 15,732.)

(Supreme Court of California. Aug. 6, 1895.)

EXECUTORS—ALLOWANCE TO WIDOW—PETITION—SETTLEMENT—SUPPLEMENTAL INVENTORY OF PERSONALTY—APPRAISEMENT—WHEN NECESSARY—LIFE TENANT—POSSESSION OF PERSONAL ESTATE.

1. Under Code Civ. Proc. § 1466, which confers on the court power to make reasonable allowance out of the estate for the maintenance of the family, the court may make such allowance without first setting apart a homestead, as authorized by section 1465, and determining that it is insufficient for the widow's support. 38 Pac. 628, affirmed.

2. The son of the widow may petition for the allowance to her, though he is also the executor. 38 Pac. 628, affirmed.

3. Where the executor disposes of certain personal property without including it in the inventory, in accordance with the expressed wish of the decedent, and, on final settlement, makes a supplemental inventory of such property, the court may determine its value, and it need not be appraised as other property of the estate. 38 Pac. 628, affirmed.

4. Where testator gives "all" his property to his wife to hold and to "enjoy" for life, and to others the residue "remaining upon the termination of the life estate," the wife is entitled to the possession of the personal estate without security, in the absence of adverse showing by the remainder-men. 38 Pac. 628, affirmed.

In bank.

On rehearing. For decision in department, see 38 Pac. 628.

PER CURIAM. After a full consideration of this cause in bank, we are satisfied with the conclusion reached in department

and with the opinion of Mr. Justice HARRISON therein delivered. 38 Pac. 628. In accordance with said opinion, the superior court is directed to modify the decree of distribution by striking therefrom the following proviso: "Provided, that the sum of one hundred dollars of said distribution shall have been heretofore received by Thomas Garrity, and that the sum of fifteen dollars has been received by James Garrity;" and, as so modified, the decree is affirmed. The orders for a family allowance and settling the account are also affirmed; and the costs of this appeal are to be borne by appellant.

108 Cal. 484

In re LI PO TAI'S ESTATE.

LI TAI WING v. FREESE. (No. 15,746.)
(Supreme Court of California. Aug. 7, 1895.)
ADMINISTRATOR WITH WILL ANNEXED—RIGHT TO
REMOVE—EXECUTOR—COMPETENCY—
RES JUDICATA.

1. Code Civ. Proc. § 1383, providing that when letters of administration have been granted to any other than the wife, child, etc., of the intestate, any one of them may obtain the revocation of the letters, and become entitled to the administration, applies to a case where deceased left a will, and an administrator with the will annexed has been appointed, and may be availed of though the person applying for the revocation was designated by the will as executor; section 1354, providing that where the person designated in a will is absent from the state, or a minor, letters of administration with the will annexed shall be granted, which, in the discretion of the court, may be revoked on return of the absent executor, or arrival of the minor at the age of majority, having application only where the petitioner has no other right to administer, except that he was designated by deceased. 39 Pac. 30, reversed.

2. A person is not incompetent to serve as an executor, on the ground of want of understanding (Code Civ. Proc. § 1350), merely because he cannot speak English, and is not instructed as to the constitution of the state.

3. Denial of application under Code Civ. Proc. § 1354, for removal of an administrator with the will annexed, and appointment in place of him, is not an adjudication of want of understanding of petitioner; no reason being assigned for the denial, and there being various other grounds on which the application could be denied.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Petition by Li Tai Wing for the removal of A. C. Freese, public administrator, as administrator with the will annexed of Li Po Tai, and that letters of administration with the will annexed be issued to petitioner. From an order denying the application, petitioner appeals. Reversed.

Alexander D. Keyes and Philip Teare, for appellant. J. D. Sullivan, W. M. Willett, and R. H. Countryman, for respondent.

BEATTY, C. J. On the 28th of February, A. D. 1894, appellant, Li Tai Wing, filed a petition in the probate court of the city and county of San Francisco, in which, with other

allegations, he stated: That Li Po Tai died in said city and county March 20, 1893, testate. That by his will he nominated petitioner and his mother executor and executrix of the will. That at the time of the death of Li Po Tai, and when the will was probated, and letters testamentary were issued to his mother, petitioner was a minor, and was absent from the state of California. That his mother, Lee See, was appointed executrix April 11, 1893, and duly qualified. That afterwards, on the 27th day of October, 1893, said Lee See was removed from office, and her said letters revoked; and afterwards, on the 15th day of November, 1893, A. C. Freese, public administrator, was appointed administrator with the will annexed, to take charge of the estate, and said Freese duly qualified, and is still acting as such administrator. That said Freese was not the husband or wife, child, father, mother, brother, or sister of said Li Po Tai, deceased. Petitioner is the eldest son of said Li Po Tai; is over the age of 21 years, and a resident of the city and county of San Francisco. Wherefore, he asked that the letters of administration issued to A. C. Freese be revoked, and letters of administration with the will annexed be issued to petitioner. Freese was duly cited to appear and answer. He filed no answer, but did appear, and was allowed to contest the right of the petitioner. Petitioner bases his claims upon the language of section 1353, Code Civ. Proc., and succeeding sections. He contends that under these provisions his right to the relief asked is absolute, provided only that he be found to possess the statutory competency.

The first question to be considered is this: Has section 1383 any application where the decedent has left a will? By its terms, it might seem to have been intended to apply only in cases of intestacy; but in *Estate of Pacheco*, 23 Cal. 476, it was applied to a case in which, like the present, there was a will, and in which the other material facts were substantially the same. It is true that the question of its applicability, although argued by counsel, was not expressly adjudicated, but the decision rests upon the tacit assumption by the court that the right to administration in the case provided for is unaffected by the fact that there is a will. In itself, this decision may not be of much weight as an authority; but it was made many years ago, and has never been overruled or questioned. Meantime the legislature has revised the statute, and re-enacted this particular section in its old form, and, we are bound to suppose, with the intention that it should be construed now as it was construed before the revision. In my opinion, there is no reason for changing its construction. If it be said that the decision in the *Pacheco* Case disregarded the terms of the law, it may be answered that the court was fully justified by the whole tenor of the statute, and the manifest policy of the legislature in respect to the choice of administrators, in departing from a literal construc-

tion of this particular section. By the old probate act, as by the corresponding sections of the Code, the legislature had prescribed the order in which the relatives and creditors of an intestate and other persons should be entitled to administer, and had made the same order of preference applicable to cases in which executors named in a will failed to qualify or ceased to act. These various provisions are found in sections 1350, 1365, 1425, and 1426, Code Civ. Proc. The policy of the law is clear. In the absence of any designation of an executor by the decedent, certain persons, in a certain order, have the right to administer. When executors have been appointed by the decedent, if they cannot act, or will not act, or are not allowed to act, then the same persons, in the same order, are entitled to letters of administration with the will annexed. Falling the choice of the decedent, the law enforces its choice. And so of the case where letters of administration have been granted to some person other than the husband or wife or child of the decedent,—it makes no difference whether there was a will or not; if one of the persons preferred by the law asks that the administrator (with or without the will annexed) be removed, and himself appointed, his request should be granted, if he is legally competent to discharge the trust. It is argued that this conclusion does not follow, and that section 1383 does not apply in cases of testacy, because section 1354¹ is specially applicable to such cases, and confers upon the court a discretionary power to remove or retain the administrator with the will annexed, as it may deem proper. But I do not think section 1354 applies where the petition for the removal of the administrator with the will annexed is based upon a right to administer conferred upon the petitioner by the statute. If the petitioner has no other right to administer, except such as flows from his designation by the decedent, then section 1354 applies, and the granting or refusal of the petition rests in the sound discretion of the court. But, when the petition is based upon the statutory right to administer, then section 1383 applies; and, if the petitioner is not incompetent by reason of some statutory disqualification, the court has no discretion to deny his petition.

But, although the objection that section 1383 does not apply is the point principally relied on by respondent to support the order of the superior court denying the petition of Li Tai Wing, it does not appear that this was the

ground of the decision. The superior court found that Li Tai Wing was not competent, and that he had been previously adjudged incompetent, to discharge the trust, and upon these grounds denied his petition. The question is whether the evidence sustains these findings. In my opinion, it does not. The only evidence of incompetency was directed to the point that the petitioner had not sufficient understanding (Code Civ. Proc. § 1350), and it only proved that he could not speak the English language, and was not instructed as to the constitution of the state. These facts do not show lack of understanding, and the other evidence showed that the petitioner was a man of intelligence and education. Nor was there any prior adjudication of want of understanding. The petitioner had made an application under section 1354, which had simply been denied without any reason assigned, and without any finding of fact. The denial of the former petition does not imply a finding of incompetency, because there are various other grounds upon which it might have been denied. Code Civ. Proc. § 1911. The order appealed from is reversed.

We concur: VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

108 Cal. 490

SAN BERNARDINO INV. CO. v. MERRILL.
(No. 19,439.)

(Supreme Court of California. Aug. 7, 1895.)

CORPORATIONS—ASSESSMENT OF STOCK—ENFORCEMENT OF ASSESSMENT.

1. Civ. Code, § 831, provides that "a corporation, * * * after one-fourth of its capital stock has been subscribed, may * * * levy and collect assessments" thereon. *Held* that, in an action to collect an assessment on certain shares of stock, a complaint that does not show one-fourth of the capital stock to have been subscribed is demurrable as failing to show a cause of action.

2. In the absence of any provision therefor, a corporation cannot levy an assessment on its capital stock until after the whole amount has been subscribed.

3. The term "waiver" implies the abandonment of a right which can be enforced, or of a privilege which can be exercised, and there can be no waiver unless at the time the right or privilege waived is in existence.

4. Civ. Code, § 339, relating to the levy and collection of assessments on corporate stock, and the sale thereof for delinquency, provides that "the first publication of all delinquent sales must be at least fifteen days prior to the day of sale." Section 349 provides that "on the day specified for declaring the stock delinquent or at any time subsequent thereto the board of directors may elect to waive further proceedings * * * and proceed by action to recover the amount of the assessment." *Held* that, where the directors fixed May 7th for the sale of delinquent stock, they could not on April 25th elect to waive further proceedings therein, and proceed by action for the recovery thereof, no notice of delinquent sales having been published up to that time.

Department 1. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

¹ Code Civ. Proc. § 1354, provides that: "Where a person absent from the state, or a minor, is named executor—if there is another executor who accepts the trust and qualifies—the latter may have letters testamentary and administer the estate until the return of the absentee or the majority of the minor, who may then be admitted as joint executor. If there is no other executor, letters of administration with the will annexed must be granted; but the court may, in its discretion, revoke them on the return of the absent executor or the arrival of the minor at the age of majority."

Action by the San Bernardino Investment Company against Samuel Merrill to recover an assessment levied on certain stock. Plaintiff had judgment, and defendant appeals. Reversed.

Goodcell & Leonard and John W. Craig, for appellant. Rolfe & Rolfe, for respondent.

HARRISON, J. The plaintiff made an order March 11, 1892, by which it levied an assessment of \$1.50 per share upon its capital stock, payable on or before the 18th of April, and providing that any stock upon which such assessment should remain unpaid on that day should be delinquent and sold at public auction May 7, 1892. Under the directions of the secretary, this notice was published in a newspaper of general circulation in the county of San Bernardino once a week for four successive weeks, commencing March 18, 1892, and on the same day a copy thereof was sent by him by mail to each stockholder. On April 25th the board of directors of the plaintiff passed a resolution by which it elected to waive further proceedings for the sale of the stock on account of any delinquency in paying the assessment, and to proceed by action to recover the amount thereof. The defendant was the owner of 1,025 shares of the capital stock of the plaintiff, standing in his name upon its books, and, the assessment upon this stock not having been paid, the plaintiff brought this action and recovered judgment for the amount of the assessment.

1. The defendant demurred to the complaint upon the ground that it does not state a cause of action against him. The complaint alleges that the amount of the capital stock of the plaintiff is \$500,000, divided into \$5,000 shares of the par value of \$100 each, and that during all the time mentioned in the complaint the defendant was the owner of 1,025 shares of such capital stock. There is no allegation of the amount of its capital stock that had been subscribed or that had been issued, or any allegation that any of its capital stock, other than that of the defendant, had been subscribed or issued. The rule is well established that, in the absence of any provision to the contrary, a corporation cannot levy an assessment upon its capital stock until after the whole amount thereof has been subscribed. *Ang. & A. Corp. § 146; Bridge Co. v. Cummings*, 3 Kan. 55; *Livesey v. Hotel Co.*, 5 Neb. 50; *Railroad Co. v. Gould*, 2 Gray, 277; *Railroad Co. v. Barker*, 32 N. H. 363. This rule has been modified in this state by section 331, Civ. Code, which provides: "The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form and to the extent pro-

vided herein." Unless, therefore, one-fourth of its capital stock had been subscribed, the directors had no authority to levy the assessment upon which this action is brought. This was a condition precedent to the exercise of the power given by the statute, and, in order that the complaint should show a right of recovery in the plaintiff, it was necessary to allege the existence of the condition under which the power might be exercised. See *Boone*, Code Pl. § 203. The demurrer to the complaint should, therefore, have been sustained.

2. The plaintiff seeks to recover the amount of the assessment, not by virtue of any contract of subscription on the part of the defendant, but solely by virtue of the obligation against him which is created by the statute, and hence a strict observance of the statutory mode and provision is essential to its recovery. Section 334, Civ. Code, provides: "Every order levying an assessment must specify the amount thereof, when, to whom, and where payable; fix a day subsequent to the full term of publication of the assessment notice on which the unpaid assessments shall be delinquent, not less than thirty nor more than sixty days from the time of making the order levying the assessment; and a day for the sale of delinquent stock, not less than fifteen nor more than sixty days from the day the stock is declared delinquent." Section 337 provides that, if any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the secretary must, unless otherwise ordered by the board of directors, cause to be published a notice specifying each certificate of stock upon which the assessment is delinquent, and that as many shares thereof as may be necessary to pay the delinquent assessment, with costs and expenses of sale, will be sold on the day fixed for the sale in the order levying the assessment; and section 339 declares that "the first publication of all delinquent sales must be at least fifteen days prior to the day of sale." Section 349 provides: "On the day specified for declaring the stock delinquent, or at any time subsequent thereto, and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment, and the costs and expenses already incurred, or any part or portion thereof."

The term "waiver" or "to waive" implies the abandonment of a right which can be enforced, or of a privilege which can be exercised; and there can be no waiver unless at the time of its exercise the right or privilege waived is in existence. There can be no waiver of a right that has been lost. "Waiver is a voluntary act, and implies an election by the party to dispense with

something of value, or to forego some advantage which he might at his option have demanded or insisted upon" (per Cooley, J., in *Warren v. Crane*, 50 Mich. 301, 15 N. W. 465). Bouvier defines waiver as "the relinquishment or refusal to accept of a right." See, also, *Stewart v. Crosby*, 50 Me. 134; *Shaw v. Spencer*, 100 Mass. 395; *Dawson v. Shillock*, 29 Minn. 191, 12 N. W. 526; *Bish. Cont.* § 792. If the relinquishment of some right is the consideration upon which another right is to be created, there is no consideration for the creation of such other right unless there is an existing right to be relinquished. Under a statute conferring a special remedy for enforcing a right, and providing that the party may have a different remedy upon condition that he will surrender his right to the first, such surrender must be made while he has the right to enforce the original remedy. The party cannot by his neglect or inaction suffer the special remedy to elapse, and then claim the right to resort to the other. A right of election between two remedies, which is conferred upon the condition of relinquishing one of the remedies by some positive act, must be exercised while both of the remedies are open. Unless there is a remedy to relinquish, there is no place for an election. To exercise an election of remedies implies the right to resort to either, and that both exist at the time of the election. In the present case the board of directors, in the order levying the assessment, fixed April 18th as the day on which the assessment would be delinquent, and May 7th as the day on which the sale for delinquent assessments would be made. As the secretary was not "otherwise ordered by the board of directors," it was his duty, if the board had intended to sell the stock of the defendant in order to recover the delinquent assessment thereon, to publish the notice of such sale at least 15 days prior to May 7th; that is, its first publication must have been made not later than April 22d. The directors did not make the election provided for by section 349 "on the day specified for declaring the stock delinquent," nor until after the time had elapsed within which they could take any proceedings for the sale of the stock. By the failure to make publication of the delinquent sale "at least fifteen days prior to the day they had fixed for such sale," they lost all jurisdiction to sell the stock for the delinquent assessment, unless they should begin anew all previous proceedings and publication subsequent to the levying of the assessment as authorized by section 348. As, therefore, on the 25th of April the board of directors had lost jurisdiction to take any further proceedings for the collection of the delinquent assessment, under the chapter providing for the sale of the stock, there were no "further proceedings" which it could waive, and the condition

under which the statute authorized it to elect to proceed by action to collect the same did not exist. It follows that the plaintiff had no cause of action against the defendant. The judgment and order are reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

5 Cal. Unrep. 113

RAFFERTY v. HIGH et al. (No. 19,469.)
(Supreme Court of California. Aug. 8, 1895.)

MORTGAGES—COUNSEL FEES.

A mortgage expressly stating that it is given "as security for the payment of" the principal sum of the note, "with interest thereon according to the terms of the note," does not secure counsel fees provided by the note in case of suit being brought against the maker.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Mrs. E. C. Rafferty against Annie M. High and others. Judgment for plaintiff. Defendants appeal. Modified.

M. A. Luce, for appellants. E. W. Britt, for respondent.

VANCLIEF, C. Action to foreclose two mortgages on the same lot of land, each to secure a distinct promissory note. The rate of interest on each note was 15 per cent. per annum from date of note until payment, payable and compounded semiannually, and each note contained the following: "And I further agree that, in the event of suit being brought against me, then there shall be added to any judgment against me rendered in said suit, as counsel fees, an additional sum of ten per centum * * * upon the amount of the principal and interest hereof accrued at the time of the entry of such judgment." Each mortgage was expressly given "as security for the payment of" the principal sum of the note, "with interest thereon according to the terms of the note," and a copy of the note secured was set out in each mortgage. But neither mortgage expressly purported to secure the payment of counsel fees in any event. The trial court allowed plaintiff counsel fees amounting to \$178.91, and held that the payment of them was secured by the mortgages, and ordered that they be paid from the proceeds of the foreclosure sale. Counsel for appellants contends that the court erred in holding that counsel fees were secured by the mortgages, and whether or not they were so secured is the only question presented on this appeal. Upon this question I think the case of *Clemens v. Luce*, 101 Cal. 432, 35 Pac. 1032, is clearly in point for appellants. In that case the note secured by mortgage provided for the payment of counsel fees in the same language and form as in this case; and the mortgages in that case stated that they were given "as

security for the payment to said mortgagee of the sum of \$16,000, with interest thereon according to the terms of a certain promissory note, of date September 22, 1891,"—setting out a copy of the note,—but said nothing about securing counsel fees. In that case this court said: "As to what these mortgages were given to secure, was a matter of pure contract between the parties. They could have been given to secure the principal of the note alone, or the interest alone, or both principal and interest, as was actually done, or they could have been given to secure future advances, and attorney's fees in case of foreclosure. It follows that security for an attorney's fee is not provided for in either mortgage, and consequently such fee cannot be made a lien upon the land, and the judgment of the court in that regard is erroneous." This decision has been affirmed in at least three unreported cases. See list of unreported cases in 101 Cal. xvii. Counsel for respondent cite the case of *Ogborn v. Ellason*, 77 Ind. 393; but in that case it does not appear that the mortgage purported to secure only the principal and interest of the note, as in the case at bar. For aught that appears in the report of that case, the mortgage may have expressly purported to secure payment of the note according to its terms, without specifying merely the principal and interest, and omitting counsel fees, as in this case. I think the court erred in deciding that the payment of counsel fees was secured by the mortgages, and that the judgment should be modified by subtracting from the total amount adjudged to be secured by the mortgages the sum allowed for attorney's fees, to wit, \$178.91; and, thus modified, the judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is modified according to that opinion, and, as so modified, is affirmed. Costs of the appeal to be taxed to the respondent.

5 Cal. Unrep. 115

SAVINGS BANK OF SAN DIEGO COUNTY
v. FISHER et al. (No. 19,557.)

(Supreme Court of California. Aug. 26, 1895.)

MISJOINDER OF CAUSES OF ACTION—HARMLESS
ERROR—NOTES—WAIVER OF DEMAND
AND NOTICE OF NONPAYMENT.

1. Error, if any, in overruling a demurrer to a complaint on the ground that it united with a cause of action for foreclosure of mortgage a cause of action on a guaranty, is harmless, the court having found that the guaranty was without consideration.

2. An indorser of a note signed the following provision thereon: "I hereby guaranty the payment of the within note, * * * and waive presentation, demand, notice of nonpayment and protest." Held that, as demand and notice of nonpayment need not be given a guarantor, the waiver was by the party as indorser.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the Savings Bank of San Diego County against John C. Fisher and others. Judgment for plaintiff. Defendants Mary C. Morse and husband appeal. Affirmed.

M. A. Luce, for appellants. McNealy & Whitehead, for respondent.

HAYNES, C. The defendant John C. Fisher on April 11, 1891, made and delivered to the defendant Mary C. Morse his promissory note payable one year after date, and on the same day executed to her a mortgage to secure the same. On July 17, 1891, said Mary C. Morse indorsed said note in blank to the plaintiff, and assigned to it said mortgage. This action was brought against Fisher and the appellants Mary C. Morse and her husband, E. W. Morse, to foreclose said mortgage, and to fix the liability of Mary C. Morse, as indorser and guarantor, in case the mortgaged property should prove insufficient to satisfy the judgment. Findings were filed, and a decree entered foreclosing the mortgage, and directing that if, upon the sale of the mortgaged property, the proceeds should be insufficient to satisfy the amount found due the plaintiff, a deficiency judgment should be docketed against Fisher and said Mary C. Morse. Said Mary C. Morse and her husband appeal from the judgment and an order denying a new trial.

The complaint alleged that at the time Mary C. Morse indorsed said note and assigned said mortgage to the plaintiff she guarantied the payment of the note, and waived demand and notice, by signing the following words stamped upon the back of the note, to wit: "For value received, I hereby guaranty the payment of the within note, principal, interest, and attorney's fee, and waive presentation, demand, notice of nonpayment, and protest." The defendants Mary C. and E. W. Morse demurred to the complaint upon several grounds, of which the following only need be noticed: (1) That several causes of action have been improperly united, in this: that an action for the foreclosure of a mortgage against Fisher has been united with an action against Mary C. Morse as guarantor; (2) that these separate causes of action have been united, but are not separately stated and numbered. The second alleged defect was also attacked by motion to require these causes of action to be separately stated.

The court, however, found that the guaranty was made after the note had been indorsed and delivered, and that it was without consideration. It is, therefore, not necessary to discuss or decide whether a cause of action against Mary C. Morse upon the guaranty could be joined with a cause of action against Fisher upon the note; for, if it be conceded that the court erred in not sus-

taining the demurrer upon that ground, she was not injured, the court having found that she was not liable as guarantor. She was properly joined as a defendant as an indorser, so that the joinder as a party was proper, independently of any question of liability upon the guaranty.

The question arising upon the denial of the motion may be similarly disposed of. Counsel for appellants have not pointed out any possible theory upon which the judgment would have been more favorable to them if the court had ruled differently upon either the demurrer or the motion.

The defendants Mary C. Morse and E. W. Morse answered the complaint, and alleged: (1) That said guaranty was not made or signed at the time the note was indorsed and delivered, but long afterwards, and that it was without consideration; (2) that plaintiff is and was a banking corporation, and had not complied with the act of April 1, 1876, requiring it to publish and file for record in the recorder's office a sworn statement of the amount of its capital, the value of its assets, etc.; (3) that plaintiff had delayed bringing the action to foreclose, that the mortgaged property had greatly depreciated, and Fisher had become insolvent, whereby, etc. Plaintiff's demurrer to the first defense was overruled, and was sustained to the second and third defenses. The only question arising upon the demurrer to the second defense is whether said act of April, 1876, requiring banking corporations to publish and record said statements, was repealed by the act approved March 9, 1893. St. 1893, p. 112. That the former act was repealed by the last-mentioned act was expressly decided in *Savings Bank of San Diego v. Burns*, 104 Cal. 473, 38 Pac. 102, and that question need not be further considered. As to the third defense, it is not contended by appellants here that it stated facts constituting a defense. The demurrer to the second and third defenses was properly sustained.

The only remaining question is one presented by the motion for new trial, viz. whether the defendant Mary C. Morse waived presentation, demand, and notice of nonpayment of said note. Appellants contend that she did not, that she is not liable for any deficiency, and that the judgment against her should be reversed. There is no conflict of evidence. The undisputed facts are that on July 17, 1891, Mrs. Morse transferred said note to the plaintiff by writing her name thereon, without other words; that about a month afterwards, and before said note became due, the bank stamped upon the back of the note the words: "For value received, I hereby guaranty the payment of the within note, principal, interest, and attorney's fee, and waive presentation, demand, notice of nonpayment, and protest;" and Mrs. Morse signed her name thereto. No demand and notice of nonpayment is required to be given to a guarantor. His

liability attaches immediately upon the default of the principal, without demand or notice. Civ. Code, § 2807. Neither party, therefore, could have intended the waiver to aid the guaranty; but banks are not in the habit of releasing any ground of liability, and therefore desired to hold her as indorser without the necessity of a formal demand and notice of nonpayment, while she, if she were willing to guaranty payment, could reasonably have no objection to fixing her liability as indorser by making the waiver. But, however that may be, as the waiver could not relate to or affect the guaranty, and could only have effect or operation upon her liability as an indorser, the court correctly found that she waived demand and notice of nonpayment, and was liable upon her indorsement. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

108 Cal. 569

WITMER BROS. CO. v. WEID. (No. 19,531.)

(Supreme Court of California. Aug. 27, 1895.)

CONTRACTS—CONDITIONS PRECEDENT—DELAY IN COMPLETION—WAIVER—MISTAKE—DAMAGES—PLEADING.

1. M., in consideration of the agreement of defendant, agreed to build a certain street railroad, for which defendant agreed to pay M. a certain amount, in notes of defendant, one-half, by a two-months note, when the grading was done and the iron was on the ground, the balance, by a four-months note, on completion of the road; that the road should be constructed, weather permitting, within four months; that the notes should be deposited with B. in trust till the conditions of the contract were performed by M., and the certificate of the engineer that the conditions had been performed should be served on said trustee, and on delivery to him of said certificate he should deliver to M. the two-months note and the four-months note, respectively. The notes were deposited with B., with instructions to deliver the two-months note to M. on the certificate of the engineer that the grading was done and the iron on the ground, and the four-months note on his certificate that the road was completed. *Held*, that the completion of the road within four months was not a condition precedent to the right of M. to a delivery to him of the notes.

2. A condition precedent to the delivery of defendant's notes, that certain work be done at certain time, is waived by defendant's thereafter directing that the notes be delivered.

3. Evidence of mistake of defendant in directing delivery by a trustee of defendant's notes, or of fraud in their delivery, is not admissible under an answer merely denying that they were ever delivered by defendant, and alleging that they were delivered by the trustee before certain work was completed, in contravention of a certain contract.

4. M. agreed to construct a street railroad to defendant's property within a certain time, and defendant, in consideration of "the advantages to be derived" by him "from the extension and operation of said railroad," agreed to give M. a certain amount therefor, evidenced by his notes. *Held*, that defendant, by giving his notes to M.

after the construction of the road, was precluded from claiming a partial failure of consideration, or damages by reason of the road not being completed within the time specified; the giving of the notes being a conclusive settlement of all obligations of both parties arising from the contract.

5. An answer alleging that, if a street railroad had been completed as provided by the contract of plaintiff's assignor, defendant would have been able to sell his property for a greater price than it was "then worth without said railroad," or "is now worth with said railroad," and that defendant could, before making the contract for construction of the road, have sold his land at a greater price than he could when the road was completed, or at any time since, does not show any damages from delay in the construction of the road, it not being alleged that the decline in price was after the time the road should have been completed, or that delay in constructing the road caused the decline, or that defendant would have sold his land at any price had the road been completed within the contract period.

Commissioners' decision, Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by the Wiltmer Bros. Co., a corporation, against Ivar A. Weld. Judgment for plaintiff. Defendant appeals. Affirmed.

H. G. Weyse, for appellant. P. W. Dooner, for respondent.

VANCLIEF, C. Action on two promissory notes made by defendant to James McLoughlin, each for \$500, with interest after maturity at rate of 1 per cent. per month, and assigned by McLoughlin to plaintiff. The judgment was in favor of plaintiff for the full amount of principal and interest of both notes. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

The notes were made to secure payment of defendant's subscription of \$1,000, to be paid to McLoughlin in consideration of the construction of a proposed street railroad on a specified route passing through defendant's land. The following is a copy of the subscription contract: "This agreement, entered into this 27th day of December, 1887, by and between H. H. Wilcox, Frederick J. Moll, Henry Claussen, Mrs. H. Lee Noble, Manuel Andrada, Martin Labaig, Laurent Etchopero, Levi H. Dunham, Nicholas Cochems, N. L. Shafter, M. Sanders, T. B. Rapp, Claudio Lopez, Wm. H. Avery, I. W. Lord, W. D. Wilson, Linwood Salter, S. C. Sloan, Ivar A. Weld, H. M. Russell, parties of the first part, and James McLoughlin, party of the second part, witnesseth: That whereas, it is desirable that the steam dummy railroad now running from the terminus of the Second Street Railroad, at the corner of Diamond street and Belmont avenue, westerly by various streets and ways to the southwest corner of section 12, T. 1 S., R. 14 W., S. B. M., be extended north three-fourths of a mile and west one and one-fourth miles, to the west line of east half of N. E. $\frac{1}{4}$ of section 10, T. 1 S., R. 14 W., S. B. M., the parties of the first

part, in consideration of the advantages to be derived by them from the extension and operation of said railroad, agree to pay to James McLoughlin, party of the second part, the several sums set opposite our names, on the following terms and conditions, to wit: Ivar A. Weld, \$1,000. [The names and sums of the other nineteen are here omitted.] That the said amounts subscribed shall be payable as follows: One-half, represented by two-months notes, when grading is done and the iron is on the ground; the balance, represented by four-months notes, on the completion of the said road, on the first day of its operation. That the dummy railroad shall be extended from its present terminus to the west line of east $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 10, T. 1 S., R. 14 W., S. B. M., by the route above designated, within four months, weather permitting. That the said dummy railroad shall be well and substantially built, and shall be operated by steam power, and shall have a speed and carrying capacity equal to all requirements of the section; that the fare upon this road shall not exceed fifteen cents for residents along the line of the road as a commutation rate: provided, always, that the right of way be secured to James McLoughlin, on demand of James McLoughlin, for said extension absolutely, and for further extension of his road, by the first parties, and each of them, over and by any route that the said McLoughlin shall adopt for the construction thereof, to the westerly line of Wilcox's land, or the northerly line of Weld's land. That the said amounts shall be evidenced by the promissory notes of the above subscribers executed to the said James McLoughlin, each subscriber executing two such notes, each reading one-half the amount of his subscription; the one payable two months after date thereof and the other four after date thereof, and each bearing interest at the rate of one per cent. per month after maturity. That said notes, when so executed, shall be deposited with Geo. H. Bonebrake, at the Los Angeles National Bank, to be held in trust until the conditions in this contract specified shall be performed by the said McLoughlin, and the certificate of Geo. E. Pillsbury, constructing engineer of said road, that said conditions have been performed, shall be served upon said trustee, and upon the delivery to him of said certificate, viz. 1st, that the grading is done and the rails on the ground; and, 2nd, that the road is completed and in running order,—he shall deliver to said James McLoughlin the two-months notes and the four-months notes, respectively, at the times of such respective presentations. In consideration of the foregoing agreement of the parties of the first part, and the guaranty of I. A. Weld, O. G. Weyse, and H. H. Wilcox, hereinafter contained, said McLoughlin promises and agrees to build and equip said railroad as herein-after specified. And said subscribers, H. H.

Wilcox, O. G. Weyse and Ivar A. Weid, in consideration of the promises aforesaid, do hereby guaranty to pay to said McLoughlin when said railroad shall be completed, evidenced as aforesaid, the further sum of \$1,200.00, thereby making a total subscription of \$10,000.00, and said guaranty to be apportioned as follows: H. H. Wilcox, \$600; O. G. Weyse & I. A. Weid, jointly and severally, \$600. The said H. H. Wilcox further agrees to and hereby guarantees the subscriptions and obligations of Ivar A. Weid aforesaid. [Signed] James McLoughlin. H. H. Wilcox. N. Cochems. Ivar A. Weid."

The findings of fact bearing on the points made by appellant are as follows: "(1) That the promissory notes in suit were both deposited in escrow with George H. Bonebrake by the defendant, Ivar A. Weid, on the 24th day of January, 1888, with only the written instructions by the defendant to said Bonebrake, of said date, as follows, viz.: 'The above notes, due in two months from date of same, to be delivered to said James McLoughlin upon the certificate of Geo. E. Pillsbury that the grading for the West End Dummy R. R. is finished to Wilcox avenue in Hollywood, and that the iron for the same is on the ground; and the four-months note to be delivered to said McLoughlin upon the certificate of said Pillsbury that the road is finished and cars running to Wilcox avenue in Hollywood.' (2) That on the 7th day of May, 1888, the defendant notified said Bonebrake not to deliver the said notes, or either of them, to said McLoughlin, and thereafter, on or about the 10th day of May, 1888, said defendant departed from the state of California, and visited the continent of Europe, and remained absent from the state of California continuously until about the first day of April, 1891. (3) That on the 7th day of June, 1888, the said McLoughlin had finished the grading of the roadway for the said dummy railroad, and had the necessary iron and rails deposited on the ground, and thereupon on said day procured the certificate of Geo. E. Pillsbury, the said civil engineer, to all the said facts, and presented the same to said Bonebrake, and thereupon on said day demanded of him the delivery of the said two-months note in suit; but the said Bonebrake failed and refused to deliver the same at said time, by reason of the notification not to do so as aforesaid. That, thereafter, on the 14th day of August, 1888, the said James McLoughlin had completed said railroad, and put the same into operation, and had cars running thereon throughout, and on the said day procured the certificate of said George E. Pillsbury, engineer, to all the said facts, and on said day presented said certificate to said Geo. H. Bonebrake, and demanded of him the delivery of said four-months note in suit; but the said Bonebrake failed and refused to deliver the said note at said time, by reason of the notification by him received from said defendant not to do so, as afore-

said. (4) That on the 8th day of November, 1888, the defendant, Ivar A. Weid, acting by and through John Milner, his attorney in fact, thereunto fully authorized by a valid existing general power of attorney, theretofore duly executed by Ivar A. Weid, the defendant, and duly recorded,—which power duly authorized his said attorney, as the act and deed of him, the said Ivar A. Weid, 'to sign, seal, execute, deliver, and acknowledge such deeds, leases, and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt,' 'and such other instruments in writing of whatsoever kind and nature, as may be necessary or proper in the premises, * * * hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue of these presents,'—instructed said Bonebrake, trustee, in writing, to deliver the notes in suit to said McLoughlin, and on the day next succeeding, to wit, the 9th day of November, 1888, in obedience to said instruction, the said Bonebrake did accordingly deliver the said notes to the said James McLoughlin."

It will be observed that the road was not completed within four months after the date of the contract, as provided therein, nor until the 8th of August, 1888. As to the cause of this delay, the court found: (1) That the contract was not fully executed by all the parties of the first part until January 24, 1888, when the notes were deposited with Bonebrake; (2) that the parties of the first part failed to procure the right of way for said road, as provided in the contract; and (3) that the chief cause of the delay was that the rails and other materials for the road, while being transported by railroad, were delayed by a washout of the track; that these delays were unavoidable and without fault on the part of McLoughlin; and, furthermore, that the defendant suffered no injury or damage by reason of the delay.

1. Appellant contends that defendant's notes were never properly delivered, because defendant, on May 7, 1888, two days before his departure for Europe, notified Bonebrake that he had rescinded the subscription contract, on the ground that the terms thereof had not been complied with by McLoughlin. Conceding that the notes should be read and construed in the light of the subscription contract, which, by the way, had not been deposited with, or seen by, Bonebrake, it will hardly be contended that defendant could have rescinded that contract by mere notice to Bonebrake that he had rescinded it, without any notice of such rescission, or of his intention to rescind, to McLoughlin. It is not pretended that defendant ever notified McLoughlin of his intention to rescind, or of any objection to the delay of the work, until after the road had been completed, and after both notes had been delivered by Bonebrake pursuant to the written order of defendant's

agent, Milner. Nor does it appear that McLoughlin had any knowledge of defendant's notice to Bonebrake that he had rescinded the contract until June 7, 1888, when the work had been so far advanced as to entitle McLoughlin to delivery of the two-months note, and even then only by inference from the facts that Bonebrake then refused to deliver the two-months note, and probably then informed plaintiff of his reason for the refusal; for there is no express testimony that Bonebrake ever informed McLoughlin of defendant's notice of rescission. Nor did the defendant pretend that his notice to Bonebrake effected a rescission, or was more than mere notice to Bonebrake of a rescission already effected, as it purported to be. When and by what means had the alleged rescission been effected? To this inquiry there is no response in the record.

Another alleged reason why the notes were not properly delivered is that the time within which the road was to be completed is of the essence of the contract, and, therefore, that the completion of the road within that time was a condition precedent to the right of McLoughlin to a delivery to him of the notes. But nothing of this is expressed in the contract, nor do I think it is implied. The only conditions upon which payment of the subscriptions were to be made were: "One-half, represented by two-months notes, when the grading is done and the iron is on the ground; the balance, represented by four-months notes, on the completion of the road, on the first day of its operation." It was surely and necessarily intended that the two-months notes were to be delivered before the road was completed. Then, again, the written instructions to Bonebrake as to the conditions upon which he should deliver the notes, agreed upon by the parties and deposited with the notes, correspond with the conditions named in the contract, as follows: "The above notes [list of all the notes], due in two months from date of same, to be delivered to James McLoughlin upon the certificate of Geo. E. Pillsbury that the grading for the road is finished to Wilcox avenue in Hollywood, and that the iron for same is on the ground; and the four-months notes to be delivered to said McLoughlin upon certificate of said Pillsbury that the road is finished and cars running to Wilcox avenue in Hollywood." The subscription contract was not deposited with Bonebrake, nor did he know its contents until after delivery of all the notes in strict obedience to the above instructions and to the following written order indorsed on said instructions: "L. A., Cal., Nov. 8, 1888. Geo. H. Bonebrake: Deliver to Jas. McLoughlin the two notes given by Ivar Weld for \$500 each. Ivar A. Weld, by John Milner, His Attorney in Fact."

These conditions precedent, expressly enumerated as such in the contract and in the instructions to Bonebrake, exclude all others which are not expressly made such; and since

the provision in the subscription contract that the road "shall be extended from its present terminus to the west line of east half of northeast quarter of section 10, * * * by the route above designated, within four months, weather permitting," is not expressly made a condition precedent, nor declared to be of the essence of the contract, it should not be so construed. The case of *McLaughlin v. Clausen*, 85 Cal. 322, 24 Pac. 636, cited by appellant, is not in point; for, though that action was upon one of the notes made pursuant to the subscription contract in question here, this court said: "It does not present the mere question whether the stipulation that the road should be completed and running within a certain time was of the essence of the contract;" and this question was not considered in that case, though it was there held that "the completion of the road was, by the terms of the contract, made an absolute condition precedent, and until such completion the note could not be delivered or take effect." In that case the question thus decided arose upon a general demurrer to the answer, in which it was alleged that the road was not completed when the note was delivered.

But even if it be conceded in this case that time was essential, and that completion of the road within the time mentioned was a condition precedent to the delivery of the notes, yet the defendant was at liberty to waive the condition; and I think he did waive it by his written order on Bonebrake to deliver the notes given by his duly-authorized agent, Milner, as found by the court. No doubt that Milner was authorized to order the notes to be delivered, and that the construction of his written power of attorney from defendant by the court was correct in this respect. The only matter urged against the legitimate effect of this order by Milner is his testimony that at the time he gave the order he "was not aware of the fact that Mr. Weld had given written instructions to Major Bonebrake not to deliver those notes. When Mr. Weld left for Europe he gave no special instructions in regard to those notes, but did give me special instructions in regard to the managing of his ranch, and so on. He mentioned, in a general way, that he had given some notes to Mr. McLoughlin in connection with the building of this road, without any further instructions about them." This shows no material mistake of either the agent or principal. The agent did not exceed his authority, and did only what his principal was plainly obligated to do by his contract; besides, under the pleadings, the testimony of Milner was wholly immaterial and irrelevant. The answer simply denies that the notes were ever delivered by defendant to plaintiff, and alleges that they were delivered by Bonebrake before the road was completed, "in contravention of the terms of said contract." There is, in the answer, no averment of mistake or fraud.

2. The only other point made by appellant is that there was a failure or partial failure of consideration for the notes; and counsel for appellant says the question of failure of consideration "resolves itself into this: Was the stipulation in the contract as to time a material one?" We have seen that the time mentioned in the contract within which the road was to be completed was not a condition precedent to the delivery of the notes, and that the notes were voluntarily and properly delivered after the road was completed. Under these circumstances, I think the delivery of the notes precluded a plea of failure or partial failure of the consideration expressed in the contract, to wit, "the advantages to be derived by them [parties of the first part] from the extension and operation of said railroad." As it is admitted that the road was completed on August 8, 1888, the only possible failure of the consideration was the failure to operate the road from April 27th until August 8, 1888; and such failure occurred, and must have been known to all parties interested, before the notes were delivered. In the absence of fraud and mistake, the delivery of the notes completed a conclusive settlement of all obligations of both parties arising from the subscription contract. After such settlement that contract was satisfied, and was no longer executory by either party. The delay of 3½ months in completing the road, known to defendant at the time of the settlement, must have been considered of no consequence injurious to the defendant, or excusable, as found by the court. Furthermore, there is no foundation in the answer for a counterclaim, or a recoupment of damages on account of the delay, as to which the whole substance of the answer is as follows: If the road had been completed as in the contract provided, the defendant would have been able to sell his property "at greatly enhanced price over what it was then worth without said railroad, and over what it is now worth with said railroad"; and "defendant could, during the month of December, 1887, and before signing said contract and notes, have sold his said land at a greater price than he could at the time of the alleged completion of said road, or at any time since." It thus appears that there was a decline in the market value of plaintiff's land between the written date of the contract and the completion of the road; but whether such decline occurred during the four months within which the road was to have been completed, or later, is not stated. Nor is it alleged that the delay in constructing the road caused any decline in the market price of defendant's land, nor that plaintiff would have sold his land at any price, even if the road had been completed within the contract period. That the court properly excluded proof of these averments in the answer is too obvious to admit of question. *Pendleton v. Cline*, 85 Cal. 142, 24 Pac. 659.

The findings of fact by the court are fully justified by the evidence. I think the order and judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

108 Cal. 549

SAN DIEGO WATER CO. v. SAN DIEGO FLUME CO. (No. 19,446.)

(Supreme Court of California. Aug. 28, 1895.)

SPECIFIC PERFORMANCE — PLEADING — PARTIES — CONTRACTS OF CORPORATIONS — MONOPOLIES — PARTNERSHIP.

1. A complaint asking the specific performance of a contract and damage for its nonperformance on the same facts sets up a single cause of action.

2. When two water companies contract with each other to unite in furnishing a city water, and each appoints a trustee to manage its business, such trustees are not necessary parties to an action by one company against the other to enforce the contract.

3. A corporation owning water pipes without a city contracted with one owning those within it to deliver water for the city at the city limits, and made it its agent for the sale of water within the city, sales subject to its approval. Two trustees named in the contract, one appointed by each corporation, were to have general charge of distribution of the water, but were authorized to perform only such duties as a board of directors could perform by an agent, except that they had a limited power to determine what should be charged for operating expenses. *Held*, that the contract was not ultra vires as taking the management of the corporation from their respective board of directors and conferring it on two trustees, each a stranger to the corporation appointing the other.

4. Under Const. art. 14, § 1, water supplies of cities were put under control of the state, and the rate to be charged under control of the governing body of each city. *Held*, that a contract between a corporation owning a water supply, and pipes to conduct it to the limits of a city, and a corporation owning a system of distributing pipes in the city, under which water is to be supplied to the city, is not void as creating a monopoly.

5. Under the contract, the proceeds of sales, after deducting operating expenses, including necessary extension of pipes, were to be divided between the companies. Two trustees named in the contract, one appointed by each corporation, were given general charge under the contract. *Held*, that no partnership was created.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the San Diego Water Company against the San Diego Flume Company for specific performance of a contract, and damages for its breach. From a judgment for defendant, plaintiff appeals. Reversed.

Works & Works, for appellant. Luce & McDonald, for respondent.

HAYNES, C. Defendant's demurrer to the complaint was sustained, and, the plaintiff declining to amend, judgment of dismissal was entered, from which judgment it appeals. The only questions to be considered,

therefore, are those presented by the demurrer.

The complaint alleges, in substance, that both the parties to this action are corporations organized and existing under the laws of this state for the purpose of distributing, selling, and furnishing water to consumers in the county and city of San Diego; that the plaintiff is the owner of a complete distributing plant for furnishing water to the city of San Diego and its inhabitants; that the defendant is the owner of water rights, reservoirs, and a supply of water outside of said city, from which the water is conducted by flumes and pipes to the city boundary, where, during all the times mentioned in the complaint, they were and are connected with the water mains and pipes of the plaintiff; that the defendant was not and is not the owner of any water pipes within the city, and was unable to distribute or furnish its water to the city or its inhabitants. Under these circumstances, the parties to this action executed two written agreements, both bearing date November 6, 1890, which are referred to as Exhibits A and B, respectively, but which constitute one contract. By the first, the flume company appoints the water company its sole agent for the exclusive sale of its water within the corporate limits of the city, as then or thereafter established, excepting the peninsula of San Diego; but all sales made by the water company "shall be subject to the approval of the party of the first part [the flume company], and no sales shall be made without the consent of the party of the first part." It was further provided that said appointment should continue and be in force during the continuance of the other contract of the same date, namely, 20 years. The other contract—Exhibit B—is very long, but for the purpose of disposing of the questions made upon this appeal may be greatly condensed. By this agreement E. S. Babcock and J. W. Sefton, the former the president of the plaintiff corporation, and the latter the president of the defendant, were appointed trustees, to whom were given the control of the properties of these corporations, respectively, "so far as the same may be confined to the corporate limits of the city of San Diego," to operate and control the same for the use and benefit of the respective parties thereto. These trustees were selected and named, one by each corporation, and each was to hold said office of trustee at the pleasure of the party naming him, who should also appoint his successor, and the compensation of each should be fixed and paid by the party appointing him; that "the use, operation, and control of these properties by the said trustees shall be for the purpose of furnishing the water supply to the city of San Diego and its inhabitants, the profits arising therefrom to be subject to the control and use of the parties hereto, as hereinafter mentioned; said parties hereto agreeing to combine their joint endeavor for

the advancement of their respective interests under this trust, subject to the conditions as hereinafter mentioned." The water company agreed to furnish its entire plant, and the flume company agreed to deliver at the city limits a sufficient quantity of good water for the supply of the city and its inhabitants, to be used by the trustees for that exclusive purpose. The trustees were to keep three separate accounts, one designated as the "operating account," another as "first-division account," and the third, as "second-division account." The second and third accounts were for the purpose of distributing the profits between the respective corporations. The agreement stated, in a general way, what should be charged to operating expenses, and except as provided, and excluding certain specified matters, the trustees were empowered to determine what should constitute a proper charge to that account. It was also provided that the flume company might use the water company's system of pipes for conducting water to parties outside the city limits, the compensation therefor to be fixed by the trustees.

The complaint further alleged that the parties thereto entered upon the performance of said agreement, that the plaintiff in all things carried out and performed the same on its part, that plaintiff and defendant and their said trustees failed to agree as to the proper basis of division of the accounts between them, and especially as to the amount to be expended for the extension of plaintiff's plant, and have been unable to agree upon a settlement of their said accounts; alleged plaintiff's willingness to settle and adjust the same, but that defendant made said differences an excuse for not furnishing the water required by the contract, and had wholly failed since May 2, 1892, to comply with said contract, though plaintiff had demanded in writing such performance; alleged that upon a true and just accounting there was due to it from defendant the sum of about \$50,000, but that if the court should find otherwise, and that it was indebted to the defendant, it thereby offered to pay the same; that, by the defendant's failure to comply with its said contract, plaintiff had been damaged in the sum of \$100,000; that, acting under said contract, plaintiff contracted with the city of San Diego to supply it with water for the term of 20 years at a reasonable profit, but that defendant, after furnishing water for said purpose for about a year, failed and refused to longer furnish the same, whereby plaintiff sustained special damage in the sum of \$100,000.

The prayer is for an accounting, for damages, and for a specific performance of the contract, and for general relief.

The demurrer was upon several grounds, viz.: (1) For want of facts sufficient to constitute a cause of action; (2) that two alleged causes of action for damages are joined with an alleged cause of action for specific per-

formance, without separately stating said several causes of action; (3) for defect of parties, in that Babcock and Sefton, the trustees, are not made parties; and (4) that the complaint is uncertain, in that several causes of action are joined without being separately stated and numbered.

The second and fourth grounds of demurrer go to the joinder of several causes of action without being separately stated. Different causes of action are not stated, however. Both legal and equitable relief is sought, but the right to such relief is based upon the same facts. Pom. Rem. § 452. Nor is the third ground of demurrer well taken. The trustees were simply the agents or instruments of the parties to the contract, and had no interest in the controversy in any legal sense.

Whether the complaint states facts sufficient to constitute a cause of action is the principal question in the case. Respondent contends "that enough appears upon the face of the complaint to show that said contracts were void, because beyond the powers of the respective corporations, and against the public policy of the state." The questions here presented were discussed by counsel in another action between the same parties, but that case went off upon another point, and no opinion was expressed upon them. *San Diego Water Co. v. San Diego Flume Co.*, 100 Cal. 43, 34 Pac. 656.

It is contended that the contract in question was ultra vires, because under it the management of the affairs of the two corporations were taken from their respective boards of directors and transferred to two trustees, each of whom is a stranger to the corporation appointing the other. This statement of the effect of the contract is too broad. When analyzed, the powers of the trustees are very limited. By that part of the contract called "Exhibit A," the plaintiff, as a corporation, was appointed the agent of the defendant corporation for the sale of water within the city of San Diego; but all sales were subject to the approval of the defendant, and no sales could be made without its consent. The trustees were not given any power or authority over the sale of the water. They were given the general charge of operating the works of the plaintiff in distributing the water furnished by the defendant, and of keeping the accounts of receipts and expenses, with a limited power of determining what should be charged to the account of operating expenses; and, with that exception, their whole powers and duties were executory, and such as could not be discharged by any board of directors otherwise than through an agent. Nor is it material whether these agents were or were not connected with either corporation. They derived their authority from the agreement, and, as they were named in the agreement, each corporation acted upon and consented to the appointment of both. It is not contended that two

corporations may not enter into contracts with each other. Their power to do so depends, however, upon the character of the contract, examined in the light of their charters and of public policy. So far as the subject-matter of the contract is concerned, it relates to the sale and distribution of water, and to that extent, at least, it relates to the very purpose of the organization of each of these corporations, and is therefore presumably within their power. It is contended, however, in support of the demurrer, "that, under the power conferred by subdivisions five and eight of section 354 of the Civil Code, the defendant, by its board of directors, was only authorized to appoint such agents and enter into such contracts as were essential to the transaction of its ordinary affairs; and that any attempt to make the plaintiff its exclusive agent for the sale of water was illegal and beyond the powers of the corporation." The statement that plaintiff is made "the exclusive agent" of the defendant for the sale of water is too broad. Such agency is confined to the corporate limits of the city of San Diego, within which the plaintiff alone had the means of distributing water to consumers. The agency, however, while exclusive, was not unlimited or unrestricted; but all sales of water were to be subject to the approval of the defendant, and no sale could be made without its consent. It is not suggested that the plaintiff corporation could not legally become an agent as to matters consistent with or in furtherance of the objects of its organization, nor that the defendant, within similar limitations, could not appoint an agent; but the real question involved lies back of and beyond these objections, which go only to the instrumentalities used to carry out the ultimate purpose of the parties in making the contract in question, viz. that the contract is against public policy, and therefore void.

It is urged that "both corporations were formed for the purpose, among other things, of furnishing water to the city of San Diego and its inhabitants, and are, therefore, quasi public corporations"; and that "the agreement is contrary to public policy, for the reason that it is a combination between the parties for the purpose of creating a monopoly for the sale of water to the city of San Diego and its inhabitants." That the contract is consistent with the purpose of the organization of each of these corporations, viz. "to furnish the city of San Diego and its inhabitants with water," is too clear for discussion. The question is therefore narrowed down to this: Does the agreement create a monopoly, or in any manner injuriously affect the interests of the city or its inhabitants? "Monopoly" signifies the sole power of dealing in a particular thing, or doing a particular thing, either generally or in a particular place. A monopoly is usually, though not necessarily, harmful or injurious to public interests, though, as

that term is generally used, injury to the public is implied, and competition is therefore regarded as favorable to the public interest. But there is a competition which tends to monopoly by driving out all but the stronger competitor, when prices are again increased so as not only to yield a profit upon the original investment, but to recoup the losses incurred in breaking down competitors; or, where the competitors are of equal strength and tenacity of purpose, it may result in the destruction of the public service by the collapse of all of them. At and before the date of the contract in question, the plaintiff was the owner of a pumping plant, and of a system of mains and pipes for the distribution of water to the city of San Diego and its inhabitants, and was engaged in supplying them with water. The defendant was the owner of a reservoir supplied with water, together with flumes and pipes by which the water was conveyed to the borders of the city; but it owned no distributing plant by which it could dispose of its water within the city. To enable it to do so, it must either purchase plaintiff's distributing plant, or construct a distributing system of mains and pipes of its own, or sell its water within the city by or through the plaintiff, under some agreement for that purpose. It is not suggested that one distributing plant is not sufficient for all the wants of the city and its inhabitants, and certainly we cannot assume that it is not. Some agreement of the character here in question which would effectuate the evident intention of the parties would appear to be to the best interest of both corporations; and if the city and its inhabitants can be properly served through one distributing system, at reasonable rates, it is obviously to its best interest that its streets should not be subjected to the burden of laying and keeping in repair an additional system of mains and pipes. So far as the parties to this contract are concerned, the restraint is only partial. It is confined to the city of San Diego, or rather to that part of it which did not include the peninsula; and this, we think, was upon a sufficient consideration, and not an unreasonable restriction as between the parties. See *Mitchel v. Reynolds*, 1 Smith, Lead. Cas. (8th Ed.) 417. Nor does it injuriously affect the city or its inhabitants. Our constitution provides that "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law"; and it further provides that the rate or compensation to be collected for the use of water supplied to any city or town or its inhabitants shall be fixed annually by the governing body of the city and county, or city, or town, and any person or corporation collecting water

rates "otherwise than as so established" shall forfeit the franchises and waterworks of such person or corporation to the city, etc. Const. art. 14, § 1. In *Spring Valley Water Works v. City of San Francisco*, 82 Cal. 286, 22 Pac. 910, 1046, it was held that, when the constitution provides for the fixing of rates or compensation for the use of water, it means reasonable rates and just compensation; that the power of regulating rates is not a power of confiscation, or to take the property of the water company without just compensation.

Under the constitution, and the construction thus given its provisions, we fail to perceive how the agreement in question can create a monopoly, or in any manner increase the rate or compensation to be paid by the city or its inhabitants for the water supplied. Indeed, it is evident that water can be supplied more cheaply through one distributing plant than through two; and the governing body of the city, in whom is vested the power to fix the water rates, is bound to take that fact into consideration, as well as all other facts which will enable it to fix "reasonable rates" and award a "just compensation." In *Mor. Priv. Corp.* § 1129, it is said that the same rule which applies to traffic arrangements between competing railroads applies also to telegraph, water, and gas companies; and, in relation to traffic arrangements between competing roads, it is said, at section 1131: "It is certainly not true that all agreements or combinations restricting competition are illegal at common law. * * * Even if there were such a rule as has been claimed, applicable to competition in trade, the principle and policy of the rule would not be applicable to traffic arrangements designed merely to prevent ruinous competition and 'wars' among railroad companies. The main objection which has been urged against combinations restraining competition in trade, namely, that such combinations tend to produce monopolies and cause extortion, has no application to combinations among railroad companies; for railroad companies are prohibited by law, irrespective of any combination, to charge more than reasonable rates. * * * Public policy clearly does not demand that railroad companies operating competing lines shall engage in strife causing their financial ruin." With even greater force may it be said in this case that public policy does not condemn nor prohibit an arrangement intended to prevent a competition between these corporations which would inevitably result in the financial ruin of one or both of them, and which could not in any event benefit the city or its inhabitants.

The contention that the agreement in question creates a partnership between these corporations is without force. It does not appear that it covers all of the business of either party, though the whole of the busi-

ness of each relates to the sale of water. In a partnership, each partner has authority to represent all the partners, and to bind them by his acts so far as they relate to the partnership business. Here the agency is not of that character, but is expressly limited. It simply provides a mode of determining the compensation the defendant shall receive for the water furnished by it to the plaintiff,—an arrangement made necessary by the fact that neither of the parties, nor both combined, could determine the rate at which the water could be sold to consumers, nor accurately fix the cost of distribution, nor the quantity of water required.

The judgment should be reversed, with directions to overrule the demurrer to the complaint.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions to overrule the demurrer to the complaint.

DENVER CONSOLIDATED ELECTRIC CO. v. SIMPSON.¹

(Supreme Court of Colorado. July 1, 1895.)

NEGLIGENCE—ELECTRIC WIRES—PLEADING—EVIDENCE—NEW TRIAL—SURPRISE—SPECIAL FINDINGS—DEGREE OF CARE.

1. The fact that a complaint for injury by coming in contact with an electric company's wire contains allegations assuming the defendant to be an absolute insurer of the public against injury by its wires will not render it bad on that ground where it also alleges that the location and defective condition of the wire in question was due to negligence of the defendant in the building of its line and keeping it in repair.

2. Where a complaint against an electric company for injury by coming in contact in a public alley with a fallen wire alleges that the defendant was negligent in keeping its wires in repair, evidence of notice to the company, prior to the accident, of the defective condition of the wire, is admissible.

3. On suit against an electric company for injury by coming in contact with a fallen wire, plaintiff, contrary to agreement, as defendant claimed, put in evidence notice of the defect sent to defendant's office by a police officer prior to the accident. Defendant's affidavit for a new trial on the ground of surprise averred that, if a continuance had been granted after the admission of the notice, it could have shown by the record of police headquarters, in which such complaints were entered, that the officer did not, as he testified, report the defect to police headquarters before the accident. *Held*, a new trial was properly refused, it not being claimed that no notice was received.

4. Under Code 1887, § 199, providing that when the jury render a general verdict they may be required to make special findings, the refusal to submit questions for special findings at defendant's request is proper where a verdict for plaintiff under the instruction given would answer all the questions.

5. Evidence that the wire of an electric company, so highly charged with electricity as

to be dangerous to persons coming in contact with it, was detached from its fastenings and hung down in an alley, so as to endanger public travel, is *prima facie* evidence of negligence of the company.

6. Where degrees of negligence are not recognized, an instruction that a company for distributing electricity over wires suspended above the public streets is bound to use the highest degree of care in the construction and maintenance of its wires is not prejudicial error.

7. In maintaining electric wires in public streets, persons are bound to exercise that reasonable care which a reasonably prudent person would exercise under similar circumstances, and, as the business is attended with great peril to the public, the care to be exercised is commensurate with the increased danger.

Appeal from district court, Arapahoe county.

Action by John H. Simpson against the Denver Consolidated Electric Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wolcott & Valle and H. F. May, for appellant. E. Cayless, H. N. Sales, and E. Keeler, for appellee.

CAMPBELL, J. This was an action by the appellee to recover damages for personal injuries. The evidence tends to show that the appellant, for the purpose of furnishing light, was engaged in the business of conveying and distributing electricity throughout the city of Denver by means of wires attached to and suspended from poles placed in the streets and alleys of the city. While the plaintiff was lawfully passing along one of the public alleys in the city, without any fault on his part, he came in contact with one of the defendant's wires, heavily charged with electricity, which wire had become disconnected and detached from its overhead fastening, and was hanging down to within about two feet of the ground in said alley. As the result of such contact, plaintiff received a severe shock from the electricity carried by the wire, and was seriously injured. The negligence charged against the defendant, of which there was some proof, consisted in its failure properly to construct its line, and its omission to take the necessary precautions to prevent the wires from falling and causing injury in case they became detached from their fastenings. There was a verdict for the plaintiff in the sum of \$2,800, upon which the court entered judgment, to reverse which the appellant prosecutes this appeal.

The principal errors assigned relate to the overruling by the trial court of the defendant's demurrer to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action; to the admission of evidence, over the defendant's objection, tending to show that the defendant had notice of this defect in its line in time to make repairs before the accident; to the refusal of the court to submit to the jury, at the request of the defendant, certain questions for their answer; and to the giving of

¹ Rehearing denied September 9, 1895.

certain instructions by the court, over defendant's objection, defining the duty of the defendant to the traveling public.

The defendant's objection to the sufficiency of the complaint arises out of the supposition indulged in by its counsel that counsel for the plaintiff assumed that the defendant was an absolute insurer of the safety of the public from all danger from its wires, and drew his complaint upon that theory. If such were the fact, the complaint would be bad, for the defendant is not an insurer; but, aside from certain allegations found in the complaint, which, by themselves alone, might bear such construction, there are specific allegations to the effect that the presence in the alleyway of the wire which caused the injury was due to the negligence of the defendant in omitting to exercise due care in building its line, and culpable negligence in failing to maintain it in good repair. The original complaint contained an allegation that the defendant had notice of this fallen wire in time to repair the defect before the accident, but failed to do so. In the amended complaint this averment was omitted, and therein a general allegation was inserted to the effect that the defendant was negligent, not only in failing to keep its wires in good repair, but was also negligent in constructing the same. Before, or possibly during, the trial, in a conversation between counsel for the plaintiff and the defendant, the counsel for the defendant insists that he was led to believe that no evidence would be offered by the plaintiff tending to show that any notice was given to the defendant of this defect. At the trial, however, the plaintiff did offer testimony as to such notice, which notice was alleged to have been transmitted over the telephone by the witness Hedges to the office of the company, prior to the accident, which evidence the defendant subsequently moved to withdraw from the jury for the reasons above given, and because such evidence tended to prove no issue in the case. We think the defendant was not prejudiced by this evidence. It tended directly to establish the issue of the negligence charged, and there was no attempt by counsel for plaintiff to mislead the defendant, nor is it so claimed by appellant. Besides, while counsel for the defendant may have been, in a sense, surprised by this evidence, yet his affidavit on this point does not point out that he would be able on a new trial to produce evidence from any officer or employé of the company that such notice was not actually received at the office of the company. Had a continuance been granted after this evidence was offered, the defendant claims he would have been able to produce evidence that the record at the police headquarters, where a memorandum of such complaints is kept, would show that no such complaint or notice was sent in on the night in question by the policeman Olsen, who testified that he reported to police headquarters this defect in the wires before the accident

occurred. This is no such showing as would warrant the court in granting a new trial on the ground of newly-discovered evidence, nor is it sufficient to warrant us in saying that the court committed error in admitting testimony in regard to the notice.

The defendant requested the court to submit to the jury certain interrogatories, to be answered by them along with their general verdict. These were whether the defendant was guilty of negligence, and, if so, in what particular; at what time the accident occurred; at what time the wire was first down; whether the defendant had notice of the fallen wire before the accident, and, if so, how long before; and whether, if the defendant had such notice, it allowed an unreasonable time to pass before the accident without repairing the same. Section 199, Code 1887, provides: "In any case in which the jury render a general verdict, they may be required by the court to find specially upon any particular questions of facts to be stated to them in writing." This is substantially like the Nebraska Code, and in *Flonten v. Ferrell*, 24 Neb. 347, 38 N. W. 732, it was held that the giving to or withholding from the jury questions for special findings of fact was within the discretion of the court. We may add that we perceive no special objection to the interrogatories submitted by the defendant to the court, and it certainly would not have been error had the court submitted them to the jury; but we cannot say that the refusal to give them was such an abuse of discretion as to justify a reversal on that ground. The return of a verdict for the plaintiff under the instructions as given to the jury must necessarily have been equivalent to an answer by the jury of each of these questions against the defendant. Hence, we fail to perceive that the defendant was prejudiced in any substantial right.

The most important and difficult questions concern the instructions given by the court. The defendant requested a number of instructions, some of which the court refused altogether. Others it gave with modifications. This branch of the case we will consider under two general heads,—Alleged error of the court in instructing upon what constitutes prima facie negligence in cases of this kind; alleged errors in instructing as to the nature and extent of the duty of the defendant to the general public using the highway over and across which its wires are strung. In substance, the court instructed the jury that if they found that the defendant's wire was so charged with electricity as to become dangerous to persons coming in contact with it, and that the wire had become disconnected or detached from its fastenings, and hung down in a public alley so as to endanger public travel, that, of itself, was prima facie evidence of negligence on the part of defendant. Strictly speaking, except in some relations springing out of contract, the mere happening of an accident is not any evidence of negli-

gence. *Thomp. Carr. Pass.* p. 209, § 9. But in some cases of tort it has been held that the existence of certain facts, unexplained, is some evidence of negligence. *Thomas v. Telegraph Co.*, 100 Mass. 156, and *Haynes v. Gas Co.*, 114 N. C. 203, 19 S. E. 344, are cases in point, and are authority for the instruction given in this case. This is the first case in this court where it has become necessary to determine the duty to the traveling public resting upon a person or corporation distributing electricity by means of wires suspended above a public street or alley. The employment of electricity for supplying light is of comparatively recent origin. The best methods of constructing lines for its distribution, and the precautionary steps to be taken to guard the public from the dangers incident to its use, may not be known or fully understood. But enough is known to justify the statement that the business of distributing electricity on wires strung over the streets of a city is a dangerous business, and attended by peril to travelers along the highway. This court does not recognize any degrees of negligence, such as slight or gross, and logically it ought not to recognize any degrees in its antithesis, care. The court instructed the jury in this case that the defendant was not an insurer of the safety of plaintiff, but that, in constructing its line and maintaining the same in repair, it was held to the utmost degree of care and diligence; that in this respect it is bound to the highest degree of care, skill, and diligence in the construction and maintenance of its lines of wire and other appurtenances, and in carrying on its business, so as to make the same safe against accidents, so far as such safety can, by the use of such care and diligence, be secured. If it observed such degree of care, it was not liable. If it failed therein, it was liable for injuries caused thereby. We think the court was unfortunate in attempting to draw any distinctions in the degrees of care or negligence. It would have been safer and the better practice to instruct the jury,—which ought hereafter to be observed,—even in cases like the one before us, that the defendant was bound to exercise that reasonable care and caution which would be exercised by a reasonably prudent and cautious person under the same or similar circumstances. In addition to this, the jury should have been instructed that the care increases as the danger does, and that, where the business in question is attended with great peril to the public, the care to be exercised by the person conducting the business is commensurate with the increased danger. But, in effect, this is what the court did. Under the facts of the case, the law required of the defendant, conducting, as it did, a business so dangerous to the public, the highest degree of care which skill and foresight can attain, consistent with the practical conduct of its business under the known methods and the present state of the particular art. This is the

measure of the duty owed by a common carrier to a passenger for hire. *Thomp. Carr. Pass.* p. 208, and cases cited. Not for the same reason, or because the doctrine rests upon the same principle, but with even greater force, should this rule apply to a person or corporation engaged in the equally, if not more, dangerous business of distributing electricity throughout a city by means of wires strung over the public alleys and streets, in so far as is concerned its duty to the traveling public. In those courts where degrees of negligence are not countenanced, nevertheless, in cases where the duty of a common carrier of passengers is laid down, the jury are told that carriers are bound to the utmost degree of care which human foresight can attain. This is upon the theory that reasonable or ordinary care in a case of that kind is the highest care which human ingenuity can practically exercise, and that, as a matter of law, courts will hold every reasonably prudent and careful man to the exercise of the utmost care and diligence in protecting the public from the dangers necessarily incident to the carrying on of a hazardous business. Where the facts of a case naturally lead equally intelligent persons honestly to entertain different views as to the degree of care resting upon a defendant, the court ought not to lay down a rule prescribing any particular or specific degree in that case. But where all minds concur—as they must in a case like the one we are now considering—in regarding the carrying on of a business as fraught with peril to the public, inherent in the nature of the business itself, the court makes no mistake in defining the duty of those conducting it as the exercise of the utmost care. It was, therefore, not prejudicial error for the court to tell the jury in this case what the law requires of the defendant, viz. the highest degree of care in conducting its business. The late case of *Block v. Railway Co.* (Wis.) 61 N. W. 1101, rightly interpreted, supports this doctrine, and the case of *Haynes v. Gas Co.*, supra, expressly lays down the rule observed by the trial court in the instructions given in this case.

The foregoing considerations dispose of all the errors assigned which we deem necessary to notice. The judgment will be affirmed. Affirmed.

DENVER & R. G. R. CO. v. SULLIVAN.¹
(Supreme Court of Colorado. June 17, 1895.)

RELEASE OF ONE DEFENDANT — EFFECT — PAROL EVIDENCE — FRAUD IN PROCURING.

1. Where two railroad companies are jointly and severally liable for injury to a person, a release by such person of his right of action against one of the companies releases the other.

2. Where a written instrument on its face shows that it is a release of a cause of action

¹ Rehearing denied September 7, 1895.

against a railroad company for injuries, parol evidence to show that it was given as a receipt for wages is inadmissible.

3. On suit against one of two railroads severally liable for an injury, the defendant set up as a defense the release of the other road. To prove fraud in procurement of this release, the plaintiff testified that the claim agent of the road released told him that the road's attorney advised him that their road was not liable; that the accident was caused by a defect in the rail, and the other road was responsible for the condition of the track. The plaintiff read the release before signing, and knew that it released that road. *Held* error to submit to the jury the question of fraud in procurement of the release.

Appeal from district court, Las Animas county.

Action by George W. Sullivan against the Denver & Rio Grande Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action brought by George W. Sullivan against the Denver & Rio Grande Railroad Company to recover damages for injuries alleged to have occurred by reason of the negligence of appellant in constructing and keeping in repair its railroad track. At the time of the accident, appellee was in the employ of the Union Pacific, Denver & Gulf Railway Company as brakeman. This company was a part of the Union Pacific Railway system, and at this time the Union Pacific Railway Company ran its trains over the line of the Denver & Rio Grande Railroad Company between Pueblo and Trinidad. under an agreement with the latter company. On the 15th day of August, 1891, appellee was acting in his capacity as brakeman on one of the Union Pacific Railway Company's freight trains, and when near El Moro the car upon which he was standing was derailed, and in jumping therefrom he sustained the injury complained of. The jury found that there was what is known as a "lip" upon the track, which caused the derailment. Among other defenses, the appellant set up as a defense to the action the following release executed by appellee to the Union Pacific Railway Company:

"Denver, Colo., September 25, 1891.

"The Union Pacific Railway Company to George W. Sullivan, Dr.

"Sept. 25th. For amount agreed upon in full settlement of claim against the Union Pacific, Denver & Gulf Ry. Company on account of injuries received Aug. 15, 1891, trains, extra engine 1,362, El Moro, Colorado, while employed as brakeman, and in full of all demands and claims of whatsoever character.

"Claim settled for \$108.

(Over.)

"Paid by draft No. 1908.

"Approved:

"_____, General Solicitor.

"Approved:

"_____, Gen. Cl. Agt.

"I hereby certify that the above account is correct.

"G. N. Manchester, Claim Agent.

"Received, September 25th, A. D. 1891, of the Union Pacific Railway Company, \$108, in full payment of the above account. In consideration of the payment of said sum of money, I, G. W. Sullivan, of Trinidad, in the county of Las Animas, and state of Colorado, hereby remise, release, and forever discharge the said company, its operated, leased, and auxiliary lines and companies, as well also as all companies whose lines are operated or known as a part of the Union Pacific system, of and from all manner of actions, suits, debts, and sums of money, dues, claims, and demands whatsoever, in law or equity, which I ever had or now have against said company by reason of said matter, cause, or thing whatever, whether the same arose upon contract or upon tort, from the beginning of the world to this day. In case the said sum of money is paid for or on account of any claim against any other company, or for or on account of any legal obligation or liability of any other company, or for or on account of sums of money, dues, claims, and demands whatsoever, in law or equity, which I ever had or now have against any company, I expressly admit and agree that the Union Pacific Railway Company is fully authorized to make such payment for and on behalf of such other company, and to adjust and settle my claim against it; and I hereby remise, release, and forever discharge the company for and on behalf of which the said sum of money is paid from all claims and demands whatsoever, as hereinbefore more fully set forth.

"In testimony whereof, I have hereunto set my hand, this 25th day of September, 1891.

G. W. Sullivan.

"Witness: G. N. Manchester."

This defense was first traversed by appellee. Upon the trial of the cause, after the appellant had introduced its evidence and rested, and appellee was called to the witness stand in rebuttal, over the objection of appellant, the court granted appellee leave to amend his replication and set up fraud in the procuring of this release. Counsel for appellant thereupon asked that the trial be discontinued because of this new issue, which request was denied by the court. In support of this issue, appellee testified that he was taken into Mr. Manchester's office by Mr. Bissell, who introduced him to Manchester, and told him that witness was the man who was in the wreck above El Moro on the 15th of August, 1891, whereupon Manchester turned to him and said: "We have consulted our lawyers in regard to this matter, and they advised me that the Union Pacific Railway Company was not to blame for the accident." And he further stated that, "according to the reports sent in by the trainmen, that the accident was caused by the lip on the rail, consequently the Rio Grande was responsible for the condition of the track. * * * He said he would allow me full time up to that date. And I said to him

that I had to go to Hot Springs on account of my ankle, or, that is, my doctors had advised me to go,—it would be beneficial to my ankle,—and that I would like it if he would make it to the first of October, if he would; and after he decided to do it he said it would not be very much difference, so he made it that." Appellee further testified: That at that time he was still in the employ of the Union Pacific Railway Company. Had not been discharged. That his salary from August 15th to October 1st would amount to \$108. That he had not at any time made any claim against the Union Pacific Railway Company for the injuries to his ankle. Appellee was then asked to state to the jury if relying upon the statement of Manchester as true was the cause of his signing the instrument which he had signed. Over objection, he answered: "Yes. That was the cause of my signing the instrument; that is, on the ground that I told him that I wanted to go to Hot Springs, and wanted to get this time up to the first of October." On cross-examination appellee testified that he had not, as a matter of fact, done any work for the Union Pacific Railway Company since the date of the accident, and had not up to the present time; that he never, at any other time, received any money from Manchester as wages, so far as he remembered. No witnesses were called by appellant upon this issue, but when Manchester was previously on the stand, and before the amendment to the replication whereby fraud was alleged in obtaining the release, on cross-examination he stated that he was instructed by the superintendent—Bissell—to pay \$108; that he did not know what salary appellee received; that he did not say to appellee that his company was not liable, and that if any one was liable it was the Denver & Rio Grande Railroad Company, and that no one said that in his presence; that he did not say their attorney had advised the Union Pacific Railway Company that it was not liable; that appellee read the document himself, it being handed to him to read by the witness; that there was nothing said at the time about the liability of the Denver & Rio Grande Company, so far as he could remember.

The trial resulted in a verdict and judgment in favor of appellee for \$5,000. From this judgment the Denver & Rio Grande Railroad Company prosecutes this appeal.

Wolcott & Valle and H. F. May, for appellant. Gordon & Hendricks, for appellee.

GODDARD, J. (after stating the facts). It is manifest from the instructions under which the evidence was submitted to the jury, and the special findings, that the derailment of the car upon which appellee was standing at the time was occasioned by a defect in the track; and hence the negligence upon which the appellee bases his

right of recovery against the appellant would also constitute a cause of action against his employer, the Union Pacific Railway Company, it being the duty of that company, as well as of the appellant, to see that the road over which it ran its cars was safe and in good repair. The same duty devolved upon it in this respect as though it owned the track. The rule upon this subject is thus stated in *Stetler v. Railway Co.*, 46 Wis. 504, 1 N. W. 112: "As between itself and its employes, who were directed to use the road in the business of the defendant company, such employes have the right to treat the road as the company's road, and the company, as to its employes was bound to see that such road, whilst so used for its benefit by such employes, was in such condition as not to unnecessarily endanger their lives or limbs." To the same effect are *Railroad Co. v. Ross*, 142 Ill. 9, 31 N. E. 412; *Railroad Co. v. Kanouse*, 39 Ill. 272; *Railway Co. v. Peyton*, 106 Ill. 534; *Elmer v. Locke*, 135 Mass. 575; *Snow v. Railroad Co.*, 8 Allen, 441. It therefore follows that his cause of action was a joint one against both companies, or a several one against either. In other words, both companies were liable for the injury, and a release that would bar appellee's right of action against one would inure to the benefit of the other, and be equally available as a defense to the action. The court below adopted this view, and correctly held that if the release in question was binding as between the appellee and his employer, the Union Pacific Railway Company, it was also a discharge of appellant from all liability. The doctrine is thus announced in *Cooley, Torts* (2d Ed.) p. 160: "It is to be observed, in respect to the point above considered, where the bar accrues in favor of some of the wrongdoers by reason of what has been received from or done in respect to one or more others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar as to all." *Tompkins v. Railroad Co.*, 66 Cal. 163, 4 Pac. 1165; *Seither v. Traction Co.*, 125 Pa. St. 397, 17 Atl. 338; *Chapin v. Railroad Co.*, 18 Ill. App. 47; *Brown v. City of Cambridge*, 3 Allen, 474; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107. In the latter case it is held that a release given to one who is not in fact liable operates as a release to all who may be liable. The court say: "The rule that a release of a cause of action to one of several persons liable operates as a release to all applies to a release given to one against whom a claim is made, although he may not be in fact liable. The validity and effect of a release of a cause of action do not depend upon the validity of the cause of action. If the claim is made against one and

released, all who may be liable are discharged, whether the one released was liable or not." Therefore, the controlling question in this case is whether the validity of the release relied on was successfully assailed upon the ground that it was fraudulently procured. In so far as the evidence introduced on this issue tends to show that the release was given as a receipt for wages, merely, it was incompetent, since the writing, in plain and unambiguous language, states that the \$108 was paid in full settlement of the claim against the Union Pacific Railway Company on account of the injuries complained of, and in consideration of such payment expressly releases the company from any action therefor; and oral testimony is inadmissible to contradict or vary its terms. The only testimony, therefore, that was admissible, was the alleged statement of Manchester that he had been advised by its attorney that the Union Pacific Railway Company was not liable, and, "according to the reports sent in by the trainmen, the accident was caused by a lip on the rail, consequently the Rio Grande was responsible for the condition of the track." Laying aside the testimony of Manchester, who testified that he made no such statement, and assuming that the testimony of appellee is uncontradicted, and that Manchester did so state to him, and that it was true that he had been so advised, we are at a loss to perceive wherein that statement constitutes in any sense a fraud. It was at most a statement of opinion as to the legal liability of the Union Pacific Railway Company, and there was nothing in the relation of Manchester towards him that would imply any undue influence, or that should induce him to accept what he may have said without question. "It has been more than once held that it is error to submit a question of fraud to the jury upon slight parol evidence to overturn a written instrument. The evidence of fraud must be clear, precise, and indubitable. Otherwise it should be withdrawn from the jury." *Railroad Co. v. Shay*, 82 Pa. St. 198; *Stine v. Sherk*, 1 Watts & S. 195; *Dean v. Fuller*, 40 Pa. St. 474. It appears from the uncontradicted evidence that the appellee read the paper before signing, and was fully informed as to its terms. He was therefore advised as to its effect as a release of all liability on the part of the Union Pacific Railway Company,—a result that he never questioned until he learned that its legal effect was also to release appellant,—and it is apparent that he now questions its validity on account of a misconception of such legal effect, rather than because he was influenced to sign it by any representation as to the nonliability of the Union Pacific Railway Company. The evidence relied on to show fraud in its procurement was clearly insufficient, and the court below erred in submitting that question to the jury. For this

error we are compelled to reverse the judgment; and it is unnecessary to notice the other assignments. The judgment is accordingly reversed. Reversed.

ELLIOTT et al. v. FIELD.

(Supreme Court of Colorado. June 17, 1895.)

CONTINUANCE—PLEADING—WAIVER OF DEFECTS—
NEGLIGENCE OF CITY—PLEADING.

1. A continuance on account of the serious illness of the plaintiff is properly granted.

2. The objection of uncertainty, in a complaint against a city and an individual, in not alleging the facts which constitute the negligence of the defendants a breach of the common duty, on the ground of which it seeks to hold them liable, is waived by answering over.

3. A complaint against a city and an individual for injury by falling in a hole dug in a sidewalk by the individual, which alleges the common duty of both defendants to keep the place where the accident occurred in a safe condition, their failure to do it, and that such failure was the cause of the injury, and states facts showing that the city ought to have known of the defect, and repaired it, prior to the accident, is sufficient to support a verdict against both defendants.

Error to La Plata county court.

Action by Ralph Field against W. S. Elliott and the city of Durango. From a judgment for plaintiff, defendants bring error. Affirmed.

Wilson & McCloskey and O. S. Galbreath, for plaintiffs in error. Jackson & Yeager, Geo. F. Sumner, and John Hipp, for defendant in error.

CAMPBELL, J. This was an action by the defendant in error against the plaintiffs in error to recover damages for personal injuries which the complaint alleges were sustained by the plaintiff on the night of the 20th of September, 1891, as the result of his falling into a deep and dangerous excavation made by the defendant Elliott in a public street in the city of Durango, which the said defendant and his codefendant, the city, negligently and wrongfully suffered to remain open and exposed for a period of about three months, without any protection, and without any light or signal to indicate danger at night. The trial resulted in a judgment for the plaintiff against both defendants in the sum of \$1,140, to reverse which the defendants are prosecuting this writ of error. To the complaint the defendants interposed separate demurrers, on the grounds of uncertainty; that the complaint did not state a cause of action; that there was an improper joinder of several causes of action, and a misjoinder of parties defendant. These demurrers were overruled by the court, and the defendants, not electing to stand by their demurrers, filed separate answers, that of the defendant Elliott being a general denial, while the answer of the city contained, not only a general denial, but a so-called separate and further defense, al-

leging that the excavation was in the sidewalk, and the city was not the owner of the adjoining lot; that the excavation was not made by it, or under its authority; and that it had no notice of any defect in the street. The plaintiff filed a replication denying this affirmative matter, and trial was had upon the issues thus joined. The bill of exceptions filed in this court was stricken from the record upon the application of the defendant in error, so that in considering the errors assigned we are restricted to those appearing in the record proper. These relate to the granting of a continuance by the court, upon the application of the plaintiff, over the objection of the defendants, and to the overruling of the demurrers to the complaint.

1. One of the grounds for a continuance was on account of the absence of material witnesses, whose evidence, as set out in the affidavit, the defendants, in order that there might not be a delay in the trial, offered to admit would be given. If the objection and the exception to this ruling of the court upon the continuance are preserved in the record, the action of the court was proper, because one of the grounds assigned for the continuance was the unavoidable absence from the court of the plaintiff, who was detained by serious illness. The plaintiff had the right to be present to assist his counsel in the trial, and his necessary absence was a good ground for continuance. We must assume, in the absence of any showing to the contrary, that the court granted the application upon this ground, and that the showing therefor was sufficient.

2. Under our practice, a demurrer to the complaint, except for the grounds that the same does not state a cause of action, and that the court has no jurisdiction of the person of the defendant or the subject of the action, is waived if, after the demurrer is overruled, the defendant answers and goes to trial upon the merits. *Webb v. Smith*, 6 Colo. 365; *Green v. Taney*, 7 Colo. 278, 3 Pac. 423; *Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 343; *Bliss*, Code Pl. (3d Ed.) § 417. The alleged infirmity of the complaint, in failing with sufficient particularity to apprise the defendants of the facts which constitute their negligence a breach of a common duty, having been thus waived by the plaintiffs in error by their answering over, and their failure to preserve and file in this court a bill of exceptions exhibiting the evidence produced at the trial,—which would have enabled us to determine whether the facts showed a common duty of the two defendants to keep the street in question safe, and whether or not there was a breach of such duty,—this judgment must stand, unless the complaint does not state a cause of action, or the court had no jurisdiction of the subject of the action or the person of the defendants.

No objection is raised or argued as to the

jurisdiction of the court. It is true, the complaint is silent as to the relation, if any, which the defendant Elliott sustained to his codefendant. We are unable to say whether he was the owner of the lot fronting on a street, in the sidewalk in front of which lot this hole was dug, or whether, as an employé of the city, he dug the hole, or whether he was a trespasser. When the defendants, by their demurrers, endeavored to ascertain such relation, they were unsuccessful; but, for reasons satisfactory to themselves, they saw fit to waive such information, pleaded over, and went to trial upon the merits.

From the answer which the city filed, it may be inferred that this excavation was made by Elliott as the owner or agent of the owner of the abutting lot. Whether the evidence would support this inference, as we have said, we are precluded from determining. There are cases "where the injury is the result of a neglect to perform a common duty resting on two or more persons, although there may be no concert of action between them." *City of Peoria v. Simpson*, 110 Ill. 294; *Klauder v. McGrath*, 35 Pa. St. 128. This may be one of those cases where both the owner of the abutting lot and the city are under a common obligation to keep safe the sidewalk in front of such lot. If so, and if the plaintiff is injured by their failure in this respect, which failure would be a common neglect of a common duty, the plaintiff would have his election to sue the defendants jointly or severally. It is sufficient to say, however, that, in effect, this complaint in general terms alleges that it was the duty of both the defendants to keep safe this place where the accident happened, which, it is alleged, they did not do, and their failure was the cause of the injury. The gist of the grievance was the common negligence of both defendants in not properly guarding the excavation. This being so, and the complaint also setting forth a state of facts which shows that the city ought to have known of the defect in this street, and repaired the same, prior to the accident, the complaint is sufficient to support the verdict against both the defendants. The judgment should, therefore, be affirmed. Affirmed.

DENVER & R. G. R. CO. v. GUSTAFSON.¹
(Supreme Court of Colorado. June 3, 1895.)
ACCIDENT AT RAILROAD CROSSING—NEGLIGENCE
OF FLAGMAN—CONTRIBUTORY NEGLIGENCE.

1. A railroad company which knowingly avails itself for a number of years of the services at a street crossing of the flagman employed and paid by another company will be liable as an employer for injury to a person by one of its trains, due to the negligence of the flagman.

2. The fact that a flagman at a railroad crossing signals a person to cross does not re-

¹ Rehearing denied September 7, 1895.

lieve such person from the duty of looking and listening for approaching trains.

3. It is error to instruct that plaintiff, if he started across a track on a signal from the flagman, was not guilty of contributory negligence unless he actually saw the train in time to avoid it, and failed to do so; the duty to listen not being referred to.

Appeal from district court, Arapahoe county.

Action by William Gustafson against the Denver & Rio Grande Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

This action was brought by the appellee in the district court to recover from the appellant damages alleged to have been sustained by him through its negligence. The jury returned a verdict for the plaintiff in the sum of \$3,000, upon which the court entered judgment. From this judgment the defendant appeals.

The accident occurred about 5 o'clock in the afternoon, in the city of Denver, where Sixth street (along which defendant's railroad is constructed) intersects Market street. From the Union Depot, on Seventeenth street, to a point on its line about two blocks north of the crossing in question, the defendant's road runs in an easterly and westerly course; thence, by a sharp curve, to this crossing, in a substantially north and south direction. There were five or six tracks at this street crossing, the west one being owned and used by the Union Pacific Railroad Company, the others by the defendant. A flagman had been stationed at this place for nearly 10 years. He was employed and paid by the Union Pacific Company, and not by the defendant, but during all this time he had flagged trains for the defendant as well as for his employer, and, so far as the public could know, the flagman was serving both companies, and protecting their property, as well as guarding travelers along the highway from injury at their hands. The jury, in answer to special questions, found that the crossing was an unusually dangerous one, with which the plaintiff was familiar; that the train was running at a speed of from 15 to 18 miles per hour; but the jury were unable from the evidence to answer as to whether or not the bell on the engine was rung in the vicinity of the accident. Box cars and a locomotive standing on the second, third, or fourth track from the east line of Sixth street and immediately to the north of the north line of Market street would have obstructed plaintiff's view had he been looking in the direction from which the train came; but had he looked he could have seen the approaching train 100 feet away, after such obstructions were passed. The plaintiff was driving two horses, drawing an ice wagon, which was covered with a hood, within which plaintiff was sitting. As he was approaching this crossing, going west on Market street, a freight train from the south passed along one of the tracks and over this

crossing, and stopped just north of the north line of Market street, and it formed a part of the obstruction referred to by the jury in their special findings. Plaintiff stopped, about 10 or 15 feet from the track furthest east, till this freight train passed, and, as he says, waited till the flagman signaled him to go ahead. There is conflicting evidence as to the nature of the signal given, as there is upon most of the material questions in issue. Plaintiff himself testifies that, after he stopped and waited for the signal to cross, he neither looked nor listened for approaching trains, but relied solely upon the flagman for a safe transit. It is difficult, if not impossible, to determine how far the plaintiff could have seen to the north had he looked before starting to cross over, and it is uncertain what distance he was from the track on which the train was running just after he passed the obstruction, when he could have seen a train 100 feet away, had he looked in that direction. A number of witnesses in the vicinity, about 100 feet distant from plaintiff, testified that as soon as the plaintiff started to cross the tracks they saw the approaching train, and, by calling to the plaintiff, endeavored to stop him before he reached the place of danger. The plaintiff heard the calls, and looked first to the left, then to the right, but before he could check his team the train from the north struck the horses and wagon and threw the plaintiff from the wagon, causing the injuries sued for.

Wolcott & Valle and H. F. May, for appellant. Wells, McNeal & Taylor, for appellee.

CAMPBELL, J. (after stating the facts). There being a substantial conflict in the evidence, the verdict of the jury cannot be disturbed if they were properly instructed as to the law. Assuming, then, that the defendant was negligent, there are but two questions to be considered which are seriously urged by the appellant for a reversal: First, that the defendant is not liable, under the circumstances of this case, for the negligence of the flagman; second, if it is liable, the court erred in instructing the jury that the plaintiff might rely solely upon the flagman, and was not obliged to look or listen for approaching trains, and his failure to do so did not constitute contributory negligence on his part.

1. Employment and payment of a person are not indispensable elements to charge one, as a master, for the negligence of such one who renders him service. When one knowingly and without objection receives the benefits of labor, or holds out to the public one as engaged in his service, he is liable, as a master, for the negligence of such servant, when the act or failure constituting the negligence comes within the apparent scope of the servant's employment, even though the person for whom the service is rendered has not employed or paid the servant. The facts

of this case sufficiently show that the defendant knowingly availed itself of the services of the flagman for a long series of years, and held him out to the public as its servant.

2. The care which a railroad company whose road crosses the public highway must exercise in running its trains at such a place depends generally upon the facts and circumstances of the particular case. The care increases as the danger does. A corresponding duty is upon a traveler who attempts to cross at such a place. His care is in proportion to the danger. *Railway Co. v. Crisman*, 19 Colo. 30, 34 Pac. 286. In the case at bar, the plaintiff's team was standing, but before he started to cross the track he neither looked nor listened, but relied solely upon the flagman. We cannot say, as a matter of law, that the defendant in such a case may rely solely upon the flagman. Neither can we say, as a question of law, that his failure to look or listen was not contributory negligence. It is a question of fact, to be determined by the jury, whether or not a plaintiff may rely solely upon the flagman, or whether he is excused from the exercise of any additional precaution on his part, in these circumstances. *Buchanan v. Railway Co.*, 75 Iowa, 393, 39 N. W. 663, was a case where the cause of action was based upon the negligence of the flagman at a crossing. The trial court directed a verdict for the defendant on the ground of the contributory negligence of the plaintiff. This was held error, and the court, in discussing the point before us, says: "She [the driver] did stop, and was bidden to go on; and, while she would not have been justified in rushing into a place of obvious danger, yet it was for the jury to determine whether she was justifiable in relying on the signal to cross over." *Berry v. Railroad Co.*, 48 N. J. Law, 141, 4 Atl. 303, was an action for injuries received at a railroad crossing, caused by the negligence of the railroad company in running its train at a high rate of speed. There was no flagman at the crossing, but the court, in discussing the case, uses this language: "It is true that negligence of a flagman will not excuse the traveler who attempts to cross the track of a railroad from looking both ways and listening. He must not rely entirely on the flagman." The remark was obiter, but we consider the reasoning good, and applicable to the case at bar.

The court gave to the jury instructions numbered 3 and 4, which are as follows: "Third. You are instructed that if you find from the evidence that the flagman signaled to the plaintiff to proceed across the track in a way that led him to understand, and so that a reasonable person would have understood, that the passage was safe for him, the plaintiff had a right to rely on the safety of the track, without looking or listening for an approaching train. Fourth. You are instructed that if you find from the evidence that the flagman was there, and was seen by the plaintiff, then, in order to find that the plaintiff

was guilty of contributory negligence in this case, you must find that either the plaintiff drove upon the track after being properly warned not to do so, or that he actually saw the train approaching in time to have avoided the accident by the exercise of reasonable care after seeing the train." These instructions were evidently intended to define the duty of the plaintiff, and, in the light of the foregoing principles, should they be analyzed, the third instruction is wrong, in that it declares that the plaintiff may omit all precautions for his own safety, excepting only to follow the signal of the flagman. It relieves the plaintiff from the duty to look or listen for approaching trains. As an abstract proposition of law, this is not sound. Neither is it harmless error, under the facts of this case. The jury might well infer—as, in fact, they are expressly told—that the plaintiff might blindly obey the flagman, without doing anything further, even though his position within the hood of the wagon might have interfered with his range of vision, and, in some measure, dulled his sense of hearing. It is true that following the orders of a flagman is an exercise of some care, but it is for the jury to determine whether it is the whole duty of the plaintiff, as the exercise of that reasonable care which is demanded under the circumstances of the case. The fourth instruction in another form repeats the error in the third, and expressly omits the element of listening. In effect, the jury are told that only two acts of the plaintiff will constitute contributory negligence that would bar a recovery: First, if he drove upon the track after he was warned not to do so. Second, if he actually saw the train approaching in time to have avoided the accident by the exercise of reasonable care after seeing the train; that is to say, unless he actually saw the train in time thereafter to avoid the accident, he is not negligent, even though by looking he might have seen it, or by listening he might have heard its approach, in time to have avoided the accident. No duty is therein imposed upon the plaintiff to look or listen for the train, and his negligent acts or omission are expressly confined to looking, and to that period of time after he actually saw the train. This may not have been the full duty of plaintiff. The jury should have been instructed, in effect, that if he did not see the train because of his failure to look for it, or did not hear the noise made by it because he did not listen, nevertheless he should be charged with negligence if, by looking or listening, he might have seen or heard it in time to have avoided the accident. Neither should the jury have been limited to the time after plaintiff actually saw the train. There is testimony upon which reasonable men might honestly entertain different views as to the extent of the caution which plaintiff should have exercised. It would have been error for the court to nonsuit the plaintiff on the ground that his own evidence showed him guilty of negligence that

contributed to the injury. So, also, was it error for the court to charge the jury as a matter of law that the plaintiff was excused from doing anything for his own safety except to obey the signals of the flagman.

It is urged with much force that the judgment is excessive. A careful examination of the evidence as to the injuries received indicates, to our minds, that the verdict is objectionable in this respect; but, as the case must be reversed for other reasons, it is unnecessary to review the evidence, as upon a new trial other and different evidence may be produced, and it will not be assumed that another jury will err in this respect. The judgment is reversed, and the cause remanded. Reversed.

GOTTLIEB v. FROST.¹

(Court of Appeals of Colorado. June 10, 1895.)

DISMISSAL OF WRIT OF ERROR.

A writ of error will be dismissed where the abstract contains no part of the record referred to in the assignment of errors, and fails to present the points relied on for reversal.

Error to Arapahoe county court.

Action between Joseph Gottlieb and H. H. Frost. From the judgment rendered, Gottlieb brings error. Writ dismissed.

Ross & Deweese, for plaintiff in error. Geo. B. Campbell, for defendant in error.

PER CURIAM. The purported abstract of the record filed in this case by the plaintiff in error is in no sense a compliance with our rules. It contains no presentation of any part of the record to which reference is made in the assignment of errors, and utterly fails to advise us of the points relied on for the reversal of the judgment. The writ of error will be dismissed. Dismissed.

KILPATRICK et al. v. HALEY et al.¹

(Court of Appeals of Colorado. June 10, 1895.)

WEIGHT OF OPINION EVIDENCE—DISSOLUTION OF INJUNCTION—DAMAGES.

1. Where, in an action on an injunction bond, plaintiff testifies that he paid \$200 attorney's fees to obtain its dissolution, and an expert testifies that \$250 would be a reasonable fee for such services, such evidence is not binding, but the amount is for the jury.

2. Where a temporary injunction dissolved on preliminary hearing may, on final determination of the action in which it is sued out, be reinstated and perpetuated, a suit on the injunction bond cannot be maintained while the main action is still pending.

Appeal from district court, Arapahoe county.

Action by Ora Haley and others against James G. Kilpatrick and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Thomas H. Hood, for appellants. W. T. Hughes, for appellees.

THOMSON, J. This suit was brought by the appellees upon an injunction bond executed by the appellants in an action previously commenced by James G. Kilpatrick against the appellees. At the trial, for the purpose of showing a portion of the damage sustained by reason of the injunction to obtain which the bond was given, it was proved that the plaintiffs had paid \$200 to an attorney for his services in procuring the dissolution of the injunction; and a lawyer was introduced, who testified that, in his opinion, \$250 would have been a proper charge for the services. Upon the question of the value of the services rendered, the defendants requested the court to instruct the jury that they were not bound by the testimony of the expert witness, but that it might be considered by them, together with all the other evidence, showing the nature of the services, the time occupied in the performance of them, and the benefit derived by the plaintiffs from their rendition. The court refused to so instruct, and upon its own motion gave the following instruction: "Upon the question of attorney's fees, there is nothing whatever open for you in this case, except to find that, as to that matter, that the plaintiffs are entitled to recover \$200. There is no evidence in the case except such evidence as supports that proposition." If this instruction had pertained to a question of fact concerning which there was no dispute, it would have been proper; but the jury cannot be concluded by testimony which is purely a statement of opinion. Expert testimony is entitled to consideration, in connection with the facts upon which it is based, and is intended to assist the jury in reaching a conclusion upon the entire evidence; but they should give it only the weight to which, in the light of their own knowledge and experience, they may consider it entitled. Their judgment upon the facts is not to be supplanted by the opinions of witnesses. The defendants' request should have been granted; and the instruction given, inasmuch as it took from the jury a question the decision of which belonged peculiarly to them, was erroneous. *Leitensdorfer v. King*, 7 Colo. 436, 4 Pac. 37; *Head v. Hargrave*, 105 U. S. 45.

But we think the action was prematurely brought. The complaint alleges the allowance of a temporary injunction in the case of Kilpatrick against the appellees, and its subsequent dissolution by the court. The answer avers that the injunction was dissolved upon a preliminary hearing, but that the suit in which it was allowed was still pending and undetermined; and it was admitted at the trial that such was the fact. The complaint in that suit was introduced in evidence. It alleged the execution to Kilpatrick by one George W. Beckley of a mort-

¹ Rehearing denied September 9, 1895.

gage upon certain personal property, to secure an indebtedness from him to Kilpatrick, amounting to \$878, subject to a prior mortgage upon the same property from Beckley to Reed & McGrew. It also stated that, upon the maturity of his mortgage, Kilpatrick took possession of the mortgaged property, and duly sold it, subject to the prior mortgage, to satisfy his claim; that at the sale he became the purchaser; that he tendered to the defendant Farrar, who had purchased and become the owner of Reed & McGrew's mortgage, the full amount due upon that mortgage, which Farrar not only refused to receive, but was attempting to deprive Kilpatrick of his possession; and that the defendant Haley claimed an interest in Farrar's mortgage, and the defendant Bates claimed to be in possession under it. All the defendants in that case were plaintiffs in this. The prayer was for an injunction restraining the defendants from interfering with Kilpatrick's possession, for a decree that the parties interested in the mortgage be compelled to receive the amount due upon it, and for general relief. The averments of the complaint were put in issue by the answer. The effect of a decree in that case, in the plaintiff's favor, would have been to divest the defendants of all right and interest in the property, making the plaintiff's title, under the sale made in pursuance of his mortgage, perfect; and it would have been entirely proper, in the same decree, to reinstate the injunction and make it perpetual. The dissolution of the injunction was, therefore, not necessarily a final disposition of it; and, until it should be finally disposed of, there could be no right of action upon the bond. The great weight of authority is that until there has been a final determination of the suit in which the bond was executed no action can be maintained upon it; and the uniform reason given is that at the final hearing, upon evidence then adduced, the injunction may be reinstated and perpetuated. *Terry v. Trustees*, 72 Ill. 476; *Penny v. Holberg*, 53 Miss. 567; *Bank v. Gifford*, 65 Iowa, 648, 22 N. W. 913; *Cohn v. Lehman*, 93 Mo. 574, 6 S. W. 267; *Bemis v. Gannett*, 8 Neb. 236; *Murfree, Off. Bonds*, § 391. At the time this suit was brought, no right of action had accrued upon the bond, for the reason that the cause in which it was given was still pending. The judgment must therefore be reversed. Reversed.

SHAHER et al. v. HEWITT.¹

(Court of Appeals of Colorado. June 10, 1895.)

JOINT JUDGMENT—MOTION FOR NEW TRIAL—NOTICE OF HEARING.

1. Where a complaint for commissions on sales is entitled against two persons as partners, but contains no allegation of partnership, but

charges them as jointly liable on a contract, and the answer and all the evidence sustain the latter theory, a judgment against the defendants jointly as individuals is proper.

2. The party filing a motion for a new trial is not entitled to any notice of the time of hearing of the motion.

Appeal from district court, Clear Creek county.

Horace Phelps, for appellants. John A. Coulter, for appellee.

THOMSON, J. Action by George W. Hewitt against George O. Shafer and Charles H. Emmons to recover commissions upon sales of real estate. Judgment for plaintiff, from which defendants appeal.

One of the errors assigned is that the verdict and judgment are against the evidence. The testimony of plaintiff and the contents of certain exhibits introduced by the defendants are in some respects contradictory of the defendants' testimony, but they are amply sufficient to sustain the verdict.

Another assignment is that the judgment was rendered against the appellants as co-partners, there being no allegation or proof of partnership. This assignment is not warranted by anything in the record. The judgment was that "the plaintiff do have and recover from the defendants, Geo. O. Shafer and Charles H. Emmons, the sum of \$458.39" and his costs. The complaint is entitled "George W. Hewitt vs. Geo. O. Shafer and Charles H. Emmons, partners as Geo. O. Shafer Co.," but it contains no allegation of partnership. Service of summons was had only upon Shafer; but, first, a demurrer, and then an answer, was filed in behalf of both defendants, and their joint appearance in resistance to the plaintiff's claim is prominent throughout the entire record. It is to the allegations of the complaint that we must look to determine the character of the action; and the cause of action alleged is not against the defendants as partners, but against them as persons jointly liable upon contract. The answer contains no suggestion of partnership, but follows the theory of the complaint. In all the evidence on both sides, there is nothing to indicate that the defendants were partners, or claimed to be such; and the judgment was rendered against them jointly, without reference to partnership. No other judgment would be consistent with the pleadings and proofs. In the course of a discussion of the requisites of a judgment in a case against a partnership, counsel cites us to *Dessauer v. Koppin*, 3 Colo. App. 115, 32 Pac. 182. In that case a partnership was alleged, and the proofs sustained the allegations. One partner only was brought into court. There was no appearance by the other, and the judgment was against the partner alone upon whom summons had been served. The court held that the judgment should have been against the partnership. The reason for this, as stated in the text of the opinion, is correct-

¹ Rehearing denied September 9, 1895.

ed in the appendix to the volume, and is that "the plaintiff is entitled to enforce his claim against the partnership property, and the partner who is served with process has clearly the right to turn out partnership assets for the payment of the claim." It is entirely obvious that neither the case cited nor the argument based upon it has any applicability to the case at bar.

The defendants also complain that their motion for a new trial was set for hearing without notice to them or their counsel. It was the defendants who filed the motion for a new trial, and whatever notice of its filing was necessary must have been given by them to the adverse party. The Code provides: that such a motion shall be heard at the earliest period practicable after its filing. It is to be supposed that the defendants would have looked after their own motion, and known when it was set for hearing. We have been referred to no law, and we know of none, which entitles them to the notice, the want of which they assign for error. We have considered everything in the record which requires attention, and find no error. The judgment will be affirmed. Affirmed.

KOHN et al. v. KENNEDY. Sheriff.¹

(Court of Appeals of Colorado. June 10, 1895.)

SEALED VERDICT—RECEPTION.

Civ. Code, § 194, provides that the court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess; and section 195 provides that when the jury have agreed on their verdict they shall be conducted into court by the officer in charge of them, their names shall be called, and they shall be asked by the clerk whether they have agreed on a verdict. *Held* that, where the jury gave their sealed verdict to the bailiff, and were not afterwards called together and asked if it was their verdict, it was invalid, though they were in the court room when it was delivered by the bailiff and read by the clerk, and no objection was made by counsel.

Appeal from district court, Lake county.

Action by Joseph A. Kohn and others against P. J. Kennedy, sheriff. Judgment for defendant. Plaintiffs appeal. Reversed.

Gunnell & Baldwin, for appellants. Mechem & Fletcher, for appellee.

REED, P. J. In July, 1893, suits by attachment were brought by several parties against one I. Myers. The goods in controversy were taken upon such writs by appellee, as sheriff. The present suit was brought by appellants, claiming to be the owners of the goods, against the sheriff, appellee, and was an action of replevin, the complaint being in the usual form. The defendant answered, justifying under the writs of attachment; a trial was had to a jury, which closed late in the day or in the evening, and the jury were instructed by the

court that if they agreed before morning they could return a sealed verdict. The jury retired, reached a conclusion, finding for the defendant, and that the goods were of the value of \$1,675, and allowing damages of \$58.02, which was put in the form of a verdict, signed by the foreman, sealed, and by the jury delivered to the bailiff in charge of the jury, and the jury dispersed. On the incoming of court the following morning, the sealed envelope was by the bailiff handed to the court, by him to the clerk, by whom it was read and entered of record as the verdict of the jury. The jury was not called, nor were they in their seats. Counsel excepted to the verdict, moved to set it aside, assigning as ground for such motion, among others, the following: "First. Irregularity in the proceedings of the court, in this, to wit, that the court received and caused to be read as a verdict of the jury, without the presence of the jury, and in their absence, and without asking them whether they had agreed upon the verdict, or whether the paper so read was their verdict; and because said jury did not bring into court the said paper purporting to be a verdict at the opening of the court, contrary to the form of the statute in such case made and provided." Counsel for plaintiffs filed an affidavit in support of the motion made by Baldwin, attorney for plaintiff, and defendant's counsel caused to be filed an affidavit of Brown, his attorney, and one Louis Janowitz, a member of the jury, opposing the motion. The tenor and contents of the different affidavits are unimportant, as the court made and reduced to writing its finding overruling the motion, which fully embraces all the facts necessary for a full understanding. It is as follows: "Now, on this day, the motion for a new trial heretofore filed by the plaintiffs herein coming on to be heard, and the plaintiffs appearing herein by Messrs. Gunnell & Baldwin, their attorneys, and the defendant appearing herein by J. E. Robinson, his attorney, and the court, having considered the affidavit of Frank L. Baldwin filed herein by plaintiffs in support of their motion for a new trial, and the affidavits of Louis Janowitz and Frank Brown, read and filed herein by defendant in opposition thereto, and the arguments of the respective counsel, and having duly considered the same, and being fully advised in the premises, doth hereby find that, upon the reception of the sealed verdict herein, the names of the jury were not called, and they were not asked whether they had agreed upon a verdict, but doth further find that the said jury were directed by this court, upon retiring to deliberate upon their verdict, that they should return in the court a sealed verdict; that such verdict was agreed to by the jury during a recess of the court, and was by them reduced to writing, signed by their foreman, under their direction, sealed, and returned in court the

¹ Rehearing denied September 9, 1895.

next morning; that said jury were all present in open court when said verdict was returned into court, opened, and read, but were not called into the jury box, and that said verdict was read in open court and in the presence of said jury, and that none of them expressed any dissent therefrom; that the plaintiffs were present, by their counsel, in court when said verdict was returned into court, opened, read, and entered as aforesaid, and made no objection whatever to the reception of the verdict in the manner aforesaid, and did not ask that the names of said jury be called, or that they be asked whether they had agreed upon a verdict, and did not ask to have said jury polled. Now, therefore, on motion of J. E. Robinson, attorney for said defendant, it is hereby ordered that said motion for a new trial be, and the same is hereby, denied; and it is further ordered that judgment be entered herein in accordance with the verdict of the jury, and let the same be recorded in the judgment book. To which ruling the plaintiffs by counsel duly except.

The only ground urged and relied upon for reversal by counsel for appellants is the error or irregularity in regard to the verdict.

The following are the provisions of the Civil Code in regard to the rendition of verdicts:

Section 194. "The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day. A final adjournment of the court for the term shall discharge the jury."

Section 195. "When the jury have agreed upon their verdict, they shall be conducted into court by the officer having them in charge. Their names shall then be called, and they shall be asked by the court or the clerk whether they have agreed upon their verdict, and if the answer be in the affirmative, they shall, on being required, declare the same."

The law is specific and peremptory, and cannot be disregarded by court or counsel. It is wisely and humanely provided, for the comfort and convenience of jurors, that they may, by order of court, if they arrive at a verdict during the recess of the court, reduce it to writing, seal it, and separate; but there is no provision for its delivery to the bailiff or other person as custodian. It must be retained by the jury, or some member of it, and be by the jury delivered to the court; and, although allowed to separate, its organization as a jury must remain intact, and on the assembling of court must be called, and as an aggregate, a unit, be asked by the court or the clerk "whether they have agreed upon their verdict." If the answer is in the affirmative, the sealed verdict may be delivered to the court, and if in form the jury may be discharged from the case (Civ. Code, § 197); and until they are so discharged they are not relieved of the duties of a jury per-

taining to the case. The fact that the persons composing the jury were in the assembly was of no importance. They were there as individuals, not as a jury, and for all legal purposes in connection with the supposed verdict might as well have been scattered over the county, at their respective homes. Nor could the identity of the paper produced be established by the affidavit of a member. Admitting its identity, and that it was regularly found and sealed (and the reverse is not claimed), it was not a verdict until the law was complied with and the verdict received in court from the jury. The provisions of the Code are wise and necessary to the honest administration of justice. Although in this case there is no question as to the honesty of the transaction, to legalize such practice would open a door to fraud and abuse, enabling one member of a jury, with the aid of a bailiff, to impose upon the court and litigants. The fact that counsel for plaintiffs were in court and made no objection, as found by the court and relied upon by counsel for defendants, cannot, in any aspect of the case, be regarded as important or controlling. The proceeding and adjudication as to whether it was or was not a verdict was extrajudicial. There is no statutory authority for determining the authenticity of a verdict, as a question of fact, upon affidavits. Hence, the finding of the facts by the court was of no value to give the paper returned validity.

It is contended by counsel for defendant, in argument, that the entry by the clerk that "the sheriff delivered to the court the sealed verdict returned to him by the jury" was wholly unauthorized, and should be disregarded. It is conceded that the statement was true. It was necessary to show that the paper in some way got to the court, and, as it was not presented by the jury, the clerk could not falsify his records to make them show the receipt of it in the ordinary way. The records of the court are under the control of the judge. If an improper entry has been made, or there is an omission, counsel can only suggest the fact to the court for correction.

Counsel for appellee contend that by reason of the presence of appellants' counsel, and their silence, "appellants are estopped from contesting the regularity and validity of the rendition and reception of the verdict," and many authorities are cited, supposed to sustain the contention; but in this case the doctrine of estoppel can have no application. A party cannot be estopped by his silence, except where he is under some obligation, either legal or moral, to speak. There was neither in this case. The reception of the verdict was one of ordinary routine duties of the court, plainly and clearly defined by the law,—a matter in which counsel was not required or expected to participate. If wrong, the aggrieved party could except, as in this case, urge it upon a motion to set aside the

verdict, and, if unsuccessful, go to a court of review.

We conclude that there was a mistrial, and no verdict upon which a judgment could be based. The judgment will be reversed and cause remanded for a new trial. Reversed.

BROCK et al. v. SCHRADSKY.¹

(Court of Appeals of Colorado. June 10, 1895.)

ABSTRACT OF RECORD—EVIDENCE—ADMISSIONS OF ASSIGNOR—FRAUDULENT PURCHASE.

1. Errors assigned, but having no reference to anything in the abstract of record, which the supreme court rules require to present the parts of the record to which reference is made in the assignments of error, will be considered as abandoned.

2. Admissions by one after making an assignment for creditors are not admissible against the assignee, as made by one identified in interest with him.

3. In order to recover goods sold to a merchant, on the ground of fraud, it must not only appear that he was insolvent, but that he did not intend to pay for the goods.

Appeal from district court, Arapahoe county.

Replevin by H. Brock and others, partners as Brock, Wiener & Gelsmer, against H. Schradsky, assignee of Samuel A. Hirschfield. Judgment for defendant. Plaintiffs appeal. Affirmed.

Lipscomb & Hodges and David Plessner, for appellants. Alfred Muller and John R. Smith, for appellee.

THOMSON, J. The rules of this court require appellants and plaintiffs in error to file with the clerk a printed abstract or abridgment of the record of the case brought here for review, which shall fully set forth the points relied upon for a reversal of the judgment, and shall present the parts of the record to which reference is made in the assignment of errors. We assume that the abstract presents all that parties or counsel regard as material, and that what is omitted is not relied upon; and, except for the purpose of verifying statements which it may contain, we do not, in behalf of the party by whom it is filed, resort to the transcript of the record. A large portion of the specifications in the assignment of errors in this case have no reference to anything which is to be found in the abstract. We therefore assume them to be abandoned, and shall address ourselves to those only which are predicated upon the record as the abstract presents it.

This is replevin brought by the appellants, as plaintiffs, against the appellee, to recover a portion of a stock of goods. The ground upon which they base their right to recover is that the goods were fraudulently obtained from them by the defendant's assignor. For some years prior to the 31st day of March, 1892, Samuel A. Hirschfield had been enga-

ged in the retail clothing business in the city of Denver. The plaintiffs were wholesale clothing merchants in Buffalo, N. Y., from whom Hirschfield, during his business career, had from time to time purchased goods. In November, 1891, Leon Brock, a traveling salesman of the plaintiffs, being in Denver, took an order from Hirschfield for a bill of goods amounting to \$2,261. A portion of this bill, amounting to \$141, was shipped on November 27, 1891, and the residue on the 22d of the following February. At the time of giving the order, Hirschfield owed the plaintiffs \$1,673.50 upon former purchases. Of this amount he paid on November 27, 1891, \$500, on January 30, 1892, \$500, and between February 1st and March 30, 1892, \$288.11. On March 31, 1892, he made a general assignment to the defendant, Schradsky, for the benefit of his creditors. The assets shown by the deed were \$4,020, and the liabilities \$6,117.25. Judgment was given for the defendant, from which the plaintiffs appeal.

At the trial the plaintiffs offered in evidence the stenographer's notes of testimony given by Hirschfield at a former trial of this cause on December 15, 1892, and also a letter written by him on April 5, 1892. The evidence was objected to by the defendant, and the objection sustained. Plaintiffs contend that the evidence was competent, and should have been received as the admissions of a party in privity with the defendant and identified in interest with him. But this position of the plaintiffs is not tenable, because there is no such identity of interest between an assignor for the benefit of creditors and his assignee as to render such evidence admissible on that ground. By the assignment to the defendant, the property vested in him for the benefit of the creditors of Hirschfield. His duty was to administer the insolvent estate to the best advantage for them. He was their representative, and in all suits affecting the subject-matter of the trust they were the real parties in interest. When the transfer was consummated Hirschfield's interest was at an end. It will be observed that the testimony in question was given and the letter written after the completion of the assignment; and while admissions made by Hirschfield before he had parted with his title might be competent evidence in a proceeding to charge the estate with a debt, for a reason entirely different from that of interest in the suit, his declarations afterwards made were without value, and could in no way affect the assignee or the beneficiaries. The assignee held the property in trust for the creditors, and it was not in the power of the assignor to prejudice their rights by statements made after those rights had attached. By the act of transfer he became a stranger to the title, and his declarations were upon the same footing with those of any other stranger. Burrill, Assignm. § 362; 1 Greenl. Ev. 180; Wynne

¹ Rehearing denied September 9, 1895.

v. Glidewell, 17 Ind. 446; Bullis v. Montgomery, 50 N. Y. 352; Bump, Fraud. Conv. (3d Ed.) 587. From an examination of this evidence we are unable to see wherein the plaintiffs would have been benefited, or the defendant injured, by its admission; but, as the defendant saw fit to object to its introduction, it was properly excluded.

Upon the evidence introduced, the court instructed the jury to find for the defendant; and the plaintiffs insist that the instruction was erroneous. A question of fraud, like any other question of fact, is for the determination of the jury; but there must be some evidence tending to prove the fraud before there is anything to submit. To enable one who has parted with the possession of goods to recover them back, the transaction must have been of such a character that the title did not pass. If goods are purchased with the preconceived design on the part of the vendee not to pay for them, the title still remains in the vendor; the fraudulent vendee acquires none; and to sustain an action like this there must be some evidence that the purchase was made with that intention. Direct proof of intention, except by the party entertaining it, is, of course, impossible; but facts must be shown from which it may be inferred. The testimony of Leon Brock was that, at the time he took the order, he asked Hirschfeld how he was progressing. He replied that he was not getting rich; that he was making a little money, and when he invoiced at the end of the year he would find himself from \$1,500 to \$1,800 better off than he had been the preceding year; that his brother was hampering him, and he had to assist him; and that the plaintiffs were the only people to whom he owed any money at that time.

The following letters, written by Hirschfeld to the plaintiffs, were in evidence:

"Denver, Colo., Dec. 23, 1891. Messrs. Brock, Wiener & Gelsmer, Buffalo—Gents: Thinking you may have some uneasiness in regard to H. Hirschfeld, reported sold out in this city, has no connection whatever with me. Shall send check soon. Remaining, yours truly. S. A. Hirschfeld."

"Denver, Colo., Feb. 8, 1892. Messrs. Brock, Wiener & Gelsmer, Buffalo—Gents: Regarding H. Hirschfeld's account, the party is not here now. I expect he will pay his bills. Can't see how you can charge S. A. with account of H. Hirschfeld. You may send my goods now. I remain, yours, truly, S. A. Hirschfeld."

Leon M. Brock, one of the plaintiffs, testified to receiving the foregoing letters from Hirschfeld. He said he was manager of plaintiffs' business, and had charge of their credits; that if Hirschfeld had not written the letter of December 28th, which induced the witness to believe that he was solvent, and solicitous of his credit, and if he had not written a letter on January 26, 1892, inclosing check for \$500, and two notes, in

settlement of his prior account with the plaintiffs, and if he had not written the letter of February 8th in regard to H. Hirschfeld's account, and directing his goods to be sent at once, he, the witness, would have been suspicious of his financial standing, and would not have shipped the goods.

The foregoing is the evidence relied upon by the plaintiffs, and is the only evidence in the abstract relating to the circumstances connected with the purchase and shipment of the goods; and it is sufficient to say, concerning it, that it discloses nothing which would authorize a suspicion of fraudulent intent on the part of Hirschfeld.

The argument of counsel is that the insolvency of a purchaser at the time of the purchase is a fact to go to the jury upon the question of intent. If the insolvency is shown in connection with other facts, this may be true; but alone it proves nothing. If he was not only insolvent, but knew that he was insolvent, the evidence would still be insufficient. Something else must appear from which a fraudulent purpose in obtaining the goods is inferable. A party may be insolvent, and know that he is insolvent, and yet think that with prospective better times, and the forbearance of creditors, he will be able to retrieve himself and pay in full. It is not the circumstances of the vendee, or his knowledge of them at the time, but the motives with which he made the purchase, that are determinative of the character of the transaction. Burchinell v. Hirsch (Colo. App.) 39 Pac. 352; Morrill v. Blackman, 42 Conn. 324; Redington v. Roberts, 25 Vt. 686. But, if we should concede what counsel claim, the evidence fails. There is no proof that at the time of giving the order Hirschfeld was insolvent at all; and there is none that at the time of directing the shipment of the residue of the goods, if from subsequent developments it may be assumed that he was then insolvent, he believed himself to be so. Upon no view of the evidence was there anything to submit to the jury. The judgment will be affirmed. Affirmed.

FIREMAN'S FUND INS. CO. v. BARKER.¹
(Court of Appeals of Colorado. June 10, 1895.)

SEVERABLE CONTRACT — FIRE POLICY — INCUMBRANCES — EFFECT OF ADJUSTMENT — SUFFICIENCY OF EVIDENCE.

1. A fire policy conditioned to be void if the insured has concealed any material fact, or if his interest be other than unconditional and sole ownership, is void where the fact that there was a recorded mortgage on the property was not mentioned, though the concealment was not fraudulent.

2. A fact alleged in a pleading, but not supported by evidence, and contradicted by evidence of the other party, cannot be submitted to the jury.

3. A fire policy conditioned to be void in case of change in interest in the property is void.

¹ Rehearing denied September 9, 1895.

ed by the property being included in a mortgage through the negligence or inattention of the owner, though without his knowledge, no fraud or deception having been practiced in obtaining it.

4. An adjustment of a loss by an insurance company having no knowledge of the violation of a policy does not amount to a promise to pay or a recognition of the validity of the claim.

5. A fire policy insuring furniture, hay, and grain, each for a separate amount, is severable, and void only as to the hay, by reason of a mortgage thereon, under the condition that "this entire policy shall be void" if the interest of the insured be other than unconditional and sole ownership.

Appeal from district court, Montrose county.

Action by Franklin C. Barker against the Fireman's Fund Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

On August 20, 1892, appellant insured appellee for one year for the amount of \$500 on household furniture, \$875 on alfalfa in stack, and \$125 on wheat and oats in stack; alfalfa estimated at 700 tons and oats 600 bushels. Appellee paid for such insurance \$55. On the 4th day of December, 1892, the entire alfalfa hay crop and 400 bushels of grain were destroyed by fire. Notice and proof of loss was made. Other insurance companies had additional risks on the same property. One E. E. Beard, who designated himself as "independent adjuster," was sent to adjust the loss by the appellant, and its liability was fixed at \$935. Beard at about the same time made the discovery that appellee had made two chattel mortgages upon the burned property,—one to Thomas A. Mostyn, who owned the ranch occupied by appellee, for the sum of \$844.70, dated January 1, 1892 (prior to the insurance); the other to Goldsmith & Co. for \$375, November 10, 1892 (subsequent to the insurance),—and notified appellant of the fact, whereupon appellant refused to pay the losses. Appellee brought suit. A trial to a jury was had, resulting in a verdict for the plaintiff for \$958.20 and \$54.65 interest, making \$1,012.85. A motion for a new trial was overruled, judgment entered upon the verdict, and an appeal prosecuted to this court.

Thos. J. Black, for appellant. Sherman & Twitchell, for appellee.

REED, P. J. (after stating the facts). The following provisions occur in the policy of insurance delivered to appellee: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the assured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured, touching any matter relating to this insurance or the subject thereof, whether before or after a loss." "Or if the interest of the insured be other

than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than the death of the insured, takes place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise." The complaint was in the ordinary form. The allegations were denied, and defendant specially pleaded the above provisions of the policy, and alleged that appellee had concealed the fact of the existing chattel mortgage to Mostyn, misrepresented facts in regard to the ownership by him of the property, and subsequently, without the consent of appellant, executed the chattel mortgage to Goldsmith & Co., of which appellant had no notice until after the bringing of the suit, and that for those reasons the policy was void. Plaintiff replied, alleging knowledge of the defendant of the Mostyn chattel mortgage, and that the mortgage to Goldsmith & Co. was a renewal; was upon other property; that the hay was embraced in it without his knowledge; that he executed it, and had no knowledge until long after; that the hay was embraced in it. The plaintiff was not present at the trial, consequently did not give evidence, nor was any given in his behalf in support of the allegations in his replication. L. F. Twitchell, attorney for plaintiff, testified that plaintiff had agreed to be at the trial, "but they had lost track of him"; did not know where he was. Witnesses for the defendant testified to want of knowledge of the existence of the mortgages. The agent, Upton, who made the insurance, testified that plaintiff stated at the time the insurance was effected that the property was not incumbered. The members of the firm of Goldsmith & Co. testified to plaintiff's knowledge that the hay was embraced in their chattel mortgage.

The language of the contract of insurance is plain and unmistakable. The failure to notify the company of the existence of the Mostyn mortgage at the time the insurance was effected, and the subsequent mortgage to Goldsmith & Co., rendered the policy void. Courts cannot reform contracts, nor relieve contractors from the effects of foolish or improvident contracts, except when obtained by fraud. Where there is no ground for construction, contracts must be enforced as made. The Mostyn mortgage was of record, as required by statute. The object of the statute is to afford notice, and such record is held in law to be constructive notice to all. No good reason can be given why insurance companies should not be embraced in the general law, and be consid-

ered as having the notice, nor why, with the public record existing, the validity of the contract should depend upon the failure of the insured to state the existence of the mortgage; but such was the contract. It would, in justice and reason, seem, where insured personal property was in the possession of the insured, and the title of the mortgagee was defeasible, that until condition broken the right to secure insurance was one pertaining to the owner. How the hazard could be increased, so as to avoid the contract, by the fact of the chattel mortgage, is a question only those engaged in insurance can satisfactorily answer. By the terms of the contract, the making of the mortgage to Goldsmith & Co. without the consent of the insurer rendered it void.

The third instruction given by the court was erroneous, where it was said: "But if it should appear from the evidence that said plaintiff executed said mortgage through mistake, and that the execution and delivery of said mortgage was unintentional upon his part, then, notwithstanding the provisions of said policy regarding the incumbrance of property insured without the knowledge or consent of the company, such action on the part of the plaintiff, if unintentional, and done through an honest mistake, would not vitiate such policy, or render the same void, unless, subsequent to the execution of such mortgage, and prior to the alleged loss upon the property insured, notice that such property was included in such mortgage was brought to the knowledge of said plaintiff, and that, after such notice and prior to said loss, he failed to notify said company regarding such mortgages, or obtain its consent in relation thereto, unless, prior to such loss, knowledge in any manner of the existence of said mortgages was brought home to said company, and after such knowledge it failed to object thereto." Instructions not based upon the evidence cannot be given. The mistake and want of knowledge was alleged in the replication, was unsupported by evidence, and was contradicted by the testimony of the members of the firm of Goldsmith & Co. The facts of the hay being in the mortgage and its execution by the insured were unquestioned. There was testimony that he suggested or mentioned the hay as security that he would give, also that he read the mortgage, and knew it was included. If, through negligence or inattention, the hay was included without his knowledge, and no fraud or deception was practiced in obtaining the mortgage, proof of want of knowledge would not relieve him from legal responsibility for the act. Instead of submitting to the jury the question of knowledge and intention, under the evidence the only proper instruction that could have been given would have been to require the jury to disregard it.

Other instructions were faulty, noticeably the fourth, in which the question of the adjustment of the loss was submitted to the jury.

All the evidence was that the company had no knowledge of the violations of the contract. The acts of the adjuster in fixing the amount of loss could not be in anything regarded as a promise to pay, or a recognition of the validity of the claim. The second instruction is clearly erroneous. It is: "As to the Mostyn mortgage, to which your attention had been directed in the preceding instructions, the court instructs you that the existence or non-existence of such mortgage at the time of the issuance of said contract of insurance, or the truth or falsity of any statements which the plaintiff may have made in regard to the existence or nonexistence of such mortgage, are not material in this case, and will not defeat a recovery by plaintiff herein, unless you should find from the evidence that the existence of said mortgage was fraudulently and in bad faith concealed by said plaintiff, or that he fraudulently and in bad faith made statements in regard thereto, and that, by reason of such concealment or statements in relation to such mortgage, the risk incurred by defendant in issuing said policy was thereby materially increased." Comment upon it is unnecessary. It is so at variance with the law of contracts, particularly those of insurance, that the errors are apparent.

Whether or not the established facts in this case should exonerate appellant from the payment of the money, and whether equity and fair dealing would not require payment by it unless it was shown to have sustained some injury by reason of the irregularities, are questions we are not called upon to answer. The courts, both federal and state, are cumbered with cases of insurance where insurers contracted, received the compensation, and issued a policy, and when a loss occurred sought to evade payment through some alleged breach of technical provisions so lengthy, intricate, and complicated that no insured of ordinary capacity could be expected to read them, much less understand them. Even courts of last resort fail to agree upon their legal construction. Experience and human ingenuity seem to have been strained to the utmost to devise traps for the unwary, and provide avenues of escape for the insurer; but so long as no legislative remedies are applied to simplify the business and put it upon the same basis as other contracts, and applying the doctrine of caveat emptor, courts can only attempt to apply the contracts as made by the parties, regardless of the great disadvantage to which the insured are subjected. Authorities are numerous, from courts entitled to greatest consideration, that the policy of insurance in this case was rendered void by violations of its provisions by appellee, and that no recovery could be had. 1 May, Ins. §§ 169, 170, 195-197; Woods, Ins. §§ 195-197; Insurance Co. v. Lawrence, 10 Pet. 507; Bauduy v. Insurance Co., 2 Wash. C. C. 391, Fed. Cas. No. 1,112; Insurance Co. v. Harney, 10 Kan. 525; Louisiana Mut. Ins. Co. v. New Orleans Ins. Co., 13 La. Ann. 246; Smith v. Insurance

Co., 25 Barb. 497; Gould v. Insurance Co., 47 Me. 403. There was no conflict of evidence. It was all in favor of the defendant, and the verdict in conflict with it. The instructions as shown were erroneous. Questions unsupported by evidence were submitted. The contract of insurance was clearly severable. Separate amounts were specified upon the hay and grain. The latter does not appear to have been involved in the controversy. Nothing appears in the record to prevent recovery of the loss upon the grain. The judgment will be reversed and cause remanded. Reversed.

(7 N.M. 624)

BULLARD v. LOPEZ.

(Supreme Court of New Mexico. Aug. 20, 1895.)

PLEADING—CURED BY SUBSEQUENT PLEADING AND JUDGMENT.

Though a plea of limitations was demurrable, being one of non assumpsit *infra sex annos*, instead of non accrevit *infra sex annos*, yet, issue having been joined thereon and a question litigated as though the defense of non accrevit were presented, the plea will be held sufficient to present that defense.

On rehearing. Denied.

For former opinion, see 37 Pac. 1103.

COLLIER, J. In this case the motion for rehearing is made, not upon the main question decided by this court at the July, 1894, term thereof, but upon a question raised for the first time here, to wit, that the plea of the statute of limitations, being in form non assumpsit *infra sex annos*, etc., presented no obstacle to the obtaining by plaintiff of a judgment in the court below. This court held at said term that such a plea was not a proper plea to an action on a promissory note falling due at a future date, and that, if demurrer had been interposed to the same, it should have been held bad, but that, plaintiff having joined issue thereon, it became material in the case. More properly, perhaps, it should have been held that it became a sufficient plea to the extent of enabling defendant to rely on the statute as a bar, if in fact plaintiff's action had not accrued within six years before the commencement of his suit. In the case of *Soulden v. Van Rensselaer*, 3 Wend. 472, cited and relied on by this court, it was said: "The declaration is on a promise to perform a future act, and the plea of non assumpsit *infra sex annos* was improper. It should have been a plea of non accrevit *infra*, etc. A demurrer to it would have been sustained, but the plaintiffs preferred to take issue upon what they probably foresaw would be the main question in the cause. As neither the original promise nor the accruing of the action was within six years, etc., the plaintiffs must have expected to recover on a new promise or acknowledgment of the debt within that time. It was the issue formed by the pleadings, and the one in fact

tried. It was intended to be the material issue in the cause, and yet we are asked to overlook it and declare it to have been immaterial, and for that reason to give judgment in favor of plaintiffs. * * * The fact to be tried—the renewal of a demand by a new promise—was considered at issue by the parties, and I am therefore disposed to regard the pleadings as having terminated in an informal rather than an immaterial issue. There cannot, I think, be any reasonable doubt that the defect of the issue in this case is as effectually cured by the verdict as it would be in a case where 'not guilty' should be pleaded to a declaration in assumpsit. A verdict in the latter case has been held to cure the defect of such an issue. *Cro. Eliz.* 470; 1 *Saund.* 319a, note 6." To change the title of that case and substitute that of this would be all required, if its reasoning is satisfactory.

The brief of appellee on the motion for a rehearing gives evidence of research in the number of cases collected which lay down the doctrine that such a plea is utterly immaterial and presents no obstacle whatever; but, as we read them, there is but one (*Mallory v. Lamphear*, 8 How. Prac. 491) when the doctrine was decisive of the case. In *Mallory v. Lamphear*, supra, a plea of non accrevit *infra sex annos*, etc., would have under the facts constituted a bar. This case is quite meager. It was on a note payable immediately. It is seen that the making of the note and the accrual of the right of action were coincident in time. We do not think, as to that case, that the plea was any other than informal, and the reasoning in *Soulden v. Van Rensselaer* more commends itself to our judgment. There seemed to have been no other pleadings in that case than a declaration and a plea without reply or joinder of issue thereon. In the case at bar it may be that had there been joinder of issue on the plea of general issue, and a failure to notice the plea of "non assumpsit *infra sex annos*," etc., the plea being in itself bad and in strict form presenting no issue, the court below might have ignored it, and directed a verdict for plaintiff, or, if it had been the only plea, and no issue joined thereon, plaintiff might have been entitled to a verdict. A joinder of issue, however, and a trial, where a new promise is shown to be relied on for recovery, presents a different phase. No one is surprised, and the trial proceeds exactly as if the plea had presented the issue of non accrevit, etc., in strict form. In *Graham v. Dixon*, 3 *Scam.* (Ill.) 116, what the court says as to the plea of non est factum is dictum, the question there decided being that defendant was estopped from urging his own mispleading to the prejudice of plaintiff. In *McCollister v. Willey*, 52 *Ind.* 382, all that was decided was that a plea of non assumpsit *infra sex annos*, etc., was bad enough for a demurrer to a reply to it to be overruled upon the principle of the de-

murrer cutting back to the first fault. In *Richman v. Richman*, 8 N. J. Law, 55, the demurrer also cut back, and was overruled, as in *McCollister v. Willey*, *supra*. In *Hale v. Andrus*, 6 Cow. 226, it is stated that the issue presented was immaterial, and interposed no obstacle in plaintiff's way, and he could have had judgment non obstante veredicto. It is to be observed that in *Hale v. Andrus*, *supra*, there was also a plea of non accrevit, etc., and it appeared from the evidence that the gravamen upon which plaintiff relied for a recovery did accrue within six years. We think that presents a different case from the one at bar, and that were there two such pleas here, as in *Hale v. Andrus*, *supra*, we would say one was applicable to plaintiff's first count and the other to his second count. We think it not necessary to notice further the authorities plaintiff has cited in his brief on this motion, and we are prepared to say that in view of the fact that it is manifest that this case was tried by the parties in the court below upon a reliance by plaintiff on a parol promise to take his action out of the bar of the statute, and that it was assumed by the court and counsel alike that the pleadings sufficiently raised this question, and the evidence was all directed to it, this court should have determined, just as the court below did, whether plaintiff's action was in law barred or not. We do not think this principle is of universal application, but that each case of this kind is to be judged by itself. If a declaration plainly presents no cause of action, going to trial upon the same would not support a verdict; and if a plea has no semblance of a defense, as was instanced by some judge, viz. that no recovery should be had on a promissory note because "Robin Hood dwelt in a wood," and issue were joined on that averment, it might be wholly ignored; yet where it may be inferred that there was some attempt to state a defense, and it could be gathered from the evidence and the circumstances of the trial that all parties had recognized that attempt as applicable to evidence offered on the trial, such trial should be considered as not being wholly nugatory, but the record should be looked into and examined as if the pleadings were in form as they were treated and considered in the trial court.

The question was squarely presented in the court below as to whether or not a parol promise revived plaintiff's cause of action. A verdict was directed upon the theory that it did, and this court, disagreeing with the learned judge who tried the cause in the court below, has reversed that decision. No more could have been possibly attained if the plea had been "non accrevit," etc. The motion for rehearing is denied, and it is accordingly so ordered.

SMITH, C. J., and LAUGHLIN, J., concur.

(7 N. M. 630)

FIELD et al. v. ROMERO et al.

(Supreme Court of New Mexico. Aug. 20, 1895.)

ASSIGNMENT FOR CREDITORS—VALIDITY—MASTER—APPOINTMENT—FINDINGS.

1. An order referring an entire case to a master to take proofs and report findings and conclusions, will, in the absence of any contrary showing on the record, be held to have been made on the assent of all parties.

2. Findings of fact by a master to whom, by assent of parties, an entire case is referred, are conclusive, there being evidence to support them.

3. An assignment for creditors of partnership and individual property is fraudulent and void, as authorizing payment of individual debts out of partnership property, where there is no direction to pay individual debts out of individual property, and partnership debts out of partnership property, but disposition of the funds, as to payment of debts, is left to the assignee, and he is directed to pay taxes assessed against the firm and the partners, respectively.

4. An assignment for creditors will be held to have been made to hinder and delay creditors, where, just prior thereto, the assignors contracted debts and secured extensions on false statements as to their circumstances, and immediately after it they wrote creditors, "We expect to be out of our trouble soon. All we want is an extension of time,"—and the business was thereafter continued by the assignee, in the same place, under the old sign of the firm; the assignors being in his employ, and the stock being replenished from time to time, purchases being made sometimes by the assignee, and sometimes by the assignors.

Error to district court, San Miguel county; before Justice Long.

Suit by Marshall Field & Co. and others against M. Romero & Co. and others to set aside an assignment for creditors. Decree for defendants. Complainants bring error. Reversed.

Catron, Knaebel & Clancy, for plaintiffs in error. M. Salazar, for defendants in error.

HAMILTON, J. This cause comes to us from the Fourth judicial district, in San Miguel county, where a bill was filed by the complainants to set aside a deed of assignment made by the defendants M. Romero & Co., upon the ground of fraud. Answer was filed, the issues made up, and the cause referred to a special master, who made a report to the court, upon which a decree was entered declaring the deed of assignment valid, and ordering a dismissal of the bill. It appears from the pleadings and proofs in the case that during the year 1885, and prior thereto, the defendants M. Romero & Co. were a mercantile firm engaged in business in Las Vegas; that about the 29th day of September, 1885, they applied to the complainants Marshall Field & Co., at Chicago, Ill., for the purchase of a bill of goods on credit; that, in order to procure the purchase of these goods, they represented to Marshall Field & Co. that the assets of the firm of M. Romero & Co. were \$75,650, while their entire liabilities were \$35,000, thus leaving a surplus of assets of \$40,650; that, relying

upon these representations so made, Marshall Field & Co. sold them a bill of goods, on time, amounting to \$3,000; that a portion of this indebtedness matured in November, following, and on the maturity of the indebtedness a similar representation of their financial condition was made to Marshall Field & Co. by M. Romero & Co., which secured the extension of the time of payment; that this representation of their financial condition made by M. Romero & Co. to Marshall Field & Co., upon the faith of which the goods were sold, was untrue; that their indebtedness was much larger, and their assets much less, than represented; that, as a matter of fact, they were deeply involved, and were so heavily embarrassed, financially, that on the 6th day of January, 1886, in less than three months after they purchased the goods of the complainants, they made and executed the deed of assignment, the validity of which is in controversy in this case. This deed was a conveyance of all of the property of the firm, and also of all the property owned by the individual members of the firm, and authorized the assignee to take possession, and sell and dispose of all of the property, at public or private sale, as he might deem most beneficial to the creditors; that out of the proceeds realized, the assignee should pay all "costs, expenses, charges, and commissions attending the preparation and execution of the deed and of carrying into effect the trust created, including reasonable counsel fees," and reasonable compensation to the party of the second part for his services in carrying on the trust. Then follows in the deed a statement of 27 preferred debts, which the assignee is directed to pay in the order of preference in which they are given. One of these preferences (No. 25), for \$5,712.38, was an individual debt of one of the members of the firm. The assignee was also authorized to pay interest on a portion of the indebtedness, some of which was bearing interest at an illegal rate. There is no direction to the assignee to keep the property and funds of the firm and of its individual members separate, and to apply the firm assets to the payment of firm indebtedness, and those of the individual members of the firm to the payment of the individual debts, but the disposition of the funds, as to the payment of debts and interest, in this regard, is left to the assignee. The complainants, in their bill, attack this deed of assignment upon the ground that it is fraudulent and void. Answer was filed, and issues made up. The order appointing the special master directed him to "take proofs, and report his findings thereon with all convenient speed." Hearing was had, proofs taken, and the master made his findings of fact and conclusions of law, among which are the following, as the most important findings relating to the questions for decision: First. The first finding of fact made by the master sets forth that the complainants are judgment creditors of the defendants. Third. The mas-

ter finds that the goods were obtained and credit extended by the complainants Marshall Field & Co. to the defendants M. Romero & Co. upon the representations made to the complainants by M. Romero & Co. Fourth. He finds that these representations were false and untrue. Seventh. He finds that the complainants, when they sold the goods and extended the credit, did so upon the faith of the representations made to them by the defendants. Ninth. He finds that the deed of assignment was made on the 6th day of January, 1886, and was made to Manuel Baca y Ortiz. The deed conveys all the property of the firm, as well as the property of its individual members, and provides for the payment of certain indebtedness, specifically mentioned herein, with the interest thereon, as therein specified. This deed contains 27 preferences, the names and amounts being specified in the deed. The deed leaves it optional with the assignee as to whether he shall sell the property at public or private sale. The deed of assignment has no directions to the assignee to pay partnership debts out of partnership property, and individual debts out of individual property. Eleventh. That all the 27 preferred creditors mentioned in the deed of assignment were residents of the territory of New Mexico, that all of the unpreferred creditors of said assignors were nonresidents of the territory of New Mexico, except one. Fifteenth. He finds that the debt of \$5,712.38, mentioned as the twenty-fifth preference in the deed of assignment, was a debt due originally by Margarito Romero to one Andres Dold, now deceased; that the same, after the death of Andres Dold, was renewed, and the note therefor signed by the firm. Seventeenth. That he should pay to Miguel Salazar a note for \$1,000, which bore interest at the rate of 15 per cent. per annum. Nineteenth. That after said deed of assignment was made the said business was carried on for about a year, until January 1, 1887, in the name of the assignee. However, the name of M. Romero & Co. was retained as a sign over the door. Romero and Marquez were employed to assist at the business, and help manage the same, and sell goods. Marquez was the bookkeeper, and goods were bought to replenish stock, sometimes by one and sometimes by another, but in the name of the assignee, Manuel Baca y Ortiz. Twenty-third. That the firm of M. Romero & Co. was a partnership, and their indebtedness to complainants Marshall Field & Co. was partnership indebtedness. Twenty-fourth. Gives the amount of goods purchased and sold during the time the assignee carried on the business, and shows that they purchased new goods to replenish stock, during this period, to the amount of \$17,605.22. In the last conclusion of the master, referring to the letter written by the defendants to the complainants, the following is found by him: "We expect to be out of our trouble in a very short time. All we want is an extension of time."

This declaration, coupled with the continuance of the business, the employment of the defendants by the assignee, and the practical management of its affairs by the assignors, together with the belief expressed by the assignors that their assets were greater than their liabilities, looks very much as though they had in their minds, in making the assignment, the idea that by gaining time they would be able to tide over their financial difficulties, and, by means of such arrangement, hinder and delay their creditors in the collection of their claims until such time as they could realize sufficient to pay up and come out whole. Such an understanding in making the deed would necessarily avoid it."

From these findings of facts the master concludes, as a matter of law, that the misrepresentations made by the defendants to the complainants at the time they purchased the goods; the fact that the deed failed to specify that partnership debts should be paid out of partnership property, and individual debts out of individual property; that usurious interest was directed to be paid on some of the debts; that the fact that the defendants may have made the deed of assignment to gain time,—were not facts upon which he would undertake to declare the deed void. Various exceptions were filed to the findings of fact and conclusions of law made by the master, which were, in the main, overruled by the court, and the decree entered as above stated, declaring the deed valid, and ordering a dismissal of the bill. The correctness of the action of the court in its rulings on the master's report, and entering this decree, is the matter now before us.

The first question which we deem it proper to consider is the action of the court in overruling certain material findings of the special master. Under our system of practice, the reference of a case to a special master, to take the proofs and report his findings thereon to the court, has become one of general custom in chancery cases; and the growing tendency of this class of litigation has rendered the system of reference, in such cases, one of almost absolute necessity. The master being vested with the power of taking all the testimony, and deciding controverted questions of fact upon conflicting evidence, is intended as an aid to the court in arriving at a correct conclusion as to the rights of parties in important litigation. It therefore becomes important to determine what effect shall be given to the findings and conclusions of the master in such cases. The master appointed by the court in a particular case is an officer of the court, selected to aid in reaching a conclusion as to certain controverted facts referred to him for determination. The court may refer only one branch of a case to the master, or it may refer to him only some particular question upon which the court desires to be advised, or the court, by consent of the parties,

may refer the entire case to the master, with directions to take the proofs and report his findings and conclusions thereon. In either case the powers and duties of the master are limited and fixed by the terms of the order under which he is appointed. If the order of appointment, made by consent, as in this case, refers the whole case to the master, to take the proofs and report his findings thereon, then the findings of the master, in so far as they involve disputed questions of fact, are attended by the same presumption of correctness as would be accorded to the findings of a referee, or the special verdict of a jury. In the case of *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, the court, in passing upon the conclusiveness of the findings of the master in chancery, say: "Its findings, like those of an independent tribunal, are to be taken as presumptively correct,—subject, indeed, to be reviewed, under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence or in the application of the law, but not otherwise." In the case of *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, the court, in speaking of the effect of the findings of the master upon a question of fact under a consent order, like this, treat the findings as they would the special verdict of a jury, or the findings of a referee. "In neither of these cases," says the court, "is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable." The master sees the witnesses, hears their testimony, has an opportunity of observing their manner upon the stand, is not infrequently familiar with the surroundings under which they may give their testimony, and is better capable of weighing their testimony and of reaching a correct conclusion therefrom than either the district or appellate court. If, therefore, the testimony before the master was conflicting, or if it depended upon the credibility of the witnesses, and the master has found the facts from this testimony, his findings in this particular are not subject to attack, and are binding upon the court, unless the court, by an inspection of the record, can discover that there is no testimony to sustain it. The order of reference to the master in this case shows it to have been entered without objection. We must therefore presume that the parties were in court, and assented to it, there being no objection to the reference manifest upon the record. There is abundant evidence to sustain the findings of fact made by the master. In so far, therefore, as the order of the court below sought to set aside these findings of fact, it was erroneous.

The main question, however, for our con-

sideration, is as to whether the deed of assignment is void. It is contended by the complainants that the assignment is fraudulent and void for the following reasons: That the deed of assignment conveys to the assignee all of the property, both of the firm and of its individual members, and that there is no direction to the assignee to pay partnership debts out of partnership funds, and individual debts out of individual funds; that the twenty-fifth preference provided for in the deed of assignment, of \$5,712.38, was the individual debt of one of the members of the firm; that the assignee is directed to pay this debt out of the funds; that it provided for the payment of interest on certain indebtedness, both firm and individual, some of which was bearing interest at an illegal rate; that it provided for counsel fees for carrying on the trust. We have examined the deed of assignment and the facts which are set forth in this record, and considered the objections assigned by the complainants, upon which they contend the deed to be fraudulent and void; and we are clearly of the opinion that the matters upon which their objections to the assignment are urged are well founded, and fully justify and sustain the position taken. The clear recitals set forth on the face of the deed of assignment contain, in express terms, a positive direction to the assignee to apply the funds of the firm to the payment of supposed debts and obligations for which the firm were not in any way liable. To sustain this deed of assignment can but inevitably result in charging the individual debts of Margarito Romero against the firm of M. Romero & Co., set forth in the deed of assignment, and entitle this individual creditor to share in the distribution of the firm property, as a preferred creditor, to the exclusion of the complainants, as creditors of the firm. The effect of such a result is apparent, as it leads to the fraudulent and illegal appropriation of the firm assets to the payment of individual obligations of a member of the firm; and this must clearly have been the intent and purpose of the parties to this deed, at the time of its execution. A firm of debtors, in failing circumstances, finding themselves pressed by vigilant creditors, and unable to meet their liabilities in the ordinary course of business, as they mature, have no right, either legal or moral, to assign and pledge the property of the firm to the payment of the individual obligations of one of its members, to the exclusion of the rights of firm creditors. Under such circumstances the law declares that the property left in the hands of the failing debtor is a trust fund, to which the firm creditors may look, and out of which they have a prior and permanent right to be first paid, and any attempt on the part of the debtor to divert this property or fund from the channel in which the law has placed it is a fraud upon the rights of firm creditors which justly calls

for the interposition of a court of equity. In the case of *Burtus v. Tisdall*, 4 Barb. 588, the court say: "It is clearly settled that the joint creditors have the first equitable claim upon the whole for the satisfaction of their debts. Sometimes the copartnership is called a 'trust fund' for the benefit of creditors, and sometimes it has been said that the copartnership creditors have a lien, or a quasi lien, upon it; but, whatever may be the exact nature or extent of these rights, it is certain that the joint debts have a claim to priority of payment out of the whole of the joint funds." In *Pars. Partn.* p. 253, he says: "It is the universal rule, founded upon obvious justice, that the creditors of a firm are exclusively entitled to all of the assets of the firm until their debts are paid." Chancellor Kent, in volume 3 of his *Commentaries*, at page 64, says: "So far as the partnership property has been acquired by means of partnership debts, these debts have, in equity, a priority of claim to be discharged; and the separate creditors are only entitled, in equity, to seek payment from the surplus of the joint fund after the satisfaction of the joint debts." The funds and property of a partnership firm, on its failure or dissolution, must first be applied to the payment of partnership debts, and cannot be applied to the settlement of individual debts until all of the firm creditors are paid. *Muir v. Leitch*, 7 Barb. 348; *Rodgers v. Meranda*, 7 Ohio St. 179; *Murrill v. Neill*, 8 How. 426. Every sale or conveyance of copartnership property made by an insolvent firm for the purpose of diverting the property from the payment of partnership debts, and applying it to the payment of demands against one of the partners, is void as to the creditors of the firm. *Mead v. Phillips*, 1 Sandf. Ch. 85; *Lester v. Abbott*, 28 How. Prac. 488; *Ferson v. Monroe*, 21 N. H. 468; *De Wolf v. Manufacturing Co.*, 49 Conn. 282. In the last case the court held the deed fraudulent and void because of the fact that it conveyed both the firm and individual property, and contained a provision authorizing the payment of the debts of the individual members of the firm out of the proceeds of the property of the firm. In speaking upon this subject the court, in rendering the opinion in that case, say: "The obvious effect of these proceedings, if they should be sustained, would be to charge the debts of Amasa Sprague and William Sprague, partnership and individual, or such of them as were due to creditors who assented to the terms of the deed in the manner and within the time prescribed by its conditions, upon the property of the A. & W. Sprague Manufacturing Company, described in the deed, and entitled those creditors to share in the distribution of that property, or its avails pro rata with the assenting creditors of the company, to the exclusion of the plaintiff and all the other nonassenting creditors. And this effect

would be in accordance with the manifest intention and purpose of the parties to the deed. There can be no question, therefore, that the deed was executed by the company, and by the Spragues, who joined them in its execution, with the intent and purpose to hinder, delay, and defraud the creditors of the company, unless it was divested of its fraudulent character by the circumstances that it embraces the partnership property of A. & W. Sprague, and the individual property of the partners, Amasa Sprague and William Sprague, and the property of Mary Sprague and Fanny Sprague. But the deed was not divested by that circumstance of its fraudulent character."

This deed also contains a direction to the "assignee to pay the taxes that were, or might lawfully be, assessed against the said firm and the said partners, respectively." This, as we understand it, is a direct authority to this assignee to apply the funds of this insolvent partnership to the payment of taxes for which the individual members of the firm, only, were liable upon their individual property, before the partnership debts were satisfied. Under the authorities above cited, this was a violation of the law, under which the assets of an insolvent firm must be distributed among the creditors of the firm. The individual members have no claim upon the partnership assets until all the creditors are satisfied. The authority of the assignee to use the partnership funds to pay taxes on the property of its individual members was the application of the firm assets to the benefit of its individual members before the payment of the partnership liabilities, and constitutes a fraud upon firm creditors.

Another provision contained in this assignment, which, it is contended, affects its validity, is the direction to the assignee "to pay all just and reasonable costs, expenses, charges, and commissions of carrying into effect the trust hereby created, including reasonable counsel fees." While strong authority has been offered by counsel to sustain their attack on this clause of the deed of assignment, yet, in view of the conclusions reached on other points, we do not deem it necessary to a proper disposition of the case to pass upon this question.

We pass now to the consideration of the findings of the master as to the facts preceding, connected with, and subsequent to the assignment, and the conduct of the assignors and the assignee in the management of the estate under the deed. The master found that the statements and representations made by M. Romero & Co. to the complainants Marshall Field & Co., wherein they stated the assets of the firm of M. Romero & Company to be \$75,650, and the indebtedness of that firm as being \$35,000, leaving a surplus of \$40,650, were untrue; that the goods were sold and delivered, and the credit extended, by the complainants to the de-

fendants, upon the faith of those representations. The master found that the business was carried on by the assignee for about a year after the assignment as it was before; that the name "M. Romero & Company" remained over the door; that new goods were bought "to replenish stock, sometimes by one, and sometimes by another." In his twenty-fourth finding the master finds that there were purchases made of new goods, to the value of \$17,605.22, out of the proceeds of the sale of goods in stock. In his last conclusion the master finds, in speaking of the representations made by the defendants to the complainants at the time of the purchase of the goods, and in speaking of the letter written by the defendants to the complainants immediately after the assignment was made, that "it looks very much as if they had in their minds, in making the assignment, the idea that by gaining time they would be able to tide over their financial difficulties, and, by means of such arrangement, hinder and delay their creditors in the collection of their claims until such time as they could realize sufficient to pay up and come out whole." Such arrangement in the making of the deed would necessarily avoid it. Although the master found these facts, he concluded, as a matter of law, that they were not sufficient to avoid the deed, and it was held by him to be good. While, under the rule adopted, a strong presumption exists in favor of the correctness of the report of the master, in the findings made by him upon a disputed question of fact, and they will not be disturbed if there be evidence to sustain them, yet if the master has incorrectly applied the law to the facts, the court, in the exercise of its superintending power, will correct the error. Applying what we conceive to be the correct principles of law to the facts, as found by the master, the inevitable conclusion is that this assignment was fraudulent in fact, and made with an intent to hinder, delay, and defraud the creditors of the assignors. In *Forbes v. Waller*, 25 N. Y. 430, the court say, "The use that was made of the assignment, and the acts of the parties thereunder, must furnish the data to judge of the intent and motives under which it was executed." Take the fact that the defendants obtained these goods and the extension of credit from the complainants by false representation; take the language of the assignors, as contained in their letter addressed to the complainants after the assignment, that "We expect to be out of our troubles soon. All we want is an extension of time,"—and they furnished a motive for this transfer which the law declares illegal. An insolvent and failing partnership debtor, in order to force its unwilling creditors into an indulgence, has no right to place its property beyond the reach of execution, and, under the cloak of a fraudulent assignment, deprive them of the legitimate means which the law gives

them for the collection of their claims against a firm. *Van Nest v. Yoe*, 1 Sandf. Ch. 8; *Kellogg v. Slawson*, 15 Barb. 56; *Gardner v. Bank*, 95 Ill. 298. In the last case the court use this language: "The placing of property in the hands of an assignee for any other purpose than to distribute it, or its proceeds, among creditors, is fraudulent and void, as to creditors. If made to procure time, or for the benefit of the assignor, it is fraudulent." In the case of *Vernon v. Morton*, 8 Dana, 263, the court said: "And again, when it appears upon the face of the deed of trust that the motives for making it were to prevent a sacrifice of the property, a bad motive is shown,—a motive to obstruct the ordinary process of law, or the subjection of the property to the payment of debts,—which vitiates the whole deed." See, also, *Nesbitt v. Digby*, 13 Ill. 387; *Phelps v. Curtis*, 80 Ill. 113.

Another fact connected with this assignment, which is found by the master, and which shows the fraudulent character of this deed, is "the continuance of the business, and the practical management of affairs by the assignors." Their employment in the store; the buying of new goods "to replenish stock," sometimes by the assignors, and sometimes by the assignee, until \$17,605.22 of the proceeds of the sale of goods had been expended in the purchase of new goods; the continuance of the business at the same place under the old sign of the firm,—are facts which, if standing alone in this case, would stamp the assignment as a fraudulent conveyance, and render the deed invalid, as to creditors. When an assignment of a stock in trade is made for the benefit of creditors, as in this case, the law requires reality and good faith in all the parties connected with the transaction, and not a sham and a pretense. The assignor must, in good faith, part with the possession, management, and control of the stock and business to the assignee, who must speedily, and with honest care, reduce the stock to cash, and distribute it to the creditors. In the case of *Levy's Accounting*, 1 Abb. N. C. p. 186, the court used this language: "The idea that a general assignee for the benefit of creditors can, in the exercise of any proper discretion imposed upon him by virtue of the assignment, proceed to conduct and carry on the previous business of the assignor so long as he pleases, or do any act in respect thereto except such as tends to the most speedy conversion of the assigned estate into cash, is wholly untenable; and the acts of the assignee tending to any other result are in fraud of the creditor, in hindering and delaying him in the realization of what is justly due him, either from his debtor or the assigned estate." And when a stock of goods in a retail business is assigned the assignee cannot continue the business and retail the goods as before, with the view of obtaining higher prices, but

must sell them at once. It is even held a breach of trust for the assignee to delay the sale of the property for the purpose of retailing it at a higher price. See, also, *Hart v. Crane*, 7 Paige, 37; *Dunham v. Waterman*, 17 N. Y. 9; *Bank v. Inloes*, 7 Md. 380.

It is clear, therefore, that in whatever light we view this transaction,—whether we consider the provisions and terms as contained on the face of the deed of assignment, or whether we view it from the conduct of the parties prior to, at the time, and subsequent to its execution, with the facts and circumstances connected with their management of the property under the deed, as found by the master, we must reach the conclusion that the assignment was fraudulent and void, as to creditors of the firm. The decree of the court below will be set aside, and the cause reversed and remanded with directions to the court below to enter a decree canceling and setting aside the deed of assignment, and for such other orders as may be necessary.

SMITH, C. J., and COLLIER and LAUGHLIN, JJ., concur.

(7 N. M. 650)

OAK GROVE & SIERRA VERDE CATTLE CO. v. FOSTER.

(Supreme Court of New Mexico. Aug. 24, 1895.)

CORPORATIONS—AUTHORITY OF TREASURER—ACTION ON NOTE—PLEADING—EVIDENCE—BONA FIDE HOLDER.

1. The treasurer of a corporation is not such an officer as is vested with implied power to make negotiable paper in its name.

2. Under Comp. Laws, § 1922, declaring that the "due execution and genuineness" of a written instrument made a part of a pleading is admitted by the opposite party unless he denies the same under oath "in another pleading or writing" filed in the cause, it is reversible error, in an action against a corporation on a note executed by its treasurer, to strike out a plea denying execution of the note by the defendant, or by any one authorized by it, and verified by its president.

3. In an action against a corporation on a note executed by its treasurer without express authority, evidence that the treasurer had never executed other notes to the plaintiff for the defendant previous to the one in suit is admissible.

4. On suit by a bank against a corporation on its note, it appeared that the note was executed by the treasurer of the defendant, who was also president of plaintiff, without authority, in consideration of the transfer to his personal account of an acceptance of a third person, given as collateral security for a loan, and that the said president, acting for the discount committee of the bank, discounted the same, and credited it on such personal acceptance. Held, that the bank was not a holder for value without notice.

Error to district court, Grant county; before Justice Fall.

Action by E. L. Foster, receiver, against the Oak Grove & Sierra Verde Cattle Company on a promissory note. From a judgment for plaintiff, defendant brings error. Reversed.

This was an action in assumpsit by the defendant in error, as receiver of the First National Bank of Deming, against plaintiff in error, upon the following promissory note: "\$6,000. Deming, New Mexico, Dec. 1, 1892. On March 1st after date, we jointly and severally promise to pay to the order of the First National Bank six thousand no/100 dollars, at the First National Bank of Deming, with interest at the rate of one per cent. per month from Jan'y. 1st, 1892, until paid. Value received. And in event of a suit to enforce the collection of this note, or any portion thereof, we further agree to pay the additional sum of ten per cent. upon the amount found due, as attorney's fees in said suit. The Oak Grove and Sierra Verde Cattle Co., per C. H. Dane, Treasurer. No. 1,598. \$6,000. Due Mar. 1, 1892." The declaration claimed that amount, with interest and 10 per cent. as attorney's fees, and was made returnable to the November, 1893, term of said district court. At this term defendant filed a plea "that the note upon which plaintiff's action is founded was not executed by it, the defendant, or by any one authorized to bind it in the premises," and to this plea is an affidavit that "T. F. Conway, agent for said defendant in this behalf, makes oath that the above plea is true." At said term the record shows the following: "Now, by order of the court, the defendant herein is granted leave to plead over in this cause. And now the court overruled plaintiff's motion to strike out the pleas heretofore filed herein." At the April, 1894, term of said court there was filed plea of general issue and special pleas, both concluding to the country. The first special plea alleged that defendant "did not execute," and that it "did not authorize any person to execute; the said promissory note" for it or in its behalf. To these pleas was annexed the affidavit of Henry W. Bishop, as president of defendant corporation, "that said defendant never authorized any person to execute said promissory note for it or in its behalf; that said defendant never ratified the execution of said promissory note; and that I have read the foregoing pleas by the said defendant above pleaded, and know the contents thereof, and that the same is true in substance and in fact. So help me God." Issue was joined on these pleas as follows: "And the said plaintiff, to the pleas respectively of the said defendant company, whereof said defendant puts itself upon the country, doth the like." At a later day of the term two additional pleas were filed, both concluding with a verification, and neither sworn to. The first, in substance, alleged that the note was obtained by fraud and circumvention, in that C. H. Dane, being treasurer of defendant corporation, made and gave said note without consideration, and the bank, well knowing Dane had no authority to execute said note, accepted the same as the note of Dane, and not of de-

fendant. The other additional plea alleged that Dane signed the note without authority, and delivered same to the bank without consideration, either to Dane or defendant, as to which the bank had notice, and such delivery was for the purpose of entering upon the books of the bank said note as a fictitious credit and asset of said bank. Plaintiff moved to strike out the second, third, and fourth pleas, because the second plea is applicable only to actions upon instruments under seal; because the matter in the third may be shown under plea of general issue; and the same as to the fourth, if they make any defense. The court below sustained the motion as to all three of said pleas, and the cause proceeded to trial, as may be inferred, though not definitely shown, upon the "sworn plea of the general issue." Over the objection of defendant that the note, "under the sworn plea of the general issue, cannot be introduced except its execution be first proven," the court admitted the note in evidence; and it being admitted that plaintiff is receiver, etc., and the suit properly brought, plaintiff rested its case. The defense introduced as a witness F. H. Siebold, who was cashier of the bank at the time that the note was given, who testified, in effect: That the note came into the bank January 7, 1892. That at the time Dane was president and director of the bank. That he never saw the note made. That, on the books of the bank, bills receivable was charged with \$6,000, and the number 1,032, standing for acceptance of \$20,000 given by Masterson on Huller, was credited with \$10,500, being \$6,000, amount of this note, and another item of \$4,500. The acceptance was entered on the books October 5, 1891, and, being \$10,000 over the limit that the bank (being capitalized for \$100,000) could loan to any one individually, Dane had to reduce this overlimit paper because the bank examiner was expected along very soon. This \$6,000 was given as part payment to reduce this overlimit paper. "Q. Was it credited on the \$20,000 acceptance in any way? A. Yes, sir. On one account." This acceptance was drawn by Masterson, accepted by Huller, and used by Masterson as collateral security. Dane took the collateral security, put it in bills receivable on or about October 5, 1891, as his individual paper, and got from the bank the value of \$20,000 for the acceptance. The following question and answer was asked and given: "Q. The \$6,000 note, then, was used by Mr. Dane to reduce his personal liability on the \$20,000 acceptance to the bank? A. Yes, sir." Plaintiff moved to strike out the testimony as to the fact of Dane using this money personally, which was sustained, and exception taken, but the testimony was allowed to stand "as to the consideration for the note" and "as to the proceeds of the note." It is difficult to gather from the testimony whether the witness meant to say

the acceptance which was given as collateral security, which was reduced by the \$8,000 note, or whether the indebtedness of Dane, which purported to be reduced by the acceptance, was so reduced; but it is taken that the indebtedness was reduced, as the collateral did not belong to the bank, and would not have been reduced if it had. These questions were asked: "Q. In the regular course of business in the Deming Bank at the time you were cashier, who attended to the discounting paper? A. Mr. Dane. Q. That bank had a discount committee, didn't it? A. Yes, sir. Q. How many members? A. Three. Q. Directors? A. Three directors. Q. Under the by-laws of the bank, whose duty was it to pass on the discounted notes, loans, etc.? A. The discount committee. Q. Who actually acted? A. Mr. Dane. Q. Did you have anything to do with the discount of any notes? A. No, sir. Mr. Dane had an account with the bank as treasurer of defendant company, and checked against it from time to time. Q. Did Mr. Dane, as treasurer, execute or discount in your bank, the First National Bank of Deming, a note of the Oak Grove & Sierra Verde Cattle Company, previous to this?" This question being objected to as incompetent, immaterial, and irrelevant, objection was sustained, and exception noted. The witness stated that no consideration passed out of the bank for the note. Other testimony was offered by the defendant as to by-laws, but was ruled out, and the court instructed the jury to find a verdict for amount of note, interest, and attorney's fees. Motion for new trial being made and overruled, the case is here by writ of error.

G. D. Bantz and A. A. Jones, for plaintiff in error. H. B. Fergusson, for defendant in error.

COLLIER, J. (after stating the facts). The assignments of error which will be noticed in this opinion are that the court below erred in striking out the second, third, and fourth pleas; in admitting in evidence the promissory note upon which the action was founded; in excluding legal and competent evidence; and in instructing the jury to find for the plaintiff.

In considering the question of striking out the pleas, we will take it that the first plea was regarded by the court and counsel at the trial as not being in the case, and that of the four other pleas the three last were stricken out by the court, thus leaving what the counsel for the defendant in the court below, plaintiff in error here, denominated "sworn plea of the general issue." The question of striking out the third and fourth pleas is perhaps easily disposed of by saying that, as these pleas merely set up want of consideration, evidence as to that may be given under the general issue.

The second plea, which denies that the defendant either executed the note sued on

or authorized any person to execute it in its behalf, and is verified by the affidavit of the president of the defendant company, was stricken out upon the ground that such a plea was only applicable to instruments under seal. This question requires a more extended consideration. The particular ground stated in the motion for striking out the second plea is that such plea is applicable only to actions upon instruments under seal; and this, we think, was so decided in *Luna v. Mohr*, 3 N. M. 60, 1 Pac. 860. It cannot be gathered from the opinion in that case whether section 1922, enacted in 1882, was in force at the time of the filing of the plea of non est factum, but there is not in the opinion any reference whatever to said section. Section 1922 enables either party, plaintiff or defendant, to take as admitted by the other party the genuineness and due execution of any written instrument referred to in a pleading, where it or a copy is incorporated in or attached to such pleading, unless in another pleading or writing filed in the cause the opposite party denies the same under oath. If, under the rules of evidence, "genuineness and due execution" would have to be proven as to the particular written instrument referred to and attached to the pleading, this necessity would be obviated by there not being a denial of the same under oath. If, however, under the rules of evidence, "genuineness and due execution" is not necessary to be proven before the instrument can be admitted in evidence, a denial under oath could not impose a condition of admissibility that did not before exist. For example, if an action is brought upon a promissory note purporting to be signed by the defendant, a denial under oath of the genuineness and due execution would not take the place of section 1914, Comp. Laws, which provides: "When any party to a suit, either as principal or security, or indorser, founded on any written instrument, covenant or agreement whatever, shall deny his signature, he shall do the same under oath." The denial referred to in section 1922 would be merely inapplicable in that kind of a case, so far as genuineness and due execution are concerned. Was it applicable, however, in the case at bar, for this purpose? The note sued on purported to be the obligation of an artificial person, a corporation, executed by its officer, having requisite authority. As such, plaintiff brought suit upon it. He must be held to have averred the genuineness and due execution of that note, and, inasmuch as there is annexed to the declaration what purports to be a copy of the note itself, such genuineness and due execution could be taken as admitted, unless denied under oath. This would be as much the case as if Richard Roe were sued upon a promissory note signed "Richard Roe, per John Jones, agent"; and neither case might be met by a denial of making signature. We hold, therefore, that the second plea, being

sworn to, constituted a denial under oath, contemplated by section 1922, and the court erred in sustaining the motion to strike the same out. We do not hold that a plea was strictly necessary, but think that the statute would be satisfied by an affidavit denying genuineness and due execution, its office being merely to prevent an admission of genuineness and due execution arising. The denial may be "in a pleading or writing filed in the cause." Any mode is sufficient, so that the denial is under oath. Is this reversible error?

This inquiry involves at least two considerations. If the treasurer, who signed the note, is not such officer of a corporation as makes his signing a promissory note presumptively or prima facie the act of the corporation, then the burden of showing that he acted with authority is upon the plaintiff. If a treasurer of a corporation is such an officer as is vested with implied power to make negotiable paper in its name, then the burden is on the defendant to show the want of such authority in a particular case; and the denial under oath required by section 1922 merely leaves the parties to make out their case under the ordinary rules of evidence. In *Fifth Ward Sav. Bank v. First Nat. Bank* (N. J. Err. & App.) 7 Atl. 318, it is held that a treasurer of a savings bank had no authority or power *virtute officii* to borrow money for the savings bank and give its notes or pledge its security in payment. It is also stated in *Daniel, Neg. Inst.* § 394, citing *Torrey v. Association*, 5 Allen, 327, that the treasurer of a corporation is not such an officer as is vested with implied power to make negotiable paper in its name. In *Re Great Western Tel. Co.*, 5 Biss. 363, Fed. Cas. No. 5,739, it is stated that usage may authorize the treasurer of a corporation to bind it by a promissory note, plainly implying that otherwise he could not. This also we understand to be the rule laid down by *Mor. Priv. Corp.* § 251, and that such principle is well established. In *Craft v. Railroad Co.*, 150 Mass. 207, 22 N. E. 920, it is stated that, whatever may be true of trading corporations, there is nothing in the nature of the business of a horse-railroad corporation, or of the duties of a treasurer of such a corporation, which implies that the treasurer, by virtue of his office, has authority to borrow money for the company, or give its notes therefor. By reference to *Monument Nat. Bank v. Globe Works*, 101 Mass. 67, we find that by statute in Massachusetts the treasurer or manager of a trading corporation may bind the company to the payment of promissory notes made in pursuance of the business of the company. We hold, therefore, that, with the second plea in the case, it would have devolved upon the plaintiff in the court below to show authority in C. H. Dane, treasurer, to execute the note sued on, as a condition precedent to recovery. At the time the note was offered, ob-

jection was made to its admissibility upon the ground that under the sworn plea of the general issue its execution must be first proven. We do not think that "a sworn plea of general issue" is such denial as is required by section 1922, and that, as the case then stood, the objection was properly overruled. The objection would have been good, however, if predicated upon the second plea, which we hold to have been improperly stricken out.

It is contended, however, that, inasmuch as the testimony put in by the defense showed authority in the treasurer to execute the note sued upon, the striking out of the second plea was without prejudice to defendant, and the judgment should be affirmed. We have examined the record carefully as to this, and the only thing we find upon the subject which may be supposed to touch the question is as follows: "Q. At the time the note was received in the bank, had you or not any knowledge in your official capacity as cashier, derived in the course of your official duties, with regard to Mr. Dane's authority to sign the name of the defendant to that note? A. Mr. Dane told me he was treasurer of the company, and he had an Oak Grove & Sierra Verde Cattle Company account, and he was drawing checks from time to time against that account as treasurer. That is all I know about it. Q. You know nothing about this note or the authority? A. No, sir; I do not. I suppose he was treasurer of the company. Q. Did Mr. Dane, as treasurer, ever execute or discount in your bank, the First National Bank of Deming, a note of this kind, a note of the Oak Grove & Sierra Verde Cattle Company, previous to this?" This last question was ruled out as incompetent, irrelevant, and immaterial. It can scarcely be contended that the drawing of checks by the treasurer against money of a corporation establishes, or even tends to establish, a usage as to the giving of promissory notes of the corporation. It is no different to draw a check upon a bank where corporation funds are deposited, in payment of its bills, than for him to keep the money in the corporation's safe and pay it out on proper demand. Under the theory upon which the case was tried in the court below, this question was competent, material, and relevant. Such testimony would not have been competent against an innocent holder for value, who received the note of a corporation executed by an officer with prima facie authority, such as a cashier in indorsing the commercial paper of his bank. See *West St. Louis Savings Bank v. Shawnee Bank*, 95 U. S. 559. In the case at bar we think, however, that, even if the treasurer stood as an officer prima facie authorized to execute the note sued upon, the question ruled out would have been competent evidence as a circumstance taken with the others that were shown. Thus it was shown that Dane was president of the bank at the time that he executed the note of the

cattle company; that without a dollar's cash passing from the bank to him as treasurer, or to the cattle company, he credited his individual account, and charged the cattle company account on the books of the bank; and that, as president of the bank, he attended to the discounting of paper, and, notwithstanding there was a discount committee, Dane actually acted. Under these circumstances the jury should have had the benefit of proof that this note was the first attempted exercise of authority by the treasurer of the cattle company to discount its note.

As this case is to go back for a new trial because of the error in striking this second plea out, and in effect holding that Dane, as treasurer, had prima facie authority to execute the note sued upon, we will express our views upon other questions for the court's guidance upon a retrial. We think that the evidence in the case establishes that the bank was not a holder for value without notice, if, indeed, it was a holder for value at all. In *Bank v. Blake*, 60 Fed. 78, the plaintiff bank sued upon a promissory note, negotiable in form, due one year after date, and transferred for value before maturity. The defendant pleaded that the note was part of a contract relating to real estate, and the consideration of its giving was the promise of N. A. Cornish to protect certain real estate from incumbrance thereon, that he failed to do, and defendant became entitled to a surrender of the note. It was further alleged that at the time of the transfer of the note Cornish was the president and general manager of plaintiff bank. A demurrer to the plea was overruled, the court saying: "Upon these facts, is the plaintiff a bona fide holder of the note sued on? It is claimed for the demurrer that the knowledge which Cornish had cannot be imputed to the bank, because he acted for himself in the transaction; that his interest was opposed to that of the bank, and that, therefore, there is no presumption of a communication by him against his own interests, but that the presumption is the other way,—that he concealed the knowledge he had of the infirmity of his own title. A large number of cases are cited in support of this view, and it is well settled that an officer or agent, dealing with a corporation or his principal on his own account, is not presumed to communicate knowledge which it would be his interest to conceal, and the corporation or principal is not chargeable with such knowledge. But there is no room for the application of this principal where the agent is the sole representative of both parties in the transaction." On that case the inference was merely drawn that Cornish was the sole representative of both parties, because it was stipulated that he was president and general manager, and as such was duly authorized to discount notes, and generally to act for plaintiff in such matters. In this case the proof shows that Dane alone attended to the discounting

of notes, performing all the duties of the discount committee. In that case actual value was paid by the bank to the payee of the note. In this case it merely appears that there was a book entry. Numerous cases are cited in the opinion in *Bank v. Blake*, supra, some of which are found in the brief of plaintiff in error. We think the view enunciated in that case should apply to this. If it should be shown upon another trial that Dane was not the sole representative of both parties in this transaction, we think it will also be necessary to show that this treasurer acted with authority, either expressly granted or implied from usage or a long course of dealings; that the officers of the bank, other than Dane, had no knowledge of its being, if it was, a personal transaction of Dane's, and that the bank gave value for the note. Inasmuch as the receiver, under the rulings of the court, was not called on to make any such proof, and should be given such opportunity, we reverse the judgment of the court below, and remand the case for a new trial, with directions to reinstate the defendant's second plea; and this is accordingly done.

SMITH, C. J., approves the conclusion.
LAUGHLIN, J., concurs.

(7 N.M. 678)
DE CORDOVA et al. v. KORTE et al.
(Supreme Court of New Mexico. Aug. 24,
1895.)

REFERENCE—CONSENT—MODIFYING FINDINGS OF
FACT—PAROL EVIDENCE.

1. Where there is no objection to a reference by the court of all the issues in a suit to a master, consent of all parties to such reference will be presumed.

2. It is reversible error for the district court, acting solely on a master's report, to set aside or modify findings of fact by the master on conflicting evidence, unless there was clearly error in such findings.

3. Parol evidence is admissible to show that the name of an individual, used as grantee in a deed, was a partnership name.

Appeal from district court, San Miguel county; before Justice O'Brien.

Bill by Doloritas Martin de Cordova and others against Henry Korte and others. From a decree dismissing the bill, plaintiffs appeal. Reversed.

T. B. Catron and J. D. W. Veeder, for appellants. Long & Fort, for appellees.

BANTZ, J. This is a suit in chancery brought by Doloritas Martin de Cordova and others, as the natural heirs of Frederick Metzger, against Henry Korte. After the issues were made up, Henry Korte died, and the cause was revived against his heirs and representatives. The bill, briefly stated, avers that Metzger died in Mora county in 1885, possessed of a large real and personal estate, consisting of merchandise, cattle,

horses, ranches, and farms; that Metzger, at the time of his death, was in partnership with Korte, under the name of Henry Korte; and that Metzger had made conveyances of all of his property to Korte, which were really intended for the use of the partnership conducted under the name of Henry Korte, and had contributed \$100,000 to the firm, which was indebted to him in that sum at the time of his death. The bill further avers that Korte took out letters of administration upon Metzger's estate, and falsely and fraudulently inventoried the property as of the value of only \$180, and that he had refused to account for the balance. It is also alleged that complainants are the children of Metzger, an unmarried man, and of one Viviana Martin, an unmarried woman, and that Metzger left surviving him no other natural children or descendants. A discovery and accounting are prayed, and that the property of the firm, held in the name of Henry Korte, to which Metzger's heirs would be entitled, be decreed to complainants, and for general relief. The defendants' answer denied all of the material allegations of the bill, and alleged that Metzger left surviving him one Juana, the wife of Korte, a natural child of Metzger, by whom she had been adopted. The court below, without objection from either side, referred the whole case to a master, to take testimony and report his findings of fact and conclusions of law. A large amount of testimony was taken, and a great many witnesses were examined by the parties. The principal question of fact seems to have been in regard to certain conveyances made in June, 1873, by Metzger to Henry Korte, covering all of his visible property, real and personal, the consideration of which, as named, was \$18,330 in money and \$2,300 in book accounts. The complainants introduced a number of old and intimate neighbors and business acquaintances, who testified that, after these conveyances, Korte and Metzger, in the presence of each other, repeatedly said that they were in business together, as partners in equal shares, under the name of Henry Korte, and that both of them seemed to have control and direction of the business, as such partners. One of the witnesses introduced by the defendants, who was a subscribing witness to the deeds, testified that, when the deeds were delivered, Metzger said to Korte: "Henry, here is your papers. Hand me my money." This occurred in the store, and there was a little room adjoining, into which Korte went, and brought out a hat box which contained bundles of money, each having around it a white paper band, whereon was marked the amount of the contents. They looked over the figures on the bundles, and then Metzger told Korte to take the money and put it away again; and Korte took the money, and put it back in the place where he got it

from. On the part of the defendants, witnesses were introduced to show that Metzger ceased all control of the store and other property after the conveyances, and had repeatedly said that he had sold out to Korte, and a receipt for the consideration named was also shown in evidence. The answer avers that Metzger intended to go to Europe, and had sold out to Korte with that expectation, but that he afterwards reconsidered his visit to Europe, and, being much attached to his daughter, Korte's wife, continued to live with her until his death. The master found that Korte had not in reality paid Metzger anything for the property, and that, in truth and in fact, Metzger and Korte were partners after the conveyances. The master expressly found that it was not the purpose of Metzger to disinherit his children, the complainants, and he recommended a decree in their favor. The defendants filed exceptions to the report of the master, and the court below sustained the exceptions, and entered a decree for the defendants, dismissing the bill; and this cause was brought here by appeal.

1. The findings of the master were upon disputed questions of fact, and were reached after weighing the conflicting testimony of a large number of witnesses. He had many opportunities afforded, by observation, for judging of the intelligence, character, and credit of the witnesses, which could not be obtained from the dry transcript of the testimony. The court below had, in the nature of things, no better facilities for weighing and judging that testimony correctly than an appellate court would have. It is not within the general province of a master to pass upon all the issues in an equity case, and it has been said that it is not competent for the court to refer the entire decision of the case to him, without the consent of the parties. *Kimberly v. Arms*, 129 U. S. 517, 9 Sup. Ct. 355. In the case at bar the court referred all of the issues to the master, without objection, and the parties united in executing the order. Consent is to be presumed where there is no objection. In *Medsker v. Bonebrake*, 108 U. S. 69, 2 Sup. Ct. 351, the bill was filed to set aside a deed to the debtor's wife, on the ground of fraud upon his creditors, and the issues were referred to a master without objection. The master found the issues for the defendants, but the circuit court overruled the master on the facts, and entered a decree for complainants. On appeal to the supreme court the lower court was reversed, and Mr. Justice Miller remarked: "The evidence taken by the master was reported with his findings, and the case seems to have been treated by the court below without much regard to the finding of facts by the master, or any special regard to the exceptions made to his report. This is not correct practice in chancery in the circuit courts of the United States, whatever may be the rule in the state courts.

The findings of the master were prima facie correct." In *Kimberly v. Arms*, 129 U. S. 517, 9 Sup. Ct. 355, the rule is laid down that the report of a master upon disputed questions of fact should be treated "as so far correct and binding as not to be disturbed unless clearly in conflict with the weight of the evidence upon which they are made." And in *Tilghman v. Proctor*, 125 U. S. 149, 8 Sup. Ct. 804, Mr. Justice Gray says: "In dealing with these exceptions, the conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part." See, also, *Davis v. Schwartz*, 155 U. S. 633, 15 Sup. Ct. 237; *Trow v. Berry*, 113 Mass. 146; *Howe v. Russell*, 36 Me. 127; *In re Murray*, 13 Fed. 551; *Greene v. Bishop*, 1 Cliff. 186, Fed. Cas. No. 5,763. The decisions on this subject by the supreme court of the United States are specially pertinent, in view of section 522, Comp. Laws. If the rule in regard to the effect of a master's finding of facts were otherwise, the service of the master, now so generally employed to pass upon all the issues of fact, would be of little aid to the administration of justice. *Mason v. Crosby*, 3 Woodb. & M. 269, Fed. Cas. No. 9,236. If the findings of the master had been based upon illegal testimony, or he had misapplied the law to the facts, in drawing his conclusions as to them, there would undoubtedly have been good ground for setting his findings aside. *Troy Iron & N. Factory v. Corning*, 6 Blatchf. 332, Fed. Cas. No. 14,196. But no exception was filed upon such ground, and none was urged here. It has been urged that the presumptions in favor of a master's report apply only in the court below, and upon appeal from the district court the presumption is in favor of that court's action. In *Howard v. Scott*, 50 Vt. 52, the court says, "Neither the court of chancery, nor the supreme court on appeal, will review the findings in regard to the weight to be given to the testimony." And in *Medsker v. Bonebraker*, *Tilghman v. Proctor*, and *Kimberly v. Arms*, the supreme court reversed the court below for overruling the master's finding of fact. The court below had, as we have, a mere dry transcript of testimony upon which to base conclusions of fact. It will be unnecessary to determine whether the findings of fact by a master, which have some evidence to sustain them, will be treated as unassailable in all respects as the verdict of a jury. It will be sufficient to say in this case that the findings of fact by a master, which depend upon the weight of conflicting testimony, have every presumption of correctness in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part, and that a disregard of this rule by the district court, acting solely

on the master's report, and without any new testimony, is reversible error.

2. If this case had been one depending upon proof of an oral agreement, made at the time of the conveyance, to take and hold the real property conveyed by Metzger to Korte in trust for Metzger, it would seem that the statute of frauds would have been an insuperable bar, as such an express trust must have been manifested or proved by writing, although it need not have been so created and declared. 1 *Perry, Trusts*, § 79; *Movan v. Hays*, 1 Johns. Ch. 341. And the same result would probably have occurred, had the complainants' right depended merely upon proof that the consideration mentioned in the deeds had not in fact been paid by Korte to Metzger. Evidence will be received to contradict the recitals in the deed as to the consideration paid, in order to establish a debt from the grantee to the grantor, but not for the purpose of defeating the operation of the conveyance, or creating a resulting trust. To allow parol evidence for such a purpose would be to break in upon the express provisions of the statute of frauds. 1 *Perry, Trusts*, § 162. But in this case the bill, the proofs, and the findings of the master proceed upon the theory, and the point to which the evidence mainly directed was, that the name of Henry Korte was used in this matter as a firm name by the partnership composed of Metzger and Korte; and it was therefore a simple question of identity, and not a case of express trust, depending upon oral proofs, or a case of resulting trust, depending upon the nonpayment of the consideration named in the deed. And, indeed, that seems to have been the view of the learned solicitors for the defendants, as no point was raised upon either such ground. The absence of actual consideration was a fact to be weighed in connection with other testimony upon this subject as equity naturally looks with suspicion upon conveyances made to strangers without consideration. *Id.* The name of one of the partners may be used as a firm name. Though a presumption may arise that it was a personal transaction, yet the proofs may show it to be one of partnership. *Bank v. Monteath*, 1 Denio, 404; *Winship v. Bank*, 5 Pet. 529.

It appearing from the report of the master that the facts were with the complainants as to the ownership by the firm of the property held by Henry Korte, and the complainants, being the heirs of Metzger, became vested with his interest, it is therefore ordered that the cause be reversed and remanded, with directions to the district court to enter a decree in conformity with the findings and recommendations of the master, and for such further proceeding therein as the nature of the case may require.

SMITH, C. J., and COLLIER, HAMILTON, and LAUGHLIN, JJ., concur.

(7 N.M. 666)

PEREA v. HARRISON et al.

(Supreme Court of New Mexico. Aug. 24, 1895.)

CROSS BILL—NEW PARTIES—GUARDIAN AND WARD—RIGHT TO ESTATE ON WARD'S DEATH—WITHOLDING ASSETS OF DECEDENT'S ESTATE—PERSONAL LIABILITY—COSTS—RIGHT OF COURT TO TAX—APPEAL—NEW QUESTION.

1. Where, in an action by an administrator against a person holding a fund belonging to the estate and the heirs of decedent for the distribution of the fund, it appears that there is in the hands of such person a fund ready for distribution, a demurrer to his cross bill, alleging that plaintiff, as administrator of decedent's father, had misappropriated moneys belonging to decedent, and asking that plaintiff be required to account therefor, was properly sustained, it appearing that its consideration would require the bringing in of new parties, and that a suit was pending for the accounting asked for.

2. Where, at the time of a ward's death, the guardian has no claim against the funds in his hands, and the estate is ready for distribution, and the guardian, with another, is appointed administrator of the ward's estate, they, as such administrators, become immediately vested with the control of the estate, though there has been no final accounting by the guardian.

3. Where, on the death of a wife who was an administratrix with another, her husband took possession of the funds of the estate, to the exclusion of the other administrator, with full knowledge of their trust character, and held them for three months before he was appointed his wife's administrator, and deposited them to his own credit, and, to recover them, the other administrator had to sue him, it was proper, in rendering a decree for their distribution, that it should be against him personally, and not as administrator of his wife's estate, though he was sued as administrator as well as individually.

4. In an action where the costs are chargeable against a fund, the court may fix the amount thereof on its own knowledge, without taking evidence of the value of counsel's services.

5. A party having in the trial court claimed to hold a fund as guardian cannot, it being decided that he held it as administrator, claim administrator's fees for the first time on appeal.

Appeal from district court, Bernalillo county; before Justice Lee.

Bill by Pedro Perea, administrator of the estate of José Leandro Perea, against George W. Harrison and others for the distribution of a fund held by defendant Harrison. From a decree for plaintiff, defendant Harrison appeals. Decree modified.

W. B. Childers and E. A. Fiske, for appellant. Neill B. Field, for appellee.

SMITH, C. J. This is a bill in equity filed in the district court of Bernalillo county to obtain the distribution of the estate of José Leandro Perea, 2d, deceased, an infant, who at the time of his death was about eight years of age. The bill was filed by Pedro Perea, as sole surviving administrator, and also as one of the heirs at law of the decedent, against George W. Harrison, as an individual, and as administrator of his deceased wife, Guadalupe P. Harrison; all the other heirs at law of the decedent being also made parties defendant, and the prayer of v.41P.no.5—34

the bill being "that a final decree may be entered for a settlement of the said estate, and the distribution thereof, and that the complainant, as surviving administrator, be decreed his reasonable expenses, including solicitors' fees, against said George W. Harrison, individually and as administrator as aforesaid, in and about this suit," and for equitable relief. The facts of the case, as disclosed by the record, are that José Leandro Perea, a wealthy citizen of Bernalillo county, died in 1883, leaving a widow and 13 children, of whom the decedent was one; that each of the said children inherited about \$35,000 at the death of the elder Perea. His widow, Guadalupe Perea, was appointed guardian of the infant child, José Leandro, 2d, and as such received from the administrators of the father the estate of said child. Said Guadalupe Perea, widow as aforesaid, intermarried with the defendant George W. Harrison, and he thereupon took entire charge of her affairs, and notified the administrators of her former husband that when they had any business to transact with her they should communicate with him, as he was the one who attended to all business. This child, José Leandro Perea, 2d, died on the 27th day of August, 1887, and Guadalupe Perea, the then wife of the defendant George W. Harrison, and the complainant, Pedro Perea, were appointed by the probate court of said county administrators of his estate. Mrs. Harrison insisted that, notwithstanding the death of said child, she held his estate as guardian until the final settlement of her accounts as such, and that no part of the same could be turned over to the administrators until such final settlement. The defendant George W. Harrison made for her all reports as guardian, the first report being made in the life of the child, on July 6, 1886. It consisted of three items of debit against the guardian, amounting to \$18,003.09, and stated that the money was in a safe place, and "the interest well pays the expenses of said minor." No credits were claimed in this report, nor was there any charge against the guardian as to many items shown by the record then to have been in her hands. The second report of the guardian, filed on November 7, 1887, more than two months after the death of the child, was denominated by said Harrison, acting in behalf of his said wife, "A final report," and contained debit charges against the guardian amounting to \$25,190.20. No credits were claimed in this report. The third report was filed on the 6th day of March, 1888, and contained debit items amounting to \$26,977.44, and claimed credits amounting to \$9,306.83, showing an alleged balance of \$17,670.61. This last report was excepted to in the probate court, the exceptions were sustained, and the guardian appealed from the judgment to the district court, but did not perfect her appeal until after the filing of this bill of complaint. This record is silent as to the result of that

appeal; but the bill alleges that it was taken at the March, 1888, term of the probate court, and remained imperfect at the time of the filing of this suit, on the 3d day of April, 1890. Mrs. Harrison died on the 20th day of October, 1889, and her husband was appointed her administrator on January 6, 1890. Between the time of her death and his qualification as her administrator, the defendant George W. Harrison on December 17, 1889, wrote a letter to N. C. Collier, Esq., one of the attorneys for complainant, in which he said: "My Dear Sir: In answer to yours of the 16th, my wife never had possession of any of the effects of the estate of José L. Perea, 2d, as administratrix, but as the guardian; and, by Pedro Perea's action, the matter of the settlement of the guardianship is in the district court, and Pedro Perea will have to wait a good while before he gets possession of any of said estate, and will probably learn who he is fooling with before he gets through with me." When this bill of complaint was filed the defendant Harrison demurred to the same, assigning 10 grounds of demurrer, only one of which it is necessary to notice: "Because the said complainant, as the co-administrator of defendant's intestate, seeks by said bill to administer the estate of José L. Perea, 2d, alone, and to the exclusion of defendant, who is entitled to participate in such administration as the administrator of the complainant's coadministrator." This demurrer being overruled, he answered the bill, in double capacity of an individual and as administrator, by a joint and several answer, in which it was insisted that no assets of the estate of José L. Perea, 2d, ever came into the hands of Mrs. Harrison as administratrix,—that she held the same as guardian up to the time of her death,—but alleged that he and the defendant Grover William Harrison, a minor child of himself and his deceased wife, have succeeded to all the interest and rights of said Guadalupe Perea in and to the assets of said estate, and that for said reason the complainant is not entitled to a decree for anything upon said accounting, but defendant alleges that "he is ready and willing to pay any sum for which he or the estate of Guadalupe Perea de Harrison may be found liable on said accounting." The answer also alleged that the complainant was one of the administrators of José L. Perea the elder, and that as such he failed to account for a large sum of money, alleged to be \$30,000, due and owing to the said José L. Perea, 2d, from the estate of his deceased father, and that large sums of money and large amounts of property had come into the hands of complainant, as one of the administrators of said deceased father, of which no account had been made by him, and that the pro rata share of said child, José L. Perea, 2d, in the assets so unaccounted for, would amount to \$30,000. He also filed a cross bill, in which he set up these allegations more in detail, and made

all the administrators of the elder Perea parties defendant, and prayed an accounting as to that estate. It appeared from the allegations of this cross bill that there was a suit then pending in the same court, brought by defendant Harrison against the administrators and heirs at law of the elder Perea, for the same relief as that sought by the cross bill in this cause. The complainant in this cause excepted to so much of the answer as set up matters relating to the estate of the elder Perea, upon the ground of impertinence, and demurred to the cross bill for the reason that the matters alleged therein were not germane to this action, and that it sought to make new parties, and was multifarious. The exceptions to the answer were sustained. And, while there is no order in the record to that effect, it is conceded by counsel on both sides that the demurrer also was sustained, and the cross bill dismissed in the court below; that it was so treated by the parties in said court; and it is contended here that this court should so treat it, and pass upon the question as if the record showed the order sustaining the demurrer and dismissing the cross bill. To this proposition we give our assent; and we shall proceed to determine whether or not there was any error in sustaining the exceptions and demurrer and dismissing the cross bill.

If the court below was of opinion that the matters set up in the answer were immaterial, and tended only to embarrass the litigation, it properly sustained the exceptions. There was a large amount of money ready for distribution among the heirs of the decedent minor child, and that there might be a further large sum recovered at some future time was not a sufficient reason to delay distribution of that which was ready for distribution. Story, Eq. Pl. § 863. It is not the office of a cross bill to bring new parties before the court, and, besides, the matters set up in the cross bill are not germane to the subject-matter of the original bill. The demurrer was, therefore, properly sustained. Id. § 389; Shields v. Barrow, 17 How. 130.

The contention advanced that, subsequent to the death of the decedent child, his estate remained in the hands of Guadalupe Perea de Harrison, as guardian, and did not pass to her as administratrix, cannot be conceded. The report of said guardian, made during the life of said child, revealed an estate immediately ready for distribution at the death of said child, and the report made by her subsequent to his death disclosed that the same was still intact, and had increased more than \$7,000. We hold that by operation of law the administratrix, who succeeded herself as guardian, became immediately (in conjunction with her coadministrator) vested with the control and administration of said estate, and that this transfer by law was not arrested by the fact that there may have been no final settlement of her guardianship. It is to be observed, however, that

this report was filed as "a final report," and it was an announcement that the estate (no credits being claimed against it by the guardian) was ready for delivery. The case went to a master, who found all the material facts in favor of complainant, and said master stated an account more favorable to the defendant than the facts justified; but we will not disturb his findings, abundantly sustained by the evidence and the rules of law applicable to such cases. *Dillman v. Hastings*, 144 U. S. 136, 12 Sup. Ct. 662; *Wormley v. Wormley*, 8 Wheat. 21; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237.

Complaint is made that the decree in this case was against the defendant personally, and not as administrator. The evidence establishes that for the period of time which elapsed between the death of his wife and defendant's qualification as her administrator, nearly three months, defendant was in possession of the assets of the estate, with full knowledge of its trust character, and without the shadow of right to hold them, claiming them for reasons plainly insufficient in law, and tauntingly asserting his intention to retain them. It is also to be noted that the record does not show that, as administrator of his deceased wife, he ever charged himself with one dollar of these assets, or that they entered into the inventory of her estate, or that they were ever treated by him as a portion of his said wife's estate. It is also shown by his own testimony that he continues in possession of such assets, and that they are deposited in the bank to his credit. Having appropriated them individually, he is estopped to deny his individual liability. We therefore hold that the facts are complete to establish a case for a decree against him as an individual. 1 Perry, Trusts, §§ 129, 217; 2 Perry, Trusts, § 828.

It was earnestly contended by counsel for appellant that the allowance for solicitors' fees without evidence as to the value of the services performed is unwarranted and illegal. We think, however, that the authorities abundantly support the practice followed in this case of charging these fees against the fund, upon the knowledge of the court and the master as to what is just compensation. Some of these authorities are cited in the brief of counsel for appellee. *Ex parte Plitt*, 2 Wall. Jr. 453, Fed. Cas. No. 11,228; *Trustees v. Greenough*, 105 U. S. 532; *Fowler v. Equitable Trust Co.*, 141 U. S. 415, 12 Sup. Ct. 8. Nevertheless it appears that the solicitors' fee for the complainant, considering the amount involved, is large. We have also determined that we should reduce the master's fee in this case to the sum of \$500. And we direct that the solicitors for complainant be allowed a fee of 10 per cent. upon the total amount found in the hands of the defendant, with interest at 6 per cent., calculated to this date. We find that the commissions of the administrator are in accordance with the statute, and the amount

of the same will be calculated as in the decree appealed from.

As to the claim that Mrs. Harrison is entitled to share these commissions, it is sufficient to say that both she in her lifetime, and the defendant Harrison then and after her death, always insisted that she never held the funds as administratrix, and denied participation in their control as coadministrator for said reason, and no claim for such commissions was ever made until after the case came into this court. It is therefore too late to assert the same, even if it were well founded. *Lloyd v. Preston*, 146 U. S. 630, 13 Sup. Ct. 131; *San Pedro & Canon del Agua Co. v. U. S.*, 146 U. S. 120, 13 Sup. Ct. 94. We therefore direct that a decree be prepared in accordance with this opinion, and entered as the decree of this court, against the appellant and the sureties on his appeal bond, and that all costs of both courts, including master's and solicitors' fees, be paid out of the fund in appellant's hands, and the remainder, less administrator's commissions, be distributed by said decree.

LAUGHLIN, J., concurs.

(8 N.M. 1)

SALAZAR et al. v. TERRITORY.

(Supreme Court of New Mexico. Aug. 24, 1895.)

ACTION ON COUNTY TREASURER'S BOND—CONCLUSIVENESS OF REPORT TO COMMISSIONERS.

In an action on a county treasurer's bond, given for his second term, a report by him, as to funds in his hands, made during the second term, and approved by the county commissioners, is not conclusive on defendants, so as to preclude them from showing that the default occurred during his first term.

Error to district court, Lincoln county; before Justice A. A. Freeman.

Action by the territory of New Mexico against Scipio Salazar and others on a county treasurer's bond. Judgment was rendered for plaintiff, and defendants bring error. Reversed.

H. B. Fergusson and John Y. Hewitt, for plaintiffs in error. E. L. Bartlett, for the Territory.

BANTZ, J. This is an action against the principal and sureties, brought on the official bond of Scipio Salazar, former treasurer of Lincoln county. Salazar served one full term and about half of the second term. At the trial the plaintiff below introduced a report made by Salazar, as treasurer, to the board of county commissioners, in which he reported that he had in his custody, as treasurer, the sum of \$13,069.83. This report was made during his second term. On the same day the board approved it, and thereupon he tendered his resignation, which was accepted "with regrets." But he was unable to turn over a large portion of the money reported. The

bond sued on was given at the beginning of the second term, and before the report was filed. There was no evidence of any report made by Salazar to the board prior to that time, or at the conclusion of his first term; nor was there any evidence of any settlement between him and the board at the conclusion of his first term, ascertaining the amount on hand. The sureties attempted to introduce testimony as to the condition of the treasurer's account during his first term, showing debits and credits, and offered to prove that he was in arrear during his first term, and did not have any money, as treasurer, at the conclusion of that term. The court below rejected the testimony so tendered, and a verdict and judgment was rendered against the defendants, who have brought this case here on writ of error.

If the fact be that the treasurer was a defaulter during his first term, and not during his second term, it is conceded that the bond sued on would not ordinarily be liable; but it is urged that the report made by the principal, and its approval by the board, estopped the sureties from showing that the default occurred during the first term. The report was made and approved on the day Salazar resigned, and this action was brought almost immediately afterwards. There was therefore, manifestly, no estoppel in pais. If the sureties are precluded from showing when the default actually occurred, it arises either because the recorded proceedings of the board imported the conclusive verity of a judgment roll of a common law court, or because the report and its approval became a contract. But even a judgment would not be conclusive upon sureties who were not parties, and who had no opportunity to defend; and a contract between the principal and the board, fixing the debt, would not be within the condition of the bond, conditioned, as it was, for the faithful discharge of certain duties. If, in reporting that he had on hand \$13,068.83, the treasurer reported an untruth, it would have been a technical breach of his bond, but no actual loss would have been suffered from the untrue statement. The damage would be merely nominal. Moreover, no breach was assigned for failing to make true report, but the breach charged was the refusal to pay over the balance reported to the board and found by it to be correct. The pleader has treated the report and its approval as, not the mere evidence of liability, but as the things to be proved, and as in some way conclusive. Upon this point the cases of *Roper v. Sangamon Lodge*, 91 Ill. 521; *Morley v. Town of Metamora*, 78 Ill. 304; *City of Chicago v. Gage*, 95 Ill. 593; and *Territory v. Cook* (Ariz.) 17 Pac. 10,—are not pertinent. In these cases the bonds were made at the commencement of the second term, after an accounting, and an ascertainment of the amount in the hands of the principal at the conclusion of the first term; and it was either held that the sureties could not dispute

the amount which had been ascertained when their obligation was entered into, or that such official reports formed the basis of the fiscal concerns and financial policy of the municipal government, so that great public injury would result if they were subject to falsification after they had entered into governmental action. Neither of these reasons applies to the facts of this case. In an early case in Virginia it was held, by a majority of the court, that the principal and his sureties were conclusively bound by the settlement made between the principal and a county board, entered of record in the proceedings of the board. *Baker v. Preston*, 1 Gilmer, 235. This case has been approved in Illinois and some other states, and also in Arizona; but it is opposed by the great weight of authority, and is not in harmony with sound principle. In a later Virginia case (*Craddock v. Turner*, 6 Leigh, 124), Judge Tucker says that the opinion in *Baker v. Preston* "has certainly not been acceptable to the profession." In *State v. Rhoades*, 6 Nev. 352, the court say that "it is at variance with all the cases we have been able to consult, both American and English." And, though *Baker v. Preston* was at one time followed in Indiana (*State v. Grammer*, 29 Ind. 530), it was afterwards repudiated (*Lowry v. State*, 64 Ind. 421). *Baker v. Preston* seems to have been since overthrown in Virginia, in *Board v. Dunn*, 27 Grat. 622. The rule generally recognized is thus stated in *Brandt*, Sur. § 522: "The entries made by an officer in public books, while in the discharge of his duty, or returns made by him to public authorities, are generally prima facie—but not conclusive—evidence against his sureties of the facts thus stated." To the same effect is *Mechem*, Pub. Off. §§ 287-289. The leading case on this subject is *U. S. v. Eckford's Ex'rs*, 1 How. 250, where the default actually occurred during the first term of a collector, but the bond sued on was given during the second term. It was contended that the duties of the treasury officers charged with the settlement of these accounts were in their nature judicial, and that when the account is once settled it is conclusive on the government, and could only be opened for correction by a suit in equity. But the court held: "The amount charged to the collector at the commencement of the term is only prima facie evidence against the sureties. If they can show, by circumstances or otherwise, that the balance charged, in whole or in part, had been misapplied by the collector prior to the new appointment, they are not liable for the sum so misapplied." This was followed in *U. S. v. Boyd*, 5 How. 50, where it was said that: "Sureties cannot be concluded by a fabricated account of their principal with his creditors. They may always inquire into the reality and truth of the transaction existing between them." See, also, *Bruce v. U. S.*, 17 How. 437, and *U. S. v. Stone*, 106 U. S. 527, 1 Sup. Ct. 287, expressly approving *U. S. v. Eckford's Ex'rs*.

The testimony offered by the sureties tended to prove the fact that no default occurred in the second term of Salazar as treasurer (State v. Rhoades, 6 Nev. 352), and should have been received in evidence, and the cause should therefore be reversed, and remanded for a new trial.

SMITH, C. J., and COLLIER, HAMILTON, and LAUGHLIN, JJ., concur.

(8 N. M. 8)

PACIFIC GOLD CO. v. SKILLICORN et al.
(Supreme Court of New Mexico. Aug. 28, 1895.)

WITNESS—CHARGE AS TO CREDIBILITY.

It is error to instruct that, if the jury believe that any witness has testified falsely, they may disregard all the testimony of such witness, unless it is corroborated by other credible evidence, as it omits the element that the testimony must have been willfully false.

Error to district court, Eddy county; before Justice Freeman.

Action of ejectment by the Pacific Gold Company against William Skillicorn and another. A verdict of not guilty was rendered, and from an order denying a motion for a new trial plaintiff brings error. Reversed.

T. B. Catron, for plaintiff in error.

HAMILTON, J. This case is brought up by writ of error from the Fifth judicial district. It was an action in ejectment brought by the plaintiff against William Skillicorn and Lanson A. Snyder in the district court of Grant county, in the Third judicial district, and is a suit in ejectment brought for the possession of a mine called the "Pacific Lode," situated in the Pinos Altos mining district, in said county. The mine is particularly described in the declaration, which also asks for judgment, not only for the possession of the mine, but for \$25,000 damages. After the suit was brought in Grant county, a change of venue was taken to Eddy county, in the Fifth judicial district, where the case was tried at the November term, A. D. 1892. There was no plea filed by defendants. The trial resulted in a verdict of not guilty, together with certain special findings made by the jury in the case. Motion for new trial was overruled. The case is brought here by writ of error.

Plaintiffs, to reverse the case, have assigned 43 grounds of error; but, in the view which we have taken of the case, it will be necessary only to consider the second assignment of error made by the plaintiffs, which is as follows: "The court erred in the thirty-third instruction given to the jury, in that it misled the jury by the following words: 'If you believe that any witness has testified falsely upon any material matter in issue, you have a right to disregard all of the testimony of such witness, unless such testimony is corroborated by

other credible testimony.'" The whole of the instruction of which this is a part is in the following language: "It is your duty to determine the credibility of the witnesses in this case. If you believe the testimony to be conflicting, you should first endeavor to reconcile the same, if you can. If you cannot do so, you must then determine which of the witnesses you will believe. If you believe that any witness has testified falsely upon a material matter in issue, you have a right to disregard all the testimony of such witness, unless such testimony is corroborated by other credible testimony." There are three propositions contained in this instruction. The first proposition is that it is the duty of the jury to determine the credibility of the witnesses, and the weight which should be attached to their testimony; second, that, if the testimony is conflicting, it will be the duty of the jury to reconcile the same, if it can be done, and that, if the testimony cannot be so reconciled by the jury, they must then determine which of the witnesses are entitled to belief. This part of the instruction is not seriously objectionable, but it is the latter part of the instruction which is complained of, as not having been given in the language required by law. This language to which objection is made in this instruction is as follows: "If you believe that any witness has testified falsely upon a material matter in issue, you have a right to disregard all the testimony of such witness, unless such testimony is corroborated by other credible testimony." It is contended that this part of the instruction has misled the jury, by directing them to disregard the testimony of any witness who had sworn falsely, without regard to whether such testimony had been given knowingly and willfully false. It is certainly the province of the jury, in all cases, to weigh the testimony offered by the various witnesses, and to give to the testimony of such witnesses such credit as they, in their judgment, think it may be entitled to. The jury have a right to disregard the testimony of any witness or witnesses who have testified in the case, provided they believe that such witness or witnesses have willfully and intentionally sworn falsely in any material part of their testimony. Whether the jury will disregard the testimony of any witness must depend upon circumstances. The jurors have a right to exercise their judgment with the same care that a judge would use in weighing the testimony. It is not every unintentional mistake respecting a material fact that will authorize the jury in disregarding the testimony of a witness. If a witness has made a mistake in his testimony, or if he has testified untruthfully, about any material fact, it may affect his testimony, in the minds of the jury; but the jury are not authorized to disregard the whole of the testimony of the witness simply because he may, by mistake or by misapprehension,

have stated what is untrue. The jury must believe that he has testified knowingly and willfully false as to some material portion of the testimony given by him. In *Rap. Wit.* § 192, he lays down what we consider to be the rule in such cases: "The true rule undoubtedly is that, if a witness willfully and knowingly testifies falsely to any material fact in the case, the jury are authorized to discredit and reject the whole of his testimony." This we understand to be the rule which has been followed almost universally by the courts of the country. In the case of *Gottlieb v. Hartman*, 3 Colo. 59, the court were considering an instruction in the following language: "That they [meaning the jury] are the sole judges of the credibility of the several witnesses, and that if they believe from the evidence that one of the witnesses has spoken falsely, in any particular, then the jury are at liberty to disregard all the evidence of the witness." In considering this instruction, the court say: "A witness, through mistake, from imperfect memory, or through a misunderstanding, may unintentionally tell an untruth in evidence. In such case, although the jury might believe, from all of the evidence, that the witness had testified falsely in some particular, they would not therefore be at liberty to wholly discredit the witness, unless they further believed from the evidence that the witness had intentionally told an untruth." In the case of *People v. Strong*, 30 Cal. 156, the court, in passing upon an instruction similar to the one under consideration, used this language: "As a general proposition, the jury cannot be said, of their mere caprice, under the guise of a legal discretion, to disregard the entire testimony of a witness because he may have made an innocent mistake as to a particular fact." The court also, in that opinion, quoting from *Poth. Obl.*, use this language: "It is said that if a witness deposes falsely in any part of his testimony the whole of it is to be rejected; and this is certainly correct, so far as the falsehood supposes the guilt of perjury, the ground of credit being thereby destroyed. But if nothing can be imputed to the witness but error, inaccuracy, or embarrassment,—if there does not appear to be a real intention to deceive or misrepresent,—neither the objection nor the reason for it applies." This question has also been considered by the supreme court of Missouri in the case of *Bank v. Murdock*, 62 Mo. 74, in which the court in that case passed upon an instruction in the following language: "If the jury believe from the evidence that any witness has sworn falsely in regard to any material fact in issue, they are at liberty to disregard his entire evidence." The court, in passing upon this instruction, say: "It is not true, as a legal proposition, that because a witness has honestly testified to that which is, in point of fact, untrue, therefore the jury may reject the whole of his

testimony. It is only where a witness has knowingly testified to an untruth that an instruction of this character should be given."

An instruction of the nature of the one under consideration should only be given where the testimony in the case is of a character to warrant it, and then it should not be given except in proper form. It is often true, as a matter of fact, that even the best and most reputable citizens of a community, in undertaking to relate the facts and circumstances connected with a particular matter, may differ widely in their versions or statements in relation to it, and may even make statements honestly which, as a matter of fact, are untrue; yet this alone should not furnish a basis for impugning their integrity, or denouncing such persons as wholly unworthy of belief. See, also, the case of *Paullette v. Brown*, 40 Mo. 52. In the case of *Wilkins v. Earle*, 44 N. Y. 172, an instruction of this kind was given: "That if the plaintiff's relation of material facts is contradicted in one or more important particulars, about which he cannot be deemed simply mistaken, his evidence is not entitled to credit." The judge instructed them that they were authorized in that case to disbelieve the plaintiff's whole statement, but were not bound to do so. The court say, in passing upon this instruction: "The request was not correct. The mere fact that his evidence was contradicted as to any fact or facts as to which he could not be simply mistaken was not conclusive as to the falsity of the evidence as to those facts. The jury might have believed the evidence, although contradicted. The jury must believe the evidence to be willfully false in some particular, before they are authorized to discredit the whole evidence of a witness."

The question of the legality of an instruction like that under consideration has been before the supreme court of Illinois in a number of cases, from the earliest history of that state down to the present time, and the courts of that state have uniformly held such an instruction to be improper. In the case of *Brennan v. People*, 15 Ill. 511, the court used this language: "The nineteenth instruction was erroneous. It authorized the jury to discredit a witness altogether, if he swore falsely in a single particular. It does not follow, merely because a witness makes an untrue statement, that his entire testimony is to be disregarded. This must depend upon the motive of the witness. If he intentionally swears falsely as to one matter, the jury may properly reject his whole testimony, as unworthy of credit, but, if he makes a false statement through mistake or misapprehension, they should not disregard his testimony altogether." This doctrine was followed in the case of *Pollard v. People*, 69 Ill. 148. In the latter case an instruction almost like the one now under consideration was given, in the following language: "The jury are instructed

that, if they believed from the evidence that any of the witnesses who have testified on the part of the defense have sworn falsely on any material fact in issue, then they have the right to entirely disregard their testimony, unless corroborated by other credible evidence in the case." The court, in passing upon this instruction in that opinion, say: "The instruction was clearly wrong. It omits the essential element that the witness has willfully and knowingly sworn falsely;" citing, in support of the rule laid down, *Brennan v. People*, 15 Ill. 512, and *City of Chicago v. Smith*, 48 Ill. 107. This doctrine has been followed by the supreme court of that state in the case of *Swan v. People*, 98 Ill. 610, in which an instruction in the following language was given: "The jury are instructed that if they shall believe any witness or witnesses sworn in this case is or are unworthy of belief, because of his or their manner on the stand, or because of his or their contradictory statements, or because of his or their material points being contradicted by reliable evidence, or because of his or their having heretofore, under oath or otherwise, made statements on material points different from those made by him or them on this trial, then the jury may entirely reject the testimony of such witness or witnesses, except upon the matters wherein they are corroborated by other reliable testimony." The court, in passing upon this instruction, following the rule heretofore stated, used this language: "In all cases, and especially such as this, where the evidence is inharmonious, it is indispensable that the jury should be accurately instructed. The instruction omits the element that the witness must be contradicted on a material point in his testimony, to authorize the rejection of his evidence as being unworthy of belief. Nor does the instruction inform the jury that, to authorize them to reject all of a witness's evidence, he must have knowingly and intentionally made misstatements as to some material point in the case." The court cites, in support of this doctrine, *Express Co. v. Hutchins*, 58 Ill. 44; *Bonnie v. Earll*, 12 Mont. 240, 29 Pac. 882; *Otmer v. People*, 76 Ill. 148, and *Gulliver v. People*, 82 Ill. 146. It will therefore be seen that the instruction under consideration is almost in the same language as the instructions which are given and passed upon by the court in the two cases last above cited. The latter part of the instruction under consideration, which provides "that the jury have the right to disregard all of the testimony of such witness, unless such testimony is corroborated by other credible testimony," does not cure the instruction; i. e. the clause which provides that the testimony should be corroborated by other evidence does not cure the instruction. It is the lack of the words "knowingly" and "willfully" which destroys this instruction.

Under the authorities above cited, and under the rule, as we understand it, which is universally adopted in other states, aside

from those which are given, it is clear that the instruction above given does not contain the language which would make it a valid instruction, under the law. It gave the jury the authority to disregard all the testimony of any witness or witnesses who may have testified falsely, regardless of the fact as to whether that testimony was given intentionally or knowingly false. It is not the false statement, alone, of the witness, which will authorize the jury to discredit it, but it is testimony which may be falsely given by a witness, knowingly and intentionally, which destroys it. We therefore conclude that the court erred in giving the thirty-third instruction, and for that reason the case must be reversed and remanded for such further proceedings in the cause as may be proper.

LAUGHLIN and BANTZ, JJ., concur.

(8 N.M. 18)

GERMAN-AMERICAN INS. CO. v. ETHERIDGE et al.

(Supreme Court of New Mexico. Aug. 28, 1895.)

FAILURE TO SERVE DECLARATION — DISMISSAL OF ACTION.

Under Laws 1891, p. 122, § 4, declaring that within 10 days after defendant appears plaintiff shall deliver to him a copy of the declaration, and failure to do so shall entitle defendant to a judgment of dismissal, provided such judgment is obtained before the pleading is served, defendant is entitled to judgment of dismissal, notwithstanding the declaration is served before the judgment is rendered, where before it is served the motion to dismiss has been heard and submitted without any showing by plaintiff for his failure to serve the declaration.

Error to district court, Bernalillo county; before Justice Collier.

Action by the German-American Insurance Company against Charles Etheridge and others. There was a judgment of dismissal, and plaintiff brings error. Affirmed.

On the 25th day of May, 1881, the defendant in error, Charles Etheridge, being then the local agent of the plaintiff in error, entered into a bond to it in the sum of \$500, the conditions of which were that said principal, Etheridge, should well and truly discharge his duties as such agent, and pay over to said company all funds received by him as such agent and due said company. The other defendants in error, W. B. Childers and Jeff Grant, signed and became sureties on said bond. In 1887 Etheridge left the country, and on the 27th day of April, 1891, declaration was filed by plaintiff in error in this case on the bond against the principal and sureties thereon. Said Etheridge and Grant being nonresidents, defendant Childers was served with process, and he at once appeared and obtained a rule on plaintiff for security for costs, which rule was complied with on May 27, 1891. No other proceedings in case appear from the record until the 9th

day of October, 1891, when defendant Childers filed his motion to dismiss the case because plaintiff had failed to serve defendant or his attorney with a copy of the declaration within 10 days after the return of the writ. The case then remained in "suspended animation" until the 27th day of April, 1895, when, after the motion was heard and under consideration by the court, and before the decision was rendered, plaintiff's attorney caused to be handed to defendant Childers a copy of the declaration. The court sustained the motion of defendant on the 2d day of May, 1895, and dismissed the case; and plaintiff thereupon sued out his writ of error, and the case is now before this court on the record.

Bernard S. Rodey, for plaintiff in error. W. B. Childers, for defendants in error.

LAUGHLIN, J. (after stating the facts). The contention of the plaintiff in error is that the court below erred in sustaining the motion to dismiss the case after a copy of the declaration had been served on the defendant, pending the motion, and before the decision of the court had been rendered thereupon, in that the service of the copy cured any laches on his part. The section of the statute governing this case is as follows: "Sec. 4. Within ten days after defendant's appearance is entered plaintiff or his attorney or solicitor, shall deliver to defendant or his attorney or solicitor a copy of the declaration, or bill of complaint; and each successive pleading thereafter shall be filed with the clerk, and a copy served on the opposite party or his attorney, or solicitor, within ten days of the filing, and service of the next preceding pleading. And failure to file and serve a pleading within the required time shall entitle the opposite party, if plaintiff, to a judgment *nisi* dict, or a decree *pro confesso*, and if defendant to a judgment or decree of dismissal: provided, such judgment or decree is obtained before the pleading is filed and served." Laws 1891, p. 122. Plaintiff in error contends that this case comes under the proviso, in that the pleading was served before the judgment of the court had been rendered on the motion. This contention cannot be maintained. He made no showing for his failure to comply with the statute, and the court was left without any discretion in the matter. The motion had been heard by the court and submitted, and the only thing left was to sustain or deny it. This was in the nature of a default proceeding, and the court will not set aside a default judgment without a proper showing addressed to the sound discretion of the court. In this case there was no showing or excuse of any kind offered. *Haynes v. B. F. Schwartz Co.* (Wash.) 32 Pac. 220; *Wiggins v. Mayer* (Ga.) 18 S. E. 430; *Society v. Jagodzinski* (Wis.) 54 N. W. 102. Plaintiff in error in this case has allowed it to remain in "a state of innocuous desuetude" for nearly

four years, and we think the court would have been sustained in dismissing the case, in the face of such laches on the part of the plaintiff in error, unexplained, even without the provisions of the statute *supra*. There being no error of record, the judgment of the court below is affirmed.

HAMILTON and BANTZ, JJ., concur. THE CHIEF JUSTICE did not sit in the case, and took no part in this opinion.

(8 N.M. 21)

LOCKHART v. WOOLLACOTT.

(Supreme Court of New Mexico. Aug. 23, 1895.)

CERTIORARI—BOND—OBJECTIONS IN DISTRICT COURT.

1. Under Comp. Laws 1884, § 2442, providing that whenever judgment shall be rendered by a justice, and, from any cause, a party shall be unable to appeal in 10 days, he shall petition the district judge, within 30 days from the judgment, setting forth the reason why he was unable to appeal in the ordinary way, and the judge shall then deny or grant the writ of certiorari, and fix the bond, the time for filing the bond is within the sound discretion of the judge.

2. After a case has been taken to the district court on certiorari from a justice of the peace, the contention that the writ should be dismissed because the account sued on did not contain the full first name of plaintiff cannot be raised there for the first time by motion to dismiss, but should be, according to the practice prescribed for the district court, by plea.

3. Though a bond filed by plaintiff on certiorari from a justice was not in the exact statutory form, refusal of the district court to dismiss the writ will not be held error, where it was substantially in compliance with the law, was taken and accepted by the clerk of that court, and there was no motion asking for a new bond, and defendant did not and could not suffer from a defective bond, for the reason that the district court rendered judgment against him.

4. Laws 1889, c. 48, providing a distinct remedy where a justice shall wrongfully refuse to grant an appeal where it is permitted by law, does not repeal or amend Comp. Laws 1884, § 2442, authorizing a writ of certiorari where judgment is rendered by a justice of the peace, and, from any cause, a party is prevented or unable to appeal in 10 days.

Error to district court, Bernalillo county; before Justice N. C. Collier.

Action by H. J. Woollacott against Henry Lockhart. Judgment for plaintiff, and defendant brings error. Affirmed.

On the 5th day of October, 1893, H. J. Woollacott filed a suit on an open account for \$57.88 against Henry Lockhart, to recover for the price of certain goods, wares, and merchandise sold and delivered to said Lockhart, before W. H. Burke, justice of the peace for precinct No. 12 in said Bernalillo county. On the 20th day of the same month the defendant filed with said justice of the peace a counterclaim for an amount claimed to be due from plaintiff as unliquidated damages, and the case was tried and judgment rendered in favor of defendant Lockhart for \$20. The plaintiff did not take or ask an appeal from the judgment

within 10 days thereafter; but on the 18th day of November, following, and on the 29th day after rendition of the judgment, plaintiff, by his attorney, made out and presented in writing, under oath, his petition to the judge of the district court for a writ of certiorari, requiring the justice of the peace to send up a transcript and all the papers in the case, in the manner prescribed by section 2442, Comp. Laws 1884. The judge granted the writ, and required plaintiff to file within seven days thereafter a bond to the adverse party in the sum of \$40, to be approved by the clerk of said court, which was furnished. Defendant moved to dismiss the appeal and quash the writ of certiorari, because of the insufficiency of the bond as to form, and because it was not filed within 30 days from rendition of judgment, and because plaintiff had not asked or taken his appeal within 10 days from rendition of judgment, and because the full first name of plaintiff was not given, which motion was by the court denied. On May 2, 1895, the trial was had in the district court without the intervention of a jury, and the court rendered judgment in favor of the plaintiff for \$30, costs of suit, and interest. Defendant moved for a new trial on practically the same grounds set up in the motion to dismiss, which motion was denied by the court, from which defendant sued out his writ of error to this court, and the case is here on the record.

Warren, Fergusson & Gillett, for plaintiff in error. Thomas N. Wilkerson, for defendant in error.

LAUGHLIN, J. (after stating the facts). Plaintiff in error assigns as errors by the court below that the court erred in overruling the motion to dismiss the writ of certiorari, because the plaintiff below was not sufficiently described, in that his first full name was not given, and because the bond was not filed within 30 days, and because the plaintiff did not take or apply for his appeal within 10 days after the rendition of the judgment by the justice of the peace.

The writ of certiorari was granted under the authority found in section 2442, Comp. Laws 1884. This section of the statute is broad and comprehensive in its scope and meaning, and it provides, among other things, that: "Whenever judgment shall be rendered by a justice of the peace, and from any cause whatever, either party shall be prevented or shall be unable to appeal within ten days, and he shall believe that injustice has been done him in the trial, if any was had, and in the judgment, he shall make out his petition in writing to the district judge, within thirty days from the rendition of the judgment setting forth the circumstances of the trial, or as much as shall be necessary, and the reason why he was unable or was prevented from appealing in

the ordinary way. * * * " And upon the petition being sworn to, and presented to the judge, he then grants or denies the writ of certiorari, and fixes the bond. This was done in this case, and the bond was filed with the clerk of the court within 7 days thereafter, within the time fixed by the judge, and 36 days after the rendition of the judgment by the justice of the peace. The statute is silent as to when the bond shall be filed; and the matter of granting or refusing the writ, the amount of the bond, and the time within which it shall be filed, are matters within the sound discretion of the judge, and will not be reviewed unless it be apparent upon the record that that discretion has been abused; and that does not appear in this case, and there was no error in the court below on these points.

The plaintiff in error contends that the writ of certiorari should have been dismissed because the account sued on did not contain the full first name of the plaintiff. This contention is not tenable, because it was raised in the district court for the first time on a motion, where it should have been raised by plea, in the regular way. When a case once reaches the district court, and that court has acquired jurisdiction of the person and subject-matter, it is tried *de novo*; and the trial thereafter proceeds according to the rules of pleading and practice prescribed for the procedure of causes in the district court, except as to the form and jurisdiction of the cause, as it originated in the justice court.

The second assignment of error is as to the form of the bond, and, while the bond is not within the exact form prescribed by the statute, yet we think, from the fact that the district court gave judgment against the plaintiff in error here and defendant below, and that he did not, nor could he, suffer any harm from a defective bond, if it was defective, and that the bond was taken and accepted by the clerk of that court, and that there was no motion asking for a new or better bond, and that it is substantially in compliance with law, that it was sufficient; and we think there was no error in the court below denying the motion to dismiss the writ of certiorari on that ground.

There is no conflict between section 2442, Comp. Laws 1884, and chapter 48, Laws 1889. Nor does the latter law in any manner repeal or amend the former section. The latter provides a distinct and separate remedy where any justice of the peace "shall wrongfully refuse to grant an appeal in any case where an appeal is now or may hereafter be permitted by law," when the appeal is applied for in the ordinary manner. Believing that substantial justice was done, the judgment of the court below is affirmed.

SMITH, C. J., and HAMILTON, J., concur. BANTZ, J., did not sit in the case, and took no part in the opinion.

(8 N.M. 27)

In re PERALTAREAVIS.

(Supreme Court of New Mexico. Aug. 28, 1895.)

FRAUDULENT CLAIM AGAINST UNITED STATES—
COURT OF PRIVATE LAND CLAIMS—HABEAS
CORPUS—WHAT REVIEWED.

1. Rev. St. U. S. § 5438, makes it unlawful for any person to present for payment or approval to any officer in the service of the United States any claim against the United States, knowing such claim to be false, fictitious, or fraudulent. Act March 3, 1891, § 14, creates the court of private land claims, and authorizes it to render judgment against the United States for the value of lands which the United States may have granted or sold belonging to a claimant, and provides that such judgment shall be a charge on the treasury of the United States. *Held*, that a fraudulent claim presented to the court of private claims is within section 5438. Smith, C. J., and Collier, J., dissenting.

2. Where the committing court had jurisdiction of defendant and of the offense charged, the commitment will not be reviewed on habeas corpus. Smith, C. J., and Collier, J., dissenting.

Application of James Addison Peraltareavis for a writ of habeas corpus. Denied.

Catron & Spless, for petitioner. J. B. H. Hemingway, U. S. Atty., and Matt. G. Reynolds, U. S. Atty. for court of private land claims, for the United States.

BANTZ, J. The prisoner was committed to jail, after a preliminary hearing, on the charge (1) of filing in the court of private land claims a claim against the United States in the sum of \$100,000, said claim being false, fictitious, and fraudulent, and known by him to be such at the time; and (2) that he entered into a conspiracy with one Sofia Treadway to defraud the government of the sum of \$100,000 in respect to such claim. If the claim had been one for land simply, it is conceded that it would not have been an offense within section 5438, Rev. St. U. S. The material part of that section is as follows: "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, * * * or who enters into any agreement, combination, or conspiracy to defraud the government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * every person so offending," etc. Then follows punishment. The information contains two charges: First, presenting a fraudulent claim; and, second, conspiracy to defraud.

By section 14 of the act of March 3, 1891, creating the court of private land claims, express authority was given that court to render judgment against the United States

for the value of the lands which the United States may have granted or sold belonging to the claimant, "and such judgment when found shall be a charge on the treasury of the United States." The information specifically avers that the prisoner made a money claim against the United States. The section under which this prosecution was begun (5438) requires that the fraudulent claim shall have been made to some person or officer in the civil, military, or naval service of the United States. It is, among other things, denied that the court of private land claims comes within this description. In *U. S. v. Moore*, 3 MacArthur, 227, Judge MacArthur said that a claim presented against the United States in the court of claims was not presented to a person or officer within the meaning of this act; but the other judges did not concur in that opinion, and it was pure obiter dictum. The point arose in *U. S. v. Strobach*, 48 Fed. 908, in a prosecution against a deputy marshal for presenting an account for approval to the district court, and Justice Woods said: "The contention of counsel for defense is that the law only punishes for presentation to a person or officer in the civil service of the United States of a false claim, and, when a false claim is presented for approval to the district court of the United States in which the district judge is presiding, that that is not a presentation thereof to an officer in the civil service of the United States. In other words, that a United States judge in vacation, and when not engaged in the discharge of his usual duties, is an officer in the civil service of the United States, but when engaged in holding the term of court he ceases to be an officer in the service of the United States, and his identity as such is lost, and he is only a court or a member of a court. We think that a United States judge is at all times an officer in the civil service of the United States, within the meaning of the statute, and that, when a claim is presented to a court of which he is the presiding officer, it is presented to an officer in the civil service of the United States." It may be observed that there is no revising power over the action of the court by the treasury officials in relation to witness and jury fees and mileage.

There is, however, in this case, the charge of conspiracy to defraud the government by means of a false, fraudulent, and fictitious claim. This proceeding by habeas corpus is a collateral attack upon the proceedings upon which the prisoner was committed to jail. In *Ex parte Siebold*, 100 U. S. 371, Mr. Justice Bradley, speaking of the limitations of the jurisdiction of the supreme court on habeas corpus which arise from the nature and objects of the writ as defined by the common law, lays down the general rule that the only ground on which that court, or any court, without special statute authority, will give relief on habeas

corpus, is where there is want of jurisdiction over the person or the cause, or some other matter rendering the proceedings void, as distinguished from what is merely erroneous and reversible. The writ is not to be employed to take the prisoner away from the court which holds him for fear, if he remains, errors may be committed. *Ex parte Crouch*, 112 U. S. 178, 5 Sup. Ct. 96. Nor can it be used to subvert the purposes of the writ of error, and it will not be granted to review the whole case, but only to examine the authority of the tribunal by which the prisoner was committed. *Ex parte Virginia*, 100 U. S. 330. It has been said that the test of jurisdiction is whether the tribunal has power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong (*Otis v. Rio Grande*, 1 Woods, 279, Fed. Cas. No. 10,613), unless, indeed, some punishment is inflicted which the tribunal had no authority to impose. The prisoner's counsel conceded at the bar that the commissioner who held the preliminary examination of and committed the prisoner to custody had jurisdiction of the person and the subject-matter; but it has been earnestly and ably contended that the information charged no offense against the prisoner on which he could be imprisoned or deprived of his liberty. This point was considered in *Ex parte Siebold*, 100 U. S. 371, and the language of Chief Baron Gilbert in *Bushell's Case*, Vaughn, 135, was quoted, that "if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge." Mr. Justice Bradley, commenting, observes: "The latter part of the rule, when applied to conviction and sentence, is confined to cases of clear and manifest want of criminality in the matter charged, such as, in effect, to render the proceedings void." It is true that in *Ex parte Siebold* there had been a conviction and sentence, but, if the objection be not jurisdictional, neither would the commitment be open to collateral attack by habeas corpus. In *Re Coy*, 127 U. S. 731, 8 Sup. Ct. 1263, it was strongly insisted that no offense under the act of congress was set out in the indictment, and that the prisoner should be released on habeas corpus. Mr. Justice Miller says: "It was certainly not intended to say [in *Ex parte Watkins*, 3 Pet. 193] that because a federal court tries a prisoner for an ordinary common-law offense, as burglary, assault and battery, or larceny, with no averment or proof of any offense against the United States, or any connection with a statute of the United States, and punishes him by imprisonment, that he cannot be released on habeas corpus because the court which tried him had assumed jurisdiction. In all such cases, when the question of jurisdiction is raised, the point to be decided is whether the court has jurisdiction of that class of offenses. If the

statute has invested the court which tried the prisoner with jurisdiction to punish a well-defined class of offenses, as forgery of its bonds, or perjury in its courts, its judgment as to what acts were necessary under those statutes to constitute the crime is not reviewable on a writ of habeas corpus." "We are not here to consider it as on a demurrer before trial, but, finding that the district court had general jurisdiction of this class of offenses, we proceed no further in the inquiries on that subject." And he cites with approval *Yarbrough's Case*, 110 U. S. 651, 4 Sup. Ct. 152. This seems to be within the rule laid down by Judge Folger in *Hunt v. Hunt*, 72 N. Y. 229, who defines jurisdiction of the subject-matter to be "the power to adjudge concerning the general question involved." In *Ex parte Parks*, 38 U. S. 18, it was held that an indictment could not be collaterally attacked, on habeas corpus, which alleged the forgery of a receipt of a register in bankruptcy, though the statute covered the forgery of certain evidentiary documents. See, also, *Hauser v. State*, 33 Wis. 678, and *Ex parte Harlan* (Okl.) 27 Pac. 920. If the prisoner can attack the sufficiency of an information and commitment thereon, like the present, by habeas corpus in this court in advance of his trial in the district court, so may prisoners confined in the jail of every county in the territory attack the sufficiency of indictments against them by habeas corpus in this court, instead of employing a demurrer or motion to quash in the court below. Under such circumstances, the supreme court of the United States have refused to interfere. In *re Lancaster* (1890) 11 Sup. Ct. 117; *Ex parte Frederick*, 149 U. S. 70, 13 Sup. Ct. 793. We are of the opinion that the commitment was issued in the exercise of the jurisdiction of the subject-matter, and that a sufficient cause is set forth upon which the prisoner should be held.

HAMILTON and LAUGHLIN, JJ., concur.

COLLIER, J. (dissenting). I am constrained to express my dissent from the conclusion reached by the majority of the court upon this application for a writ of habeas corpus. Such a writ is so sacred to the law, it is such a great writ that it is to be considered like the palladium of liberty, and no question of courtesy, comity, or propriety should for a moment be entertained when it is applied for to a court having jurisdiction to issue it. It is the freeman's writ, and any suggestion of its denial to an American citizen illegally restrained of his liberty seems in conflict with the genius of our institutions. To the argument which proposes hesitation in its issuance because of propriety between courts, or because of propriety for any other reason, in time of peace, an American grown to the stature of these institutions is instinctively opposed. No man should be considered a criminal of so dark a dye, or should be able

to defraud his government or his neighbor in so outrageous a manner, that any court could be induced to inflict injury to the vital principle that every inhabitant of this broad land shall breathe the free air of liberty until he is restrained according to law. It is one of the chiefest praises of the judiciary that, no matter how fiercely popular passion may rage, how red-handed a murderer may be, or how otherwise extreme any violation of law may be considered, it sits in calm deliberation to enforce the law and to make an offender's act become a beacon light in the illumining of liberty's path, instead of creating a precedent for the oppression of its followers. I therefore think that the argument that this court should withhold this writ, when our organic act gives jurisdiction to issue it, because petitioner should have applied to the judge of the district court, or because his alleged monumental and historical fraud calls grievously for redress, is unworthy of a moment's consideration.

No less opposed to the spirit of our law is the doctrine that, by implication and inference, reason may bring within the scope of a criminal statute offenses to which its letter does not extend. It has ever been held, under the common law and in this country, to be a cardinal principle in the expounding of criminal statutes that they should be read "*in favorem vitæ et libertatis*," and strictly as against the state. All construction and intentment are against the government and in favor of the accused, though not to the extent of emasculating or destroying a statute. The statute under which the accused is charged has a range very broad and comprehensive, and an utility distinctly manifest, even though it should be held not to reach the character of act described in the complaint upon which petitioner has been arrested and is now detained. No one will dispute that section 5438 of the United States Revised Statutes covers the presentation of false claims against the government for approval and payment by any officer or person given the authority to approve or pay the same, when the scienter is properly laid and proved. The question here is whether or not a suit begun in the court of private land claims, established by act of congress passed March 3, 1891, comes within the purview of said section, where it appears that plaintiff recites in his petition that land within the exterior boundaries of an alleged grant claimed by him has been disposed of by the United States, and he claims the maximum per acre so disposed of. It is conceded by the attorney for the United States that but for said feature of the claim for land there could be no pretense that section 5438, Rev. St., would have any application whatever to the case at bar; and this court in its opinion also proceeds upon that theory. It seems to be minimizing substantials and magnifying accidentals to hold that this section, not otherwise applicable, becomes so by the presence

of a provisional money feature in the suit. This feature, if it should ever become material in the litigation begun by the petitioner, becomes so because of acts affecting the petitioner in invitum, and done not by his procurement or consent, and possibly without his knowledge. This pecuniary feature only becomes material after the land sued for has been "decreed." In other words, when plaintiff's exterior boundaries shall have been adjudicated to him, he can obtain patent only to so much, above what the government has the right to pay him for at \$1.25 per acre, as he recovers, so that it, the government, may keep faith with those to whom it has already sold and granted some portions of claimant's land. But the principle here involved rises above what, with respect to my associates, I deem a consideration too small for their intelligent attention; and this decision may, I fear, become a precedent for statutory construction harmful in the extreme. There can be no question here of collateral attack, if no offense is charged, and I would wish no other authority than the one cited by the court of *Ex parte Siebold*, 100 U. S. 371: "A court will give relief on habeas corpus where there is want of jurisdiction over the person or the cause or some other matter rendering the proceedings void." If no offense is charged, is there any "cause"? If there is no offense charged, are not the "proceedings void" as to every step? Also, I would cite the very case the opinion of this court rests on, as refuting the position that section 5438, Rev. St., refers to any such class of case as the bringing of a suit either in a constitutional or a legislative court for adjudication, judgment, or decree. *U. S. v. Strobach*, 48 Fed. 903. The compiler of that volume states the full force and effect of that case in the fifth syllabus as follows: "Although the act of a federal judge in passing upon the accounts of a United States marshal in open court, as required by Act Cong. Feb. 22, 1875, is, in a sense, the act of the court, yet, as his decision is subject to revision by the accounting officers of the treasury, it is only quasi judicial, and therefore a presentation to him is a presentation to an officer in the civil service of the United States, within the meaning of section 5438." It is "sticking in the bark" with due respect I say it—to draw any other conclusion from that decision, and, indeed, the whole argument of the learned justice is an effort to avoid a result on demurrer which would have overturned the indictment, by showing that "open court" meant, in the statute there construed, a court in quasi judicial matters only. No one can, I venture to say, carefully read that decision, without arriving at the conclusion that Judge Woods believed that in matters judicially determined section 5438 has no application whatever. It shocks our understanding to say that one of the three co-ordinate branches of this government—a court created, not for the ap-

proval of claims, but to adjudicate them, and, when adjudicated, to enforce them—is "a person or officer in the civil service" of the government. The court is itself civil service, and those who serve in it are officers and persons in the civil service; that is, in its service. This opinion being prepared on the day the majority opinion was submitted to me, then to be handed down, I am not given opportunity for more elaborate discussion of a decision which, I think, makes the most damaging precedent yet emanating from this court.

I am authorized to say that the chief justice concurs in this dissent; but the views above expressed have not been submitted to him.

(8 N. M. 37)

FORD v. SPRINGER LAND ASS'N et al.
(Supreme Court of New Mexico. Aug. 28, 1895.)

MECHANICS' LIENS—SUFFICIENCY OF NOTICE—STATEMENT OF AMOUNT DUE—DESCRIPTION OF LAND—ESTOPPEL—PAYMENT—JUDGMENT—APPEAL.

1. A mechanic's lien law should be liberally construed in favor of the lienor. *Finane v. Hotel, etc., Co.*, 5 Pac. 725, 3 N. M. 256, overruled.

2. Comp. Laws 1884, § 1524, requiring a claim of lien to state the lienor's demands after "deducting all just credits and offsets," is satisfied by a statement that the lien is a certain sum, the balance due, after deducting all just credits and offsets, for work done under a contract which is made part of the notice, and for an additional sum for extra work allowed by the terms of the contract.

3. Under Comp. Laws 1884, § 1524, requiring a notice of lien to state the name of the "owner or reputed owner, if known," a notice which states that certain corporations and individuals are "the owners or reputed owners" of the property is sufficient.

4. Under Comp. Laws 1884, § 1524, requiring a notice of lien to state the name of the person by whom claimant was employed, a notice of lien for constructing an irrigation ditch, which states that claimant was employed by a corporation through its general manager, with the approval of its president, naming each, is sufficient.

5. Comp. Laws 1884, § 1524, requiring a notice of lien to contain "a statement of the terms, time given, and conditions of his contract," is satisfied by a notice which refers to the contract, in which these facts are stated, for such facts, and makes the contract a part of the notice.

6. Under Comp. Laws 1884, § 1524, requiring a notice of lien to contain "a description of the property to be charged with the lien sufficient for identification," a notice of lien for the construction of an irrigation ditch, which gives a description of the ditches, laterals, reservoirs, and right of way such as would enable one familiar with the locality to survey and plat the same is sufficient.

7. Under Comp. Laws 1884, § 1524, requiring a notice of lien to contain "a description of the property to be charged with the lien sufficient for identification," a description of land sought to be charged with the lien by government subdivisions is sufficient.

8. Comp. Laws 1884, § 1529, provides that any improvement mentioned in section 1520 (giving a lien for labor or materials furnished in construction of ditches and other improvements made on land) will be deemed to have been made at the instance of the owner unless, when in-

formed that the work is being done, he posts a notice that he is not responsible for the same. *Held*, that a contractor for the construction of an irrigation ditch was entitled to a lien on land appurtenant to the ditch, which was increased in value by the ditch, where it appears that his employer, by contract with the owner, was to receive a portion of the proceeds of such land when sold at an enhanced price after the construction of the ditch, and that the owner consented to the construction.

9. An objection to a notice of lien for insufficiency in the statement of claim cannot be urged for the first time on appeal.

10. Where, in an action to foreclose a mechanic's lien on 22,000 acres of land for construction of an irrigation ditch, defendant admits that the land is appurtenant to the ditch, and then describes it by government subdivisions, such defendant is estopped from asserting, after judgment of foreclosure, that the subdivisions contain more than 22,000 acres of land.

11. Where, in an action to foreclose a lien on a certain number of acres of land, the notice describes the same by government surveys, the court, in the absence of proof, may assume, on a showing that government subdivisions of the class mentioned contain a larger number of acres than that named, that the decrease in the number of acres in the divisions in question could be accounted for by rules of government surveying.

12. Where a notice of lien on land specifies the number of acres, and then describes them by government subdivisions, the latter description controls, though there be in them in fact a larger number of acres than that stated in the notice.

13. Where a contractor constructing an irrigation ditch agrees to select a tract of land and pay a certain sum for it, which is to be credited as part payment of the work on condition that his employer secures a sufficient deed from the owner to himself, tender of a sufficient deed to the contractor by his employer must be shown.

14. Where a contract provides that payment shall be made for work on final estimate and certificate of an engineer approving the work, and a showing that the work is free from all liens, and, after the final estimate is made and the certificate procured, the contractor, being refused payment, files his lien, the fact that subcontractors subsequently file liens for work will not defeat the contractor's lien.

15. Comp. Laws 1884, § 522, directs the territorial courts to conform to the laws and usages of the federal courts. Equity rule 92 authorizes a personal judgment in foreclosure of a mortgage, for the balance due complainant over and above the proceeds of sale. *Held*, that a decree for foreclosure of a mechanic's lien, providing that the decree shall operate as a personal judgment against each of the defendants, is proper.

16. Findings of fact by a chancellor on testimony in the first instance will not be disturbed unless it clearly appears that such findings are against the weight of the evidence.

Appeal from district court, Colfax county; before Justice O'Brien.

Action by Patrick P. Ford against the Springer Land Association and others to foreclose a mechanic's lien. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action in chancery, brought by Patrick P. Ford, appellee, against the Springer Land Association, and certain individuals corporate thereof, together with the Maxwell Land-Grant Company and its trustees, to establish, fix, and foreclose a mechanic's lien upon a certain ditch and reservoir system, rights of way therefor, and certain

lands alleged to be appurtenant thereto, and it is founded on the following facts:

On October 20, 1888, a contract was entered into between Patrick P. Ford, of the first part, and the Springer Land Association, of the second part, for doing the earth work in constructing a certain ditch line and reservoir system, for irrigation, all in the county of Colfax and territory of New Mexico, the provisions of which, so far as pertinent to this case, are as follows: The party of the first part to furnish all necessary tools and labor, and perform all work of excavating and grading required in the construction of the Cimarron ditch and its accessories. Said work to be done in a thorough and workmanlike manner, and in full accord with the specifications thereto attached, and made part of the contract. The party of the second part agreed to pay said party of the first part for the work so done at the rate of 11 cents per cubic yard for all earth removed, without classification; amounts due for said work to be paid at the time and in the manner described in the specifications thereto attached. "Specification 13. Subcontracts must be submitted to the engineer, and receive his approval, before work is begun under them. No second subcontracts will be allowed. Subcontractors will be bound by the same specifications as the original contractor, and will be equally under the authority of the engineer." "Specification 15. On or about the first day of each current month the engineer will measure and compute the quantity of material moved by the contractor during the preceding month. He will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten per centum, retained, will be paid to the contractor, in cash, within ten days thereafter. This retained percentage will be held by the company as a guaranty for the faithful completion of the work, and will be paid in full with the final estimate, upon the certificate of the engineer accepting and approving the work; it being expressly understood that the failure of the contractor to fulfill his obligations will mean a forfeiture of this retained percentage to the company. The amount due to the contractor under the final estimate will only be paid upon the satisfactory showing that the work is free from all danger from liens or claims of any kind through failure on his part to liquidate his just indebtedness, as connected with this work."

The land upon which the ditches and reservoirs were to be and were actually located and constructed, and upon which the improvements were actually made, did not belong to the said Springer Land Association, or to any of the parties to the contract, or to their successors in interest, so far as appears from the record, but was at the time

the property of the Maxwell Land-Grant Company, which was not a direct party to the contract. The Maxwell Land-Grant Company did, however, make a contract on the 1st day of May, 1888, with C. C. Strawn and his associates, who afterwards organized the Springer Land Association, by which the Maxwell Company gave it and its associates a right of way for the proposed irrigation system of ditches and reservoirs, and by which said agreement it was provided, among other things, that, with the view of selling certain of its lands at an enhanced value, and in consideration of certain perpetual water rights and franchises to be granted it by the other party, it agreed to set apart and reserve from sale about 20,000 acres of its lands, and to give the other party, the Springer Land Association, which succeeded to the rights of said Strawn and his associates under said contract, a certain portion of the proceeds which might be derived from the sale of the said lands, when sold. These lands were under the proposed ditch system, and to be irrigated by it. And by this agreement said Strawn and his associates agreed to expend about \$60,000, or a sufficient sum to complete the enterprise on the proposed plan. The title to the lands at that time and at all times afterwards, so far as appears from the record, was in, and remained in, the Maxwell Company, except as to the rights acquired by Strawn and his associates and successors in interest under said contract. The same contract constituted and made Strawn and his associates and successors in interest the agent of the Maxwell Company to the extent of and for the purposes of carrying into effect the spirit and intent of the contract as to the sale of the said lands; but that party, the Springer Land Association, contracting with the appellee, Ford, had no other title in the lands than as given in that contract. Five days subsequent to the time the ditch contract was made, Ford entered into another contract with the Springer Land Association, by which he agreed to select and take one section of the land under the ditch system, at the stipulated price of \$8,000, to be considered as part payment on the contract price for constructing the ditch system, and the Springer Association agreed to procure a deed to Ford from the Maxwell Company, free from all incumbrances. The work of construction proceeded under the Ford contract, and he let subcontracts to McGarvey, Dargle, and Haynes. Estimates, as provided by the contract, were made by E. H. Kellogg, the supervising engineer, from time to time, which were audited and paid by the Springer Association, up to about May, 1889, and the final estimates were made, including all balance alleged to be due on the contract, and for extra work, and presented about the middle of June of that year, and at the time the contract work was alleged to have been completed, amounting to \$17,634.27 due on

the contract and \$390 for extra work, and which the Springer Association refused to pay, on the grounds that the sum claimed was in excess of the amount due, and that the work had not been completed according to the contract; that the engineer's final estimate was erroneous in part, either through fraud, inadvertence, or mistake; and because the subcontractors had not been paid the several sums due them on the work by Ford, and that the property was not free from danger from liens. Thereupon Ford, on July 3, 1889, filed his notice of claim of lien for \$17,634.27, alleged to be due on the contract, including all moneys due subcontractors at that time, and for \$390, alleged to be due him for extra work. Thereafter the subcontractors filed their notice of claims of liens on the property for moneys alleged to be due them,—McGarvey for \$5,000, Dargle for \$2,274.30, and Haynes for an amount not shown by the record,—all of which said notices were filed within the time prescribed by law. Soon thereafter suits were brought to establish and foreclose the several liens by the subcontractors, some of which were pending when this suit was brought, and all against the ditch, laterals, reservoirs, and right of way, about 60 feet wide, the full length of the ditch, about 26 miles in length, and against 22,000 acres of land, alleged to be under the ditch system, and to be irrigated thereby, and appurtenant thereto.

Ford filed his bill to foreclose the lien so claimed on June 30, 1890, in which he set out his contract of October 20, 1888; averred substantial compliance therewith, completion and acceptance of the same, but not by whom accepted; the filing of his claim of lien; the total amount due him at completion thereof; described the property as in the claim of lien; averred as to the contracts between the Maxwell Company, Strawn and his associates, and the Springer Association and its associates; that, during all the time the Ford contract was being executed, the Maxwell Company and the Springer Association both had full knowledge of the same, and that neither gave any notice that they would not be responsible for it; that at the time of the completion of the work there was due Ford from the Springer Association and the individuals composing it \$17,634.27 on the contract, and \$390 for extra work ordered by the supervising engineer in charge,—with prayer for an accounting and foreclosure of lien, decree for payment of costs, solicitors' fees, sale of ditches, laterals, and reservoirs, and the 22,000 acres of land described, and for a deficiency judgment, in case the property, when sold, should not produce sufficient funds to fully satisfy the several amounts so found to be due against the Springer Land Association and its associates. The Springer Land Association and the individuals composing it answered the bill, and denied that the work was ever completed by complainant or accepted by defendants; denied that

they were indebted to the complainant for said work in any sum, or that any claim of lien was filed which would be effective to establish a lien on the ditch system, or lands described therein; averred that the Maxwell Company owned the lands, and had given the Springer Association the right to construct the ditches and reservoirs thereupon, but denied that the 22,000 acres of land was to belong to the Springer Association; averred that the final estimates made by the engineer were given for work never done or completed, through fraud, negligence, mistake, or inattention, or through the fraudulent procurement of the complainant; that under the contract the right to audit and determine the amount to be paid on the engineer's estimates rested with the Springer Association, and that it was not bound to pay on estimates as made exclusively by the engineer; that under said contract defendants were not bound to pay final estimates made by the engineer, except upon satisfactory showing that the work was free from all danger from liens or incumbrances of any kind; that subcontractors had filed liens for about \$10,000 against the property, upon some of which suits had been brought, and were still pending; that complainant had failed to remove or to take steps to remove or to defend against said liens,—by reason of all of which defendants were not bound to pay the final or any other estimates for said work. These defendants filed a cross bill, setting up matters averred in the answer, and other breaches by complainant, Ford, and the loss, damages, and expenses to the defendants by reason thereof, with a prayer that, in case an accounting should be decreed under the bill, these matters should be considered and allowed as set-offs to Ford's claims, and for general relief. But neither the Maxwell Land-Grant Company nor any of its trustees filed any answer or other pleadings of any kind. Complainant filed general replication to the answer and answer to cross complaint, and issue was joined on the general replication of defendants to cross answer. The cause was then referred to W. E. Gortner, Esq., as special examiner, to take proofs and report the same to the court. A vast amount of testimony was then taken, orally and by depositions, and a great number of exhibits were offered, the bulk of which was directed to the question of completion or noncompletion of the work in compliance with the terms of the contract and specifications, and the erroneous character of the final estimates by the engineer, through mistake, inadvertence, or fraud. The record here consists of over 1,200 closely-printed pages. The taking of proofs was closed and the case set down for argument, and was argued before the court in vacation, and on March 28, 1893, Chief Justice O'Brien rendered his decision in favor of the complainant, and made his findings of facts and conclusions of law. And a final decree was thereupon enrolled, establishing a lien on the entire

ditch and reservoir system and rights of way, and on the 22,000 acres of land, for \$22,097.75, including interest, being the amount claimed in the notice of lien, and which included all sums due him, and due on all subcontracts; and out of this amount to pay into court a sum sufficient to satisfy subcontractor Dargle on his subcontract lien, in event that Ford did not pay the amount due to him, and file Dargle's receipt in full for same, it then appearing that Ford had settled with all other subcontractors in full; and with interest to run at 6 per cent. from date of decree for the debt, and \$1,000 for complainant's solicitors' fees, and for all costs; and for a deficiency judgment, in case the proceeds derived from the sale should not be sufficient to pay the several sums so found for complainant, against the Springer Land Association and its associates therein named; and for an order of sale and foreclosure. To all of which defendants excepted, and the case accordingly is here on appeal.

Defendants assigned errors sufficient to raise all the material issues in the cause as to its merits.

The cause was ably argued in this court, at the July, 1894, term, by Frank Springer, Long & Fort, and A. A. Jones, for appellants, and by Wolcott & Valle, for appellee, and exhaustive briefs were submitted on both sides.

Frank Springer, A. A. Jones, and E. V. Long, for appellants. Joel F. Valle, for appellee.

LAUGHLIN, J. (after stating the facts). This is an action in chancery, the purpose of which is to establish and foreclose a lien in favor of the appellee on the property of the appellants, as described in the notice of lien and in the bill of complaint. And upon the notice of lien the appellee must succeed or fail; and he must show that it is in substantial compliance with all the material requirements of the law and the facts applicable to the subject.

The law providing protection to mechanics, material men, and laborers, by giving them a security on property upon which they have furnished material, labor, and skill for the enhancement of its value requires nothing unjust to the owner, and nothing unreasonable on the part of those who seek its protection in enforcing their remedy under it. Those who attempt to fix a lien and establish an incumbrance on property for the security of their just debts and demands, and thereby compel the owner to pay these obligations, which in many instances they never directly contract, must show affirmatively a substantial compliance with all the essential requirements of the statute under which they claim protection. The mechanic's lien law was unknown to and is in contravention of the common law and equity jurisprudence. It had

its origin with the civil law (*Canal Co. v. Gordon*, 6 Wall. 561; *Minor v. Marshall* [N. M.] 27 Pac. 481; *Davis v. Farr*, 13 Pa. St. 167), yet, being remedial in its nature, and equitable in its enforcement, is to be construed liberally. The equitable object of the act is clearly expressed in the first section, in defining it: "Sec. 1519. A lien is a charge imposed upon specific property, by which it is made security for the performance of an act." This court held in *Finane v. Hotel, etc., Co.*, 3 N. M. 256, 5 Pac. 725, that the law should be construed strictly; but the weight of authorities is against it, and that decision, to that extent, is here overruled. *Baldwin v. Merrick*, 1 Mo. App. 281; *Tuttle v. Moutford*, 7 Cal. 358; *Barnes v. Thompson*, 2 Swan, 313. "Notwithstanding the mechanic's lien law was unknown to the common law, yet, in view of the equitable character of the statute, it should be liberally construed, but cannot by construction be extended to cases not provided for by statute." *Barnard v. McKenzie*, 4 Colo. 251; 15 Am. & Eng. Enc. Law, 179, and cases there cited. But the notice of claim of lien, being the foundation of the action, must contain all the essential requirements of the statute, and the failure or omission on the part of the person claiming the lien of any of the substantial requisites of the statute is fatal, and will defeat the action.

The tenth assignment of error is that the court below erred in establishing any lien whatsoever on the real estate, ditches, and reservoir system described in the decree and entered in said cause. This raised the question of validity of the notice of claim of lien. The authority for filing a claim of lien is found in section 1520, Comp. Laws 1884, and a ditch is therein enumerated as one of the various kinds of property subject to a lien; and it provides that every person who performs labor upon or furnishes materials to be used in or upon the construction, alteration, or repair of the several kinds of property therein enumerated "has a lien upon the same for the work or labor done, or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building, or other improvement, or his agent." And section 1522 provides that: "The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement, or structure to be constructed, altered or repaired, but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien." This section goes to the quantity of the property to be charged, and to the interest to be conveyed to and vested in, the purchaser at

the foreclosure sale. Section 1524 says: "Every original contractor, within ninety days after the completion of his contract, and every person save the original contractor, claiming the benefit of this act, must within sixty days after the completion of any building, improvement or structure, or after the completion of the alterations or repairs thereof, or the performance of any labor in a mining claim, filed for record with the county recorder of the county in which such property or some part thereof, is situated, a claim containing a statement of his demands, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the term, time given and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself, or some other person." This section is given in full because the lien is based upon its requirements, and must be tested by it, and on it the lien, and the action as to the validity of the notice of claim of lien, must stand or fall. It will be seen by this section that the notice of the claim of lien must contain five essential allegations or averments, and each must be stated substantially in the language of the statute. But no particular form of statement is required. All that is necessary is that the language used in the statement must convey and express in an intelligent manner the meaning and intent of the statute. To hold otherwise would be in effect, in many instances, to defeat a just and equitable claim on mere technicalities. This the legislature did not intend. The best manner in which to determine the validity of the notice of claim of lien in this case is to state each requirement of the statute and the averments in the notice of claim of lien applicable thereto; and this course will be hereinafter pursued.

The record discloses that the notice of claim of lien was seasonably filed and recorded, and that it was properly verified by the oath of the appellee, and that the action on the same was commenced within one year thereafter, and within the time prescribed by the statute. But appellants contend that none of the other requirements in this section were complied with, and that, therefore, there never was, nor is there now, any lien at all on the property as described and herein sought to be charged. This controversy can only be determined by a careful comparison of the essential requirements set out in this section with the allegations in appellee's notice of claim of lien. This section requires: First. "A claim containing a statement of his demands, after deducting all just credits and offsets." After describing the property, the notice of lien says: "To secure the payment of the sum of seventeen thousand six hundred and thirty-four

dollars and twenty-seven cents, the balance due and owing to said Patrick P. Ford by the aforesaid owner or reputed owner, after deducting all just credits and offsets, for excavating and embankments done and performed by him under a certain contract entered into by the said Springer Land Association, a copy of which contract is hereto annexed, and made a part of this claim of lien; as, also, for the further sum of three hundred and ninety dollars, for extra excavating and hauling ordered by the engineer in charge of said ditch, and allowed him in pursuance of the provisions of the said contract,—all of which having been begun on, to wit, the first day of November, 1888, and prosecuted continuously until the twenty-first day of June last past." Second. "With the name of the owner or reputed owner if known." The notice of lien says, after naming the Springer Land Association, certain individuals connected therewith, the Maxwell Land-Grant Company, and certain individuals as its trustees, "owners or reputed owners"; and further on it says the sum due and owing to said Ford "by the owners or reputed owners" of the land before described, and in closing it says: "The names of the reputed owners of the land hereinbefore mentioned are the Maxwell Land-Grant Company, and certain persons therein named as trustees of said company, acting under the name, style and title of the 'Board of Trustees of the Maxwell Land-Grant Company.'" It is here seen that names of the owners or reputed owners of the lands are mentioned three times; and the proof shows and it is admitted by both parties that the 22,000 acres of land sought to be subjected to the lien belong to the Maxwell Land-Grant Company; and it is equally clear from the allegations, proofs, and admissions in the answer that the ditch system and right of way is the property of the Springer Land Association, and of the individuals composing it; and as the notice of lien and bill of complaint used the language of the statute, and is sustained by the proofs, it is sufficient. *Minor v. Marshall* (N. M.) 27 Pac. 481; *Harrington v. Miller*, 4 Wash. 808, 31 Pac. 325; *Allen v. Rowe* (Or.) 23 Pac. 901. Third. "And also the name of the person by whom he was employed, or to whom he furnished materials." The notice of lien says: "Claimant was employed to do said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn, as president." It would be difficult to observe that requirement more fully than it is by this statement; and it is sufficient. Fourth. "With a statement of the terms, time given and conditions of his contract." The notice of lien avers that "the terms, time given, and conditions of said contract are those that fully appear in the copy of the said contract, which is attached hereto and made a part hereof." And, by reference to the contract and specifications filed and

recorded with the notice of claim of lien as a part thereof, it will be seen that the contract provides that "said party of the first part [appellee] agrees to begin work within ten days after signing the contract, and to complete the same on or before July 1st, 1889. The party of the second part [the Springer Land Association] agrees to pay said first party for work so done at the rate of eleven cents per cubic yard, without classification; and the amounts due for said work shall be paid at the time and in the manner described in the specifications hereto attached." By reference to the specifications it is found as follows: "(15) Estimates. On or about the first day of each current month the engineer will measure and compute the quantity of material moved by the contractor during the preceding month. He will certify the amount to the company together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten per centum, retained, will be paid to the contractor, in cash, within ten days thereafter. The retained percentage will be held by the company as a guaranty for the faithful completion of the work, and will be paid in full with the final estimate, upon the certificate of the engineer accepting and approving the work; it being expressly understood that the failure of the contractor to fulfill his obligations will work a forfeiture of this retained percentage to the company. The amount due the contractor under the final estimate will only be paid upon satisfactory showing that the work is free from all danger from liens or claims of any kind through failure on his part to liquidate his just indebtedness as connected with this work." The contract for the work was signed October 26, 1888. And it here appears that the terms of the contract were 11 cents per cubic yard for all earth removed, without classification; and the time given was 10 days after the signing of the contract to the 1st day of July, 1889. The conditions of the contract were that the contractor should perform the labor in accordance with the contract and specifications, and that the company should pay him, at the stipulated price, from the first to about the middle of each month, in cash, for the work performed during the preceding month, less the retained percentage, which was to be paid with the final estimate, when the work was completed, on a satisfactory showing that the property was then free from all danger from liens and claims through the fault or neglect of the contractor. But appellants contend with much earnestness that it was not a sufficient compliance with the statute to give the terms, time, and conditions of the contract by simply attaching the contract and specifications to the notice of claim of lien, as a part thereof, and rely upon it as sufficient notice to the world of the contractor's claim of lien on the property

sought to be charged, and that it would be too much to require persons searching the voluminous record of the notice of claim of lien, the contract and specifications in a matter of this importance. But this contention cannot be maintained, because the searcher, by the notice of the lien, has his attention called to the contract as a part thereof, and the contract calls his attention to the specifications as a part of it, and on reading the entire record he is given full and ample notice of all of its conditions. This is the most satisfactory manner in which the public could possibly be advised of the notice of an intention to claim a lien and to fix an incumbrance upon the property therein described. *Knabb's Appeal*, 10 Pa. St. 186; *McLaughlin v. Shaughnessy*, 42 Miss. 520; *Phil. Mech. Liens*, § 405. Fifth. "And, also, a description of the property to be charged with the lien, sufficient for identification." The averment in the notice of claim of lien is that he, Ford, files his claim "against all that certain ditch, canal, and reservoirs commonly known as the 'Cimarron Ditch,' and its accessories,—the said ditch beginning at a point where the Pofill and Cimarron rivers meet to form the Cimarron river, thence continuing in a devious course eastwardly to a point on the Atchison, Topeka and Santa Fe Railroad about five miles northeast of the town of Springer, in Colfax county, territory aforesaid, being in length about 26 miles, and said ditch and land appurtenant thereto for right of way being of the uniform width of sixty feet,—together with all lateral ditches and reservoirs, and the land covered by and appurtenant to the same as aforesaid, as also twenty-two thousand acres of land, appurtenant to said ditch, the said land being also in said county, and under the ditch to be irrigated thereby, and described according to the townships and sections." Here follow the numbers of 46 sections of land, according to the legal subdivisions of the government survey, and "all of which ditches, laterals, reservoirs, and lands as aforesaid are platted and laid out on the plan hereto attached and made part of this claim of lien." The same descriptions of all the property sought to be charged in the notice of lien are given and averred in the bill of complaint and in the answer and cross complaint of appellants, the Springer Land Association and the individuals composing it, and admitted as correct. There is no denial, either in the pleadings or in the proofs, that the description is in any particular erroneous. The description of the ditches, laterals, reservoirs, and right of way is amply "sufficient for identification," and to enable any one familiar with that locality to go upon, survey, and plat the same with sufficient accuracy, should it become necessary. The 22,000 acres of land sought to be charged is described by legal subdivisions according to the statutes and rules prescribed for the surveys of the public lands of the United States.

There is no other way in which a description of lands can be given more satisfactorily than by the legal subdivisions of the public surveys. Such a statement must be held a specific description of the ditches, laterals, reservoirs, right of way, and of the lands, and a full compliance with all the essential requirements of the statute. After a careful consideration of all the facts, claims, statements, and demands set out in the notice of claim of lien, averments in the bill of complaint, and admissions in the answer thereto, it is found, and so held, that the notice of claim of lien is well founded, and is in full and substantial compliance with all the essential requirements of the statutes on that subject, and that it has the force and effect to, and does, subject the said ditches, laterals, reservoirs, and right of way, and the real estate thereto pertaining, as described therein, to the demands of said appellee.

The most difficult proposition in the whole case is the effort on the part of the appellee to subject the 22,000 acres of land, not included as a part of the ditch system, to the force and effect of his lien as a security for the satisfaction of his demands in payment for his labor in constructing the ditch and reservoir system. This requires a most careful consideration of the further proposition, viz. how far a lien becomes effectual as to property beyond that upon which labor, materials, and skill have actually been expended in improvements and betterments upon a particular tract of land. Appellants contend, with much force, that the lien cannot extend and attach, under any possible construction, to the 22,000 acres: (1) Because the improvements were not put upon it; (2) because it belonged to the Maxwell Land-Grant Company at the time the contract was made with Ford; and (3) because there is no averment in the notice of lien or in the bill of complaint that the land was necessary as and for "a convenient space about the same, or so much as may be required for convenient use and occupation thereof," as provided by section 1522, *supra*. These three propositions will be considered together. The statute applicable to the first proposition is section 1529: "Every building or other improvement mentioned in section 1520 constructed upon any lands with the knowledge of the owner, or a person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this act, unless such owner or person having or claiming an interest therein shall within three days after he shall have obtained knowledge of the construction, alteration, or repairs, or the intended construction, alterations or repairs, give notice that he will not be responsible for the same by posting a notice in writing

to that effect in some conspicuous place upon said land or upon the building or other improvement situate thereon." So much of section 1520 as applies here is as follows: "Every contractor, subcontractor * * * or other person having charge * * * of any building or other improvement as aforesaid, shall be held to be the agent of the owner, for the purposes of this act." This action is purely statutory, and the purpose here in quoting in *extenso* from these sections is to give force and effect, in so far as possible, to the legislative intent in enacting the mechanics' lien laws, and to arrive at proper and just conclusions therefrom as applied to facts in the record. The plat of the land referred to in the notice of lien and in the pleadings as giving a description of the property sought to be charged is omitted from this record, and it is not clear from the record just what sections of the land the line of the ditch passed over; but that it does traverse some of them is very clear. Though in the construction of a ditch the improvements may be limited to the land and the right of way, 60 feet in width and 26 miles in length, yet it is clearly apparent from the record that this ditch and reservoir enterprise was intended to, and did, improve and enhance the value of all the lands to be irrigated by it. In the contract made by the Maxwell Land-Grant Company and the predecessors in interest of the Springer Land Association it is stated that "the party of the first part, with a view of selling at an enhanced value certain land, amounting to about twenty-two thousand acres,"—the same lands here in question,—for and in consideration of certain perpetual water rights and privileges, and for a certain part of the proceeds to be derived from the sale of the lands, when sold, "agrees to and with the parties of the second part that he [the representative of the Maxwell Company] will reserve, set apart, and hold from sale, except as hereinafter provided, said twenty-two thousand acres of land under the ditch system hereafter provided"; and the parties of the second part agree to expend the sum of \$60,000, or so much as might be necessary, without delay, to complete the ditch system, as a consideration for the water rights, right of way, and for their share of the proceeds from the sale of the lands when sold. Appellants the Springer Land Association and its associates in their cross complaint set out this contract and made it a part thereof; averred that they had sustained damages in large sums on the ground of the alleged failure of Ford to comply with the terms of his contract, and to complete the same, in that they had, at great expense, secured purchasers for the land at good prices, but that by reason of appellee's lien having been filed they could not complete the sale, and that they had, at great expense, in the spring of 1890, established a "model farm" adjacent to, and to be irrigated by, said ditch system.

It is clearly apparent from all the pleadings and proofs in the record that the only object in constructing the ditch and reservoir system was to improve and enhance the value of and render marketable the said 22,000 acres of land. The appellants admit in their answer, and aver in their cross complaint, the execution of the contract, and that the Springer Land Association was the successor in interest therein. The Maxwell Land-Grant Company, its trustees and agents, had full notice of the Ford contract, and had ample knowledge that the same was being executed by Ford, as the original contractor; and it is nowhere contended that it, or its agents or trustees, gave any notice that the company or its trustees would not be responsible for the work.

Appellants contend that the land can only be subjected to the lien by a showing that it is "required for the convenient use and occupation of the improvement," and then only "if at the commencement of the work * * * the land belonged to the person who caused said improvement or structure to be commenced"; there being no allegation in the bill of complaint that the said land was so required. The claim of lien alleges that the land is appurtenant to the ditch, "and under the ditch to be irrigated thereby, and described by sections and townships." And the bill of complaint also alleges the same fact, and this is admitted by the answer. It was so "determined by the court below on rendering its judgment," and the decree ordered the sale of so much of said 22,000 acres of land as may be necessary to satisfy the demands of the appellee. This objection was raised for the first time in this court, and for that reason, if nothing else, it is not well taken. All the proofs go to show that the land is appurtenant to, and to be benefited by, the ditch. The term "so much as may be required for the convenient use and occupation thereof" means all the land benefited, and the value of which is increased or enhanced by the improvements actually made upon the land appurtenant and adjacent thereto, and for which such improvements are made at the instance, knowledge, or consent of the owner or reputed owner thereof. A ditch requires much more land for a convenient space, use, and occupation than a house, wall, or fence, and a lien will attach for the construction of either; and no one would contend that the space would be limited to the land actually occupied by either. A lien may attach for the planting of a fruit orchard, and it could not be contended that only the space actually occupied by each tree would be subjected to the effects of the lien, but it would attach to the whole tract upon which the orchard was planted. To hold that this lien attaches only to the ditch system, 26 miles long and 60 feet wide, would be, in effect, to render the security for the payment of appellee's demands practically valueless, and to defeat the very spirit and

intent of the law on which he had the right to rely for protection to secure payment for his labor. When the legislature enacted the mechanic's lien law it meant to provide security, and to say to the laborer, either skilled or unskilled, and to the material man, when he improves property with his skill, labor, or material, that all the property so improved in value shall be held by him as security until his demands are paid in the manner provided by the statutes. The following authorities are cited in support of this proposition: *Walker v. Stock Co.*, 9 S. C. 204; *Roby v. University*, 36 Vt. 564; *Vandyne v. Vanness*, 5 N. J. Eq. 485; *Nelson v. Campbell*, 28 Pa. St. 156. In *Green v. Chandler*, 54 Cal. 626, it was held that all the land was subjected to the lien, but there was no allegation in the complaint that it was necessary as a convenient space, and that the proof to that effect was not sufficient without such allegation to sustain the judgment, but it is alleged in this case in the lien claim, which is made a part of the bill of complaint, and alleged therein and admitted in the answer, that the land is appurtenant to the ditch. The court below found and determined, on rendering the judgment and decree, that the 22,000 acres were "required for convenient use and occupation thereof"; and it is sustained by the proofs, and is sufficient, and the lien does attach to and subject the said 22,000 acres to the effect thereof.

It is contended by the appellants that, even if the lien does attach and become effectual as to this land, it is excessive, because the 46 sections described make 29,440 acres. This is on the theory that all the sections were full, and that each section contained 640 acres; but there is no proof to sustain that conclusion. Appellants admit in their answer "twenty-two thousand acres of land in said county and under said ditch, and to be irrigated thereby, and described as follows." Then follows the sections by number, township, and ranges according to the government surveys. And they are now estopped from setting up that these sections contain more than the quantity they admitted in their answer. The description shows that about 16 of these sections are bounded by the northern and western range lines; and Rev. St. U. S. § 2395, provides that "where the exterior lines of the township which may be subdivided into sections or half sections exceed or do not extend six miles, the excess or deficiency shall be specially noted and added to or deducted from the western and northern ranges of sections or half sections in such townships, according as the error may be in running the lines from east to west or from north to south." While the court is asked to presume that all the 46 sections contain the legal quantity, it may, in the absence of any other proof than appears here, with equal propriety presume that the discrepancy is accounted for by the deficiency in

legal quantity by the statute and rules of government surveying. Besides, quantity in the description of land is not the governing rule as against definite descriptions by metes and bounds or by name and number. In *Jackson v. Moore*, 6 Cow. 706, "the conveyance purported to include two tracts of land, being townships No. 3 in the fifth range, and also No. 4 in the sixth range, to be six miles square, and containing twenty-three thousand and forty acres each, and no more; but, as these tracts were in fact six by eight miles in size, the court held that the whole passed. *Sutherland, J.*, in delivering the opinion, said: 'It is perfectly settled that when a piece of land is conveyed by metes and bounds, or any other certain description, all included within those bounds, or that description, will pass, whether it be more or less than the quantity stated in the deed. And where the quantity is mentioned, in addition to a description of the boundaries or other certain designation of the land, without an express covenant that it contains that quantity, the whole is considered as mere description. The quantity, being the least certain part of the description, must yield to the boundaries or number, if they do not agree.' " *Stanley v. Green*, 12 Cal. 148. "While there may be a mistake respecting the courses and distances as to the boundaries of a tract of land, or as to the quantity of acres or leagues it contains, there can be none when its extent is defined by permanent natural monuments." *De Arguello v. Greer*, 26 Cal. 616; *Wadhams v. Swan*, 109 Ill. 46; *Ufford v. Wilkins*, 33 Iowa, 110. "The mention of the quantity of land conveyed may aid in defining the premises, but it cannot control the rest of the description. Neither party has a remedy against the other for the excess or deficiency unless the difference is so great as to afford a presumption of fraud." 2 Devl. Deeds, § 1044. And where land is described by government survey and by metes and bounds as containing a given number of acres the words as to quantity are held merely as descriptive. *Hatch v. Garza*, 22 Tex. 177; *Belden v. Seymour*, 8 Conn. 18; *Wright v. Wright*, 34 Ala. 194. The general rule in such cases is that, where quantity is given in a conveyance without an express covenant that the exact number of acres only shall pass, the quantity specified, being less certain, is merely descriptive, and must yield to the description as to metes and bounds by permanent monuments and numbers according to the government surveys, they being the more certain. *Doe v. Porter*, 3 Ark. 57; *Chandler v. McCard*, 38 Me. 564; *Dale v. Smith*, 1 Del. Ch. 1; *Jennings v. Monks*, 4 Metc. (Ky.) 106. But it is not quite clear just what standing the Maxwell Land-Grant Company had in the court below, or in this court, for the reason that the record here discloses the fact of the acceptance of service by its attorney, and its appearance in the lower court by attor-

ney, but it does not disclose any pleadings of any kind in its defense.

Appellants contend in their seventh assignment that the amount found for appellee in the court below is excessive, in that from the amount allowed should have been deducted \$8,000 on account of land agreed to be taken by appellee under his contract made between him and the Springer Land Association on October 25, 1888. Under the provisions of that contract, Ford agreed to select one section of land, of 640 acres, under the ditch, and to pay \$8,000 for it, and to let that go as a credit and as a payment on his contract on the final estimate; and the Springer Association agreed to secure from the Maxwell Company a deed for the same, free from all incumbrances, and deliver it to Ford. There is some proof as to the making of the deed by the Maxwell Company, but there is not sufficient evidence to establish such a tender of it to Ford by the Springer Land Association according to the terms and conditions of the contract as the law requires, and Ford was not bound in law to accept it and deduct that sum from his demands.

It is contended in the thirteenth assignment of error that before appellee can recover he should have satisfied and removed the liens filed by the subcontractors. The record shows that the subcontractors did not file liens until the appellants refused to pay the original contractor on the final estimates; and the original contractor filed his lien first, as he had a right to do, for all the money due him, including the several amounts due the subcontractors, and that was the reason then given for the refusal of payment on the final estimates; and there was due Ford at that time, on the May estimate, over \$5,000, and over \$12,000 on the final estimate. There is nothing to show that Ford had not promptly paid his subcontractors out of the money received, or that he was not responsible for the money due his subcontractors. On the contrary, he said he would settle with them as soon as he was paid, and this was before any liens were filed; and the filing of Ford's lien was brought about by reason of the failure of appellant the Springer Land Association to pay him according to the terms of the contract, and they should suffer for their own laches, and not Ford. It could not be maintained that Ford should or could pay the subcontractors until he received his money for the work. To hold otherwise would be both unreasonable and unjust.

The sixth assignment is that it was error "in providing that the decree entered in said cause should operate as a personal judgment against each of the appellants," the Springer Land Association and its associates. There are no authorities cited in the briefs of appellants or appellee in support of or against this proposition, and we have no statute on the subject. In equitable proceedings

a court of chancery will, when it is possible, afford a complete remedy; but it has been held in a state where there is no statute authorizing a deficiency judgment in foreclosure proceedings that it cannot be entered. *Noonan v. Lee*, 2 Black, 499; *Orchard v. Hughes*, 1 Wall, 73. Our statute provides as follows: "Sec. 522. The said supreme and district courts, in the exercise of chancery jurisdiction, arising under all causes and matters in equity, shall conform in their decisions, decrees and proceedings to the laws and usages peculiar to such jurisdiction in this territory, and the supreme, circuit and district courts of the United States." By the rules of practice for the courts of equity of the United States it is provided as follows: "(92) Ordered, that in suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the territories having jurisdiction of the same, a decree may be rendered for the balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court, regulating the equity practice, when the decree is solely for the payment of money." This rule amended rule 8, which provided, among other things, that "final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit." The bill of complaint contains a proper prayer in case of deficiency, and there was no error in the court below in entering a deficiency judgment and order for the writ of execution to issue in that event. *Dodge v. Trust Co.*, 106 U. S. 445, 1 Sup. Ct. 335.

Appellants contend, further, that "the amount decreed is unauthorized by the facts," on the ground that the Springer Land Association was not bound to pay simply on the estimates found by the engineer, for the reason that the amount certified by the engineer was to be "audited by the company" before payment, and that the word in specification 15 "meant to examine and adjust," and that this is a reserved power in the appellants, and that it had authority, under that reservation, to examine all statements and estimates made by the engineer before they were, under the terms of their contract and specifications, required to pay the amounts so certified, and that such estimates were not conclusive as against appellants. To maintain this contention the Springer Association would have had to send a man to examine, measure, and compute the work reported on by the engineer at the close of each month before any payments could have been made. It would require superhuman ingenuity to construe the contract and specifications to support this proposition. Such a construction is excluded by the very words and terms of the specifications. It says:

"On or about the first of each current month the engineer will measure and compute the quantity of material moved by the contractor during the preceding month. He will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay; and the amount thereof, less ten per centum, retained, will be paid to the contractor, in cash, within ten days thereafter." The words "audited by the company," as here used, meant that the company would examine and compare each estimate and the vouchers with previous estimates, vouchers, and payments allowed and made by the company. The word "audit" is defined in the Century Dictionary as meaning "to make audit of, examine, and verify by reference to vouchers; as, an account or accounts; as, to audit the account of a treasurer." Webster defines it to "compare the charges with the vouchers." There was nothing left for the company to do but to pay on the estimates furnished by the engineer, or to refuse to do so and declare the contract void as to that condition. It refused to audit and pay the estimates, and it cannot now be heard to plead its own default.

Appellants contend that the court erred in its findings of facts and conclusions of law, in that they were not sustained by the proofs. As before stated, the cause was referred to a special examiner, who took and reported the testimony to the chancellor, and he arrived at his conclusions on the facts and the law from the arguments and authorities cited by counsels and the facts contained in the record; and the whole record is here for review in just the same manner that it was before the chancellor, and it becomes the duty of this court to pass upon it without reference to the findings of fact and conclusions of law in the lower court. In this it is to be distinguished from the findings of facts by a special master appointed by the court by and with the consent of all parties in interest; and this court will pass upon the whole record, and review, affirm, or reverse the decision of the court below, where the reference was to an examiner only. The master who sees the witnesses, hears them testify, and observes their manner while upon the stand is supposed to be more competent to determine and pass upon their credibility, and arrive at a correct conclusion as to the facts, than a chancellor from mere reading of the testimony; and where the chancellor sits in the case, and hears the witnesses testify orally, his findings are in the nature of the verdict of a jury, and will be so treated by the appellate tribunal, and will not be reviewed unless it is apparent from the record that such findings of facts are not sustained by a preponderance of the evidence to the same material facts in the case. There were a great many witnesses examined orally, and a vast number of depositions taken, and numerous exhibits offered on

both sides; and it is impossible and impracticable in this opinion to review and rehearse the testimony found in the record. There are contradictions, criminations, and recriminations from almost the beginning to the close of the record, most of which were directed at and to the construction of reservoir No. 7, on the part of appellants,—that it was not constructed in a substantial and workmanlike manner, and in accordance with the contract and specifications. The appellee offered witnesses to prove that the dam and reservoir had been constructed in substantial compliance with the contract; and, while there are some contradictions to his proofs by witnesses for the appellants, it is not sufficient to overcome that of appellee, and, after a careful examination of all the evidence on this point, it is found that the work was done in substantial compliance with the contract and specifications. There seems to be little controversy as to the completion of the ditch, and the evidence shows that it was completed by Ford substantially as he agreed in his contract.

Efforts were made on the part of appellants to show that E. H. Kellogg, the supervising engineer, was during the greater part, if not all, the time that the work was progressing, under the influence of Ford, and that his estimates were incorrect and fraudulent, and that he was incompetent; and to establish this witnesses and expert engineers were put upon the stand to prove it. One engineer was brought from Chicago, who spent some two months in "experting" the whole work for the Springer Land Association during the summer of 1889; and he reported, as the result of his investigations, discrepancies in the work, as is usually the case in the testimony of expert witnesses. He was in the employ of appellants, and did his work for them, and he was by no means a disinterested witness. As a general rule, there is no testimony so unsatisfactory or so unreliable in the every day affairs of life, or that is so misleading, or that results so disastrously to just and equitable conclusions in the homely affairs of business men as that of experts. The proofs utterly fail to establish that Kellogg was either dishonest or incompetent, or in any manner under the baneful influence of Ford or any one else. Kellogg was the man mutually agreed upon to do the work by the Maxwell Land-Grant Company and the Springer Land Association, and he was agreed upon by the Springer Land Association and Ford as supervising engineer, and placed in charge of the work; and officers and agents of appellants were upon the ground and inspecting the work from its inception to its completion, and had ample opportunity to investigate and report any misconduct on the part of Kellogg, but there were no objections made by any one to him until after difficulties arose between the parties. He was in constant communication with all the parties, and furnished them regular estimates from time to time, as his duties required. The perusal of the record

will disclose the vast amount of work done by him, and it is found that he did it apparently with satisfaction to all concerned until after their difficulties came up, and after the work was about completed. The proofs show that Kellogg had been engaged for a great many years in constructing irrigating plants in different parts of the country, and it also shows that he gave general satisfaction in other work of a similar character in this territory. Before a court will stamp a man as incompetent and a falsifier in his particular profession or line of business, after sustaining a good reputation as such for more than 20 years, the proofs must be positive and convincing to the contrary. A character established for competency and honesty in a profession, occupation, or a particular line of business is a thing of value to any man, and it must not be brushed aside and held for naught on mere allegations and meaningless generalities.

In the view here taken of this case it becomes unnecessary to consider any of the other assignments of errors by appellants.

After a careful consideration of all the record, it is found that the weight of evidence sustains the findings of facts by the court below, and the judgment and decree is affirmed, with directions to the lower court to make such order as will carry the same into effect.

SMITH, C. J., and COLLIER, J., concur.

HAMILTON and BANTZ, JJ., did not sit in this case, and took no part in this opinion.

(12 Utah, 80)

CHAPMAN v. SOUTHERN PAC. CO.

(Supreme Court of Utah. Aug. 31, 1895.)

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE — QUESTIONS FOR JURY — DEFECTIVE APPLIANCES — NOTICE TO EMPLOYER — TRIAL — INSTRUCTIONS — EVIDENCE — HARMLESS ERROR — EXCESSIVE DAMAGES.

1. In an action for personal injuries, plaintiff testified that he complained of the dangerous condition of the place in which he worked, and the person in charge promised to repair it, and when plaintiff returned to work he supposed the repairs had been made, but the work had not been properly done, and plaintiff was injured. *Held*, that the questions of defendant's negligence and of plaintiff's contributory negligence were for the jury.

2. Notice by an employé of a corporation, of defects in appliances, to one whose duty it is to have repairs made, whatever the grade of his employment, is notice to the company.

3. It is not error to refuse an instruction, the pertinent part of which is contained in instructions given, and the balance of which is an abstract principle of law.

4. A verdict for \$3,300 in favor of a section man for the loss of two fingers, and permanent injury to two others, of the left hand, so that they are devoid of strength, is not excessive.

Appeal from district court, Fourth district; before Justice H. W. Smith.

Action by James Chapman against the

Southern Pacific Company for personal injuries caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Affirmed.

Marshall & Royle, for appellant. Evans & Rogers, for respondent.

KING, J. Plaintiff brought suit against the defendant for personal injuries, and obtained judgment for \$3,300, from which the latter appeals. The appellant contends that the evidence fails to show any negligence upon its part which contributed to the accident, either in furnishing a reasonably safe place for plaintiff to work in, or in any other respect, but, on the contrary, that it was the negligence of plaintiff in failing to inspect the braces of the platform on which he worked, and that, if there was negligence other than plaintiff's, it was the negligence of fellow servants.

The plaintiff testified substantially as follows: That in November, 1893, he was employed as a section hand, and worked in repairing defendant's railroad track, at or near Terrace, Utah. On the 14th or 15th of the same month, defendant brought a portable sawmill to Terrace, to be used in crosscutting ties. It was placed on a flat car, and operated by a small engine. On the left of the saw, which was set in a fixed frame, was a platform connected with the car by hinges in the same manner as the leaf of a table. This platform was nearly 10 feet long and about 20 inches wide, made by placing two planks, 2 inches in thickness, side by side, and when raised was supported by two hinges and two iron rods or braces projecting at an angle of 45 degrees from the car—one end bolted to the car—in such a manner as to render the braces movable, and the other placed in a slot the shape of a horse-shoe, which was fastened to the underside of the platform near the corner. In addition to these braces, an iron staple protruded from the center of the platform on the lower side, and to this (when the platform was raised, ready for sawing) was linked an iron hook, which was securely fastened to the car. This prevented the platform from jarring or "bouncing" when any ties were thrown upon it, and so kept the ends of the braces in the slots and the platform from falling. From the 1st of November, 1893, when he entered the employ of the defendant, until the 15th, he worked on the section, but on that day was directed to work on the sawmill, and stand on this platform, and aid in pulling the ties as they were being pushed towards him from the saw, and to catch the pieces of wood as they came from the saw and throw them from the platform and the car. The plaintiff did not have charge of the business, and did not know anything about it, except as it was explained to him by McComie. The section foreman, Whalen, selected from the men the number required to operate the sawmill and engine, and directed them to accom-

pany McComie, who took them to the mill and instructed each man what to do. Whalen had charge of everything on the section. He was frequently about the mill, but gave no orders concerning it to the men employed thereon, and while it was in operation he was engaged upon the railroad track. McComie had charge of the sawmill, and "bossed" the persons working thereon. Whalen "detailed the men, and McComie showed us what to do, and how to do it." After plaintiff began work on the mill, he observed that the platform upon which he was required to stand was worn very thin, caused by the ties being thrown thereon and the men standing upon it, and he called McComie's attention to its condition. The same evening the carpenter repaired it, substituting new planks for the old ones; McComie sending the plaintiff for the carpenter and belt man to make the repairs, and instructing them what to do. On the 18th of November, while at work, a heavy piece of tie fell from McComie's hands upon the platform, and caused it to "bounce up," which resulted in the braces slipping from their sockets and the platform falling. Plaintiff was thrown down, and his left hand came so close to the saw that the glove on his fingers was cut. The plaintiff then discovered that the safety brace (running from the car to the middle of the platform on the under side) had not been replaced, and said to McComie: "If this thing is not fixed, there is some person going to get hurt." And the answer was: "I will see that it is fixed." The platform was raised by plaintiff, and the side braces placed in their sockets, and he continued to work during the afternoon. Whalen was informed by him the same evening that unless the platform was fixed "somebody was going to get hurt," and the reply was: "Well, Jim, I have got nothing to do with it." On Monday morning, the 20th of November, plaintiff saw McComie and his foreman working about the mill. After loading ties for some time, the plaintiff was told by Whalen to go to work on the mill. It was running when he reached it, and he immediately took his position on the platform. He made no examination of the platform, as it was not his business to do so, and did only what he was directed. Upon this occasion he believed that the platform had been fixed since the Saturday preceding, when it fell, because he had seen men at work, and McComie had said it would be fixed. Neither McComie nor Whalen told him to examine the platform to see if the braces were in the slots. "Had I looked on Monday morning under the platform, I could have told whether the middle brace had been put in; but a man with a sawmill running, and another man making a motion for him to get up and pull the ties away, and him taking hold of the tie and pushing it away, has no time to look for anything." After being at work for 15 minutes, a large tie, about 15 inches in diameter, was being

cut, and a heavy piece was left in McComie's hand, and in throwing it off it struck the platform where plaintiff was standing, and, there being no safety brace to hold the platform secure, the jar caused it to "bounce up," thereby releasing the side braces from their fastenings. The supports being gone, the platform fell, and the plaintiff was thrown against the saw and his hand lacerated, two fingers being severed and the others badly injured. "The platform could not have fallen if the safety brace had been placed in it."

The road master, Whalen, and McComie were called as witnesses for defendant. A portion of their testimony was corroborative of plaintiff's statement. The points wherein they vary from plaintiff are as follows: They all testified that there never was a safety brace connected with the platform, and that, when the new planks were provided, the slots and braces were arranged in the same manner as before. Whalen and McComie testified that they told plaintiff and the other employes connected with the mill "to look out for the braces, and see that they were put properly in the slots," and denied that plaintiff had spoken about the safety brace, or that any promise had been made to affix one to the platform. They also stated that examinations were frequently made of the mill, and that after the planks were renewed it was observed that the platform was in good condition "so far as the workmanship was concerned." Concerning the question of fellow servants, and who was in charge of the sawmill, the testimony of defendant's witnesses was in effect as follows: Mr. Hart, the road master, stated that Whalen was section foreman, and had charge of the yard, wood, and water on the section and the men working on the saw; that he employed and discharged them, and when repairs were necessary Whalen ordered them, but in his absence McComie or the engineer would. Whalen would detail men to help McComie run the mill, but he did not direct the men working with him on the car. If anything broke on the mill while Whalen was away, McComie had charge, and if Whalen was not there McComie would direct. "In the absence of Whalen he (McComie) would recommend what to do, direct when the mill was to be stopped and started, and would order repairs whenever needed about the mill." Whalen testified that he had charge of the section, and the direction of the sawmill. He directed the men at work on the mill when present. Some of the men he employed, and others were sent by the road master. "When I was not at the mill, McComie could call one of the men if he needed assistance. He had that authority. He had no authority to hire or discharge men. The mechanics and shopmen were not under his control. If McComie (when I was absent) asked them to repair the mill, they would respond. McComie was not particularly employed to attend the machinery, but to go to the shopmen and

have some one repair it when out of repair, and he was supposed to observe any defects about the mill, and he frequently did." McComie testified that he was employed as sawyer shortly prior to the accident; that he examined the platform when it fell on Saturday, and the saw, "not because it was my duty, but because I was looking to the interest of others as well as myself. I think it was my duty to see to the safety of others." "When Whalen was not there, I was not boss around the machine. I was overseer of the saw."

We think there was sufficient evidence to go to the jury, under proper instructions, upon the question of negligence, and to support the verdict in this case.

Appellant insists that the sufficiency of the construction of the platform is established by the evidence, and that, if there was negligence, it was in the adjustment of the appliances. Numerous cases are cited wherein it is held that when the employer furnishes suitable appliances or materials, which require arrangement or adjustment by employes, he is not liable to an employe for the negligence of coemployes in this arrangement or adjustment. This principle was fully recognized by the lower court, and the jury were told that "if the platform was properly constructed,—if it was not defective as a matter of fact, but was built in a sufficient and proper manner,—but when adjusting it and putting it in place, at the time they went to work, the plaintiff or his fellow servants negligently put it up in some insecure manner, adjusting it in such a way that it would fall, and it did fall, the plaintiff cannot complain of the defendant, because it was not responsible for that conduct." But the important consideration in the case is, was there a structural defect? Respondent claims that the platform was imperfectly and dangerously constructed by the omission of a safety brace; and that is the pivotal point in this case. Counsel assume that defendant fully discharged its duty in the matter of supplying suitable machinery and appliances and a reasonably safe position for plaintiff to work in. Assuming plaintiff's testimony to be true, was the platform reasonably safe? Would there not be grounds for reasonable men to reach the conclusion that it was negligence to place a man unacquainted with such work (except such knowledge as had been acquired in four or five days' service) upon a platform near a circular saw, operated by steam, upon which heavy pieces of timber occasionally fell, and which depended for its support upon two braces which were apt to slip out whenever the platform received a blow? From the testimony it is clear that this insecurity of the platform could have been remedied by a safety brace passing from the car to the underside of the platform, and there hooked into a staple. Of course, the employer is not bound to insure his employes against any defect in the appliance.

but he is bound to use reasonable care in the selection of his machinery and appliances and in their construction. And when that rule applies, the duty to furnish such machinery and appliances is one which the employer owes personally to the employes; and he cannot escape that duty by trusting it to an employe. The trial court clearly recognized the distinction and the main point at issue, and instructed the jury that the defendant did not insure the plaintiff "against accidents while in its employ. But it did undertake that it would furnish him suitable appliances to work with, and a safe place to work in, and that this duty was the duty of the defendant itself; and if it failed and neglected to use ordinary care for the purpose of providing a safe place to work in, or suitable appliances to work with, and, by reason of such neglect and failure to use ordinary care, the plaintiff was injured, without fault or negligence upon his part, then he is entitled to recover in this case. In other words, gentlemen, to restate the proposition, if this platform which is complained of in the complaint was so constructed as to be unsafe,—was built in such a manner that it was improperly braced or insufficiently secured,—and the plaintiff was required under his employment to work upon it, and, without negligence or fault on his part, it fell with him, and occasioned this injury, then the defendant would be liable, provided that by the use of ordinary care it might have known of such defect. Now, if the defect was one which was in the construction,—if it was built wrong in the first place, and insufficiently constructed to begin with,—and that was apparent to the person or company constructing it, then of such defect they had notice. If it was one which resulted in the use of the apron,—that is, from its becoming worn and out of repair,—they could use ordinary diligence to ascertain whether it was becoming so out of repair. And I charge you that it was their duty to inspect it for the purpose of determining that fact; to use all ordinary care,—to use such care as an ordinarily prudent man would use in his own affairs for the purpose of ascertaining if that contrivance was safe for his employes to work upon. I charge you they had a right to use a folding platform of this kind; that the fact that it would drop, that the braces were not under it, and that it was so constructed would not be a negligent construction at all. In other words, they had a right to use a platform of such design as they thought best suited to their work, provided they made it as safe as ordinarily prudent men would make it if undertaking to use the same kind of device." This instruction, taken in connection with those which followed upon the questions of contributory negligence and the duty of the defendant when it had notice of the defect (if there was a defect), correctly stated the law as applicable to the facts of this case. We think there can be no doubt of the sufficiency of

the evidence upon the questions of negligence in the construction of the platform, especially in view of the evidence that prior to the repairs—at the time plaintiff claims the safety brace was attached to it—the platform was never known to fall, while afterwards, when all parties admit there was no safety brace, it fell twice within two days. It was a proper question for the jury to determine whether there was a structural defect, and, if so, whether defendant had notice.

Appellant insists that plaintiff assumed all risk arising from the ordinary methods of running the mill, and that the defendant was not bound to provide other than a reasonably safe method of work, and a reasonably safe appliance with which to perform the work. No doubt, one who undertakes the duty of an employe assumes certain risks, but the assumption of risks does not exonerate the employer from the duty to furnish reasonably safe machinery with which to work, and reasonably safe places in which to work. The obligation rests upon the master, "whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities ordinarily safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; among which is the carelessness of those, at least, in the same work or employment, with whose habits, conduct, and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclinations or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master, has ordinarily no connection with their purchase, in the first instance, or with their preservation and maintenance and suitable condition after they have been supplied by the master." *Hough v. Railway Co.*, 100 U. S. 217. "It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, and other means by which it is to be

performed, and to keep them in repair and order. And this duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful collaborators, or from defective machinery or other instruments with which he has to work. His conduct implies that in regard to those matters his employer will make adequate provisions that no danger shall ensue to him." *Railroad Co. v. Herbert*, 116 U. S. 647, 6 Sup. Ct. 590.

The appellant further insists that, if it was negligent in omitting to place a safety brace upon the platform, it is chargeable to a fellow servant of the plaintiff; and it is strongly argued that the case of *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, establishes that plaintiff and McComie were fellow servants. There can be no doubt but, when an employé can act in a dual capacity, he may be, as to a coemployé, a fellow servant, and at the same time be the alter ego of the principal. The mere fact that McComie attended to the saw would not deprive him of his representative character. The undisputed evidence shows that, in the absence of Whalen, McComie directed the mill. He showed the men how to work, and directed their labors. He ordered repairs, and his orders were obeyed. A principal cannot employ men, and then, by attempting to station them upon the same plane, claim that they are fellow servants, and thus shield himself from any liability by reason of defective machinery or dangerous positions in which his employés are required to work. We think the evidence in this case justified this instruction by the court, of which appellant complains: "Now, as to the matter of notice in regard to any defect which may have existed there, if you find that a defect did exist, if it was a defect that the defendant did not have notice of otherwise, I charge you that notice to Whalen or to McComie, under the undisputed testimony in this case, would be notice to the defendant. In other words, whoever represented the defendant there on the ground at that time, if notice was given to such person of such defect, that would be notice to the defendant; and if a promise to repair it was made by that person, that would be the promise of the defendant within the meaning of the instruction I have already given you." In the absence of Whalen, McComie represented the defendant, and his negligence in the construction of the platform would be the negligence of the principal. *Anderson v. Depot Co.*, 8 Utah, 128, 30 Pac. 306; *Reddon v. Railway Co.*, 5 Utah, 344, 15 Pac. 262; *Ryan v. Bagaley*, 50 Mich. 179, 15 N. W. 72; *Railroad Co. v. Stevens*, 20 Ohio, 415; *Railroad Co. v. Babcock*, 154 U. S. 198, 14 Sup. Ct. 978; *Malone*

v. Hathaway, 64 N. Y. 5. When the platform fell, on the Saturday preceding the accident, plaintiff testified that the attention of McComie was directed to it, and he promised to repair it. The point decided in the *Baugh Case* is in no manner at variance with the views which we here express, and that case is clearly distinguishable from the point now under discussion. The principle involved in this instruction is not that of the doctrine of negligence of a fellow servant. It is merely a question as to whether the company had notice of the defect. In the *Baugh Case* the injury complained of was to a foreman, and was occasioned by the negligence of the engineer, whom the court held to be a fellow servant. In the case at bar plaintiff's contention is that the injury resulted from a defect in the construction and maintenance of the machinery and appliances upon which he was required by defendant to work. And, as above stated, the employer cannot escape responsibility by delegating to a servant the duty of furnishing suitable machinery and reasonably safe places for the employés to work in; and the grade of the servant to whom this duty is delegated makes no difference. As to other employés, he may be inferior, and his labors, aside from the duty of inspection, more menial; nevertheless, as to the duty of the master which is placed upon him, he becomes the vice principal. Plaintiff's injuries did not result from the negligence of McComie as a fellow servant, but are attributable to the negligence of the defendant in failing to furnish suitable appliance and a safe place for plaintiff to work in. "To provide machinery and keep it in repair, and to use it for the purpose for which it was intended, are very distinct matters. They are not employments in the same common business, tending to the same common results. The one can properly be said to begin only when the other ends. * * * In the repair of the machinery the servant represented the master in the performance of his part of the contract, and therefore, in the language of the instruction, his negligence in that respect is the omission of the master or employer in contemplation of law." *Shanny v. Androscoggin Mills*, 66 Me. 420. But it is urged that plaintiff had knowledge of the defect of the construction, and resumed work on the morning of the accident without an examination of the platform. Plaintiff's testimony is to the effect that on the 18th of November both McComie's and Whalen's attention was called to the absence of the safety brace, and the former said he had nothing to do with it, and the latter promised to have it fixed; that on the morning of the 20th the mill was in operation when he was directed to resume work, and that from the promise which had been made, and his observations of work by McComie about the mill, he believed the platform had been made secure. The court instructed the jury: "In this case,

If the plaintiff complained to the proper officer of the defect in the apparatus with which he was required to work, and that officer promised to remedy the defect, and the servant, in reliance upon the fulfillment of the promise, continued in the work, and this defect in the apparatus was not of such a character as to render it unavoidably dangerous to continue work, such continuance in the work is not contributory negligence on the part of the plaintiff; and, of course, in the service of the railroad company, it is sufficient that a complaint be made to, and the remedy promised by, that officer who is charged with the duty, in the one case, of ordering repairs, or in the other of discharging the negligent fellow servants." In the case of *Hough v. Railway Co.*, supra, the decedent had knowledge of the defective condition of the cowcatcher or pilot, and complained thereof to the master mechanic and the foreman of the roundhouse, and they promised that it should be promptly remedied. The court says: "It may be that he continued to use the engine in the belief that the defect would be removed. * * * If the engineer, after discovering or recognizing the defective condition of the cowcatcher or pilot, had continued to use the engine without giving notice thereof to the proper officer of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery so far as such defect was found to be the efficient cause of the death. * * * But there can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, within any period which would not preclude all reasonable expectation that the promise might be kept." "If a servant," says Mr. Cooley in his work on Torts (page 550), "having the right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless, or until he makes his assurances good. Moreover, the assurances removed all ground for an argument that the servant, by continuing the employment, engages to assume the risks." In the case of *Pieart v. Railway Co.* (Iowa) 47 N. W. 1019, the court says: "It appears that the yard master had no authority to direct repairs on the engine, but, if an engine was furnished him lacking some appliances necessary for switching, it was his duty to report to the train master, who would determine the advisability of furnishing whatever was required. We think, under this showing, the yard master was the proper person to whom deceased [a switchman] should complain." And it is held that a foreman under whom a person is working

is the proper person to whom complaints should be made of defects, and the employé has a right to rely upon such person's promise. *Wagon Co. v. Kehl*, 40 Ill. App. 584; *Patterson v. Railroad Co.*, 76 Pa. St. 389; *Furnace Co. v. Abend*, 107 Ill. 46; *Rothenberger v. Milling Co.* (Minn.) 59 N. W. 581. The burden of proof was upon the defendant in this case to show contributory negligence. It was a question for the jury to determine whether, under all the circumstances, if they believed there was a structural defect in the platform, it was negligence upon the part of the plaintiff to continue in defendant's employment. Under the evidence it was certainly not, as a matter of law, absolutely conclusive of the want of due care upon the part of the plaintiff to resume work without inspection upon the morning of the accident. *Railroad Co. v. Babcock*, 154 U. S. 198, 14 Sup. Ct. 978.

Appellant also assigns as error the refusal of the court to give the eighth request submitted. An examination of the first, second, third, and eighth requests shows that they were substantially given in the charge of the court. It is unnecessary for the court to employ the language of the request if the ideas therein expressed are substantially embodied in the charge. The fourth request is: "If the jury find from the evidence that the accident was the result of the negligence of Charles E. McComie, and that said McComie worked with plaintiff in running the saw, then said McComie and plaintiff were fellow servants, and cannot recover." So far as this request is a correct statement of the law, it was embodied in the charge of the court. The jury were instructed that if they found that the injury resulted by reason of the plaintiff's neglect, or the neglect of his fellow servant, then no recovery could be had. As above stated, McComie in the performance of some duties was the fellow servant of plaintiff, while in others he was the representative of the master. If the accident was the result of McComie's neglect in having the platform repaired, he would not be a fellow servant, but if it was occasioned by his carelessness when managing the saw his relation would be entirely different. The request fails to distinguish between these relations, and is erroneous. What is here said concerning the fourth request fully meets appellant's contention as to the fifth. The sixth request was for a peremptory instruction to find for the defendant. It was rightly refused. That part of the seventh request which was at all pertinent was given in substance by the court. That which was a statement of an abstract principle of law was not given. It was not error to refuse to give it.

It is further contended by appellant that the court erred in sustaining the objection to the question asked of plaintiff: "Now, you were still under the charge, on Monday morning, of Mr. Whalen, were you not?"

Conceding that the question was proper, an examination of the record shows that the witness, not only before this question was asked, but subsequently, explained in great detail his relations to Whalen and McComie, and under whose directions he worked, and from whom he obtained his instructions; so that, if the court erred, it was harmless error.

We do not think that the verdict was excessive. The evidence shows that, in addition to the loss of two fingers, the remaining two upon the left hand were so mangled and lacerated as to leave them permanently injured, and devoid of strength. Plaintiff suffered greatly from the injury, and we do not think the amount given by the jury excessive. We see no error in the record, and affirm the judgment, with costs.

MERRITT, C. J., and BARTCH, J., concur.

(12 Utah, 47)

BARNES v. COX.¹

(Supreme Court of Utah. Aug. 31, 1895.)

UNLAWFUL DETAINER—PLEADING.

1. A complaint for possession of unsurveyed government land must allege the facts on which plaintiff bases his right to possession.

2. A complaint for possession of land, which fails to allege that the defendant unlawfully withholds the same, and service of a written demand for possession, is fatally defective.

Appeal from district court, Fourth district; before Justice H. W. Smith.

Action by A. E. Barnes against M. D. Cox. From a judgment for plaintiff, defendant appeals. Reversed.

Evans & Rogers, for appellant. Maginnis & Weber, for respondent.

BARTCH, J. The plaintiff brought this action to recover possession of certain unsurveyed lands of the United States, and for damages for the rents and profits of said premises. The case was tried, and a verdict and judgment rendered in his favor. This appeal is taken from the judgment roll, and the sole question necessary to be considered is whether the complaint states facts sufficient to constitute a cause of action. It is therein alleged that on the 19th day of March, 1890, the plaintiff was, and for a long time prior thereto had been, in the quiet and peaceable possession of the premises in controversy; that the premises were unsurveyed lands of the United States, and marked on the map as an island, and known as "Daw Newman Ranch"; that on the 19th day of May, 1891, the defendant, with permission and consent of plaintiff, went into possession of the premises, as his agent and tenant, under contract, whereby the defendant was to perform certain labor on the premises, and was to occupy the same while in the performance thereof, or for such length of time as plaintiff might permit; that on the 19th

day of March, 1894, the plaintiff made demand, in writing, of the defendant, for the possession of the premises; that more than five days had elapsed since the making of such demand; and that the defendant had refused for more than that space of time to quit possession. Such are, substantially, the material allegations in the complaint. It will be observed that there is no allegation of title in the plaintiff. In fact, the contrary appears, for the premises consist of unsurveyed government land. Nor is there any allegation that the plaintiff had any right of possession, either when the defendant entered into possession, or when demand was made of him for the possession. Neither is there an allegation showing that the defendant unlawfully withheld the premises, or that service of demand for possession of the premises was ever made upon him. The omission of these material allegations renders the complaint fatally defective, and therefore the position of counsel for the appellant, that the complaint does not state facts sufficient to constitute a cause of action, must be sustained. Where a party brings an action for the possession of property which, he claims, is being unlawfully detained from him, he must allege and prove, not only that he has the right of, and is entitled to, its possession, but also that such property is being unlawfully detained from him, after notice to quit is served as provided by law. It is incumbent upon him to allege all the material facts on which he seeks to recover; and that his right of possession, the unlawful detainer, and the service of written demand, are material facts to establish his right to recover, is apparent. Comp. Laws 1888, §§ 8789, 8793; Bush v. Dunham, 4 Mich. 339; Morse v. Boyde (Mont.) 28 Pac. 280; Lowman v. West, 8 Wash. 355, 36 Pac. 258; Spurck v. Forsyth, 40 Ill. 438; Bryan v. Smith, 10 Mich. 229. Especially is this true where the controversy is in relation to government land, because, in such case, neither party having an indefeasible title in the land, the complainant should allege the facts upon which he relies to show his right to the possession of the property. Failing in this, the plaintiff cannot prevail. The judgment is reversed and the cause remanded, with directions to the court below to permit the parties to amend their pleadings, should they, or either of them, so desire.

MERRITT, C. J., and KING, J., concur.

(12 Utah, 51)

COOK v. BULLION-BECK & CHAMPION MIN. CO.

(Supreme Court of Utah. Aug. 31, 1895.)

MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action against a mining company, for injuries, it appeared that there was a walk, made several years before the accident, resting on timbers, and made in the usual way; that it

1 Rehearing denied November 6, 1895.

is not customary to repair such walks; that plaintiff was an experienced timberman, and knew the planks were rotten; that he undertook to walk across one of such planks, when it broke, and he was injured; that it was not necessary for him to cross such plank; and that there were plenty of new planks to be had by him, by asking for them. *Held*, that plaintiff could not recover.

Appeal from district court, First district; before Justice H. W. Smith.

Action by Philip T. Cook against the Bullon-Beck & Champion Mining Company for personal injuries caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Reversed.

Rawlins & Critchloe, for appellant. Bennett, Marshall & Bradley, for respondent.

MERRITT, C. J. The complaint in this action alleges: That on and prior to March 6, 1894, plaintiff was in the employ of defendant, at its mines in Eureka, and that, prior to said time, defendant had constructed on and across certain timbers in the Daisy stope a certain walk, for the use of the employes of defendant, of several planks, laid end to end across said timbers and through the stope. That the walk was negligently and carelessly constructed in part, and of materials that were defective and in an unsafe and dangerous condition, and unfit for the purpose, and known to the defendant at the time to be so; and defendant negligently and carelessly permitted and allowed part of the materials entering into the construction of the said walk to become defective, unsafe, and dangerous, and to remain in such condition, knowing that they were becoming and were in such condition, and that they were so unsafe, defective, and dangerous on the day of March 6, 1894. That plaintiff, while in said employ, and while discharging the duties of his employment, and while using due care and caution for his safety, and without any negligence on his part, stepped upon and passed along said walk, and did not then, or prior thereto, know of, nor could he discover by the exercise of reasonable diligence, the defective or unsafe condition of said walk, or the materials of which same was constructed; and one of the unsafe and defective planks constituting said walk then and thereupon broke, and precipitated plaintiff downward 36 feet, whereby he sustained a fracture of one of the bones of the right leg, and sprains of the ankle and knee and shoulder, and bruised and injured his ribs, spine, and back, and sustained other injuries and wounds, internal and external, and was thereby caused physical pain and suffering, and was permanently hurt and injured, to his damage in the sum of \$15,000, in addition to the sum of \$150 paid for medicine and medical attendance. The answer denied that at the time mentioned in the complaint, or at any other time, it was the duty of defendant to provide or keep for the use

of plaintiff a safe or suitable plank or walk, in good condition or repair, at the place mentioned in the complaint of plaintiff; and denied that defendant negligently or carelessly constructed at the place mentioned in the complaint a walk, or constructed the same out of defective materials, or that the materials were unsafe or dangerous, or unfit for the purpose, or that defendant negligently or carelessly, or at all, permitted or allowed any part of the materials entering into the construction of the said walk to be or to become defective or unsafe or dangerous, or to remain in a defective, unsafe, or dangerous condition, or knew that the same was becoming or remaining in a dangerous, defective, or unsafe condition; and denied that at the time or place mentioned in the complaint, or at all, it was the duty of the defendant to construct or maintain a walk for the benefit of plaintiff, or for any other purpose, or that it was the duty of defendant to keep same in repair, or in a safe condition; and denied that the plaintiff was precipitated through the timbers of the mine while using due or any care or caution for his safety, or that it happened without negligence on the part of plaintiff; denied that plaintiff was unaware of, or could not discover by the exercise of reasonable diligence, the condition of the walk or plank, or the condition of the material of which it was constructed; denied that the injuries or wounds were sustained in the manner set forth in the complaint, or by reason of any negligence on the part of defendant; and denied that he was caused, or has endured, any physical or mental pain or suffering, or was permanently hurt or injured, or damaged in the sum of \$15,000, or any other sum whatever; and denied that he was compelled to pay, or has paid, \$150, or any other sum, for medicine or medical attendance. And for a further answer the defendant alleged that at the time mentioned in the complaint the plaintiff was in the employ of defendant as a timberman in its mine, and that, at and prior to the time mentioned in the complaint, defendant was engaged in repairing an unused portion of the mine, and that in the course of said employment it became and was the duty of the plaintiff to pass through the place mentioned in the complaint, which place or stope was then, and for a long time prior thereto had been unused and abandoned; that plaintiff well knew the character of the said stope, and the timbers therein, and that the same were or might be unsafe, and that the plaintiff, while exercising no care or caution for his own safety, negligently and carelessly used the walk complained of; and that the accident to the plaintiff was occasioned solely by the want of due care and caution on the part of plaintiff, and not on account of any failure, negligence, or carelessness on the part of defendant. A jury was impaneled in the cause November 16, 1895, and a ver-

dict in favor of plaintiff, and against the defendant, was rendered, assessing the plaintiff's damages at \$3,000. The defendant's notice of intention to move for a new trial was duly filed, and specified the following grounds: (1) Insufficiency of evidence to justify the verdict, and that same was against law. (2) Errors in law occurring at the trial, and excepted to by defendant; giving notice that same would be made upon a statement of the case to be prepared and served. An order overruling defendant's motion for a new trial was made and entered on the 3d day of April, 1895, and an appeal has been taken from the judgment and order overruling the motion for a new trial. This appeal is taken upon the sole ground that the evidence is insufficient to justify the verdict, and it is alleged to be insufficient for two reasons: First, because no negligence is shown on the part of the appellant, the employer, in respect to the place where the injury occurred; and, second, because, whether negligence can be attributed to appellant, or not, the injury was the result solely of the foolhardiness and recklessness of the respondent.

The appellant is a corporation engaged in operating a mine at Eureka, Utah. Its operations are extensive, and had been carried on for a number of years prior to the accident in March, 1894. The accident to the respondent occurred in what is known as the "Daisy Stope,"—a large opening in the mine, from which rock and ore had been extracted, extending from about the 200-foot level downward below the 700-foot level, a distance of some 500 feet or more. It is of varying width, and is filled with what is known as "square sets"; being large, upright timbers, six feet in height, surmounted by caps six inches square. This is the ordinary and familiar mode of timbering large openings in mines. It serves the double purpose of a stay, upon which the miners work upward in extracting ore, and of supporting the ground, and preventing disastrous caves afterwards. And after the ore has been extracted at a given point the planks which cover the square sets, called the "floor" of the set, upon which the ore is dropped and sorted, are removed to the next set above, or wherever else they are needed, and thereafter the timbers remain for lateral and vertical support to the walls of the stope. They need no supervision or repair, except at times when, on account of decay or extraordinary pressure, they begin to give way, when, if desirable to prevent a cave, they are reinforced by new timbers. In this, as in all mines, the bad air causes the timbers to be affected by what is known as "dry rot." The life and strength of the timber are killed; a white mold forms; and in the course of a very few years they become dangerous to walk upon, and liable to give way. This was the case in the Daisy stope, in the vicinity of the 600-foot

level, and the condition was not only apparent, on account of the mold on the planks and timbers, but they had begun to give way; and the respondent had, not long prior to the accident, been employed in reinforcing the sets with new timbers, so as to secure the level. Respondent was a timberman, and was directed on the day of the accident to go to the Daisy stope, at the place where it is intersected by the 600-foot level, and lag up the timbers; that is, fill in behind the square sets with plank and lagging, so as to keep the dirt from falling down to the level. He worked at this half a day. In the afternoon, having lagged up as high as they could reach from the level, the respondent and his companions started up from the level to a point in the stope among the square sets, which they desired to reach to continue the work. In order to do this, they ascended a ladder which extended, from a point further on in the level, up through the stope, to the 500-foot level. This was a common passageway, often used by miners and others in going from one level to the other; and it was, so far as the evidence shows, in good repair. When they reached a point about 30 or 35 feet above the 600-foot level, they left the ladderway, and started north through the square sets to reach the point where they wished to make fast a pulley to haul up the lagging from the level. To reach the place by the route which they had selected, it was necessary to cross four of these square sets. Over these, planks had been left. Respondent, instead of crossing on the caps of the sets, as he might have done, attempted to walk on the rotten, molded planks; and one of them, being more rotten and unsound than the three which he had already crossed, broke short off, precipitating him a distance of some 20 feet, by means of which he sustained the injuries complained of. All of these timbers were rotten. They were moldy, and known to be so by the plaintiff. The planks which had been used at one time to work and walk on had lain there for years. It was not a passageway or gangway. The planks did not lead from the level or ladderway to any point where miners or others were expected to go. There was absolutely no invitation extended by appellant, either to the respondent or any other person who might be in that part of the mine, to make use of the plank. In the usual and ordinary course of mining in this and in other mines, the planks are left just as the timbers are left to decay when the ore is worked out. The respondent, according to his own testimony, knew as much about the place as any other representative of the appellant. Being a timberman, accustomed to go into dangerous places and repair and make secure rotten timbers, he, of all others, would be expected to know how to avoid danger, and there would be no necessity of warning him. But, as we have said, he had

actual knowledge of the unsafe condition of the timbers. The law is that the employer is bound to furnish a reasonably safe place for the employé to work in, and must furnish such information as to dangers latent, or not apparent, as may reasonably put the employé on his guard. Where the locality or the appliance is dangerous, and the means of knowledge are equally within the knowledge of the servant and the employer, the latter is not obliged to take any greater care of the former than he (the servant) does of himself. Even though it should be held that the company was negligent in not notifying plaintiff, or sending some one with him to warn him of the condition of the plank which broke, the evidence shows that the accident occurred through the negligence and rashness of the plaintiff himself, directly contributing to the injury. Plaintiff, as we have pointed out, had all the knowledge which any one could have as to the general condition of the timbers in that stope, and of the probable rottenness or soundness of the planks by which he attempted to cross. He says in his testimony: "I went up the ladderway to the sixth sets above the 600-foot level, and went back north from the ladderway to the place where we were lagging; and there was a plank and a gangway left running from the ladderway to where I wanted to go. I started through there, over the set. I tried the plank first. I knew that the plank standing there might possibly have become decayed, and I used all precautions I could. I tried the plank as well as I could, by putting out my foot and springing on it, before I started across. This was the first set north of the ladderway. When I got to the next set north of that, I tried the plank, and found that it would support me, and I went across; and so with the third set. When I got to the fourth set, I did the same as I did with the others. When I started across the plank, it broke right straight in the center, just as a card would break, and down I went." Under these circumstances, the respondent is chargeable with the reckless assumption of the risks involved in trusting his weight on the plank. It was entirely unnecessary. He had timber and planks at his disposal, and could have procured a sound plank to form for himself a safe passageway. There was timber in the mine and in the yard which he could have procured for the asking. He could have walked on the caps, which are 8x10 inches; and this is the usual method of proceeding through dangerous stopes, where planks are liable to be rotten. He incumbered himself with a rope and pulley in one hand, and his candle in the other, so that he had no opportunity to save himself when the plank broke. He could have proceeded by the safe ladderway up to the 550-foot level, and there made fast his rope and tackle. The omission to take these ordinary precautions, under the circumstances,

was an assumption of the risks involved, and the consequences cannot now be thrown upon the appellant. He knew that, if the plank happened to be decayed or defective, there was no custom of the company, or of any mine, to repair it. He knew that he was thrown entirely upon his own discretion and judgment, and could expect nothing on account of any care on the part of the employer. The courts, without hesitation, in all cases like this, deny relief to the party injured. A contrary rule would make the employer not only an insurer, but an insurer against the recklessness and carelessness of the employé himself. From a careful examination of the evidence in this case, we are clearly of the opinion that respondent was guilty of contributory negligence, which led to the accident, and, therefore, that he cannot recover. In support of these propositions, we cite the case of *Hazelhurst v. Lumber Co. (Ga.)* 19 S. E. 756, where it is held that where the evidence shows that the danger of the work in which the plaintiff was engaged must have been as obvious to himself as to his employer, and that there was no emergency requiring him to expose himself to the danger, he is not entitled to recover. In *McGrath v. Railway Co.*, 9 C. U. A. 133, 60 Fed. 555, it was held that a railway employé who, when engaged in removing a wrecked train, goes upon a bridge, the defects of which are patent, he assumes the risk arising from such defects; and the same doctrine was held in *Piper v. Iron Co. (Md.)* 27 Atl. 939; *Stone Co. v. Tate (Ind. App.)* 37 N. E. 1065; *Kilroy v. Foss (Mass.)* 36 N. E. 746; *Burgin v. Railroad Co. (Ala.)* 12 South. 395; *Murphy v. Rubber Co. (Mass.)* 34 N. E. 268. The general principle is laid down in *Knight v. Cooper (W. Va.)* 14 S. E. 909, that, where the servant willfully encounters dangers which are known to him, the master is not responsible for any injury occasioned thereby. *Foley v. Light Co. (N. J. Sup.)* 24 Atl. 487; *Sauer v. Oil Co. (La.)* 9 South. 566.

From a careful examination of this case, we are of opinion that plaintiff's own negligence and carelessness contributed to the injuries complained of, and, therefore, that he cannot recover. Judgment reversed, with directions to the court below to grant a new trial.

BARTCH and KING, JJ., concur.

(12 Utah 63)

HOLT v. PEARSON.¹

(Supreme Court of Utah. Aug. 31, 1895.)

APPEAL—WAIVER OF OBJECTIONS—SUFFICIENCY OF COMPLAINT—TRIAL—INSTRUCTIONS—APPLICABILITY TO ISSUES.

1. Objection to the sufficiency of a complaint may be made for the first time in the supreme court.

2. A complaint alleged that defendant represented to plaintiff that he was agent of the probate court for the collection of fees, etc.,

¹ Rehearing granted. Digitized by Google

for procuring deeds to certain town-site lots, and that the amount required was \$42 per lot; that plaintiff was entitled to deeds for four lots, and paid defendant \$168; and that defendant paid the probate court \$20, returned to plaintiff \$18, and retained \$120, which he refuses to return. Held, that the complaint did not state a cause of action.

3. An instruction not applicable to any issue in the case is reversible error.

Appeal from district court, Third district; before Justice G. W. Bartch.

Action by Joseph Holt against Charles E. Pearson. Judgment for plaintiff. Defendant appeals. Reversed.

M. M. Karghn, for appellant. R. D. Winters, for respondent.

MERRITT, C. J. This is an action brought by respondent against appellant to recover \$1,218.75, which, it is alleged, was received by appellant from respondent and 21 other persons, who have assigned their claims to him, in excess of the necessary charges and expenses of obtaining deeds for some 40 lots of land situated in a boulevard, 12 rods in width, which surrounded the town of Bountiful, in Davis county, Utah territory. The amended complaint, on which the action was tried, sets forth that on or about the 22d day of May, 1891, defendant represented to plaintiff and others that he was the agent of the probate court of Davis county for the collection of fees and expenses for procuring deeds to certain lots in Bountiful town site, and that the amount required was \$42 per lot; that plaintiff was the owner, and entitled to deeds for, four of said lots, and paid defendant \$168 to procure deeds for the same; that defendant paid the probate court \$20, and returned to plaintiff \$18, and retains \$120, which he refuses, after demand, to return to plaintiff. Twenty-one other similar causes of action are stated in the complaint, of persons claiming other lots, who, it is alleged, have assigned to plaintiff. Appellant, in his answer, denies that he represented that he was the agent of the probate court; that plaintiff, or any of his assignors, were owners of, or entitled to deeds of, the lots they claimed; that he withholds any money belonging to said claimants; that the expense of procuring deeds was only \$5 per lot; or that any of said 21 claimants have assigned to plaintiff,—and alleges that he is a practicing attorney at law; that the land claimed was situated on a public boulevard or highway, and claimants, who owned land abutting on said highway, were illegally claiming part of said roadway; that he was employed by them, in his capacity as attorney, to procure deeds for them at a cost not to exceed \$42 per lot; that he procured surveys to be made of said portions of land severally claimed by them in said highway; procured a relinquishment by the county court of said land as a highway; secured favorable action by, and procured deeds from, the probate court; paid all costs and expenses, and delivered said deeds to the

said parties entitled thereto, and returned to them \$1.50 per lot, of costs which he had overestimated and saved in fees of the probate court.

On the trial in the court below the judge gave, among other charges, the following: "(9) You are further instructed that there was no law in force, at the time of the giving of the deeds to plaintiff and his assignors, authorizing the probate judge to issue deeds under the town-site act, and if such deeds were given at that time they were given without authority of law. This is in reference to his authority as probate judge. There is a law by which the county court might agree or take steps to vacate a street, and they might appoint him as a committee, and in that way their agent to attend to such matter for them, as a county court; but the probate judge, as such, without such authority being delegated by the county court, could not so act." Appellant, among other things, alleges error in giving such charge, and claims in this court that the complaint does not state facts sufficient to constitute a cause of action, and that the same is not sufficient to support a judgment. The charge of the court quoted above was not responsive to anything in issue in the case. There is no question of title, or sufficiency of the deeds, raised by the pleadings. The charge was therefore calculated to mislead the jury, and cause them improperly to consider, in making up their verdict, an issue not in the case. Instructions of the court should confine the attention of the jury to the issues made by the pleadings. *Torry v. Shively*, 64 Ind. 106; *Conlin v. Railroad Co.*, 36 Cal. 404; *Frederick v. Kinzer*, 17 Neb. 366, 22 N. W. 770; *Glass v. Gelvin*, 80 Mo. 297; *Proff. Jury*, §§ 313, 314. The charge was erroneous, and giving it was error.

The other objection is to the sufficiency of the complaint. The record is silent as to whether or not this point was raised in the court below, but it is a point that is never waived in any case, and may be taken for the first time in this court. On an examination, it is difficult to apprehend on just what theory the pleader drew this complaint. It does not state a cause of action in fraud, for it contains no allegation of any fraudulent acts on the part of the defendant, nor that there was any false representations, menace, duress, or undue influence made or used to induce plaintiff or his assignors to enter into the contract with defendant, or to pay him money. There is an allegation that the defendant represented that he was agent of the probate court to do certain acts in the premises, but no allegations that said representation was false, or that plaintiff relied thereon, or that by reason thereof he was induced to enter into the contract with, or part with his money to, defendant, or was otherwise misled to his injury, nor even that plaintiff made promises which he did

not perform. Neither does the complaint set forth facts showing a breach of contract by defendant, with resultant damages to plaintiff. It perhaps comes nearer to the statement of a cause of action for money had and received by defendant to plaintiff's use, than of any other form of action. The allegation is "that defendant represented to plaintiff that the amount required for obtaining deeds from the probate court for the lots claimed by plaintiff was the sum of forty-two dollars per lot," and that plaintiff paid defendant that amount for that purpose. It does not allege that these representations were false, but only says "that the price of five dollars per lot was the actual amount required by the probate judge, and no more, for said deeds." Then follows the statement of a conclusion,—“that defendant was only authorized to collect said sum of five dollars per lot from plaintiff, and no more,”—and the statement that defendant has appropriated the balance, less \$4.50 per lot returned, and refuses to pay same on demand by plaintiff. There is no allegation that the price of the lots was the only expense involved and necessarily incurred and paid by defendant in the matter of procuring the deeds, nor that he was entitled to no compensation for his services in the premises, nor any allegation that defendant had failed to procure and deliver deeds as he had contracted to do, nor of any other facts showing an improper or wrongful disposition or appropriation by defendant of the balance of the money he had received, and that plaintiff is entitled to recover same. It seems clear that the allegations of the complaint fail to state a cause of action for money had and received. A pleader is presumed to state his case as strongly as the facts will permit, and his complaint must be construed strongly against him. No intendments or presumptions can be indulged to help out a defective pleading. We are of the opinion that this complaint does not state facts sufficient to constitute a cause of action, and that it is not sufficient to support a judgment. From the record it clearly appears that appellant, acting as an attorney at law, and for an agreed compensation paid him, made contracts with respondent and his several assignors to procure deeds for them to sundry lots of land severally claimed by them, and that he faithfully and fully performed and carried out his contract.

As a decision of these points disposes of the case, it is not necessary to consider the sundry other allegations of error made by appellant. The judgment is reversed, and the cause remanded to the court below, with directions to enter judgment in favor of appellant, with costs.

SMITH, J., concurs.

KING, J. (concurring). I am not satisfied that the instruction complained of was

prejudicial error, but I agree with the views announced in the opinion upon the question of the sufficiency of the complaint, and therefore concur in the judgment.

(12 Utah, 68)

CHIPMAN v. UNION PAC. RY. CO. et al.
(Supreme Court of Utah. Aug. 31, 1895.)

INJURY TO INFANT—EVIDENCE—LETTER OF GUARDIAN AD LITEM—COMPETENCY OF WITNESS
—DAMAGES—HARMLESS ERROR.

1. Any one competent as a witness may testify to the speed of a train at the time of an accident.

2. In an action by an infant, by guardian ad litem, a letter written by such guardian to defendant is not admissible.

3. A verdict of \$10,500 in favor of a girl three years old, for loss of a foot, is not excessive.

Appeal from district court, First district; before Justice H. W. Smith.

Action by Sarah E. Chipman, an infant, by John I. Chipman, her guardian ad litem, against the Union Pacific Railway Company and the Utah, Northern & Oregon Short-Line Railway Company. Judgment for plaintiff. Defendants appeal. Affirmed.

Williams, Van Cott & Sutherland, for appellants. King & Houtz, for respondent.

MERRITT, C. J. This action was brought to recover damages for injuries sustained by plaintiff by reason of being run over by the train of the defendant companies, and having her foot severed at the ankle. The testimony showed that the plaintiff, at the time of the injury complained of, was about three years old; that on the day of the accident she went on the highway. In playing about the track, or attempting to cross it, the plaintiff's foot caught between the rail and a plank forming a part of the road crossing. The train was a passenger train running on regular schedule time. The engineer and fireman, when within half a mile of the place of the accident, could plainly see objects on the track. The train was slowed up, and run under control for a short distance, and then started at increased speed, and ran over the plaintiff, severing her foot at the ankle. The evidence shows that the appellants were grossly negligent. They scarcely make an attempt to excuse their conduct. The jury rendered a verdict for \$10,500 in favor of plaintiff, and judgment was duly recorded for that sum. Defendants moved for a new trial, which was overruled, and defendants appeal.

There are three questions relied on by appellants as grounds for reversal of the lower court: First, that the court erred in allowing the witness Kelly to testify as to the speed of the train at the place of the injury to the respondent; second, in refusing to admit in evidence a letter written by the witness John I. Chipman to appellants; third, that the amount of the damages awarded by the jury is excessive.

As to the first point, appellants admit that one need not be an expert to testify to the speed of a train of cars. Then any person may testify to such fact. No qualification is necessary. The experience of every person who is competent as a witness is deemed sufficient to admit in evidence such person's opinion on such a matter. Of course, the weight to be given to such an opinion depends on the opportunity the witness has had to form a correct estimate; hence, Kelly's testimony was competent. But admitting, for the sake of argument, that it was error, it did not prejudice defendants, for the reason that there was no question made as to Mrs. Kelly's testimony on the speed of the train, and she places it higher than Mr. Kelly, and there is nothing in the evidence to contradict her. Appellants cannot have been harmed by Mr. Kelly's testimony.

As to the second point, it is contended that the court erred in refusing to allow appellants to produce in evidence a letter written by John I. Chipman to appellants. John I. Chipman is not a party to this action, in any sense, except as guardian ad litem. He could not in any manner affect the rights of the plaintiff. What he may have said or done or written could be of no concern in this case, except to affect the credit to be given to his evidence.

Coming now to the third assignment of appellants, that the verdict is excessive, one might cite cases where verdicts largely in excess of \$10,500 have been sustained by the courts for injuries less than in this case. An examination of the record is all that is necessary to show that appellants were grossly negligent. There is scarcely an attempt to excuse their conduct. They attempt to reason out the earning capacity of the plaintiff, in her crippled condition, after her majority, and thus demonstrate that the verdict is excessive. The amount of injury sustained by an infant cannot be reckoned or calculated by any rule of arithmetic, any more than her body can be made whole by dollars and cents. If the plaintiff was a male, the verdict would not be excessive, and the loss of a limb to a female is infinitely greater. We find no error in the record, and the judgment is affirmed.

BARTCH, J., concurs.

(12 Utah 72)

JONES et al. v. JONES.

(Supreme Court of Utah. Aug. 31, 1895.)

APPEAL—FROM ORDER APPOINTING ADMINISTRATOR—PARTY IN INTEREST.

Under Sup. Ct. Rule 24 (27 Pac. ix.), allowing any party entitled, by reason of personal interest, to ask for or oppose a judgment in the probate court, to appeal from an adverse judgment of that court to the district court, one cannot appeal from an order appointing an administrator of his brother, who died intestate, leaving parents, but no issue, it not appearing that he had any other interest than that of

brother, as in such case, by provision of Comp. Laws 1888, § 2741, subd. 2, intestate's estate goes to his parents.

Appeal from district court, Fourth district; before Justice H. W. Smith.

B. H. Jones was appointed general administrator of Lewis H. Jones, deceased. From the order of appointment, and various other orders, R. H. Jones appealed to the district court. His appeal was dismissed, and from the judgment of dismissal R. H. Jones and R. D. Jones appeal. Affirmed.

R. H. Jones, for appellants. B. H. Jones and Barlow Ferguson, for respondent.

BARTCH, J. This is an appeal from an order of the district court dismissing an appeal from the probate court of Box Elder county. It appears from the record that Lewis H. Jones died intestate, leaving neither wife nor issue; that B. H. Jones, a brother of deceased, on September 13, 1894, at the request of the parents of the deceased, filed his petition for general letters of administration; that on September 21, 1894, Ricy H. Jones, another brother of the deceased, petitioned the court for general letters of administration, and on the same day B. H. Jones was appointed special administrator of the estate; that on November 9, 1894, the petition of Ricy H. Jones was denied, and B. H. Jones was appointed general administrator; that on December 24, 1894, Ricy H. Jones appealed to the district court from the order appointing B. H. Jones special administrator, and from the one appointing him general administrator, and from several other orders; and that, within two days after the appeal was taken, Ricy H. Jones and R. D. Jones were appointed special administrators of the estate. All these administrators gave bonds, and received letters of administration. Under this state of facts, the appellants insist that the court erred in dismissing the appeal of Ricy H. Jones from the various orders of the probate court.

The motion to dismiss was based on the records and files of the proceedings in the case, and there appears to be nothing contained in the record of appeal to this court which indicates that Ricy H. Jones had such a personal interest in the estate as entitled him to appeal from an order appointing an administrator. It is shown, however, from the facts above stated, that Lewis H. Jones died intestate, leaving his father and mother, but neither wife nor any child, surviving him. This being so, Ricy H. Jones, the appellant from the order of the probate court, was not entitled, as heir at law, to any portion of the estate; for section 2741, subd. 2, Comp. Laws 1888, among other things, provides as follows: "If the decedent leave no issue, nor husband, nor wife, the estate must go to his father and mother in equal shares, or if either be dead, then to the other." This statute is conclusive of the rights of Ricy H.

Jones as heir at law, and there appears to be nothing in the abstract indicating that he had any other interest in the estate, giving him a right to appeal, under the provisions of rule 24 of the supreme court (27 Pac. ix.), which, so far as material here, reads as follows: "Any party entitled by reason of a personal interest, to ask for, or to oppose any judgment or decree in the probate court, may appeal from the judgment or decree made by the court, adverse to him or his interest, to the district court of the judicial district embracing the county where such probate court is held." Under this rule, the mere fact that Ricy H. Jones was a brother of the deceased avails him nothing. In order to enable him to take such an appeal as was attempted in this case, it must affirmatively appear that he had a personal interest in the estate, because that is the ground upon which the right of appeal rests in a case of this character. No such interest appearing, the district court properly dismissed the appeal.

There were other questions raised by counsel in this case, but we do not deem it necessary to discuss them, because there appears to be no reversible error in the record. The judgment is affirmed.

MERRITT, C. J., and KING, J., concur.

(12 Utah 76)

THIRKFIELD v. MOUNTAIN VIEW CEMETERY ASS'N.

(Supreme Court of Utah, Aug. 31, 1895.)

OBJECTIONS TO INSTRUCTIONS—CEMETERY ASSOCIATIONS—ILLEGAL DISINTERMENT—DAMAGES.

1. An instruction to which no exception is taken will not be considered on appeal.

2. On suit against a cemetery association for disinterring the body of plaintiff's child from one of its lots, it appeared that the defendant sold the lot to plaintiff for full value, executing to him a deed; that defendant had previously sold the same lot to another person, but had executed no deed of it; that the first purchaser, discovering the interment shortly after it had been made, requested, and defendant promised, to have the body removed; that, more than a year afterwards, the defendant disinterred the child, reintering it in an adjoining lot; that defendant never notified plaintiff that the removal would have to be made. *Held*, that punitive damages were properly allowed on the ground that the defendant, in thus recklessly disregarding plaintiff's right, committed a willful trespass.

3. On suit against a cemetery company for willfully removing the body of plaintiff's child from a lot which the defendant sold to him, without notice to plaintiff, a verdict for plaintiff for \$1,150 will not be set aside as excessive.

Appeal from district court, Fourth district; before Justice H. W. Smith.

Action by Frank L. Thirkfield against the Mountain View Cemetery Association. From a judgment for plaintiff, defendant appeals. Affirmed.

Rhodes & Tait and Kimball & Kimball, for appellant. H. H. Henderson and Richards & Macmillan, for respondent.

BARTCH, J. This is an action in the nature of trespass *quare clausum fregit*, and was brought against the defendant to recover damages for entering upon the plaintiff's lot in the cemetery of the defendant company, and disinterring the body of a dead child, and interring the body of a stranger therein. Upon the trial of the cause a verdict in the sum of \$1,150 was rendered in favor of the plaintiff, and judgment entered for that sum and costs. This appeal is from an order overruling a motion for a new trial and from the judgment.

The first point relied upon for reversal is a certain paragraph of the charge of the court on the question of damages for injured feelings and affections as a result of gross negligence. It appears, however, that there was no exception referring to the objectionable matter taken at the time of its rendition, and therefore this court will not review such paragraph on appeal. Where a court states objectionable matter in its charge to the jury, in order to avail the appellant on appeal, an exception must be taken, at the time of its rendition, to the specific matter which is the subject of complaint, so that the judge's attention may be called to it, and an opportunity afforded him to make a correction. This rule is so well settled that it requires no citation of authority.

The next question is raised on a portion of the charge which reads as follows: "Damages in this class of cases are usually given by way of compensation to the injured party for the wrong sustained by reason of the injury to his property, but when the acts complained of are committed maliciously and wantonly, and under circumstances indicating such an entire want of care as to raise the presumption of conscious indifference to consequences, or gross negligence on the part of the wrongdoer, the jury are authorized to impose damages by way of example and punishment, in addition to those awarded as compensation to the injured party. If you find that the body of plaintiff's son was removed by defendant as the result of a mistake merely, not due to gross carelessness or indifference, the plaintiff can only recover nominal damages." It is not claimed that, as an abstract proposition of law, this instruction is erroneous, but that there is no evidence in this case on which to base it,—no evidence to warrant any conclusion, on the part of the jury, that the trespass was committed because of malice, wantonness, or gross negligence, or an entire want of care and conscious indifference,—and that, therefore, such an instruction has no application, because, under such circumstances, vindictive damages are not warranted. If this contention be correct, then this instruction was improper, even though, as an abstract proposition, it stated the law correctly; and if, under the circumstances of the case, the jury were likely to be misled thereby, then it is cause for reversal. An examination of the evidence shows that on June 5, 1889, one J. N. Kimball be-

came the purchaser of two lots in defendant's cemetery, one of which was afterwards numbered 188, but no deed or instrument in writing was made or delivered to him; that in 1891 the plaintiff resided at Truckee, Cal., having formerly lived at Ogden, Utah; that on June 20, 1891, plaintiff's son, aged two years, died, and the remains were conveyed to Ogden and buried in defendant's cemetery in said lot No. 188, which plaintiff purchased from defendant for \$16, being the full purchase price, and received a written instrument therefor; that shortly thereafter said Kimball discovered that plaintiff's child was interred on said lot, and thereupon made complaint to the secretary of the defendant, who promised to remove the body of said child; that in November, 1892, the mother of said Kimball died; that then the said child was removed, and interred in an adjoining lot, and the mother of said Kimball interred in said lot No. 188; that the sexton of said defendant company and another man made the removal; that the parents of the dead child had no notice of such removal, nor were they aware that such removal was contemplated, nor did they ever give their consent to it; and that on one occasion, while such removal was in contemplation of defendant, the plaintiff and wife were in Ogden, and visited their child's grave, but no mention was made to them, by the sexton or any one, of such contemplated removal. Such is the evidence so far as it is deemed material in the determination of this question. It also appears that when plaintiff purchased the said lot he had no notice whatever, either actual or constructive, of any title in said Kimball. It will be observed from the evidence that no opportunity was afforded the plaintiff, or any of his friends, to witness the removal and reinterment, so that he might know of his own positive knowledge the final resting place of his child. The removal had been in contemplation for a year, and yet during all that time no attempt was made to confer with him. He was treated by the defendant as though by the interring of his child he had lost, not only all rights to its body, but also to the lot which he had purchased. This was an assumption not warranted by the law. While it is true that after burial the dead body of the child was not the subject of property, but became a part of the ground to which it was committed,—“Earth to earth, ashes to ashes, dust to dust,”—still the defendant had no right to break the plaintiff's close with impunity, and, as appears, regardless of the mental sufferings which such an act would produce on the part of the plaintiff, to whom the dead was sacred, remove the remains, without his knowledge or consent. One who thus negligently disturbs the remains of the dead after burial does so at his peril; and the degree of his liability will be in accordance with the degree of negligence, or willfulness, or wantonness. While in this class of cases the breaking and entering of the plaintiff's close is the gist of the action,

still the circumstances accompanying the trespass, and which give character to it, may be shown and considered in mitigation or aggravation of the act. From an examination of the evidence in this case, the conclusion is irresistible that the trespass was willful, being characterized by a wanton and reckless disregard of the rights of the plaintiff. The defendant is therefore liable for full compensation in damages, and, in estimating the damages, the jury had a right to take into consideration, not only the injury to the property, which was comparatively trifling, but also the injured feelings of the plaintiff. We have been cited to no law which relieves the defendant from the consequences of his willful act, or requires the mental sufferings of the plaintiff to be disregarded. In such a case aggravated damages are allowable because of the wantonness of the injury, which might have been averted by ordinary regard for human feelings or mental suffering. We conclude, therefore, that the instruction complained of was proper, under the circumstances of this case. We are aware that by some writers, and in some of the cases, the doctrine of exemplary damages has been questioned, and that in others the term is held to signify no more than a liberal extension of compensation for the wrong done, or the mental suffering induced thereby; but by the great weight of authority, in cases of tort or trespass, where the injury has been wanton and malicious, or the result of gross negligence, or of a reckless disregard of the rights of others, equivalent to an intentional violation of them, the rule is that exemplary or vindictive damages may be awarded in aggravation of the actual damages occasioned by the injury. And this is so at common law as well as by statute. In *Day v. Woodworth*, 13 How. 363, Mr. Justice Grier said: “It is a well-established principle of the common law that in actions of trespass, and all actions on the case for torts, a jury may inflict what are called ‘exemplary,’ ‘punitive,’ or ‘vindictive’ damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but, if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument.” *Suth. Dam.* §§ 391, 392, 395; 2 *Greenl. Ev.* §§ 266, 267; *Railway Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286; *Meagher v. Driscoll*, 99 Mass. 281; *Railway Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207; *Brewer v. Dew*, 11 Mees. & W. 625; *Nagle v. Mullison*, 34 Pa. St. 48.

It is further complained on the part of the appellant that the verdict is excessive, and is not the result of full and fair consideration of the evidence, but is aided by passion and prejudice on the part of the jury. Upon examination of the evidence it must be admitted that there is a question as to whether the

damages are not for a larger sum than is justified by the facts. This court, however, will not disturb the verdict, in a case of this class, unless the sum awarded is so grossly excessive as to shock the conscience, and raise a presumption of passion and prejudice on the part of the jury, because there is no accurate standard by which the injury can be measured, and, therefore, the jury must necessarily be permitted to exercise a wide discretion. The judgment of the jury, and not the opinion of the court, must govern, unless the facts disclosed by the evidence show that the jury were misled by some mistaken view of the merits of the case, or were under the influence of partiality, passion, or prejudice. *Worster v. Canal Bridge*, 16 Pick. 541; *Turner v. Stevens*, 8 Utah, 75, 30 Pac. 24; *Wilson v. Fitch*, 41 Cal. 363, 386. We are unable to conclude that the damages are so exorbitant as to warrant a reversal of the case. Nor do we find any reversible error in the record. The judgment is affirmed.

MERRITT, C. J., and KING, J., concur.

HOFFMAN v. COUNTY COM'RS et al.
(Supreme Court of Oklahoma. Sept. 7, 1895.)
IMPLIED POWER—ORGANIZATION OF COUNTY—LAWS
IN FORCE — INDEBTEDNESS — LIMITATION —
VALIDITY—CONSTRUCTION OF STATUTE.

1. A municipal corporation has the implied power to incur indebtedness whenever it is necessary to do so to carry out any power conferred upon it, unless the contracting of said indebtedness is prohibited by statute.

2. *Ex instante* upon the completion of the organization of Pawnee county, and the opening of the Cherokee Outlet and the Pawnee and Tonkawa Indian reservations to settlement, in pursuance of the act of congress of March 3, 1893, and the president's proclamation thereunder, the organic act and the constitution, and all laws of the United States not locally inapplicable, or in conflict with said organic act, and all laws of the territory of Oklahoma, went into effect.

3. In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who are called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect. *Edwards v. Darvey*, 12 Wheat. 210.

4. Section 4 of the act of congress of July 30, 1886, provides that no political or municipal corporation, or other subdivision, in any of the territories of the United States, shall ever become indebted, in any manner or for any purpose, to any amount, in the aggregate, including existing indebtedness, exceeding 4 per centum on the value of the taxable property within such corporation, county, or subdivision, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness. *Held*, that said act has been modified, as to its effect in Pawnee county prior to the first assessment for territorial and county taxes, by various acts of congress, so that said county may contract a debt not exceeding 4 per centum of the taxable property therein, to be ascertained by the first assessment.

5. The indebtedness created in Pawnee county within the provisions of law, not in excess of 4 per cent. of the value of the taxable property therein for county and territorial taxes, and prior to the first assessment, is a valid and

binding obligation against said county, and all bonds or obligations in excess of any such amount are void.

(Syllabus by the Court.)

Appeal from district court, Pawnee county.

On the 16th day of November, 1894, the county commissioners and county clerk of Payne county appeared before the district court of said county, pursuant to published notice as required by law, and filed a petition to issue funding bonds of said county. In said petition it was represented that the amount of outstanding indebtedness, due and unpaid, aggregated the sum of \$20,178.68, and that the assessed valuation of the taxable property of said county at said date reached the sum of \$222,318. At the hearing, John F. Stone, W. M. Allison, A. J. Biddison, and C. J. Wrightsman, on behalf of certain taxpayers and warrant holders, each showing his interest in the matter, duly protested against the funding of certain warrants of said county, as will hereafter appear. Judgment in favor of petitioners, and Roy V. Hoffman appeals. Affirmed.

The following evidence was introduced on the hearing (omitting exhibits):

W. W. White, being duly sworn, testified as follows:

"The Court: You are the chairman of the board of county commissioners? A. Yes, sir. Q. Have you examined this statement of the warrants of 'Q' county? A. Yes, sir. Q. I believe it is divided into Exhibits A and B,—Exhibit A covering the warrants issued from January 1, to July 10, 1894; and Exhibit B, the warrants from July 11th up to this time, A. I haven't examined that yet. Q. How much indebtedness does that list? A. The entire indebtedness of the county,—\$20,168.68,—for what warrants have been issued. Q. What are the denominations of these fundings you have had printed? A. \$500. Q. In the amount up to \$8,892.72, are there any warrants that are issued for any other purpose than for the payment of rent, fuel, lights, stationery, books, furniture, salaries of officers, travelling expenses, where allowed by law to officers, clerk hire, expenses of the courts chargeable to the county, keeping and guarding prisoners, transporting same, repairs, and all matters whatsoever pertaining to the necessary and actual operating expenses of the county, and in addition thereto the expenses of purchasing necessary cells and cages for the confinement of prisoners, not to exceed \$3,000 to any one county? A. There is one thing that seems to me to require a decision of the court to decide: What are the necessary expenses of the government? Q. What are these warrants for? A. There are some there that I should pronounce illegal,—that were issued for road and bridge warrants. The court: Road and bridge warrants will be disallowed. I think there is no question about them. They are not authorized."

Frank S. Dimon, being duly sworn, testified as follows:

"I will say there are some warrants marked here as 'supplies.' Those supplies—some of them—were for furnishing the bridge work, and matters of that kind. The Court: Call the list of warrants up to about \$8,500, and, if there are any matters of that kind, call the court's attention to them. Mr. Stone: Before proceeding further, I wish now, on behalf of the holders of the warrants issued on and since July 11, 1894, to protest against the bonding of any and all warrants of Pawnee county issued prior to July 11, 1894, for the reason that they were all issued in excess of the limitation of county indebtedness in territories of the United States, as fixed by act of congress approved July 30, 1886; there being no assessment for territorial and county purposes in said Pawnee county until July 11, 1894. (Objection overruled, and exception.) Mr. Stone: I wish, further, to object to all warrants issued for sheriff's fees, except those issued to Frank S. Dimon and M. F. Lake, for the reason that no sheriff's fees can be allowed to any one, under the statute, except the sheriff himself, and these warrants issued to deputy sheriffs are illegal. (Objection overruled, and exception.) Mr. Biddison: I wish to object to the bonding of all road and bridge warrants, all warrants for surveying, and the warrants issued for digging a well on the public square. (Objection sustained.) Mr. Houston: I object to the salary warrants issued, for the reason that the salaries were allowed upon an illegal population of 12,000, when we had only 6,000 or 7,000. By the Court: The salary warrants for the first quarter have been paid. I will allow the next two-quarters salary to be bonded, and will exclude the next warrant, and that will reduce the salaries to the proper limit, there being no objection. Mr. Stone: I object to all, as heretofore, on the ground only that the limit has been exceeded. By the Court: That objection will be overruled. (Exception.) Mr. —: I object to the funding of the warrants issued for jail cells, as being constructed and issued without authority. (Objection sustained. Exception.) Mr. Wrightsman: I object to the funding of warrants issued to pay expenses of certain inquests, the deaths having occurred in Payne county. (Objection sustained.) Mr. Biddison: I object to the funding of warrants issued to certain persons for attending habeas corpus hearing at Guthrie, they having voluntarily attended. (Objection sustained.) By the Court: Gentlemen, the rulings made cover all classes of warrants in this list. You will now foot up the amount, principal and interest of those not excluded, which amount cannot exceed four per cent. of the assessed valuation of the county as shown by the assessment. Mr. Stone: Will it not, of necessity, exceed the four per cent. limit, for the reason that the limit was reached six months ago, and the interest on valid warrants is valid, even if it is in excess of the limit, and the amount will then be the four per cent. limit, with six months'

interest added, or about \$9,100? By the Court: The court holds that the limit is arbitrary, and bonds will be signed for four per cent. only. (Exception.)"

On the same date the court ordered the following journal entry of record:

"Territory of Oklahoma, Pawnee County—
ss.: In the District Court.

"In re the Application of the County Commissioners and County Clerk of Pawnee County to Issue Funding Bonds.

"Journal Entry.

"Be it remembered that now, to wit, on this 16th day of November, A. D. 1894, personally appeared in open court W. W. White, A. G. McCain, and M. Westbrook, county commissioners, and Frank S. Dimon, county clerk, of Pawnee county, in Oklahoma territory, and file their petition to have the court pass upon and determine the amount of the legal outstanding warrants of said Pawnee county, and to sign bonds of said county for the funding of said warrants, which said application is as follows, to wit:

"Territory of Oklahoma, Pawnee County—
ss.: In the District Court. Application to Issue County Funding Bonds. Now comes W. W. White, A. G. McCain, and M. Westbrook, county commissioners of Pawnee county, Oklahoma territory, and Frank S. Dimon, county clerk of said county, and respectfully petition the judge of the district court of the Fourth judicial district, in and for Pawnee county, Oklahoma territory, to examine into and determine the correct amount of the legal outstanding warrants of said Pawnee county, and to sign bonds of said Pawnee county for the funding and payment of said outstanding warrants of said county, as required by law. Your petitioners, as county commissioners and county clerk, have caused the amount of the outstanding warrants of said county issued since the organization of said Pawnee, formerly "Q." county, and up to the date of this application, to be determined, and find the amount now outstanding, due and unpaid, to aggregate the sum of twenty thousand one hundred seventy-eight and $\frac{88}{100}$ dollars, a list of which warrants is hereto attached, marked Exhibits A and B, and made a part hereof. Your petitioners further represent that the assessed valuation of the taxable property of said Pawnee county at this date aggregate the sum of two hundred twenty-two thousand three hundred and eighteen dollars. W. W. White, Chairman. M. Westbrook, A. G. McCain, Commissioners. Frank S. Dimon, County Clerk."

"At the same time, and accompanying said application, said applicants file the following proof of publication of notice of said application, which said notice and proof of publication are as follows, to wit:

"Notice of Application to Issue County Funding Bonds. Notice is hereby given that

on the 16th day of November, A. D. 1894, the undersigned, county commissioners and county clerk of Pawnee ('Q') county, in Oklahoma territory, will appear in the district court of said Pawnee ('Q') county, and, in open court, ask the judge of said court to hear and determine their application to issue county funding bonds of said county for the funding of said debt, at which time any person interested may appear and protest against the funding of any of the outstanding warrants of said county. The county commissioners, upon examination, have found the correct amount of claims allowed against the county, and for which warrants have issued, which are outstanding, due, and unpaid, to be the sum of \$20,178.68. [Seal.] Commissioners: M. Westbrook, A. G. McCain. Frank S. Dimon, County Clerk. Dated, Pawnee, Oklahoma, Nov. 8th, 1894.'

"Proof of Publication. Territory of Oklahoma, County of Pawnee. Notice of Application to Issue County Funding Bonds. Affidavit of Printer. A. F. Stennett, being duly sworn, says that he is the foreman of the Times-Democrat, a newspaper printed in, and of general circulation in, Pawnee county, in the territory of Oklahoma, and that the notice of which the attached is a true copy was published for seven consecutive days in said newspaper, commencing on the 9th day of November, 1894. A. F. Stennett.

"Subscribed and sworn to before me this 16th day of Nov., A. D. 1894. [Seal.] Frank S. Dimon, County Clerk Pawnee ('Q') County, O. T.'

"Thereupon said applicants file the affidavit of Frank S. Dimon, county clerk of said Pawnee county, in support of said application, which said affidavit is in matter and form as follows, to wit:

"Territory of Oklahoma, Pawnee County—ss.: Personally appeared Frank S. Dimon, who, being first duly sworn, upon his oath, says that he is the county clerk of Pawnee county, Oklahoma territory, and that the lists of outstanding county warrants filed as a part of the application to bond in this case are true and correct lists of the warrants of said Pawnee county, Oklahoma territory, now outstanding, due, and unpaid, as shown by the records of his office, and that the assessed valuation of the taxable property of said Pawnee county, Oklahoma territory, as shown by the records of his office, is the sum of two hundred and twenty-two thousand, three hundred and eighteen (\$222,318) dollars. Frank S. Dimon, County Clerk.

"Subscribed and sworn to before me this 16th day of November, 1894. [Seal.] Lewis E. Craid, Dept. Dist. Clerk of the Dist. Court.'

"Said applicants also file affidavit of John F. Stone in support of said application, which said affidavit is in matter and form as follows, to wit:

"Territory of Oklahoma, Pawnee County. Personally appeared John F. Stone, who, be-

ing first duly sworn, says that he has examined the records of the office of the territorial auditor, to determine when the board of equalization of said territory finished its labors for the year 1894, and that said records show that the said board finished its labors on the 11th day of July, 1894. John F. Stone.

"Subscribed and sworn to before me this 16th day of Nov., 1894. [Seal.] J. N. Navighorst, Clerk District Court.'

"At the same time appeared John F. Stone, Wm. M. Allison, A. J. Biddison, and C. J. Wrightsman, on behalf of certain taxpayers and warrant holders of said county, and each, showing his interest in the matter under consideration, duly protested against the funding of certain warrants of said Pawnee county. Whereupon the court, having fully considered the application of said petitioners, and the proof filed in support thereof, finds that the assessed valuation of the taxable property of said Pawnee county, in Oklahoma territory, aggregates the sum of two hundred and twenty-two thousand three hundred and eighteen dollars; that the territorial board of equalization finished its labors upon the assessment for the year 1894 upon the 11th day of July of said year; that the limit upon the indebtedness of said county is, by act of congress, fixed at the sum of eight thousand eight hundred and ninety-two dollars and seventy-two cents; that the legal outstanding warrants of said Pawnee county, principal and interest, aggregate the sum of eight thousand eight hundred dollars. It is therefore considered, ordered, and adjudged by the court that the bonds of said county be issued to fund said debt, in the amount of eight thousand eight hundred dollars, and that the following list of warrants shall be included in said bonding, and that said warrants shall be paid, principal and interest, out of the proceeds of the sale of said bonds, a list of which said warrants is hereto attached, and made a part hereof, marked 'Exhibit C.' It is further ordered by the court that all of the outstanding warrants of said Pawnee county, excepting those included in Exhibit A, be and are excluded from said bonding, a list of which said warrants is hereto attached, marked 'Exhibit D.' Whereupon the judge of said court, in open court, signs the bonds of said county numbered one (1) to eighteen (18), inclusive, each of the first seventeen (17) bonds being for the sum of five hundred dollars each, and bond number eighteen (18) being for the sum of three hundred dollars; said bonds to become due in ten years, and payable, after the end of three years, at the option of the county, and drawing interest at the rate of six per cent. per annum, payable annually, amounting in all to the sum of eight thousand eight hundred dollars. Whereupon, in open court, the judge of said court delivers said bonds to L. G. Poe, the county treasurer of said county, taking his receipt therefor, and at

the same time the said county treasurer receipts to the said county clerk for the said bonds, at which time the court instructs the county treasurer that such bonds shall not be sold for less than par, with accrued interest, in cash, or the warrants of said Pawnee county included in this bonding, and that he shall not pay any of the warrants included in this bonding in any other manner, or from any other fund, than that received from the sale of these bonds. To each and every such ruling the attorneys for protestants then and there duly excepted and except. And to each of said rulings by which any of said warrants are included in this bonding, attorneys for protestants then and there duly excepted and except. And to each of said rulings by which any of the warrants included in Exhibit D, excepting road and bridge warrants, are excluded from said bonding, said attorneys for protestants then and there duly excepted and except. Whereupon attorneys for protestants prayed an appeal to the supreme court of Oklahoma territory, and were granted 15 days in which to prepare and file a case made, the judgment of this court being suspended upon the filing of a bond in the sum of \$500, and the county treasurer of said Pawnee county was thereupon directed that he should not in any manner dispose of said bonds pending said appeal."

From this judgment Roy V. Hoffman, feeling himself aggrieved, brings the case here, and assigns errors as follows: "The court erred: First. In including any of the warrants issued prior to July 11, 1894, in the list of warrants to fund which bonds were issued. Said court erred: Second. In excluding any of the warrants issued on or subsequent to July 11, 1894, from the list of warrants to fund which bonds were issued. Third. Said court erred in holding that warrants issued to deputy sheriffs for serving process were valid. Fourth. Said court erred in excluding the warrants of said county, numbered from 522 to 528, held by the plaintiff, from said bonding. Fifth. Said court erred in holding that the interest on valid warrants was invalid when it exceeded four per cent. of the assessed valuation. Wherefore, the plaintiff in error prays that said judgment so rendered may be reversed, set aside, and held for naught, and that the judgment may be ordered to be rendered in favor of the plaintiff in error and against the defendant in error, and that the plaintiff in error be restored to all rights he has lost by the rendition of said judgment, and for such other and further relief as to the court may seem just."

John F. Stone, for plaintiff in error. A. J. Seay and Asp, Shartell & Cottingham, for defendant in error.

SCOTT, J. This cause involves the same questions presented to the court in the case

of Nicholas and William Sauer v. J. W. McMurtry, as a taxpayer and county attorney of Roger Mills county, and was consolidated with this one for the purpose of argument before this court. The question in the Pawnee county case comes to this court by the petition in error of holders of warrants issued subsequent to the first assessment, who claim to be prejudiced by the action of the district court of Pawnee county excluding warrants issued since the assessment in excess of the 4 per cent. limit from the bonding process, and including warrants issued prior to that time therein. The presiding judge below (Justice BIERER) held to the view that said county could create a debt, within the law prior to an assessment, not in excess of 4 per centum of the value of the taxable property in said county, to be ascertained by the first assessment. Chief Justice DALE concurs in this view. Justice BURFORD entirely dissents, and still adheres to the view expressed in the New Vienna Bank Case, as applicable to this case as well as that one. Justice McATEE, concurs fully with the reasoning in this opinion, notwithstanding his decision in the Roger Mills County Case; and all the justices concur in the conclusions reached herein, excepting Justice BURFORD, in affirming the judgment of the court below.

The case from Roger Mills county comes here from a perpetual injunction granted by the district court of that county against the payment of any warrants issued prior to the assessment, on the petition in error of one of the holders of these warrants, complaining of the granting of such an order. The case of City of Guthrie v. New Vienna Bank, 38 Pac. 4, was decided by this court on the 7th day of September, 1894, and the language used in that case has been construed by counsel for plaintiff in error as decisive of this case; and the public at large has, to some extent, regarded that decision as the expression of the court upon the federal limitation act of July 30, 1886. The indebtedness involved in the New Vienna Bank Case arose before the passage of the organic act of Oklahoma territory, May 2, 1890; and in the consideration of this case we will entirely eliminate that case, and treat it independently, as it now stands before us on a rehearing granted at the January term of this court. Without further reference to the New Vienna Bank Case, or the case from Roger Mills county, in this opinion, we will enter upon a discussion of this one independently, and upon its full merits, as presented by the record, and the laws of the United States and of this territory as applicable thereto.

The various assignments of error presented and relied upon by counsel for plaintiff in error are stated in one proposition, as follows: "Are the warrants issued by the counties in the Cherokee Strip prior to the date when the first assessment was finally

completed (July 11, 1894) by the territorial board of equalization valid, either in whole or in part?" Counsel then submits propositions which may be classified as follows: (1) Under the act of congress approved July 30, 1886, relating to municipal debts in territories of the United States, all debts of municipal corporations in Oklahoma in excess of 4 per cent. of the valuation of the taxable property therein, as shown by the last preceding annual assessment for territorial and county purposes, are void. (2) That all warrants issued prior to the first assessment for territorial and county purposes in any of the counties of Oklahoma are void. (3) That warrants issued in excess of the constitutional limit are void in the hands of innocent purchasers, and when converted into bonds are likewise void, no matter what language the recitals may contain. (4) That the assessment cannot become the basis of a debt until it has been finally passed upon by the territorial board of equalization. (5) That there is no relief for the holder of such void claims, either in law or equity. Counsel for defendant in error states the question involved to be almost literally the same, as follows: "Are county warrants issued by the counties of Oklahoma prior to the making of the first assessment for the purpose of taxation invalid?" It is submitted by counsel for defendant in error that the so-called 4 per cent. limitation imposed by the Act of 1886 is not involved in this case in any manner, and no proposition presented by the record is, under the law, affected thereby. Three propositions are stated briefly, as follows: "First, that the organic act of the territory of Oklahoma is, in and of itself, a complete instrument, defining the exact limit of the organic power of the territory without reference to any other laws passed upon kindred subjects; second, that the act of 1886, as it is construed in the New Vienna Bank Case, is repugnant to the act of congress creating the territory of Oklahoma, and especially that part of the act creating counties, and carrying with it the implied power of the counties to maintain their organization instanter without revenue; and, third, the act is excluded from operation upon counties, and possibly other municipalities, within the terms of section 28, as being inapplicable to the conditions and necessities of the people." It is also contended by counsel for defendant in error that the contemporary construction of the various acts by those officers charged with the duty of carrying their provisions into execution should be regarded as of great moment in the determination of their legal effect at this time.

We collate and quote the several statutes affecting the case. The act of July 30, 1886, known as the "Federal Limitation Act," contains provisions as follows: Section 1 forbids the passage of local or special laws, in certain enumerated cases, by any of the ter-

ritories now or hereafter organized. Section 2 reads: "That no territory of the United States now or hereafter to be organized, or any political or municipal corporation or sub-division of any such territory, shall hereafter make any subscription to the capital stock of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to or use it for the benefit of any such company or association, or borrow any money for the use of any such company or association." Section 3 reads: "That no law of any territorial legislature shall authorize any debt to be contracted by or on behalf of such territory except in the following cases: To meet a casual deficit in the revenues, to pay the interest upon the territorial debt, to suppress insurrections, or to provide for the public defense, except that in addition to any indebtedness created for such purposes, the legislature may authorize a loan for the erection of penal, charitable or educational institutions for such territory, if the total indebtedness of the territory is not thereby made to exceed one per centum upon the assessed value of the taxable property in such territory as shown by the last general assessment for taxation. And nothing in this act shall be construed to prohibit the refunding of any existing indebtedness of such territory or of any political or municipal corporation, county, or other sub-division therein." Section 4 reads: "That no political or municipal corporation, or other sub-division in any of the territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county, or sub-division, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void; that nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law; nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation, or subdivision of any territory as to any bonds heretofore issued or contracted to be issued." Section 7 reads: "That all acts and parts of acts hereafter passed by any territorial legislature in conflict with the provisions of this act shall be null and void." The latter portion of section 1 of the organic act of Oklahoma territory, passed May 2, 1890, reads: "* * * Whenever the interest of the Cherokee Indians in the land known as the Cherokee Outlet shall have been extinguished and the presi-

dent shall make proclamation thereof, said Outlet shall thereupon and without further legislation become a part of the territory of Oklahoma. Any other lands within the Indian Territory not embraced within these boundaries shall hereafter become a part of the territory of Oklahoma whenever the Indian Nation or tribe owning such lands shall signify to the president of the United States in legal manner its assent that such lands shall so become a part of the territory of Oklahoma, and the president shall thereupon make proclamation to that effect." The material portion of section 14 of the act of March 3, 1893 (27 Stat. 645), opening the Cherokee Outlet and the Pawnee and Tonkawa Indian reservations to settlement, reads: "Before any of the aforesaid lands are open to settlement it shall be the duty of the secretary of the interior to divide the same into counties which shall contain as near as possible not less than five hundred square miles in each county. In establishing said county lines the secretary is hereby authorized to extend the lines of the counties already located so as to make the area of said counties equal, as near as may be, to the area of the counties provided for in this act." The second clause of the organic act passed May 2, 1890, contains this provision: "That for the purpose of facilitating the organization of a temporary government in the territory of Oklahoma, seven counties are hereby established therein, to be known, until after the first election in the territory, as First County, the Second County, the Third County, the Fourth County, the Fifth County, and the Sixth County, the boundaries of which shall be fixed by the governor of the territory until otherwise provided by the legislative assembly thereof. The county seat of the First County shall be at Guthrie. The county seat of the Second County shall be at Oklahoma City. The county seat of the Third County shall be at Norman. The county seat of the Fourth County shall be at El Reno. The county seat of the Fifth County shall be at Kingfisher City. The Sixth County seat shall be at Stillwater. The Seventh County shall embrace all that portion of the territory lying west of the one hundredth meridian, known as the Public Land Strip, the county seat of which shall be at Beaver: provided, that the county seats located by this act may be changed in such manner as the territorial legislature may provide." Section 2 of the organic act reads: "That the executive power of the territory of Oklahoma shall be vested in a governor, who shall hold his office for four years, and until his successor shall be appointed and qualified, unless sooner removed by the president of the United States. The governor shall reside within said territory; shall be commander in chief of the militia thereof; he may grant pardons for offenses against the laws of said territory, and reprieves for offenses against the laws of the United

States, until the decision of the president can be made known thereon; he shall commission all officers who shall be appointed to office under the laws of said territory and shall take care that the laws be faithfully executed." Section 7 of the organic act (May 2, 1890) reads: "That all township, district and county officers, not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and legislative assembly of the territory. The governor shall nominate, and by and with the advice and consent of the council, appoint all officers not herein otherwise provided for, and in the first instance the governor alone may appoint all such officers, who shall hold their offices until the end of the first session of the legislative assembly." Section 6 of the organic act (May 2, 1890) reads: "That the legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of soil; no tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the right to private property; nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to the taxation shall be taxed in proportion to its value: provided that nothing therein shall be held to prohibit the levying and collecting license or special taxes in the territory, from persons engaged in any business therein, if the legislative power shall consider such taxes necessary." In pursuance of the above grant of legislative power, there has been enacted a complete political code. The powers, duties, and liabilities of municipalities and municipal officers are clearly defined and laid down; and all these laws, except those passed at the last session of the legislative assembly, were in existence on the 16th day of September, 1893, when the Cherokee Outlet was opened for settlement, and, under the law, became a part of the territory of Oklahoma. Pawnee county, the municipality involved in this case, is a part of the country so opened to settlement on the 16th day of September, 1893, by proclamation of the president, under the act of March 3, 1893. Section 11 of the organic act put in force certain enumerated chapters of the Compiled Laws of the State of Nebraska, to remain in effect until the adjournment of the first session of the legislative assembly; and under said laws, county, district, and township offices were created, and under section 7 of the organic act said offices were filled by proper appointment. Section 28 of the organic act reads: "That the constitution and all the laws of the United States not locally inapplicable shall,

except so far as modified by this act, have the same force and effect as elsewhere within the United States; and all acts and parts of acts in conflict with the provisions of this act are as to their effect in said territory of Oklahoma hereby repealed; provided, that section eighteen hundred and fifty of the Revised Statutes of the United States shall not apply to the territory of Oklahoma."

Thus we have stated the propositions and the statutes and provisions alleged to have application thereto, but to still more simplify the real question, and more clearly define and set out our complicated legal status, present boundaries, and contemporaneous history, a slight retrospective review will be necessary. Oklahoma territory, as now constituted by the various laws of congress, embraces an area of about 39,000 square miles, and contains 22 counties. On the 3d day of March, 1889, President Harrison, by executive proclamation under the act of March 2, 1889, before the organization of Oklahoma, declared the original territory embraced within the boundaries of old Oklahoma open to settlement on the 22d day of April, 1889. On the 2d day of May, 1890, the organic act of Oklahoma territory was passed, and a temporary government, by the name of the "Territory of Oklahoma," was erected. See 26 Stat. 81. By the terms of section 4 of said organic act, this territory was subdivided into seven counties, to be known, until after the first election in the territory, as "First County," now Logan county; "Second County," now Oklahoma county; "Third County," now Cleveland county; "Fourth County," now Canadian county; "Fifth County," now Kingfisher county; "Sixth County," now Payne county; and "Seventh County," being the tract of land known as the "Public Land Strip," and now Beaver county. As heretofore stated, by the terms of section 11 of the organic act certain chapters of the Compiled Laws of the State of Nebraska were put in force, in so far as they were locally applicable, and not in conflict with the laws of the United States, until after the adjournment of the first session of the legislative assembly; and, under proper heads, certain township, county, and district offices were created. Section 7 of the organic act provides that in the first instance the governor alone shall appoint all such officers, and that they shall hold their offices until the adjournment of the first session of the legislative assembly. George W. Steele, as governor of Oklahoma, appointed a full corps of county, township, and district officers for all of said counties so established by the organic act and the laws of Nebraska put in force by said act, and said officers immediately entered upon the discharge of their duties. Upon the adjournment of the first session of the legislative assembly of Oklahoma territory, all these offices having been created thereby, the laws of Nebraska had served the purpose intended by congress, and

were no longer applicable or in force. The first legislative assembly of Oklahoma territory convened on the 27th day of August, 1890, and adjourned on the 24th day of December, 1890. The published statutes of Oklahoma (1890) then took the place of the laws of Nebraska, and the organic act stood as our constitution. All of which has so remained from said time until the present, except as amended or repealed by subsequent sessions of congress, or the territorial legislature. On the 22d day of September, 1891, the country now known as the counties of Lincoln and Pottawatomie, of the territory of Oklahoma, were opened to settlement by proclamation of the president of the United States, dated September 18, 1891, issued under and in pursuance of an act of congress approved March 13, 1891; said counties then being designated as "A" and "B" counties, and being a part of the Sac and Fox and Iowa Nations of Indians, the Citizen Band of Pottawatomie Indians, and the absentee Shawnee Indians. By the proper authority, a full corps of county, township, and district officers for said counties were appointed, and said officers entered upon the duties of their respective offices, George W. Steele still being governor of the territory. On the 19th day of April, 1892, that country known as the "Cheyenne and Arapahoe Country" was, by proclamation of the president of the United States, issued under the act of congress approved March 3, 1891, opened for settlement; and in pursuance of existing provisions of law (Hon. A. J. Seay being governor) a full corps of county, township, and district officers were appointed, who proceeded to exercise their functions as such. The country so opened was subdivided into the counties of "C," now Blaine county; "D," still "D" county; "E," now Day county; "F," now Roger Mills county; "G," still "G" county; and "H," now Washita county. On the 16th day of September, 1893, the Cherokee Outlet and the Pawnee and Tonkawa Indian reservations were, by executive proclamation, opened to settlement under the act of March 3, 1893, and divided into the counties of "K," now Kay county; "L," now Grant county; "M," now Woods county; "N," now Woodward county; "O," now Garfield county; "P," now Noble county; and "Q," now Pawnee county. And in pursuance of existing provisions of law the governor of said territory, William C. Renfrow, appointed a full corps of county officers for each of the counties contained in said territory so opened to settlement. This country so opened consists of lands formerly owned by the Cherokee, Pawnee, and Tonkawa Nations of Indians. On the 23d day of May, 1895, by proclamation of the president, the Kickapoo Indian reservation was opened to settlement under the provisions of the act of congress of March 3, 1893. No new counties were organized, but said country had been attached to Logan and Oklahoma counties for judicial purposes. On

the 29th day of May, 1890, the supreme court of the territory of Oklahoma was organized, and said territory of Oklahoma was divided into three judicial districts, under section 9 of the organic act; and upon the opening of "A" and "B" counties (now Lincoln and Pottawatomie counties) said counties were attached to, and made a part of, the First and Third judicial districts of said territory, and courts established therein. Upon the opening of the Cheyenne and Arrapahoe country the territory of Oklahoma was redistricted, and that country became a part of the Second judicial district of said territory. Upon the opening of the Cherokee Outlet and the Pawnee and Tonkawa reservations the territory was again redistricted, and said reservations were embraced within proper judicial districts. By the act of congress of December 21, 1893, two additional associate justices of the supreme court were appointed, and the territory of Oklahoma was again redistricted into five judicial districts, and so stands at this time.

Thus it will be observed that from and after the passage of the organic act (May 2, 1890), this territory has had a complete government, provided by congress and the laws of the territory passed by the legislative assembly. In each of the so organized and established counties a full set of officers were appointed by the proper authority, and the entire machinery of county government put into operation, before any assessment was ever had; and all of them, including Pawnee county (now in question), created indebtedness and incurred liabilities, in pursuance of their supposed power, prior to making an assessment for county and territorial taxes.

From this review the construction of officers charged with the execution of these laws, from the president of the United States down, so far as the appointment and qualification of officers and the establishment and organization of the municipalities embraced within the boundaries of Oklahoma territory have been involved, can be seen; and such construction, if made honestly and in good faith, should have great weight in the determination of this question. It is conceded that the various officers charged with the execution of those laws did so properly, and that the Cherokee Outlet, as well as other portions of Oklahoma, was opened to settlement, the counties established, offices created, and officers appointed, in accordance with the laws enacted for that purpose. In fact, all parties go hand in hand down to the point where the country is opened, the counties or municipalities defined and established, the various officers created and filled by the proper authority, and the officers duly qualified as provided by law; and then, and not until then, is issue taken. Thus, at length, we have squarely reached the question; and in dealing with it we are not unmindful of its importance in the commercial world, and the deep responsibility upon the court in arriving at a correct deter-

mination. We have therefore desired to omit nothing that would achieve this end. We have received much valuable aid from the very able and elaborate briefs filed by counsel on either side, all of which discloses evidence of deep and careful research, as well as a great familiarity with the subject. Yet we will be unable to adopt the theory of either side, as a whole; but we believe the conclusion reached by the court after a full consideration of argument and briefs, together with extensive independent research and deliberation, to be correct under the law, and just in equity and good conscience.

The plaintiff in error contends that the end has been reached, because there are no provisions of law for raising revenue for the purpose of enabling the authorities to discharge the functions of county government, and that no valid debt can be incurred until there has been an assessment, and for these reasons the county government must be brought to a standstill. The defendant in error contends that the provisions of section 4 of the act of July 30, 1886, are inapplicable, or have been repealed, and that, while it is true that there are no adequate laws in force for the raising of revenue, yet, under the implied corporate powers of the municipalities, valid evidences of debt can be issued, and such municipalities enabled to exist, and discharge their functions under the law notwithstanding.

It is established doctrine that a municipality has the implied power to incur indebtedness whenever it is necessary to do so to carry out any power conferred upon it, unless the contracting of such debt is prohibited by statute. It follows, then, that Pawnee county, upon being fully established, organized, and equipped with all necessary officers, as required by law, had the power to contract debts for the necessary purpose of existence, unless section 4 of the act of July 30, 1886, was in force to prevent it. This statute was passed nearly four years before Oklahoma, as a territory, had any existence, and contemplated existing indebtedness, by the use of the words, "including existing indebtedness." While this is true, there is no doubt in the mind of the court that all the laws of the United States or the territory of Oklahoma in force in old Oklahoma, so far as applicable, became operative *eo instante* upon the establishment and organization of Pawnee county. It was made a part of Oklahoma territory by act of congress, and it was, of course, intended by congress that it should be subject to and governed by the same laws. Section 28 of the organic act placed the constitution, and all laws of the United States not locally inapplicable, in force in Oklahoma, except as modified in said organic act, the same as elsewhere in the United States, and repealed all acts and parts of acts in conflict with said organic act, as to their effect in Oklahoma. It is apparent, then, and should not be controverted, that all acts and statutes of the

United States applicable to our country and conditions, and not in conflict with the provisions of the organic act, immediately took effect upon the passage thereof, and also went into effect and became applicable to the territory added to our domain from time to time under the laws of congress as heretofore stated. It would not support good reason to contend that, unless an entire statute were applicable at once upon the passage of the organic act, it never could become applicable, or that the time never could arrive when, if in conflict with the organic act, the repugnancy would no longer exist. So, then, the contention of counsel for plaintiff in error, that "locally inapplicable" refers to place, and not to time, is unsound. Before us we have a living example. The domain now embraced in the boundaries of Pawnee could in no manner be affected by the act of 1886 until such time as it became a municipality, and a part of a territory of the United States. Under the very argument of counsel for plaintiff in error, the statute could have no application, for the purpose of laying the foundation of a debt, until such time after the opening of the Cherokee Outlet and the organization and equipment of the county as an assessment had been made for territorial and county taxes. It is clear that time, in this case, has as much to do with the applicability of this statute as place, and that section 4 of the act of 1886 could have no application to Pawnee county until after the first assessment of the taxable property therein for territorial and county taxes was made, or that said act is in conflict with some of the other provisions of law, and hence repealed by section 28 of the organic act, as to its application in Pawnee county. Time has intervened since the organization of the county to make the law applicable, or has rendered it no longer repugnant, which is the same in effect. Neither is it sound to contend that section 4 could only have such application to Pawnee county as it had to the balance of Oklahoma territory. This would be true if Pawnee county were in the exact legal status as the balance of Oklahoma. If the status of Pawnee county as a municipality is such that it can come within the provisions of said act, then just so far is said act applicable thereto, and just so far is the act repealed, as to its effect therein, by section 28 of the organic act.

When Pawnee county was organized and ready for business could section 4 be wholly applicable? This question will have to be answered in the negative. It could not be applicable because Pawnee county had not had an assessment of the taxable property therein for county and territorial taxes, in order to lay the foundation so that a debt might be incurred under said act. We have said that a corporation has the implied power to contract a debt when necessary to carry out any obligation laid or power conferred upon it, unless prohibited by statute. We

are certain that congress recognized this as a principle of law, and when, by express enactment, these counties were created, it was intended that they should exist by the exercise of this power, or means of raising revenue would have been provided. It would be attributing criminality, negligence, imbecility—one or all—to congress, to hold that, either by oversight, ignorance, or design, these counties, populated in a day with a wild rush for homes, or greed, were to be left in such a pitiable and helpless condition, without revenue, or any means whatever for the protection of life, liberty, or property of the person by a proper enforcement and execution of the law. Indeed, as has been suggested, the making of an assessment itself could not be effected, because it would necessarily involve the creation of a debt, which, under the contention of counsel, would be void. It was the undoubted purpose of congress to have these counties thus exist, and the intention that the provisions of section 4 should be held inapplicable, or repealed, as to its effect in such cases.

It may be asked, what if the necessities or prodigality of the county government should be so great as to run the county in debt to an amount beyond the limit of 4 per cent. of the taxable property prior to an assessment? It may be further asked if, under this construction, there is any limit at all before an assessment is made? In answer to this, we would be compelled to hold that until an assessment has been made section 4 can have no application whatever—first, because no assessment has ever been made; and, second, because, under the statute, there is no means of applying the 4 per cent. limitation, except upon the basis laid by the assessment. Four per cent. of the taxable property prior to an assessment is an unknown quantity, and cannot be mathematically determined; and section 4 of said act can only be held to be wholly applicable or wholly inapplicable prior to an assessment. It would be a mistaken view to hold that section 4 makes reference to the last assessment as a period when the first indebtedness might be incurred, instead of regarding it as a basis for the ascertainment of the amount of indebtedness that may be created. This must be true, for in 1886, when the act was passed, there was no territory in existence where no assessment had been made therein; and said act was passed with especial reference to existing territories and existing indebtedness, counties completely organized and equipped, and assessment of the taxable property made therein. There is good reason in regarding section 4 as inapplicable prior to an assessment, but not afterwards. After the assessment is made this municipality comes clearly within the statute. It provides "that no political or municipal corporation or other subdivision in any of the territories of the United States shall ever become indebted in any

manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county, or sub-division, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void." Pawnee county is a municipal corporation. It is located in a territory of the United States. The taxable property therein has been assessed as provided by law. The laws of the United States and the territory have application thereto, as any other municipality whose legal status is the same, rendered so by the same power and authority. The only difference—if that amounts to a legal difference—is that a debt has been contracted previous to the assessment. It is also true that debts were contracted and in existence in the territories of the United States in 1886, when the act was passed. This is evident from the use of the words, "including existing indebtedness." When this statute became applicable to Pawnee county, said Pawnee county having an existing indebtedness, having had an assessment, and being a municipal corporation, and situated in a territory of the United States, who will undertake to define the distinction between Pawnee county, in this condition, and a county in the territory of New Mexico, in 1886,—at the time of the passage of said act; said county in New Mexico being a municipal corporation, having had an assessment, having an existing indebtedness, and being situated in a territory of the United States? Certainly no one would attempt such a distinction. So we can see no escape from the conclusion that the valid indebtedness incurred in Pawnee county prior to an assessment must be regarded as comparable to the indebtedness existing in similar municipalities in other territories of the United States in 1886, when this act was passed.

We presume congress intended that, if existing indebtedness reached or exceeded 4 per cent. of the assessed valuation, no greater debt could be incurred, but that such an impoverished condition of affairs would appeal to the wisdom of the proper legislative authority. There are many ways to relieve such a condition, but a discussion of the matter need not take place here. We have not to deal with that phase of the question. Neither have we to deal with the suggestion of counsel for plaintiff in error—which is wholly outside of the record—that corrupt officers, unless restrained by the limitation referred to, will hopelessly burden a municipality with debt. We can only say that if debts incurred are fraudulent there is ample relief, but the court, so far as this record is concerned, is bound to presume that the indebtedness was necessarily created, and

valid, so far as it was incurred within existing provisions of law.

From this reasoning it follows that section 4 of the act of July 30, 1896, did not become applicable to Pawnee county until after an assessment was had for territorial and county taxes, or that its provisions were repealed, as to their effect therein, by section 28 of the organic act, and that all indebtedness created within existing provisions of law in said county are valid and binding obligations upon the county; further, that if, at the time of the first assessment, the existing indebtedness reaches, or is in excess of, 4 per cent. of the taxable property of said county, no more indebtedness can be created until such times as the taxable property shall have been increased, or the existing indebtedness shall have been liquidated, to such an extent that the amount of debt to be created shall not exceed 4 per cent. of the value of the taxable property, to be ascertained by the last assessment for territorial and county taxes. It therefore appearing from the record that bonds were issued within the provisions of law by the lower court, its judgment will be affirmed, with costs. It is so ordered.

BIERER, J., having presided below, not sitting. BURFORD, J., dissents. MCATEE, J., concurs fully. DALE, C. J., concurs in the conclusion in affirming the judgment, but does not agree that a debt exceeding 4 per cent. may be contracted prior to the first assessment, or at any other time, so long as section 4 of the act of 1896 is in force.

BAILEY v. BERHANT.

(Supreme Court of Oklahoma. July 27, 1895.)

MANDAMUS—INSUFFICIENT ANSWER.

In a mandamus proceeding, where the answer to the alternative writ is so defective that it does not show any good and sufficient reason for a failure to do the thing commanded in the writ, no error is committed in sustaining a demurrer thereto.

(Syllabus by the Court.)

Appeal from district court, Payne county; before Justice Frank Dale.

Mandamus by August Berhant against J. N. Bailey. Demurrer to the answer sustained. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank A. Hutto and Robert Lowery, for appellant. A. T. Neill and J. R. Clark, for respondent.

BIERER, J. On the 9th day of February, 1893, the defendant in error, August Berhant, filed his petition in the district court of Payne county, Okl. T., alleging that on the 23d day of November, 1892, he and Maggie Berhant were defendants in an action tried before J. N. Bailey, defendant in the court below, who was at that time a justice of the

peace of Payne county, Okl. T., and in which George Daman was plaintiff, and that on the trial of said cause before said justice of the peace judgment was rendered in favor of George Daman, the plaintiff therein; and that within the time required by law the defendants in said justice court gave written notice of an appeal from said judgment; and that afterwards, on the 17th day of January, 1893, the defendants in said justice court filed a good and sufficient appeal bond in the sum of \$100, signed by two good and sufficient sureties, who justified as the law required, with said J. N. Bailey; and that the petitioner also paid the sum of \$1 to said justice for the transmission of a transcript in said cause to the district court of said county; and, notwithstanding these things, the said J. N. Bailey refused to send a certified transcript of the proceedings in said cause to the district court. The petition of the relator asked that a writ of mandamus issue, commanding the said J. N. Bailey, justice of the peace, to transmit a certified copy of all the proceedings had in the trial of said cause before him to the clerk of the district court. Upon this petition an alternative writ of mandamus was issued, requiring the said justice of the peace to transmit to the clerk of the district court of Payne county, Okl. T., a certified transcript of the proceedings had in said cause, or to show cause why he does not so do, on the day named in the writ. Bailey appeared in this action, and filed his answer, and afterwards, by leave of court, his amended answer. In his amended answer he set up as the reason why he had not sent, and why he ought not to send, a transcript of the proceedings in said cause to the district court, that the bond given by said August and Maggie Berhant was never approved by him, and that "when said George Daman attempted to appeal said cause to the district court, that he specifically notified that said bond was not approved, and that said defendants, August Berhant and Maggie Berhant, excepted thereto, and in direct violation of the order of this defendant they neglected and refused to appear before this defendant, J. N. Bailey, and justify by law as required, and in accordance with said order of said court, J. N. Bailey, and neglected and refused to take any further action in said cause." This amended answer also stated that the original answer was made a part of the amended answer. The original answer contained the allegation: "And that within five days after the filing of said bond an exception was filed by the opposing party." And also the further statement "that due notice of said exception was served on the appellants, and that they failed to justify to the amount stated in bondsmen affidavit within 5 days thereafter." There were some other allegations in the answer and amended answer not necessary to be stated,

as they do not bear upon the question raised. To this amended answer the court sustained the demurrer of the plaintiff, and rendered judgment in favor of the plaintiff, commanding the said J. N. Bailey to file a transcript as provided by the alternative writ.

The point urged as the reason for reversing this judgment is that, under section 5255 of the Statutes of 1890, under which the case was tried in the justice court, it is provided that, after an appeal bond is filed by the party against whom the judgment is rendered, "the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice before whom the appeal is taken, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given"; and that by reason of this statute the demurrer of the plaintiff below to the answer of defendant below should have been overruled. And it is urged by plaintiff in error that this statute is mandatory, and that, as the defendant in error did not have his sureties justify, as it is claimed he should have done under this statute, the appeal sought to be taken was of no force or effect. It is wholly unnecessary for us to place a construction upon this statute under the pleadings in this cause, for, although it may be that plaintiff in error intended to prepare his answer in the court below so as to raise this question, his pleading was so imperfectly and defectively drawn as not to justify us in passing upon the question he seeks to raise. His strongest allegation is "that within five days after the filing of said bond an exception was filed by the opposing party." But what kind of an exception was this? Was it an exception to allowing any appeal at all? Was it an exception to the sufficiency of the sureties? There is nothing either in the original or in the amended answer which informs us on this question. In truth, the amended answer states that August Berhant and Maggie Berhant were the parties who filed the exceptions, and does not allege, either directly or inferentially, that George Daman, the plaintiff, filed any exception of any kind to the appeal bond. We cannot consider such pleadings as containing a direct allegation that the party against whom August Berhant and Maggie Berhant were taking an appeal filed any exception "to the sufficiency of the sureties"; and, unless George Daman did file such exception, then it was wholly unnecessary for August Berhant and Maggie Berhant to present their sureties before the justice of the peace for justification, upon notice to the adverse party. No matter what view we might take of the question as to whether or not the statute referred to is mandatory, and requires the just-

fication upon notice, as claimed by plaintiff in error, his answer in the court below is so entirely wanting in respect to the necessary allegations, which he now claims were good as against the demurrer of the plaintiff below, that we cannot say the district court committed any error in sustaining the demurrer. The allegations of this answer were not sufficient to show any reason to the district court, on the part of the justice of the peace, for his failure to transmit a certified copy of his record in the proceedings referred to to the district court. The judgment of the district court is affirmed, with costs against plaintiff in error. All of the justices concurring, except DALE, J., not sitting.

MULHALL v. MULHALL.

(Supreme Court of Oklahoma. July 27, 1895.)

REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE
—OBJECTIONS TO EVIDENCE—ISSUES
—PRESUMPTIONS.

1. Where there is positive testimony to support all of the material issues involved in the case, as tried in the district court, although the evidence may be very contradictory, the supreme court will not reverse the judgment of the district court on the ground that it is not sustained by sufficient evidence.

2. Where an interrogatory is competent, relevant, and material, under any of the issues of the case, although the question is of a dual character, and might also call for an answer for which there may be no foundation laid in the pleadings, a part of the question being calculated to elicit proof directly upon the issues made, no error is committed by the court below in overruling an objection to the question as incompetent, irrelevant, and immaterial.

3. Where, on the trial of a cause, one of the issues involved was upon a counterclaim pleaded by the defendant in her answer, for money loaned the plaintiff, to which the plaintiff had replied by a general denial, and where it appears that in the trial of the case both plaintiff and defendant offered testimony upon the question as to whether or not the plaintiff had paid the counterclaim, which testimony was offered without any proper objection on either side, and where the trial court found on the issue in favor of the plaintiff,—the case being one where the pleadings might properly have been amended,—the supreme court, without determining the question as to whether proof of payment is admissible under a general denial will consider the case as if the issue had been properly made by amendment, if that be necessary.

(Syllabus by the Court.)

Appeal from district court. Logan county; Frank Dale, Judge.

Joseph L. Mulhall brought this action in the district court of Logan county to recover upon his petition in two counts,—one for the sum of \$130, and one for the sum of \$593.50,—a total sum of \$723.50, with interest. In the trial by the court without a jury, judgment was given to the plaintiff in the sum of \$593.50, with interest on that sum, as prayed for, from which defendant appeals. Affirmed.

Huston & Huston, for plaintiff in error.
Keaton & Cotterell, for defendant in error.

BIERER, J. Plaintiff in error assigns two grounds for the reversal of the judgment of the court below: First, that the judgment is not sustained by sufficient evidence; second, that the court erred in permitting evidence, over objection, tending to show payment of defendant's counterclaim, upon plaintiff's plea of general denial.

As to the first objection, the judgment is amply sustained by the evidence. Joseph Mulhall, the plaintiff, testified that in January, 1891, he furnished defendant the sum of \$130; that this sum of money was expended in the purchase of feed for certain hogs owned by the defendant and one Matthews; that on January 28, 1893, he gave to the defendant, for safe-keeping for him, two drafts for the sum of \$1,000 each, and \$570 in money; that \$1,500 of this money was paid for cattle which Zack Mulhall, the husband of defendant, had purchased of one Tonk Smith; and that the balance of the money was invested in the purchase for the defendant of hogs for shipment, and in feed for the hogs. He admitted the receipt from the defendant, at various times, of sums of money amounting in all to several hundred dollars, but claimed that the original sum of \$130 and the balance, of \$593.50, of the second amount furnished to defendant of \$2,570, were still due. Defendant, as her defense, claimed that these various sums of money were invested by herself and plaintiff as partners in the stock business, and that the money had been lost in the business, and that she never received the money from the plaintiff as a loan; that the money had been intrusted to her by the plaintiff, and had been invested in this business at his request. She also claimed an offset for money loaned the plaintiff in 1892, in the sum of \$1,000. There was but little testimony of any importance in the case, outside of that of the plaintiff and defendant. The defendant admitted the receipt of the money. She admitted the investment of it in her own name; that the business was carried on in her name; that the hogs and feed were bought in her name; were shipped to the commission house in Kansas City in her name. The bank account was kept in her name, and the checks and drafts drawn and received in her name; and there is scarcely anything in the case to support her claim, excepting her own bare statement. This is not only contrary to the plaintiff's positive testimony, but is contrary to the appearance of the case, the surroundings, and the manner of her dealing. She never rendered any accounts of these transactions to the plaintiff, and he never shared, or even claimed, any of the profits. It is true, she claimed that losses constantly and continually occurred, instead of profits, so that there were no profits to share. But this, we think, is disproved by the plaintiff, who gave prices and figures to support his contention. The defendant having admitted the receipt of the money, and having shown

an investment of it in business in her own name, the burden of proof was upon her to show that the money was lost in partnership investments, by a preponderance of the evidence. We not only think she did not sustain this burden, but even if, from the evidence, we might view the question otherwise, as there was positive evidence upon the question, and as the court below found in plaintiff's favor, this court will not reverse the findings of the court below made upon conflicting evidence. *Wood v. Davis*, 12 Kan. 575; *Allison v. McClun*, 40 Kan. 525, 20 Pac. 125.

Upon the question of the defendant's counterclaim, it appeared that during the year 1882 the defendant, who was the niece of the plaintiff, furnished the plaintiff the sum of \$1,000; also, that the wife of the plaintiff furnished Zack Mulhall, the husband of defendant, at about the same time, the sum of \$1,000. The plaintiff testifies that, with the consent and approval of defendant, the \$1,000 which he should have paid to the defendant was paid to the wife of the plaintiff, in liquidation of the debt of Zack Mulhall. The defendant denies that such settlement of this indebtedness was ever made, but she does admit that during all the years following, and up to the time that plaintiff and defendant first had their differences,—about April, 1893,—she never made any request or demand for this money, or ever claimed that the defendant owed it to her. In the light of such actions, the plaintiff's testimony seems to us all the more plausible. The evidence being conflicting upon the question of this counterclaim, we cannot, for the reason above stated, disturb the finding of the court below.

If the statement of fact of the plaintiff in error which is the basis for her second assignment of error were true, a very serious question would arise, as to whether reversible error had not been committed by the court below. Her proposition of law—that evidence tending to show payment of a claim or indebtedness, the facts surrounding which are specifically set out in the pleading of the person asserting a right to recover the debt, is not admissible under a general denial—is supported by very high authority. We do not, however, pass upon the question here, for the reason that we do not think the record makes it necessary, and therefore it is unnecessary, for us to pass upon the question. The only portion of the record upon which plaintiff in error contends this question arises is contained in the following question, with the objections and the rulings thereto, which appears in the testimony of Joseph Mulhall given upon rebuttal, to wit: "Q. You may state to the court what you know with reference to owing Mrs. Mulhall the thousand dollars claimed to have been borrowed in 1882. (Objected to as incompetent, irrelevant, and immaterial, which objection was by the court overruled, to which defendant ex-

cepted.)" What error was there in this ruling of the court upon the objections presented to the question? It may be conceded that under this question the witness might naturally proceed to give evidence as to his payment of the alleged indebtedness, so as to show that, although he had become indebted, which he had denied in his pleading, he did not then owe the money; but this fact did not make the objection good, for the interrogatory was certainly directed as much to the inquiry as to whether or not the plaintiff had ever borrowed this money of the defendant, and as to whether or not the defendant had ever loaned him this money, as it was to the question as to whether or not he had paid the money. The issue was squarely raised by his general denial as to whether he had ever borrowed the money of defendant. She alleged he had. He denied that she had loaned him the money. It was therefore entirely proper for his counsel to ask him a question which would tend to elicit proof to show that he never owed the money, because he had never borrowed the money. If a question is competent, relevant, and material in any phase of the case which the issues made by the pleadings have assumed, it is not subject to these objections because the question, or a branch of the question, may not be competent, relevant, and material under some other issue of the case, or under some issue which the pleadings had not made. If it is competent, relevant, and material for any purpose, the question is not subject to such objection; and likewise, if any part is competent, relevant, and material, it is also not subject to such objections, but the particular objection to the question must be pointed out, for the appellate court cannot say that the trial court erred in overruling objections which were untenable. In the case of *McGrew v. Armstrong*, 5 Kan. 284, it was held that no error was committed in the admission of evidence which was proper to be admitted under the general denial, although it was contradictory to matter which was set up as a special defense. This principle, in our judgment, is applicable to this case, and made the question entirely competent, relevant, and material upon the issue made by the general denial. If the defendant had made an objection to the question on account of its dual character, then the court should have required the separation of the matters embraced in it, so that the irrelevant portion could have been properly objected to; but this was not done, and, not having done so, defendant waived her objection to the form of the question, and addressed her opposition only to its merits, and upon the merits there was at least sufficient in the question to entitle the plaintiff to an answer, in so far as it was relevant. That such a question, being asked of a party to the suit, and the person to whom Mrs. Mulhall had testified that she loaned the money, when he had made an issue upon the question as to whether or not

has ever borrowed the money, and therefore ever owed her the money, was competent, relevant, and material, is so patent that it needs no discussion. In fact, to discuss it would be to enter into an elucidation of the elementary principles of the law of evidence, to do which the question presented would be no justification or excuse. There is nothing so abstruse about the proposition as to require our entering into such a discussion.

These objections being overruled, the plaintiff then proceeded to testify, not only as to the loan being made to him by Mrs. Mulhall, but also to the fact that he had canceled the debt by payment made to plaintiff's wife of a debt of the same amount as this, due from defendant's husband to plaintiff's wife, and which payment was made with the knowledge, consent, and approval of the defendant. To all of this testimony which the plaintiff proceeded to give with reference to payment, the defendant made no objection whatever; and if she desired to raise the question as to whether it was improper, under the pleadings, she should have done so, either by proper objection to the question, or, as the question was at least partly competent and material, then by objection to this portion of the answer when the witness proceeded to give it. Not only was no such objection made to the question, nor to the testimony as given by the witness, but no objection whatever was made to numerous interrogatories which followed upon this same question of payment. It is one of the plain—and certainly natural—rules that, where no objection is made to the introduction of evidence, no material error is committed in permitting its introduction. *Grandstaff v. Brown*, 23 Kan. 176. And with the same force and fairness must certainly exist the kindred rule that, where no proper objection is made to the introduction of evidence, no material error is committed in permitting its introduction. We cannot say that the court committed any error in overruling the objections that were made to this question, and that is the only question that is raised upon this matter, either in the motion for a new trial, or the brief of counsel. No objection was made in the court below to the court's considering this testimony after it had once been given, without any proper objections, upon the issues as they were framed; and, the evidence having been offered and judgment rendered without a proper objection being made, such objection, if it were good had it been made at the proper time, cannot be first made here at this time.

Without expressing any opinion upon the question discussed by counsel as to whether or not proof of payment may be made under a general denial, we simply hold that no error was committed in sustaining the objections made to the question asked. Besides this, in support of the propriety of the judgment below, it may be observed that the defendant herself entered into detail with ref-

erence to her claim that the plaintiff had borrowed of her in 1882 the sum of \$1,000, and she testified several times, in answer to questions asked by her counsel, that the plaintiff had never repaid this loan. It was perfectly natural, then, that, as she had gone into the negative proof with reference to the matter of payment, the plaintiff, on rebuttal, should be asked direct questions,—not only whether or not he had ever contracted the debt, but also as to whether or not he had ever paid it; and the question having apparently been gone into on the proof by both parties as if the issue of payment, as well as the issue of original indebtedness, were properly raised by the pleadings, and it being a case in which, had the question been raised during the trial, the court could properly have permitted an amendment so as to allege payment, this court will consider the case the same as if an amendment had been made, and will not reverse it because of the failure to make the amendment. *Loper v. State*, 48 Kan. 540, 29 Pac. 687; *Tipton v. Warner*, 47 Kan. 606, 28 Pac. 712; *Organ Co. v. Lasley*, 40 Kan. 521, 20 Pac. 228; *Grandstaff v. Brown*, 23 Kan. 176; *Railroad Co. v. Caldwell*, 8 Kan. 244. There being no other questions presented, the judgment of the court below is affirmed. All the justices concurring, except DALE, C. J., not sitting.

(3 Okl. 396)

MOORE v. DONAHEW.

(Supreme Court of Oklahoma. July 27, 1895.)

JUDGMENT BY DEFAULT—JURISDICTION.

October 10th the judge of the district court issued an order making new parties defendants in an action, and in such order required them to appear and answer by October 13th. One of said defendants made no appearance, and a judgment was rendered against her by default. *Held*, the court, by its order, obtained no jurisdiction over the person or property of such defendant.

(Syllabus by the Court.)

Appeal from district court, Cleveland county; before Justice Scott.

Action by Charles Kahoe against A. K. Donahew. V. A. Wood and H. E. Moore were made parties. Judgment was rendered against Moore, from which she appeals. Reversed.

Charles L. Botsford, for appellant. Williams & Newell, for respondent.

DALE, C. J. July 28, 1893, Charles Kahoe commenced an action in the district court of Cleveland county against A. K. Donahew, to recover the sum of \$537.25, alleged to be due upon a building contract entered into between said parties. In his petition he also asked for the foreclosure of a mechanic's lien upon lot 21, block 67, in the city of Norman, Cleveland county. Donahew was duly summoned and answered, admitting that Kahoe did the work and furnished the materials set forth in his petition and me-

chanic's lien, but denied responsibility for the entire amount, for the reason that the building was erected by three different persons, and that it was situated on three different lots; that Kahoe had a contract with him (Donahew) to perform the labor and furnish the materials for that part of the building situated upon the lot described in plaintiff's petition, but alleged that he had paid Kahoe all the contract price for the erection of the building on such lot, except \$82, which had been duly tendered. The answer then alleged "that one-half of the west wall of said building is built on the lot joining on the west, and is, and was at the time of the building, owned by V. A. Wood, and that plaintiff had a separate contract with said Wood, by which said Wood was to pay for one-half of said west wall; that one-half of the east wall was and is built onto the lot joining on the east, and is, and was at the time of the building, the property of J. T. Moore, and that plaintiff had a separate contract with said Moore, by which said Moore was to pay plaintiff for one-half of said east wall; that under the contract between plaintiff and the defendant the plaintiff particularly agreed to look to said Wood and Moore for payments due from said parties for that portion of the wall so located upon their lots." To this answer Kahoe filed his reply, denying all allegations of new matter set up in the answer of the defendant Donahew. From the record before us, we find the following order: "Now, on this 10th day of October, 1893, this cause coming on for hearing, it appearing from the evidence that Doctor V. A. Wood and Mrs. H. E. Moore, administratrix, are necessary parties to a full and complete determination of this action, it is therefore ordered by the court that said parties, Doctor V. A. Wood and Mrs. H. E. Moore, administratrix, be, and they are hereby, made parties defendant to this action, and that they appear at the courthouse in Norman, Oklahoma territory, on the 13th day of October, 1893, at nine o'clock a. m., and make defense in said action, if any they have." The order was signed by the judge, and upon the back thereof appears the indorsement to the effect that the same was served upon V. A. Wood and Mrs. H. E. Moore on the 11th day of October, 1893. On the 19th day of April, 1894, a judgment was rendered in the case, and in said judgment it appears that Mrs. H. E. Moore, administratrix, made no appearance whatever in the cause, and that notwithstanding such default a judgment was rendered against her for \$249.59, on account of one-half of a party wall built by the plaintiff, Kahoe, which judgment was made a lien upon lot 22 in block 67 in the city of Norman, and an order was made that unless the same was paid in 20 days the building upon said lot 22 should be sold to satisfy the judgment.

Moore appeals this case, and assigns nu-

merous errors, only one of which we will consider, to wit, that no service of summons was had upon her, and no waiver of summons was entered. From the record it appears that Mrs. Moore never made any appearance to the order of the court making her a party, and the judgment also recites that fact. Did the court, by service of its order of October 10th, requiring her to appear and answer within three days, obtain any jurisdiction over her in the action? This case was brought under the Code of 1890. In section 22, c. 70, Laws 1890, provision is made whereby the court may order new parties brought into the action, where such parties are necessary for a complete determination of the controversy. In the case under consideration it appears that the court, on its own motion, on October 10th, directed additional parties to be made defendants in the action, and further ordered that they appear and make defense to the action of the plaintiff on October 13th, at 9 a. m. This was error. Under the Code then in force, a new party to the action was entitled to the same notice, to be given in the same manner, as required for defendants in the commencement of an action. Laws 1890, c. 70, §§ 24, 27. This being true, it follows that the court acquired no jurisdiction over either the person or property of Mrs. Moore, and the judgment so rendered was void. *Cox v. Matthews*, 17 Ind. 367; *McCormack v. Bank*, 53 Ind. 456; and cases cited in those opinions. The judgment of the court below is reversed.

SCOTT, J., having presided at the trial in the court below, not sitting. The other justices concurring.

(3 Okl. 612)

MYERS v. BERRY.

(Supreme Court of Oklahoma. July 27, 1895.)

OBJECTION TO JURISDICTION — PUBLIC LANDS — POWERS OF TOWN-SITE TRUSTEES — CONCLUSIVENESS OF FINDINGS — RELIEF IN EQUITY.

1. Jurisdiction is the power to hear and determine the subject-matter of the controversy, and to exercise judicial power over the parties; and when this power is absent, in either case, the court is without jurisdiction. When the court has no jurisdiction of the subject-matter, either party to the suit may avail himself of the objection at any stage of the proceedings; and, whenever the court takes jurisdiction of the subject-matter, it will of its own motion, or when its attention is called to the fact, refuse to proceed further, and dismiss the case.

2. A court will reverse a judgment for want of jurisdiction, not only in cases where it is shown negatively that jurisdiction does not exist, but even when it does not appear affirmatively that it does exist.

3. Jurisdiction of the subject-matter is to be determined from the allegations of the petition; and if the petition fails to disclose such a state of facts as will authorize a court of equity to hear and determine the matters complained of, then such court is without jurisdiction, and the objection may be made on appeal, after judgment, by the party in whose favor the judgment is rendered.

4. The findings of fact made in a lot controversy by a board of town-site trustees appointed under the act of congress approved May 14, 1890, relating to town sites in Oklahoma, are final and conclusive, unless on appeal to the proper departmental officers. The courts will not inquire into the facts or evidence upon which findings are based, unless it is clearly made to appear that such findings were procured by fraud, imposition, or misrepresentation, to the manifest injury of the party complaining.

5. In order to authorize a court of equity to interfere with the final action of a board of town-site trustees appointed under the act of congress of May 14, 1890, on account of a misapplication of the law by such trustees, the petition must specifically set out the findings of fact made by such trustees, in order that the court may determine whether or not the law was properly applied to the facts found by the trustees.

6. A petition which seeks to annul the action of such a board of trustees in the final disposition of a lot, and which fails to set out the findings of fact upon which their action was based, and does not allege that there was any fraud, imposition, or misrepresentation by which the petitioner was prevented from having a fair hearing, does not state such facts as will authorize a court of equity to interfere.

(Syllabus by the Court.)

Appeal from district court, Payne county; before Justice Dale.

Action by Wesley Myers against William E. Berry. Defendant had judgment, and plaintiff appeals. Reversed.

Frank A. Hutto, for plaintiff in error. Neill & Clark and Keaton & Cotteral, for defendant in error.

BURFORD, J. This is a suit in equity brought by Wesley Myers, the plaintiff in error, to charge William E. Berry, the defendant in error, as trustee of certain town lots situated in the town of Stillwater, Payne county, Oklahoma territory. Issues were formed, trial had by the court, finding and judgment for the defendant. Myers appeals to this court, and asks that said judgment be reversed. The defendant in error, in whose favor the judgment was rendered below, objects to the consideration of the cause for the reason that the district court had no jurisdiction of the subject-matter of the controversy. No cross errors are assigned, but, inasmuch as the question of jurisdiction is the vital question in every case, we will first consider that question.

The amended complaint, upon which the trial was had, is as follows: "In the District Court in and for Payne County, Oklahoma Territory—April Term, 1892. Wesley Myers, Plaintiff, v. William E. Berry, Defendant. Amended Complaint. Now comes Wesley Myers, and by leave of the court, being first had and granted, amends his complaint heretofore filed herein so that the same shall read as follows: 'Wesley Myers, plaintiff in the above-entitled cause, for his complaint against the defendant, William E. Berry, states: That he is a resident of said county, and that defendant is also a resident thereof. That on and prior to May 1, 1891, the N. ½ of the N. W. ¼, Sec. 23, in Tp. 19

N., of range 2 east 1. M., and in said county and territory, was public land of the United States, and was settled upon and occupied as a town site under the town-site laws of the United States. That on said first day of May, 1891, Daniel J. McDade, John H. Shanklin, and William H. Merriweather, constituting board No. 1 of town-site trustees appointed by the secretary of the interior under an act of congress, approved May 14, 1890, entitled "An act to provide for the town-site entries of land in what is known as Oklahoma and for other purposes," as such trustees, entered said tract of land at the U. S. land office at Guthrie, Oklahoma, under the town-site laws of the United States, in trust for the several use and benefit of the occupants thereof according to their respective interests therein. That plaintiff was on said May 1, 1891, and long prior thereto, an actual bona fide occupant and inhabitant of said tract, and is still such occupant and inhabitant of said tract; and that on or about the 20th day of January, 1891, plaintiff entered upon and occupied a certain piece and parcel of said tract of land occupied as a town site, and that said piece and parcel of said tract of land is now described as lots 1, 2, 3, and 4 of block 36 in the town of Stillwater, Payne county, Oklahoma territory. That plaintiff has resided upon said lots continuously since the 20th day of January, 1891, to the present time, and is now an actual bona fide resident thereon, and has the quiet and peaceable possession thereof, and has so had since said 20th day of January, 1891, to the present time, and is now an actual bona fide resident thereon, and has the quiet and peaceable possession thereof, and has so had since said 20th day of January, 1891, and during all said time he has claimed said lots in his own right and title, and is the equitable owner of said lots above alleged. That he is and has always been a citizen of the United States, and was over twenty-one years of age at the time he settled upon said lots as aforesaid. That he did not enter upon nor occupy any portions of lands opened to settlement under the act of March 2, 1889, in violation of said act, nor of the president's proclamation issued thereunder, prior to twelve o'clock noon, April 22, 1889. That on said 20th day of January, 1891, he built a house, 12x16 ft., worth \$35, on said lot, and inclosed said lots with a three wire and post fence, worth and of the value of \$15, and has planted said lots to fruit trees. That on or about the 6th day of June, 1891, he submitted all the above facts and proof thereof to said board No. 1 of town-site trustees, then in regular session for the hearing of such proof, and fully advised said board in the premises, and tendered to said board the due proportion and assessment levied against said lots by said board as the amount due said board in full for all their costs, charges, dues, assessments, and compensations for entering, proving up, and deeding the same, and was then and

there ready and willing and able to pay said sum, and still is so. That, notwithstanding the foregoing facts, said board No. 1 of town-site trustees, violating their duties as such trustees, and in utter disregard of the rights of this plaintiff, did on June 6, 1891, make, execute, acknowledge, and deliver to the said defendant a deed to lots Nos. 1, 2, 3, and 4 in block No. 36 in the town of Stillwater, Payne county, Oklahoma territory, well knowing that this plaintiff was entitled to a deed for said lots. A copy of said deed is hereto attached, marked "Exhibit A," and made a part hereof. That defendant never resided upon or occupied or improved said lots in any way, and that defendant was never an occupant or inhabitant of said town site, and that he holds said deed in trust for this plaintiff, but that said defendant has failed and refused, and still fails and refuses, to convey said lots to plaintiff, but claims to own the same in his own right and title, adverse to plaintiff; and that said claim so set up and asserted by defendant, and said deed so issued to him by said board, are clouds upon plaintiff's title to said lots, to his great damage and injury. Wherefore, he prays that said defendant be declared by this court a trustee for plaintiff, and that he hold said lots and said deed in trust for him; that this defendant be compelled to convey by this court a good and sufficient conveyance of all his right, title, and interest in and to said lots, to this plaintiff, which he may have acquired by, through, or under said deed so given to him by said trustees; that, on failure of defendant to so convey, a commissioner be appointed to make such conveyance; that plaintiff's title to said lots be forever established and confirmed against defendant and any and all persons claiming by, through, or under him, and that said clouds upon his title be removed, and that his title thereto be confirmed and established and quieted against defendant and all persons claiming by, through, or under him, and that plaintiff have judgment for costs of this suit; and for such other and further relief as to the court may seem fitting and proper.' King and Miller, Attys. for Plaintiff."

If the complaint does not confer jurisdiction of the subject-matter, then there is no authority to hear and determine the matter in controversy. If the district court had no jurisdiction, then its judgment is of no force and effect; and this court has the right to determine that question on objection made by the person in whose favor judgment was rendered, as well as one against whom a judgment is rendered. Brown, Jur. § 10, states the rule as follows: "The parties cannot confer jurisdiction of the subject-matter by consent. This is an established maxim of the law, the true interpretation of which is that the consent of the parties cannot empower the court, but the law must empower it to act upon the subject-matter upon which it gives judgment. The court is the creature of

the law, and, upon considerations of general public policy, the law defines, limits, extends, or restricts its jurisdiction, and the acts of the parties can neither enlarge nor restrict its powers by consent. Therefore, it may be safely laid down as a fundamental rule that when a court has no jurisdiction of the subject-matter of a controversy, even although the party made no objection thereto, the person affected by its judgment is at liberty to repudiate its proceeding and refuse to be bound thereby. Although the proceeding may be by consent, the defendant may have voluntarily appeared to the action, and entered no protest, and may have pleaded to the merits, the rule is still the same. It may be further said that where the court has no jurisdiction of the subject-matter of the controversy the defendant may avail himself, at any stage of the proceeding, of this want of power, and any maxim that requires one to move promptly in order to take advantage of any irregularity has no application here, since this is not a mere irregularity, but a total want of power to act in the premises at all. The law goes still further than this. Whenever the court lacks jurisdiction of the subject-matter, it may, on its own motion, or when its attention is called to the fact, refuse to proceed further, and dismiss the action." In the case of *Railroad Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, the supreme court of the United States said: "This court will, when no motion is made by either party, on its own motion, reverse a judgment for want of jurisdiction, not only in cases where it is shown negatively that jurisdiction does not exist, but even when it does not appear affirmatively that it does exist." The court in the same case, further discussing the subject of jurisdiction, said: "The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. This rule was adopted in *Capron v. Van Noorden*, 2 Cranch, 126, decided in 1804, where a judgment was reversed, on the application of the party against whom it had been rendered in the circuit court, for want of the allegation of his own citizenship, which he ought to have made, to establish the jurisdiction which he had invoked. This case was cited with approval by Chief Justice Marshall in *Brown v. Keene*, 8 Pet. 112." It presents rather an

anomalous situation for the party in whose favor a judgment is rendered to insist, on appeal, that the court which rendered the judgment had no jurisdiction. But we see no good reason why such objection may not properly be made, and, if well taken, must dispose of the case without further investigation.

Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to the suit,—to adjudicate or exercise any judicial power over them,—and when this power is absent the court is without jurisdiction. Where it is apparent from the complaint that the court has no power to determine the matters complained of in the petition, or where the petition fails to state such a case as will give the court jurisdiction, then the objection may be made at any time; and whenever the matter is brought to the attention of the court, in any manner, it should refuse to proceed further, and dismiss the proceedings. The question of jurisdiction presented in this case goes to the power of a court of equity to set aside and vacate the finding or judgment of a special tribunal created by an act of congress for a special purpose, and invested with power and authority to determine the matter in controversy. We said in *Twine v. Carey* (Ok.) 37 Pac. 1096: "The town-site trustees appointed under Act May 14, 1890, bear the same relation to the disposition of town lots that registers and receivers do to the disposal of the public lands, and their decisions on questions of fact are conclusive, and will not be inquired into except on appeal to the proper departmental officers. A court of equity will only interfere to prevent injustice from being done after final judgment by reason of fraud, accident, mistake, or misapplication of the law." In *Moore v. Robbins*, 96 U. S. 530, it was said by Mr. Justice Miller: "The decision of the officers of the land department, made within the scope of their authority, on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive, even in courts of justice, when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in courts of equity the jurisdiction to correct mistakes, to relieve against fraud and impositions, and, in cases where it is clear that those officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give appropriate relief." In the case of *Vance v. Burbank*, 101 U. S. 514, which was a suit in equity, having for its purpose the same object as the case at bar, it was said by Mr. Chief Justice Waite: "Where the question in dispute is one of fact, and both parties have submitted their testimony, it is to be determined by the land department;

and, in the absence of fraud, their conclusions are final on all questions of fact. * * * The appropriate officers of the land department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or quasi judicial tribunals are." These principles are sustained by numerous decisions of the supreme court of the United States, and are controlling in this court.

Applying these rules to the case under consideration, was such a case presented by the petition as would authorize a court of equity to take jurisdiction of the matter? All presumptions are in favor of the regularity and legality of the action of the town-site trustees. There is no allegation of fraud or of imposition, but the plaintiff alleges that he was qualified to take a lot in the town site of Stillwater; that he did settle upon a lot, and improved the same, and resided upon the same, from a date prior to the entry of the land for town-site purposes, to the date of bringing his suit; that he applied to the town-site board, made his proof, and tendered the legal fees, and that they decided against him, and awarded the lot to the defendant, and afterwards conveyed same to him. Under the law and the rules of the department, these officers were required, when there were adverse claimants to lots, to hear the evidence and determine the rights of the parties, and make their award, from which an appeal might be taken to the commissioner of the general land office, and from his decision to the secretary of the interior. The trustees were necessarily required to find, as a question of fact, before issuing the deed, that the defendant was an occupant of the lots in dispute at the time the town site was entered, and that he had a better claim than that of the plaintiff. This must necessarily, under the allegations of the complaint, have been a disputed question, and the finding of the trustees is conclusive and final, in the absence of any fraud or imposition, and no fraud or imposition is alleged. It cannot be contended that the complaint makes a case for a court of equity, to correct mistakes of law, for no evidence is set out on which the board acted, and no findings of fact are pleaded. In order to present the question as to whether or not the trustees misapplied the law, it would be necessary to accompany the petition with the findings of fact upon which they made their rulings, in order that the court might determine as a matter of law whether their application of the law was correct. The court has no power or authority to review the facts or weigh the evidence taken before the board in order to determine whether they arrived at proper conclusions of fact. The petition is drawn upon the theory that the court has original jurisdiction to try and determine the same questions of fact that were passed upon by the

town-site trustees. This is an erroneous theory. The complaint does not state such a case as will authorize a court of equity to hear and determine any question thereby presented, and does not confer jurisdiction on such a court to interfere with the findings of the officers whose duty it was to determine the rights of the parties. Hence, the district court was without jurisdiction to hear and determine the matter complained of, and was without authority to pass upon the questions of fact presented by the complaint, and it was error to render any judgment thereon. The judgment is reversed, and cause remanded to the district court, with directions to dismiss the petition at the costs of the plaintiff.

DALE, C. J., did not sit in this case.

PITTS v. LOGAN COUNTY.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

CLERKS OF TERRITORIAL COURTS—FEES.

Clerks of the district courts of the territory are required by the laws of the United States to account to the secretary of the treasury of the United States for all fees earned by them as such clerks, territorial as well as United States, and any act of the legislative assembly attempting to regulate the same is in violation of the laws of the United States, and therefore void.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Dale.

Louis E. Pitts, who is the duly-appointed, qualified, and acting clerk of the district court of the First judicial district of Oklahoma territory, on the 6th day of April, 1895, presented to the board of county commissioners of Logan county his itemized statement of costs taxed against Logan county from March 9, 1895, to March 31, 1895, amounting to \$144.90. On the 12th day of April, 1895, the board of county commissioners allowed on said account the sum of \$17. From the decision of the board of county commissioners the plaintiff in error appealed to the district court of Logan county. The following agreed statement of facts was submitted: "This is an appeal taken from an order of the board of county commissioners of the county of Logan and territory of Oklahoma, entered on the 8th day of April, 1895, by the said board, wherein the claim of Louis E. Pitts for one hundred and forty-four and ⁶⁹/₁₀₀ (\$144.69) dollars was allowed in the sum of seventeen (\$17) dollars, and disallowed in all other sums. (2) The plaintiff, Louis E. Pitts, is the duly-qualified and acting clerk of the district court of the First judicial district, and of the district court of the county of Logan and territory of Oklahoma. That on the 6th day of April, 1895, he filed with the county clerk in the county of Logan and territory of Oklahoma his statement of account for fees claimed to have been earned

by him as clerk of the district court of Logan county and territory of Oklahoma, in criminal cases, between the 9th day of March, 1895, and the 31st day of March, 1895, in suits where the territory of Oklahoma prosecuted criminal cases in the district court of said county. (3) That the fees claimed in said bill would be proper charges against said county according to the territorial laws in force prior to the 8th day of March, 1895, and according to the territorial fee bill approved March 8, 1895, if it were not for the limitation in the said act, approved March 8, 1895, prohibiting the allowance of any sum in excess of seventy-five (\$75) dollars per quarter to the clerk of the district court for criminal fees; and the decision of this case depends wholly and entirely upon the question of the validity of such limitation contained in said act. (4) That the board of county commissioners, in acting upon the claim of the plaintiff in this case, allowed the plaintiff's claim upon the basis of the validity of said limitation of seventy-five (\$75) dollars per quarter for fees, prorating the time covered by such fee bill at the rate of seventy-five dollars per quarter, and allowed the bill upon said basis, and rejected the remainder. The above and foregoing are the facts of the case, and are submitted to the court for decision as a matter of law." On the 11th day of May, 1895, the court rendered the following judgment on said statement of facts: "Now, on this 11th day of May, 1895, said cause came on to be heard in its regular order. The plaintiff appeared by Asp, Shartel & Cottingham, his attorneys, and the defendant appeared by Harris Huston, county attorney, and, the parties having waived a jury in said cause, the trial of the same proceeded before the court without a jury. And thereupon the parties submitted said case to the court upon an agreed statement of facts, and the court, after hearing the arguments of counsel, and being fully advised in the premises, finds the law of the case in favor of the defendant. And thereupon the plaintiff filed his motion for a new trial, and his motion for judgment in said cause on the agreed statement of facts herein, which said motion for judgment on said agreed statement of facts the court overruled; to which ruling the plaintiff duly excepted and excepts. And thereupon said cause came on to be heard upon the motion for a new trial, which motion is by the court overruled; to which ruling the plaintiff excepted and excepts." Reversed.

Henry E. Asp, J. W. Shartel, and J. R. Cottingham, for plaintiff in error. A. H. Huston and R. B. Huston, for defendant in error.

SCOTT, J. The principal question for our consideration in this case is whether the territorial legislature has any right to fix the compensation to be allowed to the clerks of

the district courts in this territory for their services. In the discussion of the subject we find, at the very outset, that the district courts of this territory are creatures of congress. The justices of the supreme court are appointed by the president, and are ex officio judges of the district courts of the districts to which they are assigned by the supreme court. The same instrument that gave life to these courts also provided that the judges of the supreme court should appoint the clerk of that court, and the judges of the district courts should appoint the clerks of said district courts. The language of the act is, "Each district court shall appoint its clerk." After having created the office and appointed the clerk, the act further provides what fees the clerk shall receive for his services, which reads as follows: " * * * There shall be allowed to the attorney, marshal, clerks of the supreme and district courts, the same fees as are prescribed for similar services by such persons in chapter sixteen, title Judiciary, of the Revised Statutes of the United States." Organic Act, § 13. Section 823, c. 16, tit. "Judiciary," reads: "The following and no other compensation shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several states and territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and recovering from their clients other than the government such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties." The act then provides a fee bill under which the clerks are to tax costs, as follows:

Section 828 reads: "For issuing and entering every process, commission, summons, capias, execution warrant, attachment, or other writ, except a writ of venire, or a summons or subpoena for a witness, one dollar. For issuing a writ of summons or subpoena, twenty-five cents. For filing and entering every declaration, plea, or other paper, ten cents. For administering an oath or affirmation, except to a juror, ten cents. For taking an acknowledgment, twenty-five cents. For taking and certifying depositions to file, twenty cents for each folio of one hundred words. For a copy of such deposition furnished to a party on request, ten cents a folio. For entering any return, rule, order, continuance, judgment, decree or recognizance, or drawing any bond, or making any record, certificate, return, or report, for each folio, fifteen cents. For a copy of any entry or record, or of any paper on file, for each folio ten cents. For making dockets and indexes, issuing venire, taxing costs,

and all other services in a cause where issue is joined, but no testimony is given, two dollars. For making dockets and indexes, taxing costs, and other services, in a cause which is dismissed or discounted, or where judgment or decree is made or rendered without issue, one dollar. For making dockets, and taxing costs, in cases removed by writ of error or appeal, one dollar. For affixing the seal of the court to any instrument, when required, twenty cents. For every search for any particular mortgage, judgment or other lien, fifteen cents. For searching the records of the court for judgments, decrees, or other instruments constituting a general lien on real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made. For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept and paid. For traveling from the office of the clerk, where he is required by law to reside, to the place of holding any court required by law to be held, five cents a mile for going and five cents for returning, and five dollars a day for his attendance on the court while actually in session. All books in the offices of the clerks of the circuit and district courts, containing the docket or minute of the judgments or decrees thereof, shall, during office hours, be open to the inspection of any person desiring to examine the same, without any fees or charge therefor."

Section 833 reads: "Every district attorney, clerk of a district court, clerk of a circuit court, and marshal, shall, on the first days of January and July in each year, or within thirty days thereafter, make to the attorney general, in such form as he may prescribe, a written return for the half year ending on said days respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk-hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act; and every marshal shall state separately therein the fees and emoluments received or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and the proportion of such fees and emoluments, which, by the terms of his service, each deputy is to receive. Said returns shall be verified by the oath of the officer making them."

Section 839 reads: "No clerk of a district court, or clerk of a circuit court, shall be allowed by the attorney general, except as provided in the next section, and in section eight hundred and forty-two to retain of the fees and emoluments of his office, or, in case both of the said clerkships are held by the same

person, of the fees and emoluments of the said offices, respectively, for his personal compensation, over and above his necessary office expenses, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk or for any such circuit clerk, or exceeding that rate for any time less than a year."

Section 857 reads: "The fees and compensations of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the treasury, shall be recovered in like manner as the fees of the officers of the states respectively for like services are recovered."

At the last session of the legislative assembly of Oklahoma territory a law was passed in which the assembly not only prescribed a fee bill under which the clerk should tax costs, but in civil matters limited his fees to \$500 in each county per year, and in territorial criminal cases limited his fees to \$75 per quarter. Section 2, c. 25, Sess. Laws Okl. 1895, reads: "The clerks of the district court of the counties in this territory shall receive as their compensation for the services required by law to be performed by the clerks of the district court the following named fees: * * * provided, that the district clerk shall pay into the county treasury all civil fees received by him in excess of five hundred dollars per annum." Section 3 of this act then provides that the clerk of the supreme court shall receive the same fees for like services as are allowed clerks of the district court. Section 48 of said act provides: "* * * That the total amount of the fees paid by the county to any clerk of the district court, justice of the peace or constable, shall not exceed seventy-five dollars per quarter."

These are the various sections under which the clerk gets his power to tax costs. It is contended by plaintiff in error that the United States statutes and the organic act of this territory, containing various provisions relative to the powers of the clerks, are the ones under which they are to tax their costs, and no others. Counsel for defendant in error contends that the various acts of congress above quoted only apply to the United States business, and do not apply to territorial or civil business of the territory.

If these acts of congress apply, then the territorial legislature had no right to interfere with the clerk, and he is not required to tax his costs under said act. Counsel for defendant in error contend that there are two cases which give us the law on this subject (*Marte v. Railway Co.* [Utah] 35 Pac. 501, and *U. S. v. McMillan* [Utah] 37 Pac. 263), both cases being decided by the supreme court of Utah. The *Marte* Case is not a well-considered opinion, and the reasoning of the opinion will not stand the test. The court cited no authority, and seems to have de-

cided the case offhand. The *McMillan* Case announces no new doctrine, but relies solely upon the *Marte* Case. The supreme court of Utah certainly did not investigate the subject at any considerable length, it seems, or an unbroken line of standard authority would have led them to a different conclusion. The organic act of this territory is the same in substance as that enacted by congress for the several territories and the District of Columbia. Hon. Caleb Cushing, attorney general of the United States, as early as 1854, in his opinion to the honorable secretary of the interior, held that the clerk of the criminal court of the District of Columbia was bound to account to the treasury of the United States for his fees as clerk of said court. At the time this opinion was delivered, and for a long time afterwards, the District of Columbia was in many ways comparable to this territory. In 1801 (2 Stat. c. 13, p. 103) congress created two counties in the District of Columbia, Alexandria county being that portion of the District ceded by Virginia, and Washington county that portion ceded by Maryland. In the same act the circuit court of said District was created, and the laws of Virginia were put in force in Alexandria county and the laws of Maryland in Washington county. Congress retained the right to legislate for the District, but the laws of the two states were put in force, the same as the laws of Nebraska were put in force in this territory. The clerk of the circuit court was to be appointed by the judge of that court, and was to receive the same fees as the clerk of the circuit court for the district of Maryland. That part of the act in which the circuit court is created reads as follows: "That there shall be a court in said District which shall be called the circuit court of the District of Columbia, and the said court and the judges thereof, shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States. Said courts shall consist of one chief judge and two assistant judges resident within said district, to hold their respective offices during good behaviour; any two of whom shall constitute a quorum; and each of the said judges, shall, before he enters his office, take the oath or affirmation provided by law to be taken by the judges of the circuit courts of the United States; and said court shall have power to appoint a clerk of the court in each of said counties, who shall take the oath and give a bond with sureties in the manner directed for the clerks of the district courts in the act to establish the judiciary of the United States." That part of the act applicable to clerks of the circuit court reads as follows: "* * * And the said attorney, marshal and clerks, shall be entitled to receive for their respective services, the same fees, perquisites and emoluments, which are by law allowed respectively to the attorney, marshal and clerk of the United States for the district of Maryland."

The clerk of the United States district court for the state of Maryland received the same fees as the clerks of the supreme court of that state, with some additional fees expressly given by congress. 1 Stat. c. 19, p. 625. In 1838 (5 Stat. c. 192, p. 306) congress created a criminal court in the District of Columbia. The act creating the court reads as follows: "That from and after the passage of this law, a court shall be established in the District of Columbia, for the trial of all crimes and offenses against the laws now in force in the said District, and such as may be hereafter enacted, to be composed of one judge, to be appointed by the president of the United States, by and with the consent of the senate, and to receive as compensation for his services, an annual salary of two thousand dollars, which court shall be styled the criminal court of the District of Columbia." The portion of the same act applying to the clerk reads: "That the district attorney, and marshal of the said District and the clerks of the circuit court in the said District, for the counties of Washington and Alexandria, respectively, shall attend the said criminal court in said counties and perform all the duties now by law required of them respectively, in relation to the criminal business of the circuit court in the said counties, and shall be entitled to the same compensation they now receive for their attendance in the said circuit court in the said counties respectively." Under this condition of affairs, Attorney General Cushing was confronted with the question of whether the clerk of the criminal court was required to pay and account to the government for the fees received by him. The statute of 1842 was then in force. Section 167 of said act (5 Stat. 483) reads: "For defraying the expenses of the supreme, circuit and district courts of the United States, including the District of Columbia, * * * three hundred and seventy-five thousand dollars; provided, however, that every district attorney, clerk of a district court, clerk of a circuit court, and marshal of the United States, shall, until otherwise directed by law, upon the first day of January and July in each year, * * * make to the secretary of the treasury * * * a return in writing embracing all the fees and emoluments of their respective offices of every name and character, * * * and also embracing the necessary office expenses of such officers, together with the vouchers for the payment of the same, * * * which return shall be in all cases verified by the oath of the officer making the same. * * * And no clerk of a district court, or clerk of a circuit court, shall be allowed by the secretary to retain of the fees and emoluments of his said office, or in case both of the said clerkships shall be held by the same person, of the said offices for his own personal compensation, over and above the necessary expenses of his offices, and necessary clerk hire included, also to be audited and allowed

by the proper accounting officers of the treasury, a sum exceeding three thousand five hundred dollars per year for any such district clerk, or a sum exceeding twenty-five hundred dollars per year for any such circuit clerk." In 1853 (10 Stat. 163) the following act was passed with reference to the report of fees of the clerks of the courts: "Every district attorney, clerk of a district court, clerk of a circuit court, and marshal, shall, on the first days of January and July, in each year, or within thirty days thereafter, make to the attorney general, in such form as he may prescribe, a written return for the half year ending on said days respectively, of all the fees and emoluments of his office of every name and character, and of all the necessary expenses of his office, including necessary clerk-hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act. * * * Said returns shall be verified by the oath of the officer making them."

This is the law as it existed at the time of the opinion of Attorney General Cushing. After carefully reviewing the subject, and so clearly laying down the correct construction of these several acts, there can be no mistake as to what fees are included in the act. Attorney General Cushing rendered three opinions on the questions of the clerk's fees in the District of Columbia. In his first opinion, reported in 6 Op. Atty. Gen. p. 390, he says: "Subsequently, questions arose—First, whether the courts of the District of Columbia are, in any sort, comprehended within the proviso; that is to say, whether the clerk of the courts of the District of Columbia is under obligation to make any return of his fees and emoluments to the secretary of the treasury,—and, secondly, whether, if obliged to make any return, he may not premit all amount of his fees and emoluments in the criminal court of the District." Mr. Cushing then states that these questions had been before his predecessor, Mr. Crittenden, for his consideration, and he held, after the question had been ably argued before him, that the clerks of the circuit courts of the District of Columbia were required to make reports of their fees under the act of 1842, supra, but held that they were not required to report the fees from the criminal court of said District under the act. From this holding Mr. Cushing ably dissents, and has been supported by Hon. Jeremiah Black in his holding. Mr. Cushing, on this branch of the subject, says: "I do not conceive that the omission of the criminal court *eo nomine* is any more conclusive of the question than is the omission of the words 'District of Columbia.'" Further in the same opinion (Id. p. 391) he says: "I think it is apparent from the whole of the provision that congress intended the two things to go hand in hand,—payment of expenses, and accounts;

bility for and limitation of the fees and emoluments. Is the criminal court, because not specifically named in the act, to be considered as not included in the appropriation? If so, then the fees of the clerk are to be included in the proviso of accountability. I cannot sever the two things. I think it is doing violence to the language of the act to separate them. I think it is contrary to the true legal intentment of the act, as well as to the obvious purpose and policy of congress. The truth is that the district and criminal courts of the District of Columbia are each of them but exfoliations of the circuit court created by the act of February 27, 1801, which provided generally for the political organization of the District. 2 Stat. 103. Subsequently one of the judges of the circuit court was invested with the power of a district judge of the United States. 2 Stat. 104-106. At a later period, namely, in 1838, the original cognizance of all crimes and offenses committed within said District was also branched off, and a separate judge appointed for the transaction of that business. 5 Stat. 306. In all these modifications of jurisdiction, the successive subdivisions of judiciary continued to be courts of the United States; and their common expenses continued to be comprehended by the phrase of appropriation, 'Expenses of the supreme, circuit and district courts of the United States, including the District of Columbia.' Now, it would be a singular anomaly of legislation if the words 'circuit court,' or 'district court,' which take from the treasury of the United States the expenses of the criminal court of the District, do not also carry with them the corresponding rules of accountability and limitation; that a phrase of enactment which pays the expenses of the circuit court with a condition should require to be so construed as to pay the expenses of the criminal court,—but, dropping the condition, I cannot see the reasonableness of such a contradictory interpretation of the same word in the same act, and under all the circumstances tending to establish a rule of logical exegesis."

In 1855 Mr. Cushing was again called upon to give his opinion on this subject, and the questions there presented were (7 Op. Atty. Gen. p. 610) as follows: "Whether the clerk is under legal obligation to give credit for the fees earned by him. Whether, if he continues to give such credit, and fails to collect and account for the same, the department can lawfully retain of his fees, chargeable to the United States, a sum equal to the surplus found to be due to the government. And whether, fees due from private individuals thus remaining uncollected, and the sum total received thereby falling below the statute aggregate, the clerk may lawfully call on the United States to make up the deficiency. In order to answer all these questions satisfactorily, it needs only to reflect that the clerk is a statute officer,

with such rights and such obligations as the several pertinent acts of congress confer and impose. True, he is appointed by the court, not by the president or any of the administrative officers of the government. But that is immaterial. He is a public officer of the United States, appointed under statute in one of the four ways designated by the constitution, and exists only in virtue of the statutes and the constitution. It is true, also, that he receives compensation by fees, not by salary, *eo nomine*; but he receives those fees officially, and only in right of his office, just in the same way that official fees are received by the consuls of the United States. It is further true that some considerable part of his fees are for service to private suitors. But that is also immaterial. In the same way nearly all the fees of consuls are on official service rendered to private individuals. Nay, there are great departments of the public business in which it is in part or in whole for service to individuals that collections are made by the public officer, as in the post office and patent office. In all these cases the theory is the same, namely, an instrumentality created by law, and for which the government makes itself responsible in its capacity of *parens patriæ*, although much of that instrumentality is to be exerted in the direct benefit of private individuals, and is therefore maintained in part or in whole by fees charged to them, instead of being chargeable to the public revenue obtained by general taxation. Upon these premises, my opinion is that it is the duty of the clerks of the courts of the District to collect all fees in cash, just as it is the duty of the commissioner of patents to do, or of deputy postmasters in regard to the postage on letters; that, if the clerk gives credit for any fees, he does that at his own risk, and, if they be not paid, the loss devolves upon him alone; that, if any deficiency thus arises, he cannot claim indemnity of the government; and that, on the contrary, he is obliged to make account of all such fees, and if, by reason thereof, a surplus fails to exist, then the clerk is chargeable with such deficiency at the treasury of the United States."

Mr. Cushing in 8 Op. Atty. Gen. p. 33, says: "First, the act of 1842 requires the clerks to make return semiannually, 'embracing all the fees and emoluments of their respective offices, of every name and character, distinguishing the fees and emoluments received and payable under the bankrupt act from those received or payable for any other service.' After that is the provision fixing the maximum, repeated, in substance, in the latter act, and then we have the following: 'And every such officer shall, with each such return made by him, pay into the treasury of the United States, or deposit to the credit of the treasurer thereof, as he may be directed by the secretary of the treasury,

any surplus of the fees and emoluments of his office, which his half-yearly return so made as aforesaid shall show to exist over and above the compensation and allowances hereinbefore authorized to be retained and paid by him. And in every case where the return of any such officer shall show that a surplus may exist, the said secretary of the treasury shall cause such returns to be carefully examined, and the accounts of disbursements to be regularly credited by the proper officers of his department, and an account to be opened with such officers in proper books to be provided for that purpose, and the allowances for personal compensation for each calendar year shall be made from the fees and emoluments of that year, and not otherwise.' Here we have express and explicit command to the clerk to make return of all fees payable (that is, lawfully charged by him), as well as those paid,—fees receivable as well as those received. Reckoning of the responsibility of the clerk to the government is to be had on 'each such return so made by him,' and this also by the unequivocal terms of the statute. 'And the allowances for personal compensation for each calendar year shall be made from the fees and emoluments of that year, and not otherwise;' which fees and emoluments which had been previously defined to be fees and emoluments, of every name and character, received or receivable. These provisions appear to me so plain, precise, and clear as to preclude argument on the subject. * * * The statute is general by its title, covering the circuit and district courts of the United States, and it even contains enactments expressly applicable to the territories, to say nothing of the District of Columbia; and the only section of the act material to the present question—the third—is in comprehension of terms, in spirit, and in received construction applicable to the clerk of the circuit and district courts of the District of Columbia. * * * In the face of the provisions of the acts of 1842 and 1853, it is, in my judgment, quite unreasonable to contend that any clerk of the courts of the United States is to give credit for the fees of his office ad libitum, to omit to collect, and thus to throw away what is, in fact, public property; nay, more, that he is to be indemnified for the same out of the treasury of the United States. It is altogether immaterial whether the fees are large or small, and whether it is or not convenient to take the trouble to collect them in cash. The collections at the post offices are each small in amount, and the postmaster may, if he pleases, open accounts with persons in the habit of receiving letters; but that is his affair. So, many of the fees to be collected and accounted for by consuls are small in amount; but that does not change their duty nor their responsibility."

Hon. Jeremiah S. Black, attorney general of the United States, in 1858, in passing up-

on this question in 9 Op. Atty. Gen. p. 133, uses the following language: "I concur with you in the opinion you express, that he is bound by law to account for the fees received by him in the criminal court as well as in the circuit court. The reasons you have given are sufficient, and they do not need to be repeated. I am also very clear in the opinion that he must account, not merely for the fees actually received, but for those which he earned and which he has neglected or otherwise failed to collect. The arguments by which Mr. Cushing supported his decision on this point, in the opinion dated August 12, 1856, are unanswerable."

Is not the case at bar clearer, from a legal standpoint, than those just quoted? In this case the clerk is clerk of the district court, and would, under the opinions of the attorneys general, be included in the appropriation and under section 833, requiring a report. In the Smith Case, passed upon by the attorney general, the principal question was whether the clerk of the criminal court of that district was bound to report his fees. The clerk of the criminal court was not included in express terms in the acts requiring clerks to report fees, and the only way to make him report would be taking the intent of congress into consideration, and construing the statute to mean "clerks of the criminal courts" as well as the other clerks. In those cases the clerk of the criminal court taxed the same fees as taxed by the clerks of the supreme court of Maryland, with some additions. It will also be noticed that the question as to the clerks of the circuit court of the District of Columbia reporting their fees was not raised. He transacted civil and criminal business, yet the United States held that he must report his civil business to the treasurer, and account for all fees received by him, of every name and character whatsoever, and the attorney general held that "these provisions appear to me so plain, precise, and clear as to preclude argument on the subject." If the clerk must account for these fees, no power on earth but the congress of the United States can alter or abridge them, and, even if the clerk does not collect the fees, he is still bound for them, and the courts have held that he has the right to demand his fees in cash, in advance, for this very reason. It would indeed be a strange condition of affairs to hold that the clerk should tax his fees under the territorial fee bill, and be restricted in the amount he could collect and keep, and then be compelled to account to the United States for these same fees according to the fee bill of the United States (chapter 16, tit. "Judiciary," § 823). The District of Columbia, at the time these opinions were delivered, was comparable to the territory of Oklahoma, so far as this opinion is concerned, and it must be admitted that the construction placed upon the various acts by the attorney general of that time would also be applicable and ap-

ply to the clerk of the district court of this territory at this time. More than 40 years have elapsed since the first decision, and no one has questioned to any degree the soundness of these opinions. No attorney general since that time has been asked to overrule the opinions cited, and they are entitled to great weight in determining these questions. The continued construction by the heads of the departments the supreme court of the United States has many times held to be of great weight, and in matters of doubt should be followed.

Attorney General Devans in January, 1879, issued a circular letter to clerks, in which, referring to section 823, he says: "This language embraces every possible fee or emolument accruing to you by reason of your official capacity, and does not allow the withholding of any. Whatever is done by you that you could not do if out of office has an official color and significance that brings it within the compass of the language of the statute." In *U. S. v. Hill*, 120 U. S. 179, 7 Sup. Ct. 510, the supreme court, after quoting the above language of Attorney General Devans, say: "This is undoubtedly a forcible and accurate statement of the meaning of the statute." The supreme court says that it is a "forcible" statement, and not only that, but an "accurate" one. No matter what fee the clerk receives, if he does it by virtue or color of his office it is within the meaning of the act, and he must report it to the United States. If this be true, it would be supererogation to contend that the territorial legislature could bring all this to naught, and, on the contrary, require the clerk to pay these fees into the county treasury of the county, instead of accounting for them to the United States. Suppose the legislature should have enacted that the office of clerk of the district court, so far as it pertained to territorial business, should be abolished, and the duties of his office performed by the county clerk without compensation, would it be contended for a moment that the law would be valid? Yet this act practically does this by attempting to take away the compensation provided congress. The United States pays the salaries of the justices of the supreme court. It pays the clerk five dollars per day for every day court is in session, and it does this, no matter whether the court sits as territorial or United States court, or transacts federal or territorial business. He is paid by the United States for going to and from courts. His office is furnished him by the United States. The government pays for the deputy clerks, keeps a bailiff in attendance upon the court at all times, as well as a marshal. A fee bill is established by reference in the organic act. If it had been intended that the clerk should be subject to the will of the legislature, certainly congress, in this same connection, when enacting our organic law, would have provided a fee bill for the clerk

in civil and territorial business, and that the clerk need not report to the United States any fees except what he earns from the United States business of said court. When, however, the organic act was passed, the United States supreme court, in 1880, had already held that section 833 of the Revised Statutes of the United States included every fee that was earned by the clerk by virtue of his office; that whatever he did by virtue of his office that he could not have done if out of office had an official color and significance that brought it within the statute; and that this was the "undoubted" construction of this act, meaning thereby that there was no doubt. *U. S. v. Hill*, supra.

Some question has been raised by counsel for defendant in error as to the *Averill Case*, 130 U. S. 335, 9 Sup. Ct. 546. That was a case appealed by the United States from the supreme court of Utah. The latter court held that the clerk was not restricted to \$3,500 a year for his services, but could retain all the proceeds of his office. The supreme court, however, in reviewing the decision of the Utah court, reversed the holding of that court, and held that the clerk could only retain \$3,500 per year. The supreme court of the United States, after reviewing the sections of the statutes hereinbefore referred to, say: "They prescribe the fees to be allowed to, and retained by, clerks of district courts; 'and no other compensation' can, under section 1833, be allowed to be retained by clerks of the district courts in Utah, for personal compensation, than is, by the provisions of chapter 16 of the title mentioned, prescribed to be allowed to be retained by the clerks of the district courts named in section 839 for personal compensation." The supreme court does not quibble with questions, and if the clerks were allowed to retain their fees in civil and territorial criminal matters it would have said so. The court holds that the clerk can retain but \$3,500 of the fees of his office. They do not say "United States fees," but they must have known that he taxed in his office fees for territorial and civil work as well as United States business. It was sufficient for them to say that he could not retain of his fees over \$3,500 and necessary clerk hire. The court must have known that the clerk received other fees than United States fees, but in passing upon the question before them it was immaterial from what source they came, if they were taxed by him as clerk of the district court. Counsel for defendant in error in their brief say: "If counsel's efforts, however, have cast a doubt upon the Utah cases, the case of *U. S. v. Hill*, 120 U. S. 169, 7 Sup. Ct. 510, ought to be decisive of the principle for which we contend. Suit was brought in that case by the United States to recover from Hill, who was clerk of the U. S. district court for the district of Mass., fees earned by him in examining naturalization papers, under the orders of the court.

The case went to the supreme court of the United States, and it was there held that only the fees prescribed in the federal fee bill need be accounted for by the clerk; that the other fees—naturalization fees—prescribed by the orders of court need not be accounted for. And we submit that, on the same principle, fees prescribed by any other authority, whether it be by order of court or territorial enactment, are not within the purview of the federal fee bill, nor regulated thereby, but are controlled and regulated by the power that created them,—the court or the territorial legislature." Counsel have evidently mistaken the view of the Hill Case. The doctrine as stated by counsel was not enunciated by the supreme court. That court was very clear in its opinion. The circuit court held that the clerk need not report these fees, and the supreme court of the United States, in affirming this decision, quotes from the language of the opinion of the honorable circuit judge as follows: "It is for services rendered under these rules, and as a special officer of the court, and not as clerk, that these fees have been permitted. They were not duties pertaining to the office of clerk. They could as well have been performed by any other person designated by the court for the purpose, as by the district attorney, or a commissioner of the circuit court, or an attorney, or any suitable person not an officer of the court." It will be observed from the portion of the opinion just quoted that the clerk was not acting in his official capacity, but as any other individual. The court further say: "These are duties which the court has the undoubted right to have performed by some other person than the presiding judge. In these cases the clerk acts rather as a person appointed to assist the court in exercising its functions, like a master or examiner in an equity cause, or an assessor in admiralty, or an auditor in a suit at law. It is the universal practice of all courts of large jurisdiction to appoint special officers, at the expense of the parties, to make inquiries, investigate details, examine papers, take accounts, make computations, and perform ministerial acts. Their reports, when returned into court and accepted, become part of the case, and form the basis of the orders and decrees of the court in the cause." It is further said, Mr. Justice Blatchford speaking for the court: "They [the fees] did not accrue to the clerk by reason of his official capacity, but were for work which might as well have been done by him when out of office as when in." This is strong language, and, if counsel for defendant in error wish to apply the rule to this case, it would be simply saying that the fees earned by the clerk for civil and territorial business could be earned out of office as well as in, and by any private individual as well as a duly-authorized clerk. If this were true, any person could perform the services, whether clerk or not. It does not seem to us that the posi-

tion is tenable. The least that can be said of these fees is that they are earned by him as clerk of some court. If he earns them as clerk, he must account for them as such. From this conclusion we can see no escape. As to the construction of departments being of weight in passing upon ambiguous statutes, see *U. S. v. Hill*, 120 U. S. 169, 7 Sup. Ct. 580; *U. S. v. Philbrick*, 120 U. S. 52, 7 Sup. Ct. 413; *U. S. v. Dickson*, 15 Pet. 141, 145; *U. S. v. Gilmore*, 8 Wall. 330; *U. S. v. Moore*, 95 U. S. 760, 763; *U. S. v. Pugh*, 99 U. S. 265, 269; *Smythe v. Fiske*, 23 Wall. 374, 382; *Hahn v. U. S.*, 107 U. S. 402, 406, 2 Sup. Ct. 494; *Five Per Cent. Cases*, 110 U. S. 471, 485, 4 Sup. Ct. 210. In the case of *Brown v. U. S.*, 113 U. S. 568, 5 Sup. Ct. 648, it is held: "This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale." In the case of *U. S. v. Moore*, 95 U. S. 760, 763, it is said: "The construction given to a statute by those charged with the duty of executing it * * * ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men and masters of the subject. Not unfrequently they are draftsmen of the laws they are afterwards called upon to interpret." See, also, on this subject, *Edwards v. Darby*, 12 Wheat. 203; *Atkins v. Disintegrating Co.*, 18 Wall. 272, 301; *U. S. v. State Bank of North Carolina*, 6 Pet. 29. Taking this view of the question, there can be no doubt that the territorial legislature has no right to interfere with the compensation of the clerks of the district courts. The clerk must account for all of his fees, and, if so, congress is the only authority to fix the amount of such fees.

Suppose it is admitted that the clerk occupies two offices, and that in one of them he acts as United States district clerk, and is responsible to the United States for his actions as such clerk, and that in the other he acts as a territorial clerk, and is responsible to the territory for his actions as such clerk. This indeed would be an anomalous condition of affairs. The legislature has nowhere created the office of clerk of the court, has nowhere provided for the giving of a bond, and the only law which provides for a bond is section 795 of the Revised Statutes of the United States, which reads: "The clerk of every court shall give bond, in a sum to be fixed and with sureties to be approved by the court which appoints him, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk. * * *" If he is simply acting as a clerk under this statute, he is responsible to the United States. The bond is made to the United States, and it is the only one known to the law for the clerks of the district courts of this territory. Congress evidently did not intend to have a clerk of this court on the territorial side (if the construction contended for

is correct) act without a bond, and be responsible only individually. How could the territory avail itself of this bond if a default were made in the office of territorial clerk? Of course, this may be said to have been a mistake on the part of congress, or the legislature, in not providing for a bond for the territorial clerk; but in construing this act it is of importance to see what the intent of congress was upon the subject. The congress of the United States is certainly capable of enacting clear and unambiguous laws relating to the territories, and especially Oklahoma, for it was the last territory organized, and the experience of congress before and the various enactments were open for inspection, and it was thought proper to follow the various enactments with reference to the territories organized before this one. Again the question comes to us, is the clerk of the district court occupying two offices, or, in other words, two clerkships, separate and distinct from each other? If he is, it must be by implication, as there is no express statute creating the two offices. In all of the acts of congress he is spoken of as one clerk. Frequently the term "office" is used. He is clothed with many powers, the same as the judges of the district courts. He may act in many capacities, but in all of them as one clerk. There is no quality of clerkships. It has been settled by a long line of decisions by the supreme court of the United States that the courts of the territories are not United States courts within the meaning of the constitution. The question is so well settled that it is not necessary to discuss the proposition at any length. In the case of *Benner v. Porter*, 9 How. 242, the proposition is so clearly decided that it may be well for us to quote it: "The distinction between the federal and state jurisdictions under the constitution of the United States has no foundation in these territorial governments, and consequently no such distinction exists, either in respect to jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts; congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the federal and state authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to state and federal jurisdiction. They are not organized under the constitution, nor subject to its complex distribution of powers of government, as the organic law, but are the creations exclusively of the legislative department, and subject to its provisions and control. Whether or not there are provisions in that instrument which extend to and act upon these territorial governments it is not now material to examine. We are speaking here of those provisions that refer particularly to the distinction between federal and state jurisdiction." So it will be clearly seen that these courts are not

United States courts within the meaning of the constitution, but simply created under the general powers of congress in the organization and government of the territories. Congress created this court as one court, having general jurisdiction in all United States and territorial matters. The clerk was created as the clerk of that court. He is not the clerk of two courts, or three courts, or any other number but that one. He is accountable only to the United States for his actions, and the territory can have no jurisdiction over him whatever. Taking this view of the question, it must necessarily follow that the legislative assembly has no power to establish and regulate the fees and compensation of clerks of territorial courts established by the laws of congress, and the provisions of this character involved in this controversy are in conflict with the organic act and the statutes of the United States governing the fees of the clerks, and is therefore void, and in no sense a rightful subject of legislation. The judgment of the lower court will be reversed. It is so ordered.

BURFORD, J., dissenting.

DALE, C. J., having presided in the court below, did not sit.

(3 OKL. 281)

BOARD OF COM'RS OF CLEVELAND COUNTY v. SEAWELL.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

COUNTY COMMISSIONERS—CONTRACTS—PAYMENT IN COUNTY WARRANTS—ESTOPPEL.

1. Under the law, a board of county commissioners can only contract to bind the county while they are sitting as a board; and an agreement with one of the members, in the absence of the others, does not bind the county.

2. Where a party enters into a contract with a board of county commissioners to lease to a county a building to be used for the purpose of holding court and for county offices, and under such contract is to receive the sum of \$150 per quarter, and the county issues its warrants for the sums agreed upon, and the party receiving the warrants is obliged to sell the warrants at a discount in order to convert the same into cash, *held*, that the county is not liable for the loss sustained by reason of the sale of the warrants at a discount.

3. Where a claim against a county is presented to its board of county commissioners, and is by such board allowed in part, and a warrant drawn for the sum allowed, and the warrant thus issued is accepted, the party accepting such warrant is thereby estopped from a recovery for that part of the claim which was disallowed by the board.

4. Where an owner of a building leased to the county voluntarily performs the work of a janitor in such building, and it does not appear that the board of county commissioners either employed or directed him to perform such labor, he cannot recover from the county for the value of his services.

(Syllabus by the Court.)

Error from district court, Cleveland county.

W. H. Seawell filed a claim before the board of county commissioners of Cleveland county for rent of a building, discount on

warrants, and services as janitor, which was disallowed. He appealed to the district court, and obtained a judgment against the board for the sum of \$354.58 and costs. The board brings error. Reversed.

A. Hutchins and Gardner & Risley, for plaintiff in error. Fisher & Hennessy and Harris & Botsford, for defendant in error.

DALE, C. J. On July 17, 1893, the board of county commissioners of Cleveland county disallowed a bill presented by the defendant in error, W. H. Seawell, for the sum of \$369.59. Seawell appealed the case to the district court of Cleveland county, and the case was tried in that court, and judgment rendered in favor of Seawell in the sum of \$354.58. The account presented to the board of county commissioners, and which is the basis of this action, consists of 17 items. The 1st item is for rent. The 2d, 3d, 4th, 5th, 13th, and 14th are for loss sustained by reason of the sale of certain warrants received from Cleveland county by Seawell. The 6th and 7th are for a disallowance of a portion of the bills presented by Seawell, and also for loss sustained by reason of the discount upon the warrants so received. The remaining items are for janitor's work, for brooms, and for the filling of a vault upon the premises on which the building in which the court was held was situated. It appears from the record that in the summer of 1890 Seawell entered into a contract in writing with the board of county commissioners of Cleveland county wherein it was agreed that Seawell was to furnish the county with rooms for holding court and for county offices for a period of two years, beginning on January 1, 1891, and ending December 31, 1892, at an annual rental of \$600, payable quarterly. In the agreement appears the following clause: "It is hereby agreed by said W. H. Seawell that the building shall be ready for occupancy by said date, January 1, 1891; and it is further agreed that, in case the building is not in condition to be occupied by the county officers and court by that date, the said W. H. Seawell, of the first part, shall pay a forfeiture of \$150, which sum shall be paid to the county for said building for the first quarter." The building was not completed at the time agreed upon in the contract, and not until February 9, 1891, was it ready for occupancy by the county officials, on which last-named date it appears that the occupancy was begun on behalf of Cleveland county. At the meeting of the county commissioners in July, 1891, a warrant in the sum of \$150 was issued to Seawell in payment of the rent for the building, and thereafter, at the beginning of each quarter, a similar warrant was drawn, in an equal amount, for the rent of said building, all of which were accepted by Seawell. In his bill rejected by the commissioners, and the one here for consideration, the first item of \$83.33 is for

rent of the building from February 9 to April 1, 1891. The claims set out in items numbered 2, 3, 4, 5, 13, and 14 are, in the aggregate, for the sum of \$125, which is the amount of loss Seawell alleged he sustained by reason of the fact that the warrants received as rent were worth that sum less than their face value at the time he received the same; and he asks to be reimbursed in such sum. Items 6, 7, and 15 were for a balance due upon rent for rooms furnished to a jury, and the discount upon the warrants received for such rooms. It appears that Seawell furnished the county, for use of juries while court was being held, rooms in a part of his building not covered by his lease with the county; that he presented his claim to the board for the rent of such rooms, which was allowed him in one-half of the amount claimed, and warrants were ordered to be issued for the amount so allowed, which warrants were by Seawell accepted and sold at a discount; and the items last numbered are for the unpaid balance of the claim, and the discount on the warrants. Items 8, 9, 10, 11, 12, 16, and 17 are claims presented for janitor services in and about the building, and for brooms used in performing such services. The evidence shows that no contract or arrangement was entered into between Seawell and the county commissioners by which Seawell was to do janitor work on behalf of the county, but it appears that Seawell thought that the reputation of the building was involved, and, rather than to see the work go undone, he took it upon himself to voluntarily perform the work and to furnish the brooms for such purpose.

There are four questions presented to us for consideration in this case: First, is Cleveland county liable to Seawell for the rent on the building used for county rooms and county offices from February 9 to April 1, 1891? Second, is such county liable for the difference between the cash and par value of its warrants? Third, is a liability created in favor of Seawell for rent of jury rooms? Fourth, did the voluntary work performed by Seawell as janitor bind the county?

1. When the contract of lease was entered into between Seawell and the county, it was stipulated that the building should be ready for the county on the 1st day of January, 1891, and in case it was not Seawell was to forfeit the first quarter's rent. Seawell seeks to avoid the effect of this agreement by showing that James N. Bishop, then a member of the board, told him that if it was ready by February 9th—the time the court was to convene—it would be satisfactory. When the lease was entered into, it appears that the board of commissioners was in session, and all matters pertaining thereto were placed of record. It is not shown that the board in any manner modified or changed the contract. But it is claimed that one of the individual members, at a time subsequent to the date upon which the contract

was entered into, had a conversation with Seawell, in which such member consented to begin occupation of the building on February 9th. Article 6, c. 24, St. 1890, which provides for a board of county commissioners, also makes provision for the time and place of the meeting of such board, how they shall transact business, and the record they shall keep of all transactions had on behalf of the county. Under such law, the only way by which the county could be bound upon a contract was by action taken by the board while it was in session, and the evidence of what was done were the records kept by the board. Under this law, a board of county commissioners could only act to bind the county while they were sitting as a board, and an agreement of one of the members, in the absence of the others, could not bind such county. Therefore, the alleged arrangement between Bishop, one of the county commissioners, and Seawell, whereby Seawell was to have longer time in which to prepare the building for occupancy, did not change the contract, and must be treated as a nullity. The contract of lease expressly agreed upon a penalty for the violation of its terms. Such penalty was the forfeiture of the rent for the first quarter. It was not an unreasonable stipulation, and should be upheld.

2. The contract expressed the sum of \$600, as here written, as the annual rental for the building. Each quarter a warrant for \$150 was drawn in favor of Seawell, and by him accepted. He shows in his evidence that in order to cash the same he was compelled to discount the warrants, and he thereby failed to receive the full amount of money agreed upon as the rental for his building. The law has but one method whereby a county may pay its debts. The account must be presented to the board of county commissioners in separate items, the nature of each item stated, and the board then allows or rejects the account, as it thinks proper. If allowed, a warrant is drawn upon the county treasurer. The warrant is numbered, dated, and the amount for which the warrant is drawn and name of payee are stated upon the face of the warrant. The warrant so issued entitled the holder to the money for which the same is drawn, if the money is in the hands of the county treasurer. If not paid upon presentation, the warrant commences to draw interest at the rate of 6 per cent. per annum after presentation. Here we find a complete method adopted for discharging the obligations of a county. Under the law no claim can be paid except by warrant, and the evident purpose of numbering them is that they may be paid in the order in which they had issued as obligations against the county. The provision for payment of interest is made for the purpose of indemnifying against

loss those who are compelled to hold warrants on account of a lack of funds to meet them. The law clearly intends to make the warrant a check upon the treasury of the county, and 6 per cent. interest upon warrants not paid upon demand sufficient to indemnify against loss. And when Seawell contracted with the county he entered into such contract with reference to the law then in existence, which pointed out how he would receive his pay. We hold, therefore, that the county is not liable to Seawell by reason of the difference between the face and cash value of the warrants.

3. Seawell claims a liability from the county because the commissioners only allowed him one-half of what he states was due him for rooms furnished for the use of juries. It appears that the board of county commissioners allowed in part his claims presented for the use of such rooms. Warrants were drawn in his favor for the sums so allowed, which he accepted. As we find the law, such acceptance is a waiver of any further claim against the county. It is in the nature of an executed agreement to receive less than the amount claimed, and an acceptance of such sum will estop the party receiving the same from asserting his claim to the balance. This principle is concisely stated in *Wapello Co. v. Sinuaman*, 1 G. Greene, 413, as follows: "If the plaintiff presented his claim for allowance, and it was in part allowed by the board, and he accepted the amount thus allowed, he should not be permitted to afterwards sue for the balance. The acceptance of the part allowed should be considered satisfaction for the whole." To the same effect are the following decisions: *Fulton v. Monona Co.*, 47 Iowa, 622; *Brick v. Plymouth Co.*, 63 Iowa, 463, 19 N. W. 304; *Bradley v. Delaware Co.*, 57 Iowa, 552, 10 N. W. 898; *U. S. v. Adams*, 7 Wall. 463; *U. S. v. Child & Co.*, 12 Wall. 232.

4. The last question to consider is the claim made for janitor's service in and about the building. It is not contended that the commissioners entered into any agreement with Seawell under which the labor was performed. Seawell thought it ought to be done, as he states, for the credit and reputation of his building. Perhaps the county commissioners should have furnished a janitor, or should have compelled the county officers to keep their rooms and the stairway leading to them in a cleanly condition; but when Seawell volunteered to perform the work of janitor, in the absence of employment or direction by the board of county commissioners, he cannot recover from the county for his services. The judgment of the court below is reversed, and the cause is remanded, with directions to render judgment for the plaintiff in error.

SCOTT, J., having presided at the trial of the cause in the court below, not sitting. The other justices concurring.

LEE, County Treasurer, v. ROBERTS.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

CONSTRUCTION OF STATUTES—LIQUOR LICENSES.

1. Liquor licenses, as well as taxes and other public charges, are payable in money, unless provision is made by statute for their liquidation in some other manner or by some other means.

2. A statute must be construed in accordance with the legislative intent, and to ascertain this intent the various provisions of the legislative enactments must be construed together.

3. A literal interpretation will not be given to the language used in a part of a section of a statute when such construction would conflict with another provision of the same section and with other provisions of the statute.

4. Nor will a literal interpretation be given to language in a statute when such interpretation would operate unjustly or lead to absurd results.

5. The section of the statute relating to the duties of the county treasurer, which provides that whenever he receives any money, warrants, or orders on account of licenses, fines, or any other account, except taxes charged on the tax roll, shall make out duplicate receipts therefor, one of which shall be deposited with the county clerk, and which provides that the treasurer shall then enter the same in his cashbook as cash received for taxes, does not, when construed in connection with other provisions of the statute making liquor licenses payable in dollars, and providing for the registration and payment of county warrants in the order in which they are presented to the county treasurer, and providing for the use of such warrants in payment of taxes, and the redeeming of such warrants either by payment or by their receipt for taxes, require the county treasurer to receive county warrants in payment of liquor licenses when there are many thousand dollars in outstanding warrants of the county which have precedence in order of payment over those tendered, and when those tendered cannot be received as cash.

(Syllabus by the Court.)

Appeal from district court, Kingfisher county; before Justice John L. McAtee.

Frank Roberts, who is a saloon keeper in the city of Kingfisher, brought this action in mandamus to compel J. M. Lee, the county treasurer of Kingfisher county, to accept certain county warrants in payment of his liquor license. An alternative writ of mandamus was issued, to which the county treasurer made return and answer, alleging, in substance, that he did not receive the warrants in payment of the liquor license of the plaintiff because it was the duty of the plaintiff to make payment of his license, not in warrants, but in money, and because there were several thousand of the county warrants duly registered and outstanding, and which were entitled to payment ahead of those tendered by the plaintiff for the payment of his liquor license, and that the amount of warrants registered ahead of those which the plaintiff tendered, and which were entitled to payment before those which the plaintiff tendered, amounted to more than \$20,000. To this answer a demurrer was sustained, and judgment rendered requiring the county treasurer to receive the warrants offered by plaintiff in payment of his liquor license in the sum of \$200, from

which judgment the defendant appeals. Reversed.

J. B. Moffett, Co. Atty., for plaintiff in error. Hobbs & Kane, for defendant in error.

BIERER, J. This case presents one question, and that is whether Roberts was entitled to make payment of his liquor license, and whether the county treasurer was required to receive the same, in outstanding warrants of said county, and which had been registered, and not paid for want of funds, and where there were many thousand dollars in amount of other county warrants outstanding and entitled to payment in advance of those tendered. It is claimed by Roberts that, under the law, he can make payment of his liquor license in such county warrants, while the county treasurer contends that such license is payable only in cash, or in county warrants which are equivalent to cash. Section 3141 of the Statutes provides that a liquor seller is entitled to a county license to engage in such traffic upon doing certain things, and "upon payment into the county treasury of the sum of two hundred dollars for each license." This language is equivalent to saying that the sum of \$200 in money must be paid as a condition precedent to the procuring of a license, and there would be no doubt upon the question were it not for the language contained in section 5639, which is as follows: "Whenever the treasurer receives any money, warrants or orders on account of licenses, fines or any other account, except taxes charged on the tax roll, he shall make out and deliver to the person paying the same duplicate receipts one of which receipts said person shall forthwith deposit with the county clerk in order that the treasurer may be charged with the amount thereof. The treasurer shall then enter the same in his cash book as in case of money received for taxes, but in a separate and distinct series of numbers of receipts issued therefor; and no person shall receive such license or be discharged from obligation by reason of such fine on account until he shall have so delivered such duplicate receipt to the county clerk, and the treasurer shall so inform the person making the payment at the time of payment." It is the language of this latter section that is the cause of this controversy, and without it undoubtedly there would be no question for dispute, and there would be no contention but what this license charge must be paid in money. Public charges, such as taxes, are payable in money unless some other provision is made by statute. *Cooley, Tax'n*, p. 12; *Amenia v. Stanford*, 6 Johns. 92; *Judd v. Driver*, 1 Kan. 455. And this rule is as applicable to licenses as to taxes. In the case of *Blake v. Commissioners*, 18 Kan. 266, the supreme court of that state, in a decision rendered by Justice Brewer, held that under two sections of the statute, one providing that all fines, penalties, and forfeitures should be

paid into the county treasury, to be applied to the support of the common schools, and the other requiring that the county treasurer should collect all moneys due for school purposes from fines, forfeitures, etc., the county treasurer was directed to collect a judgment of forfeiture in money, and said that, the treasurer "having authority to collect, if he receive anything other than money in full satisfaction and discharge of the judgment, he renders himself liable for the amount thereof." In this case the bond of the county treasurer, who had received scrip instead of money, was held liable for the amount of the judgment. It cannot be disputed that, in the absence of a statute clearly making other provision, taxes, fines, forfeitures, licenses, and similar charges due the public are payable in money; and the language of the liquor-license law is clearly in accord with this general proposition, and manifestly intends that the license shall be paid in money, and the liquor-license charge must be so paid, unless the legislature has clearly made other provision for its payment. Does section 5639, when read and construed with all the other provisions of the revenue law, show clearly a different purpose in the mind of the legislature with reference to the manner of the payment of liquor licenses than that expressed by their language when legislating upon that particular subject? That its language is not in harmony with a purpose that liquor licenses shall always be payable in money is quite apparent; but when is it that they may be received by the treasurer in warrants? Is it all the time, or only when he may receive them as cash because they are entitled to be immediately paid in cash?

In answering the question we must arrive at the legislative intent, for that is the true meaning of all statutes; and to do this its various provisions must be read and construed together. *Territory v. Clark* (Okla.) 35 Pac. 882. Section 5633 of the revenue law provides as follows: "Territorial warrants are receivable for the amount payable into the territorial treasury on account of the general territorial tax, the county warrants are receivable at the treasury of the proper county for the amount of county tax payable into the county treasury, except when otherwise provided by law; and city warrants shall be receivable for city taxes; and school warrants shall be received for school taxes in the district where such warrants are issued; but United States treasury notes or their equivalent only are receivable for such taxes as are or may be required by law to be paid in cash." This is the provision of the statute which provides for the use of warrants as a medium of payment, and it only provides for their use in liquidation of taxes. The language is specific, and authorizes their use only in payment of taxes, and not in liquidation of any other account or charge due to the public; and the county warrants, under its terms, may be used in

payment of the county taxes, except when otherwise provided by law. And this exception does not indicate that it was made in favor of or in anticipation of extending the cases in which warrants could be used as cash in discharge of public charges due the county, but it was a limitation upon the general terms of the section giving the right to use warrants in payment of county taxes; and this limitation clearly appears in the latter lines of the section, which make United States treasury notes, or their equivalent, the only medium for the payment of such taxes as may be payable only in cash. The exception referred to in the language with reference to the use of county warrants as payment for county taxes was evidently intended to provide for cases in which they could not be so used, and a limitation upon their use, rather than to permit other and additional cases where they could be used. Had it been the intention of the legislature to authorize the use of all county warrants in payment of licenses, it would have been very easy indeed for the legislature to have expressed such an intention in framing the language of this section. It was in enacting this section that the legislature had particularly in mind the matter of making provision for the use of warrants instead of money in making payments to the public, and they authorized them to be used only when paying taxes. Section 5639 does not direct that the treasurer shall receive warrants on account of licenses, and such a construction would not only make the section conflict with the terms used in the liquor-license law, and be an enlargement upon the general use of warrants, and out of harmony with section 5633, but would give to it a meaning not expressed by any of the language when considered alone and when used without relation to any other part of the statute. That warrants must be received in payment of liquor licenses could only be drawn by inference from this language, and that they shall be so received is nowhere stated. The legislature, when framing this language, was not legislating upon the question of the use of warrants in payment, but was making a provision for the treasurer's giving a receipt when receiving payment for licenses, etc. It simply makes a direction as to what the treasurer shall do when he receives money, warrants, or orders on account of licenses or other accounts, and directs that he shall issue his duplicate receipts therefor, one of which receipts the person receiving the same shall deposit with the county clerk. It then provides that "the treasurer shall then enter the same in his cash book as in case of money received for taxes," clearly showing that the legislature intended, not that the treasurer must at all times receive warrants in payment of license dues, but that he might receive warrants on account of licenses whenever he could enter the same as money com-

ing into the county treasury; and if he could not receive the same as money, of course he could not, under this section, be required to accept such warrants as could not be held equivalent to money. Under this section, whatever he receives in payment of licenses, fines, or any other account, "except taxes charged on the tax roll," he shall receive as money, and be charged for as money. And in section 5683, when making his settlement, he is required "to pay over all money with which he may stand charged," and on his failure so to do suit must be instituted against the treasurer and his sureties; and by the next succeeding section the board of county commissioners are given power, when suit is commenced, to remove the treasurer from office, and to appoint a person to fill the vacancy thereby created. We cannot place upon this section of the statute such a construction as, taking it with other sections, would require the county treasurer to receive these warrants, and then, when they are not cash, and cannot be equivalent to cash, to account for them to the county in cash, and to make payment in cash in lieu thereof. He cannot be required to receive that which he cannot be permitted to pay, and, as he must account for all payments which are made for licenses in money, the same as "money received for taxes," and as these warrants are not such as can be paid in cash, because there are many thousands of others which have been registered as provided by law, and are entitled to priority in payment over them, the treasurer is not bound to receive them in place of money. It was evidently the intention of the legislature that the county treasurer might receive county warrants in payment of licenses whenever the warrants tendered were payable in cash out of the county treasury, and whenever the treasurer could charge himself with them as cash and account for the cash by producing in its stead warrants which were entitled to payment in cash.

A consideration of section 5638 shows also that the legislature had some particular purpose in making a separate provision for the treasurer receipting for money or its equivalent being received on account of licenses, fines, or other accounts, except taxes charged on the tax roll, for otherwise there could have been no reason whatever for enacting section 5639. If we are to take the language of section 5639 to mean that the treasurer must receive any or all county warrants tendered on account of licenses, then there is no reason whatever for this section being contained in the statute book, for section 5638 provides very specifically for the treasurer keeping a cashbook, and for his entry therein of all money received, specifying the purpose and the details of its receipt, and the account on which it is received, and also provides that in the same account, in separate columns, shall be entered the amount paid in warrants, orders, or receipts, keeping the

accounts of moneys, warrants, and orders received separate from each other; and it provides that he "shall keep his account of money received for and on account of taxes levied separate and distinct from moneys received on any other account." This section is specific, and makes, in the most complete detail, provision for the keeping of the account both of warrants and of moneys received. And if it had been intended by the legislature that warrants should be received in payment of licenses on an equality with those receivable in payment of taxes, it would no doubt also have been provided for in this section, and section 5639 would have been omitted; for it would have been entirely unnecessary for the legislature to have made provision for receiving and accounting for warrants, as they did do, if warrants are to be received in payment of licenses the same as in payment of taxes. We cannot suppose that the legislature was engaged in making separate provisions for receipting for the same kind of warrants, which were to be receivable on an equal footing for the two different purposes. The provision of section 5639, that whenever the treasurer receives warrants in payment of licenses he shall charge himself as if he had received cash, is consistent only with the interpretation that the legislature meant to establish different conditions under which warrants might be received in liquidation of license charges than when received in payment of taxes, and is not compatible with any other understanding than that what he does receive must be equivalent to cash, and whatever he does receive he shall be charged for as cash; and, therefore, warrants would only be entitled to be received in payment of licenses when they were interchangeable with cash in the county treasury, so that the charge against the treasurer for the receipt of the license would be balanced by the payment of the warrant. And this could not be done unless the warrant was entitled to payment in its order of registration.

There are numerous other sections of the statute which make provision for the county treasurer receiving warrants in payment, and none of them provide for their being so received in payment of anything else than taxes. Section 5675 provides for the treasurer keeping a warrant book, in which he shall enter territorial, county, road, or other warrants received in payment of taxes. Section 5682 provides that when a person desiring to pay taxes shall present a county order to the treasurer in payment of such tax, which shall exceed the amount of the tax, the treasurer shall indorse on the back of the order the amount paid. The legislature has also made specific provision for the redeeming of warrants in section 5681, and their redemption is provided for by this section in only one of two ways,—that is, where they are received in payment of a tax, or when such warrants are paid by the county

treasurer. The numerous sections of the statute all repel the idea that the legislature intended that county warrants should be received by the county treasurer in payment of a liquor license except when they could be received as cash; and we cannot believe that the language of section 5639 was intended to make provision for the payment of such licenses in any other kind of county warrants. The language of the section referring to the use of county warrants as payment of public charges does not say so, and the other provisions of the same section, as well as all the other sections, repel this idea, and such a construction would make this section conflict with the plain and manifest provisions of the other sections of the statute. We do not think a literal interpretation of the language used would give the section the meaning contended for by counsel for defendant in error. But if it would, then it cannot be given this literal interpretation, for that would make the section out of harmony with the other provisions of the law, and "when the provisions of a law are inconsistent and contradictory to each other, or a literal construction of a single section would conflict with every other, and with the entire scope and manifest intent of the act, it is the duty of the court, if it be possible, to harmonize the various provisions; and to effect this it may be necessary to depart from a literal construction of one or more sections." *State v. Heman*, 70 Mo. 441. Such a construction would operate unjustly and oppressively upon the county treasurer, and a literal interpretation cannot be given to a statute when it would operate unjustly and lead to absurd results. *Brown v. Woods* (Okla.) 39 Pac. 473; *Suth. St. Const.* § 324.

This license was payable in money, not only, as we have seen, by virtue of the general law, but by the plain expression of our statute, and we cannot accept the language of section 5639 as expressing an intention on the part of the legislature to change the other plain provisions of the law, excepting when the warrant could be received as equivalent to cash. Holding these views, the court erred in sustaining the demurrer to the defendant's answer below; and the judgment of the court below must be reversed, with directions to proceed in accordance with the views here expressed. All the justices concurring, except McATEE, J., not sitting.

CITY OF OKLAHOMA CITY v. WELSH.
(Supreme Court of Oklahoma. Sept. 7, 1895.)
DEMURRER TO EVIDENCE—DEFECTIVE STREETS—
NOTICE—PRESENTING CLAIM—EXCESSIVE DAM-
AGES—CONTRIBUTORY NEGLIGENCE.

1. It is not error for the trial court to overrule a demurrer to the evidence filed in a case tried under the Code of 1890, where such demurrer does not tender all of the evidence in the case.

2. It is not error in the trial court to instruct the jury that no actual notice of the

dangerous condition of a street was necessary to be brought home to the officers of the city, where such city, by contract, had allowed ditches and excavations, dangerous to the traveling public, to be made in its streets, and left unguarded by barriers or danger signals.

3. Where a traveler on horseback, passing along a street, falls into an open ditch, negligently left in such condition by the city, and sees a light, which he presumes to be a danger signal, at a distance of from 20 to 40 feet, *held*, that the question of contributory negligence was a question of fact to be submitted to the jury.

4. Where a person is injured by falling into an excavation negligently left in such condition by a city, and when it is shown by the evidence that, prior to the injury, he was an able-bodied man, and since such injury he has been unable to perform much labor, this court will not reverse the court below because such court refused to set aside the verdict as excessive, where the judgment was in the sum of \$1,350.

5. Where a party having sustained a personal injury for which he claims that a city is liable presents his bill therefor to the city council for allowance, which is by such council disallowed, he may thereafter sue for and recover all the damages sustained, though such damages exceeded the amount claimed in the bill, and on such judgment recover costs. *City of Wyandotte v. White*, 13 Kan. 191.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county.

Action for damages by John T. Welsh against the city of Oklahoma City for injuries received in falling into an excavation in one of the streets of the city, temporarily made to receive gas mains. Judgment in the court below for Welsh in the sum of \$1,350. The city appeals. Affirmed.

R. G. Hayes and W. R. Taylor, for appellant. J. W. Johnson and Selwyn Douglas, for appellee.

DALE, C. J. September 9, 1892, John T. Welsh filed in the district court of Oklahoma county a complaint against the city of Oklahoma City, alleging, in substance, that he had been injured by falling into an open ditch, which the city negligently allowed to remain in such condition; and, by reason of injuries so received, he asked damages in the sum of \$1,500. To this complaint the city answered by alleging, in substance, contributory negligence on the part of Welsh. The case was tried to a jury, and a verdict returned for the plaintiff in the sum of \$1,350. To reverse the case the city appeals, and assigns numerous errors, which may be grouped as follows: First, error in admitting and excluding testimony; second, in overruling the demurrer of defendant below to the evidence introduced on behalf of plaintiff below; third, in giving certain instructions, and in refusing those offered by defendant below; fourth, in overruling the motion of defendant below for a new trial.

1. Taking up the assignments of error as they are numbered above, we find that counsel in their brief have not in any manner pointed out the evidence they claim it was error for the court to have admitted or rejected. We have read the entire record, and

fall to notice any material error in the rulings of the court relative to the admission or exclusion of evidence, and therefore dismiss the assignment referred to.

The second question raised is the ruling of the court upon the demurrer. The demurrer filed is as follows: "Now comes said defendant and demurs to the evidence introduced by the plaintiff in the above-entitled action, and, for reason therefor, says that such evidence does not prove a cause of action in favor of plaintiff and against this defendant." This case was commenced, and therefore tried, under the Code of 1890, adopted from Indiana. The supreme court of that state under this Code recognized only the common-law demurrer, where the same was interposed to the evidence, and required a party offering it to set out the evidence fully in his demurrer. *Griggs v. Seeley*, 8 Ind. 264; *Lindley v. Kelly*, 42 Ind. 294; *Strough v. Gear*, 48 Ind. 100.

The demurrer filed in this case, not complying with this requirement, was properly overruled.

2. The next contention is raised upon the instructions given and refused by the trial court. It appears from the record in this case that the excavation which plaintiff fell into was in the nature of a ditch or trench dug by parties who had a franchise, under an ordinance of the city, granting to them the privilege of laying gas mains along the streets of the city, and giving to such parties, under their franchise, the right to excavate the streets for such purpose. It was contended by appellants, at the trial below, that no liability could attach to the city for the injury received by Welsh, provided the excavation complained of was not known to be open by any of the city officials at the time of plaintiff's alleged injury, and had not been kept open for a sufficient length of time before said injury that the city officials ought to have known of it by the exercise of reasonable diligence. The court refused to give such instruction, and directed the jury that if they found from the evidence that the city authorized the contractors to make the excavations, and such contractors failed and neglected to properly guard the ditches and excavations by barriers or suitable danger signals, the city was liable, in the absence of contributory negligence by Welsh. The court below was correct in its statement of the law. No actual notice to the city was necessary in order to make it liable. The city had, by ordinance, permitted the excavations to be made, and was bound to know that such work would be dangerous to travelers upon its streets. It was therefore incumbent upon it to see to it that all proper safeguards were thrown about the work, and, if it failed so to do, it was guilty of negligence. *Brooks v. Inhabitants of Somerville*, 106 Mass. 271; *City of Salina v. Trosper*, 27 Kan. 544.

3. We now come to the assignment of error

wherein complaint is made to the action of the court in overruling the motion for a new trial. All of the errors set forth in the motion for a new trial have been considered, except the second and third grounds, which are as follows: "That said verdict is contrary to the evidence given in the trial of said cause," and "excessive damages, which appear to have been given under the influence of passion or prejudice." We have carefully examined the entire record, and find that there is a conflict of evidence upon most of the questions involved. Counsel for appellant set forth some questions asked the plaintiff below, together with his answers thereto, and insist that it is shown by such plaintiff's testimony that he was guilty of contributory negligence as a matter of law, and that he cannot, therefore, recover. The questions and answers referred to are as follows: "Ques. You were speaking about lights. There was one near the sidewalk, somewhere, right at the corner, sitting at Mr. Turley's? Ans. He had a kind of a porch right at the end. I believe it was sitting right by the corner, or hanging there. I saw that. Ques. You understood that was a danger signal? Ans. Yes, sir. Ques. Didn't stop to see where the danger was, or anything about it? Ans. No, sir, because the light was over 20 or 30 feet out by the sidewalk; right by the corner of the building. Ques. You didn't stop to investigate what that was,—whether it was dangerous or not,—but just kept trotting right along? Ans. Yes, sir." The above evidence is claimed by appellant to be, under the law, such contributory negligence upon the part of Welsh as precludes his recovery. As we gather from the record, the ditch into which Welsh fell was being excavated east and west along First street, and running parallel with and about 20 feet south of the north line of said First street, and that such excavation continued to nearly the center of Broadway street, Broadway street being about 100 feet in width, and intersecting with First street at the place where the accident occurred. Welsh fell into the ditch a short distance east of the center of Broadway, and, as we think the evidence shows, about 50 feet from the corner of the porch on the Turley Building, where he says he saw the light. True, Welsh testifies that he understood that it was a danger signal, and that he did not stop to see where the danger was, or anything about it, because, as he states, the light was over 20 or 30 feet away, out by the sidewalk, right by the corner of the building. Notwithstanding his testimony, we incline to the belief that the record fairly shows that he was much further from the light than he presumed he was; that, in fact, he was fully 40 feet away. There is contradictory evidence in the record as to whether there were any lights, at or near the place where this accident occurred, other than that seen by Welsh. We think there were not other lights at that point. In passing, it might be well to state that the

record shows that Welsh knew of the fact that they were digging ditches in that city at that particular time for gas mains, and was also acquainted with the fact that they had been working on the ditches in the vicinity of where the accident occurred. It does not appear that at the time the accident occurred Welsh had in mind the fact that there was a ditch in that immediate vicinity. We are asked to say, in view of these facts, that Welsh was guilty of contributory negligence, and that, under the law, he cannot recover for the injuries received. We do not believe plaintiff in error is correct in its contention. The fact that there is a light at the corner of a building, which a man may presume to be a danger signal, and which he should presume, if he thought the same was a danger signal, was placed there for the purpose of warning the public that there was danger in the immediate vicinity of where the light was located, does not carry with it the further fact that a man is bound to know that such danger signal intends to warn a person against a danger a distance of 40 feet, or even 20 feet, from the point where such lamp was located. It is a well-known fact that sidewalks become dangerous at times, and that the city, in the exercise of proper precaution, places warnings or danger signals at the point where the sidewalks are defective. It is also a fact that, if there is an excavation in a street which is used for people riding on horseback or in vehicles, the danger signal would ordinarily be placed at or near the point where the danger existed. We think Welsh was justified in paying no attention to the danger signal at the corner of the building while he was traveling on horseback in the street, a distance of from 20 to 50 feet from the location of such danger signal. The question of contributory negligence in this case is a question of fact, which should have gone to the jury. The court in its instructions directed the jury that if Welsh, by the use of ordinary care in traveling the street, could have discovered or avoided the danger, it was his duty to have done so, and if he failed therein he was guilty of contributory negligence. In this case we think, under the facts, the court was warranted in letting the jury pass upon the question of contributory negligence, and we therefore find that the court did not err in overruling the motion for a new trial upon the ground that the verdict was contrary to the evidence. *Wilson v. Gravel-Road Co.*, 83 Ind. 326; *City of Huntington v. Breen*, 77 Ind. 29; 2 Thomp. Neg. § 52, p. 1203; *Town of Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256.

4. The next matter which we will consider is the question of excessive damages. Under the evidence in this case it appears that plaintiff below was a strong, able-bodied man before his injury; that since that time he has been unable to work to any great extent. Under these facts we do not think the verdict of the jury was so excessive as to warrant this court in disturbing it.

5. The other proposition discussed by counsel for appellant in his brief is that the plaintiff below was permitted to amend his complaint by inserting in the prayer a claim for \$1,500 damages, instead of \$500, as the complaint was originally drawn, and that no judgment for costs should be taken against defendant below. It appears from the evidence that plaintiff presented his bill for damages to the city council in the sum of \$500. Counsel for plaintiff in error contends that suit was originally brought for such sum, and that afterwards, over objection, an amendment was permitted to the complaint by allowing the plaintiff below to ask for a recovery of \$1,500. In the transcript we find but one complaint set out, and that is the one asking for a recovery of \$1,500. This being the case, we have nothing before us upon the question of the amendment. However, the allowance of such an amendment would not ordinarily be ground for reversal. *Mulhall v. Mulhall* (decided at the present sitting of this court; not yet officially published) 41 Pac. 109.

Objection is also made to the judgment for costs. Under our statutes (section 41, c. 14, p. 174) all claims against the city must be presented in writing to the city council for allowance, and, unless so presented, no costs shall be recovered against the city in an action brought against it for any unliquidated claim. In the case under consideration a claim was duly presented for \$500. At the trial \$1,500 was claimed. Judgment was obtained against the city for \$1,350. It is contended that plaintiff below could not, under these circumstances, recover a judgment for costs. Our statute was adopted from Kansas, and is identical in all respects with section 70, c. 19, Gen. St. Kan. 1889. In *City of Wyandotte v. White*, 13 Kan. 192, Mr. Justice Brewer, in passing upon this question, held to the view that, where a claim was presented for \$600, such presentation was a sufficient basis for a suit for \$10,000 and a verdict for \$1,200, and that the verdict carried the costs. That decision is controlling.

For the above reasons we affirm the judgment of the court below.

SCOTT, J., having presided as trial judge, not sitting. The other justices concurring.

WAMSLEY v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 7, 1895.)
CRIMINAL LAW—FAILURE TO TAKE EXCEPTIONS—
REVIEW ON APPEAL.

Where, upon the trial of a defendant charged with a felony, after conviction, a motion in arrest of judgment and a motion for a new trial are filed and overruled, and no exception taken thereto, or in any manner saved in the record, the supreme court will not reverse the lower court upon such motion.

(Syllabus by the Court.)

Appeal from district court, Canadian county.

William Wamsley was found guilty and sentenced for the crime of burglary. From such judgment he appeals. Affirmed.

J. W. Talbot and Henderson & Warren, for plaintiff in error. C. A. Galbraith, Atty. Gen., and Thos. B. Reid, Co. Atty., for defendant in error.

DALE, C. J. The defendant in error brings this case here, and asks a reversal upon the grounds that the court erred in overruling his motions in arrest of judgment and for a new trial. The defendant was tried and convicted of the crime of burglary, after which, through his counsel, he filed a motion in arrest of judgment and a motion for a new trial, both of which were by the court below overruled, and upon the verdict of the jury the defendant was sentenced to the penitentiary. It is impossible for us to consider the errors assigned, as no exception was asked or taken to the ruling of the court upon the motions. In fact, a thorough examination of the entire record has been made, and nowhere do we find an exception asked for or saved. In this case the defendant was arraigned upon the indictment, and pleaded thereto without objection. He went to trial without an objection to the introduction of evidence, and no objection appears to have been made or exception saved to the ruling of the court upon the motions for a new trial and in arrest of judgment. Section 10, art. 13, c. 68, Code Cr. Proc., gives the defendant the right to except to the ruling of a court in granting or refusing a motion in arrest of judgment or for a new trial, and the right to have the same incorporated in a bill of exceptions. Section 7, Id., provides how exceptions shall be incorporated into a case made. The law appears to be plain, and counsel who undertake to protect the rights of a person charged with crime ought to observe the rules laid down for the benefit of their clients if they wish to have alleged errors reviewed in the supreme court. In this case, as no exceptions have been taken or preserved, we can do nothing but affirm the judgment of the court below. The judgment is affirmed. *City of Atchison v. Byrnes*, 22 Kan. 65; *U. S. v. Duggins* (Utah) 40 Pac. 707.

BURFORD, J., having presided at the trial in the court below, not sitting. The other justices concurring.

BASSETT v. MITCHELL.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

TOWN SITES—ESTOPPEL—LACHES.

Where a settler upon a lot claiming under the act of congress of May 14, 1890, fails to assert any right to the lot before the board of town-site trustees, and such failure was wholly his own laches, he becomes thereby estopped from obtaining relief in a court of equity.

(Syllabus by the Court.)

Error from district court, Oklahoma county; before Justice Scott.

Action by Jesse A. Mitchell against O. T. Bassett and J. C. Wellwood, to declare them trustees for Mitchell, and compel a conveyance from Bassett and Wellwood of real property. Judgment for plaintiff. Bassett brings error. Reversed.

R. G. Hayes and J. L. Jenkins, for plaintiff in error. Selwyn Douglass, for defendant in error.

DALE, C. J. May 1, 1891, Jesse A. Mitchell commenced proceedings in the district court of Oklahoma county against O. T. Bassett and J. C. Wellwood, to declare Bassett and Wellwood his trustees, and to decree a conveyance by Bassett and Wellwood of lot 21 in block 5 in the city of Oklahoma City, Oklahoma county. Mitchell, in his complaint, alleged, in substance, that at the time Oklahoma was opened to settlement he was qualified to acquire title to land therein, and that on the 23d day of April, 1889, he selected and occupied the lot above described, and has since continued to reside upon and improve it, and at the time of the institution of this suit he had improvements thereon to the value of \$500; that under the act of congress of May 14, 1890, relating to town sites in Oklahoma, the land had been duly entered by trustees appointed by the proper authorities, which entry was made for the several use and benefit of the town-site claimants; that he notified said town-site trustees of his occupancy and improvements upon the lot, and made a claim thereto; that he understood this to be the only application necessary; that, being an occupant of the lot, he relied upon the trustees to notify him of any adverse claim to it; that the lot was not awarded on the day designated by the regulations governing the actions of the trustees, and he was not notified of any adverse claim; that the defendant Wellwood was never a bona fide inhabitant of the town site, or of the lot, and was not entitled to a deed; that Wellwood made application for a deed, representing that he was an inhabitant of the town site, and an occupant, under claim of right, of the lot; that by false statements said Wellwood procured a certificate from the authorities of Oklahoma City, but it was revoked before the trustees entered the town site; that the certificate, after such revocation, was presented to the trustees as a basis for his (Wellwood's) claim to the lot; that, under the laws and regulations governing the action of the trustees in the disposal of lots, said Wellwood, not being an inhabitant of said town site and an occupant of said lot, was not entitled to a hearing on his application, and it was error of law and a neglect, on the part of the trustees, in not making the proper, required, and legal notice and investigation before awarding him (Wellwood) a deed to said lot; that Wellwood represented himself to said trustees as

being the owner of the lot, and entitled to a deed for the same, on October 15, 1890, when in fact he had on October 9, 1890, transferred the same to Bassett, by a quitclaim deed, in consideration of \$250; that at the time of such transfer the actual value of the lot was \$1,500, and that all the improvements on said lot were placed there by him (Mitchell); that neither of the defendants have any improvements on the lot, and the occupancy of the plaintiff was always notorious; that Bassett was not a bona fide purchaser of the lot; that the trustees awarded the deed to the lot to Wellwood on false statements, etc., without notice to the plaintiff, and this was error of law, and a mistake of fact, and a neglect, upon the part of the trustees. To this complaint Bassett demurred, which was overruled by the court, whereupon he filed a separate answer, alleging, in substance, that the town-site trustees, after proving up the town site, in pursuance of law, proceeded to award to the occupants of the town site the lots to which they were entitled, and for that purpose set October 6, 1890, as a day on which they would set off to the occupants their respective lots, and, for more than 15 days prior thereto, caused a notice thereof to be posted in the Oklahoma City papers. The notice is set out as an exhibit in the answer, and is addressed to all persons interested or concerned in the town site, and, upon its face, recites that the survey and plats have been completed, and that on October 6, 1890, the board would proceed to set off and allot to persons entitled to the same, according to their respective interests, the lots and blocks to which the occupants thereof should be entitled under the provisions of the act of congress of May 14, 1890; notifying all persons claiming any of said lots that they were required to make application to the board, under oath and in writing, and on blanks to be furnished by the trustees on or before that day, setting forth the grounds of their respective claims to lot or lots in Oklahoma City. The notice further set out that no application filed after that date would be considered, where it would operate to the institution of a contest, unless a legal excuse for filing out of time should be shown. The answer then further alleged that on the day designated the defendant Wellwood being the only applicant and legal occupant of the lot, the trustees having no notice of the claim of Mitchell thereto, and Wellwood having filed his application for the lot, in accordance with the rules, and paid the fees, the lot was awarded to him by the trustees, and deed afterwards executed and delivered to him, which was filed for record October 15, 1890; that he (Bassett), in good faith, and after the deed had been made by the trustees, purchased the lot from Wellwood for \$250; that at the time of such purchase he was ignorant of the plaintiff's claim; that, although the deed bears date October 9th, it was not delivered and the purchase money paid until

October 15th. As other exhibits to this answer, appear the application of Wellwood for a deed to the lot in controversy, which was duly filed with the town-site trustees, the trustees' deed to Wellwood, and the deed from Wellwood to Bassett. Mitchell's reply raised no new issue in the case. Upon the issues thus joined the case was ordered to William H. Clark, as referee to take testimony, and after the testimony was complete the judge referred the case to H. H. Howard, as a referee to determine the questions of fact, under the evidence, and present his conclusions of law, which was done. It will not be necessary in this case to notice the findings of fact made by the referee, except, generally, to say that the claims of each party, as set forth in their pleadings, appear to have been substantiated by the findings of fact as made by the referee. In his conclusions of law the referee, among other statements, says: "I do not hesitate to say, at the outset, that the rights of the plaintiff were clearly superior to those of the defendant J. C. Wellwood, and that, upon a contest being had before the board of town-site trustees, their decision would have been in his favor. This conclusion resolves the controversy into an inquiry, not of the relative or respective rights of the plaintiff and Wellwood prior to October 15, 1890, but of the rights of the plaintiff and defendant Bassett when this suit was filed, on October 16, 1890. The defendant failed absolutely to assert, in a legal way, his rights, until the title had passed from the trustees to Wellwood, and from him to Bassett, but immediately brings this action to recover what he claims—and, it seems, correctly—he could have recovered in the court especially created to hear and determine claims." And further on in his conclusions he states that: "The failure to assert his right before the trustees is wholly his own fault. If the proceeding before the board was regular, and no fraud perpetrated, his rights would be gone, beyond all doubt. That the plaintiff has cause for complaint against himself is certain. It remains to be seen how far he has such cause against the trustees and the defendant. * * * He did not attempt to comply with the law or their requirements, and consequently is not in a position to say that they denied him any right demanded. If they did anything for which he may complain, it was in the ex parte transaction by which the premises were conveyed to Wellwood."

The report of the referee, finding for the plaintiff below, was, over the objection of the defendant Bassett, confirmed by the court, and its judgment and decree rendered, declaring Bassett the trustee for Mitchell, and directing a conveyance. To reverse this judgment the case is brought here, and numerous assignments of error set forth, but it will not be necessary for us to consider only the seventh, which is as follows: "The court erred in confirming the report

of the referee and the conclusions of law made by him, and in rendering judgment thereon." In *Twine v. Carey* (decided by this court) 37 Pac. 1006, it was held that a court of equity had no jurisdiction when it is apparent from the petition that the plaintiff had a remedy at law, and failed to avail himself of it, and shows no good reason for such failure, and wherein it also appears that he was not entitled to the relief prayed for. In the same decision the court further held: "Before a court of equity will interfere to declare the holder of the legal title a trustee for an adverse claimant, said adverse claimant must show in his bill for relief that he has availed himself of all the rights before the land-department officials, and that he has performed every requirement of the law and rules regulating the acquirement of title applicable to the land he claims; and he cannot set up in his own laches, neglect, mistake, or inadvertence as an excuse for failure to comply with the law, unless such fault was brought about by fraud, wrong, or misconduct of his adversary." Under the pleadings in this case, it appears that both Wellwood and Mitchell were claimants for the lot in controversy; that Wellwood prosecuted his claim before the tribunal which congress had created for the purpose of passing title to the party to whom title should be awarded. Mitchell failed to appear before the board, or in any way to assert his title to the property before such tribunal. In his conclusions of law the referee finds that "if the proceeding before the board was regular, and no fraud perpetrated, his rights would be gone, beyond all doubt," and finds that he did not attempt to comply with the law, or the requirements of the town-site board, and consequently is not in a position to say that they denied him any right demanded. But the error of the referee was in holding that Mitchell was a proper party to try the question of fraud, as between Wellwood and the United States. If Wellwood perpetrated a fraud upon any person, it was upon the United States. It was not upon Mitchell. Mitchell was asking for nothing. Consequently, his rights were not invaded. As between Mitchell and Wellwood, before the tribunal especially created to try the issue of right in the land in controversy, no question was raised by Mitchell as to Wellwood's right to the lot. As stated in *Twine v. Carey*, supra, such board was created for the purpose of hearing and deciding disputed questions arising between claimants to lots, and, if parties failed to assert their rights before such tribunal, courts will not aid them. The decision of the referee seems to have been based entirely upon an alleged fraud perpetrated by Wellwood upon the board of town-site trustees. We do not think Mitchell could complain of such fraud. The government of the United States might, if title to the lot still remained in Wellwood,

institute an action to cancel the deed for fraud in the procurement thereof; but this is not a proceeding by the government for such purpose, and, the title to the property having passed to Bassett, it is doubtful if the government could now be heard to institute any proceedings for the cancellation of such patent. But, however that may be,—and we are not called upon to decide that question,—it is clear to us that Mitchell having wholly failed to assert any right to the lot before the proper tribunal, and such failure being wholly of his own laches, he is estopped from coming into the courts to contest any action which the town-site trustees may have taken in disposing of the lot in question. The judgment of the lower court is reversed and the case remanded, with direction to award judgment for the defendant Bassett.

SCOTT, J., having presided at the trial below, not sitting. The other justices concurring.

HURST v. SAWYER.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

APPEAL—EFFECT ON JUDGMENT—ASSIGNMENT OF ERRORS.

1. Under the Indiana rule, which was adopted here by the adoption of the Indiana Code by the legislature, it is held that, in cases which arose before the change to the Kansas practice, an appeal to the supreme court did not suspend the binding force of the judgment upon the parties, and that the judgment was not rendered incompetent to be offered in evidence because an appeal was pending in the supreme court; and this court will not reverse the judgment, in a case where the judgment appealed from was offered in evidence, because the judgment so offered was thereafter reversed by this court.

2. An assignment of error which is not relied upon in the brief of counsel for a reversal of the case will not be considered by this court; nor will this court review a question partially discussed, when counsel, in closing his brief, chooses to abandon it, and rely entirely upon another proposition, and when counsel on the other side have relied upon such withdrawal.

(Syllabus by the Court.)

Appeal from district court, Canadian county; before Justice John H. Burford.

Action by Hamlin D. Sawyer against James D. Hurst. Judgment for plaintiff, and defendant appeals. Affirmed.

R. B. Forrest, for plaintiff in error. Dille & Schmook, for defendant in error.

BIERER, J. The record in this case is a very unsatisfactory one, because none of the dates of the filing of the various pleadings are given; but we are able to gather from the records and the briefs that some time during the summer of 1893, and while the Indiana Code of Civil Procedure was still in force in this territory, the defendant in error brought his action in the district court of Canadian county against James D. Hurst to recover the possession of all the wheat and cats

grown on the N. W. $\frac{1}{4}$ of section 36, township 12 N., range 5 E., in Canadian county, of the value of \$150; and on the trial of the case, on December 20, 1893, judgment was rendered in favor of the plaintiff for the recovery of the wheat and oats, or the value thereof, as charged in the complaint. On the trial of the case the plaintiff below offered in evidence the judgment of the district court of Canadian county, rendered on the 1st day of May, 1893, in which the plaintiff was found to be entitled to the immediate possession of the premises there in controversy, which are the same as those upon which the wheat and oats involved in this case were raised and were situated at the time this action was brought,—they having been at that time cut and shocked by the defendant, Hurst,—and in which the plaintiff recovered judgment from the defendant, Hurst, for the immediate possession of the real estate in question. The defendant objected to the introduction of this judgment in evidence on the ground that the case in which it was rendered was then pending in the supreme court on appeal, but the objection was overruled; and he now assigns this ruling as error, and particularly insists that this judgment should be reversed because the judgment which was offered in evidence has since been reversed by this court. *Hurst v. Sawyer* (Okla.) 37 Pac. 817. The plaintiff in error claims that pending his appeal in the former case to the supreme court the judgment could not be offered in evidence against him as an estoppel to show that the plaintiff had been, by the judgment of the court, decreed the possession of the premises on which these crops were raised; and he cites very high authorities in support of his proposition, including section 328 of *Freeman on Judgments*, where he says: "In perhaps a majority of the states, the perfecting of an appeal suspends the operation of a judgment as an estoppel, and renders it no longer admissible as evidence in any controversy between the parties." And we are willing to concede that this would seem to be the more reasonable and fairer rule, for otherwise a party may be deprived of much of the benefit of his appeal, in case he procures a reversal of the judgment below, or may be put to the necessity of additional litigation in order to have the full and complete protection of his rights. But it will be observed that, while Mr. Freeman states the majority rule as he does, he also, in the same section, states the contrary rule as existing in many of the states, to the effect that the judgment is competent evidence to be admitted, where proper, in other proceedings, until it is reversed on appeal, and that its binding effect and operation on the parties are not suspended because of the appeal therefrom, although the execution thereof may be stayed; and he cites the Indiana decisions as supporting the latter rule, as they clearly do. The supreme court of Indiana announced the rule of that state,

in the leading case of *Nill v. Comparet*, 16 Ind. 107, as follows: "The only effect of an appeal to a court of error, when perfected, is to stay execution upon the judgment from which it is taken. In all other respects, the judgment, until annulled or reversed, is binding upon the parties, as to every question directly decided. *Cole v. Conolly*, 16 Ala. 271. And it has been expressly decided that 'it is no bar to an action upon a judgment that the judgment has been removed, by writ of error, to a superior court.' " And this case is followed throughout the Indiana decisions, and the rule was firmly fixed in that state at the time our legislature adopted the Indiana Code. *Burton v. Reeds*, 20 Ind. 87; *Burton v. Burton*, 28 Ind. 342; *Mull v. McKnight*, 67 Ind. 525; *Buchanan v. Railway Co.*, 71 Ind. 265; *Scheible v. Slagle*, 89 Ind. 323; *Padgett v. State*, 93 Ind. 396; *State v. Krug*, 94 Ind. 366; *Central Union Tel. Co. v. Board of Com'rs of Tippecanoe Co.* (Ind. Sup.) 10 N. E. 922. The legislature of this territory having adopted the Indiana statute with this construction placed upon it, it is a rule of law for this territory; and it is not left to us to choose another, although we might think it better, and although it might be supported by the weight of authority. However, in support of the Indiana rule, it is pertinently suggested that the hardships and vexatious complications that result from being precluded by a judgment which is afterwards reversed on appeal may easily be avoided by a continuance of the subsequent case until the appeal is disposed of; but no application for a continuance was made in this case. Nor can we reverse the judgment of the court below on account of its having admitted in evidence the record of the judgment, which was competent when offered, because it has since been reversed. That matter is not a ground of error for which the plaintiff in error may complain here; for, if the judgment was properly admitted and offered, its subsequent reversal did not make this action of the court erroneous. Upon this subject the supreme court of New York, in *Parkhurst v. Berdell*, 110 N. Y. 386, 18 N. E. 123, says: "If the judgment roll was competent evidence when received, its reception was not rendered erroneous by the subsequent reversal of the judgment. Notwithstanding its reversal, it continued, in this action, to have the same effect to which it was entitled when received in evidence. The only relief a party against whom a judgment, which has been subsequently reversed, has thus been received in evidence, can have, is to move on that fact in the court of original jurisdiction, for a new trial." The plaintiff in error's remedy for a release from the operation of the erroneous judgment, after its reversal, so far as it affected the case at bar, was not an appeal to this court.

The only evidence offered by plaintiff in error in support of his right to recover the crop

of wheat and oats standing in shock upon the land was the judgment entered in the ejectment suit on May 1, 1893. The plaintiff here assigns the action of the court in rendering judgment upon this evidence as erroneous, and contends that the judgment in the ejectment suit would not entitle Sawyer to recover the crops of grain which had been harvested before the defendant was ejected by the execution of the judgment. This is a very nice question, and one upon which very high authority might be cited on both sides of the proposition; but we do not pass upon it here, because counsel, in the latter part of his brief, has withdrawn the matter from the consideration of this court, in the following language: "The extent of this judgment [referring to the judgment in the ejectment suit] had escaped attention until the point which it was intended to here make had been reached. It is useless to argue the rights of Hurst as an adverse possessor, when the judgment had declared him a trespasser. I must therefore leave the force of the argument to apply upon the first point developed, viz. the error of the court in admitting the judgment, and treating it, pending the appeal, as an estoppel." Counsel for defendant in error, in their brief, treated the assignment of error on this point as withdrawn, as they had a right to do; and where assignments of error are not relied upon by counsel, in their brief, they will not be considered by this court. *Gardenhire v. Gardenhire* (Okla.) 37 Pac. 813. Counsel for plaintiff in error having withdrawn the latter assignment from our consideration, we will not consider it. The judgment of the court below is affirmed. All the justices concurring, except BURFORD, J., not sitting.

BARTON et al. v. SPENCER et al.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

ATTACHMENT—PROPERTY IN CUSTODIA LEGIS.

Where service of process in garnishment is had, the property found in the possession of the garnishee is in custodia legis; and no rights can be obtained in such property by subsequent attaching creditors, as against a creditor causing the garnishment summons to issue.

(Syllabus by the Court.)

Error from district court, Canadian county.

Action by Barton Bros. against P. S. Kern, in which L. M. Spencer was summoned as garnishee. Pending the suit the sheriff of Canadian county levied an attachment. From the judgment, Barton Bros. bring error. Reversed.

Boynton & Smith and White & Grigsby, for plaintiffs in error. C. H. Carswell and Green & Strang, for defendants in error.

DALE, C. J. September 20, 1893, Barton Bros. filed a petition in the district court of Canadian county against P. S. Kern, alleging that there was due upon account to the plain-

tiffs in said action the sum of \$370. At the same time the plaintiffs filed an affidavit of garnishment, wherein it was alleged that one L. M. Spencer had in his possession, and under his control and custody, personal property belonging to said P. S. Kern, and that said defendant had no other property, exempt from execution, sufficient to satisfy plaintiffs' claim and demand, and that the property in Spencer's hands was not exempt from seizure or sale under attachment or execution. This garnishment summons was duly served in the manner required by law. The garnishee, L. M. Spencer, answered to the effect that P. S. Kern, the defendant in the proceeding instituted by Barton Bros., on the — day of September, 1893, made an assignment of a general stock of merchandise, accounts, etc., to him (the said Spencer) for the benefit of his creditors, and that said stock of merchandise and accounts was appraised at the sum of \$2,350; that he (Spencer, assignee) was in no way indebted to the defendant, nor had he been since the commencement of the action, nor was he at the time the summons in garnishment was served upon him. In due time the plaintiffs served notice of their election to take issue on the answer of the garnishee, and thereafter filed their reply to his answer—First, generally denying all of its allegations; and, second, alleging that the assignment was void as to the plaintiffs; and the grounds upon which it was claimed that the assignment was void were set out in different paragraphs. The plaintiffs, Barton Bros., applied to the court for an order making the sheriff of Canadian county a party defendant; alleging in their application that the sheriff had received writs of attachment and execution against P. S. Kern, placed in his hands by different parties, and that he had served the same by levying upon the property held by Spencer as assignee, and that such writs of attachment and executions were subsequent in time to the service of summons in garnishment upon said Spencer; and alleging that under the writs of attachment and execution the sheriff had taken all, or nearly all, of the property out of the hands of Spencer, thereby making it impossible for Spencer to surrender enough of said property, upon the garnishment proceeding, to satisfy the claim of the plaintiffs. Afterwards, Spencer, by supplemental answer, showed that the entire property in his hands as assignee at the time of the service of summons in garnishment had been taken by the sheriff, upon writs of attachment and execution, subsequent to the date upon which the garnishment process was served upon him. The case came on for trial upon the issue joined between Barton Bros. and the sheriff, and the parties claiming through the sheriff, under the writs of attachment and execution, and upon such issue the court below held and concluded as follows: "That the summoning of the defendant Spencer did not create a lien of any kind upon the property of the defendant

Kern in the hands of Spencer at the time of the service of such summons in garnishment upon him, and did not place such property in the custody of the law, and that the levy of the attachment thereon by the defendant the sheriff, after such garnishment, and with knowledge thereof, did not make such levies, and the rights claimed thereunder by the execution and attachment plaintiffs, subject and subordinate to the garnishment, and the levy of such attachments were as fully effectual as though no garnishment had occurred previous thereto; and the making of the sheriff a party to the action while said property was in his hands did not affect the attachment, nor make the same subject to the orders of the court in the case, and the property, or its proceeds, cannot be made subject to the order of the court in this action, applying the same to the payment of plaintiffs' claim, but the same must be released from the temporary injunction, and inure to the benefit of the plaintiffs in the attachments and executions,"—and in the judgment rendered in the action also entered a personal judgment against L. M. Spencer, garnishee, in favor of Barton Bros., for the full amount of their claim against Kern. In explanation of a portion of this judgment, it may be well to state that Barton Bros. had procured a temporary injunction against the sheriff, enjoining the sheriff from turning over to the attachment and execution creditors the money received from the sale of the stock of goods levied upon under the writs of attachment and execution. Barton Bros. bring this case here, and assign as error the conclusion of the court wherein it was held that Barton Bros. obtained no lien against the property in the hands of Spencer, the assignee, by virtue of the service of the garnishment summons upon said Spencer.

There is but one question before us to decide, and that is, did the service of the garnishment summons upon Spencer prior to the service of the writs of attachment and execution have the effect of a lien upon the property held by Spencer, in favor of the garnishee creditors? Spencer—the man to whom Kern assigned his property for the benefit of his creditors, and against whom the court rendered a personal judgment—did not appeal, and the judgment rendered in the court below against him is not here for consideration. Plaintiffs in error are contending for their lien upon the goods by virtue of their proceedings in garnishment. The court below held that, as against the subsequent attaching and execution creditors, no lien was created. Exhaustive briefs have been filed by both parties, and we have carefully examined all the authorities cited which we are able to obtain, and, after consideration, reach the conclusion that the court below was in error. Numerous decisions will be found in support of either doctrine, and we will not attempt to review all of them in this opinion, but will content our-

selves with citing some of the cases which support our view, and which, we think, present the correct principle of law: *Beamer v. Winter*, 41 Kan. 596, 21 Pac. 1078; *Brashear v. West*, 7 Pet. 608; *Burlingame v. Bell*, 16 Mass. 318; *Focke v. Blum* (Tex. Sup.) 17 S. W. 770; *Ide v. Harwood*, 30 Minn. 191, 14 N. W. 884; *Mattingly v. Boyd*, 20 How. 128. These cases, and the authorities therein cited, are some of the principal ones which we think uphold our view of this question. An examination of the statutes of the states from whence these decisions come will show that they are similar to ours in many respects. As against the doctrine, the principal cases cited are *McGarry v. Coal Co.*, 93 Mo. 237, 6 S. W. 81; *Bigelow v. Address*, 31 Ill. 322; *McConnell v. Denham*, 72 Iowa, 494, 34 N. W. 298. In *McGarry v. Coal Co.*, supra, the decision is apparently based upon a statute which, in our opinion, gives an express lien in favor of a garnishment process, as against all subsequent claimants. Section 5221, Rev. St. Mo. 1889, is as follows: "Notice of garnishment, served as provided in this chapter shall have the effect of attaching all personal property, moneys, rights * * * of the defendant in the garnishee's possession, or charge, or under his control at the time of the service of the garnishment. * * *" This statute would seem to expressly give to the garnishment process a lien, but the court held otherwise, and based its decision upon the ground of a want of statutory authority for such lien. We do not agree with the conclusion arrived at by the learned court in that case. In *Bigelow v. Address*, supra, we have not their statute, but gather from the opinion that they arrived at their conclusion upon the ground that, before a lien upon property can be created, there must be an express statute authorizing it. But in *Smith v. Bridge Co.*, 13 Ill. App. 572, is apparently announced a different principle. In *McConnell v. Denham*, supra, we have some doubt as to whether or not the court intended to decide the same question as the one involved in this case, as they had before them a garnishment against a mortgagee in possession of the chattels mortgaged; the court holding that no lien would lie in that case. Other cases are cited in support of the contention of counsel for appellees, but we have not the time to discuss them. Our statute was adopted from Kansas, and while it is not the exact statute passed upon by the supreme court of that state while considering the case of *Beamer v. Winter*, supra, yet, in its important features, it is very similar. Section 200, c. 66, of our Code provides that "any creditor shall be entitled to proceed by garnishment in the district court of the proper county, against any person (naming him) * * * who shall be indebted to or have any property, real or personal in his possession, or under his control belonging to such creditor's debtor. * * *" Then follow

a number of sections relating to procedure, down to section 210, which last-named section provides what the character of the action shall be, and the jurisdiction of the court, and is as follows: "The proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant, as parties defendant, and all the provisions for enforcing judgments shall be applicable thereto; but when the garnishment is not in aid of execution no trial shall be had of the garnishee action until the plaintiff shall have judgment in the principal action, and if defendant have judgment the garnishee action shall be dismissed, with costs. The court shall render such judgment in all cases as shall be just to all the parties, and properly protect their respective interests, and may adjudge the recovery of any indebtedness, the conveyance, transfer or delivery to the sheriff, or any officer appointed by the judgment, of any real estate or personal property disclosed or found to be liable to be applied to the plaintiff's demand, or by the judgment pass the title thereto; and may therein, or by its order when proper, direct the manner of making sale and disposing of the proceeds thereof, or of any money or other thing paid over or delivered to the clerk or officer. The judgment against a garnishee shall acquit and discharge him from all demands by the defendant or his representatives for all moneys, goods, effects, or credits paid, delivered, or accounted for by the garnishee by force of such judgment." It will be noticed that this section gives complete power to the court to render such judgment in all cases as shall be just to the parties and properly protect their respective interests, and, in doing so, to adjudge the recovery of any indebtedness, and the conveyance, transfer, or delivery to the sheriff, or any officer appointed by the judgment, of any real estate or personal property disclosed, or found to be liable to be applied to the plaintiff's demand, or by the judgment may pass the title thereto, and may therein, or by its order, direct the manner of making sale, dispose of the proceeds of the sale, etc. Under this section we find authority to do everything in connection with the property found in the garnishee's hands which is necessary to be done in order to satisfy any judgment the creditor may obtain against the principal debtor. In short, as we analyze this section, it gives the court complete jurisdiction over the person and property of the party against whom the process of garnishment is issued, from the time of service thereof until the final disposition of such property has been made, and the proceeds thereof turned over to the creditor in satisfaction of his debt. And not until the property found in the possession of the garnishee has been so disposed of does his liability to the creditor cease. Section 213 of our Code recites that: "From the time of the

service of the summons upon the garnishee he shall stand liable to the plaintiff in the amount of property, moneys, credits and effects in his possession or under his control, belonging to the defendant or in which he shall be interested, to the extent of his right or interest therein, and of all debts due or to become due to the defendant, except such as may be by law exempt from execution. Any property, moneys, credits, and effects held by a conveyance or title, void as to the creditors of the defendant, shall be embraced in such liability." Here, then, we have an express liability for the property from the time of the service of garnishment; and in section 200, *supra*, the right given to the creditor to proceed against a party by garnishment process, and, in section 210, a complete jurisdiction given to the court to try the question, as between the creditor and party garnished, and to take possession of the property found in the hands of the garnishee, and dispose of the same in satisfaction of the debt. What more is needed in order to give a lien upon the property in favor of the creditor? This view of our statute gives full effect to the provisions respecting garnishment proceedings. Under the contention of counsel for appellees, we would nullify the effect of the law. To say that a creditor may have process against a party holding property of the debtor, and to follow that with the assertion that a subsequent attaching creditor may seize and hold the property so discovered by the garnishment process, and thus take it out of the power of the party garnished to apply the property to the satisfaction of the debt of the creditor who first found the property, is equivalent to saying that such creditor shall not be entitled to proceed by garnishment, as such a conclusion would put it out of the power of the garnishee to respond in satisfaction of the debt, except as, in this case, the court rendering judgment in favor of the attaching creditors, thereby giving them the property, should also render a personal judgment against the party garnished. In such case the efficacy of the garnishment proceedings would depend upon the solvency of the party garnished,—clearly not contemplated by the statute, because the right to a judgment is often contingent upon finding property in the hands of the party garnished. And such judgment may be for property. In *Beamer v. Winters*, *supra*, in speaking of the effect of garnishment, the court says: "Garnishment is attachment in the hands of a third person, and is thereby a species of seizure by notice. Upon an examination of the record and the controlling authorities, we are of the opinion that the effect of the garnishment was to place the personal property of the debtor in the garnishee's hands in the custody of the law, from the date of the service of the notice or summons. The service of the garnishment notice or sum-

mons is a constructive attachment or seizure"; citing authorities in support of this doctrine. To the same effect are the decisions in *Brashear v. West*, *Burlingame v. Bell*, *Focke v. Blum*, *Ide v. Harwood*, and *Mattingly v. Boyd*, supra. If, from the time of the service of summons in garnishment, the property is in custodia legis, then it follows that such proceeding is in the nature of an action in rem, as well as in personam; and this is the opinion of the supreme court of Texas in *Focke v. Blum*, supra. This view of the law is manifestly just. It gives entire effect to the statute, and is, we think, well supported by authority, and sound in principle. In this case no question was raised in the court below as to the right of appellants to proceed in the manner they did, and therefore we are not called upon to pass upon any question of practice in this case. The judgment of the court below is reversed.

BURFORD, J., having presided at the trial, not sitting. The other justices concurring.

(3 Okl. 591)

DOSSETT v. UNITED STATES.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

MURDER—CIRCUMSTANTIAL EVIDENCE—CRIMINATING CIRCUMSTANCES.

1. In a prosecution based upon circumstantial evidence, the several circumstances upon which the conclusion depends must be fully established by proof. They are facts from which the main fact is to be inferred, and they are to be proved by competent evidence, and by the same weight and force of evidence as if each one were itself the main fact in issue. *Com. v. Webster*, 5 Cush. 295.

2. An instruction by the trial court, where circumstantial evidence is relied upon by the prosecution for a conviction, that if the jury find from the evidence that all the criminating circumstances relied upon by the prosecution for a conviction will as well apply to another person as to the defendant, they must acquit, is erroneous.

(Syllabus by the Court.)

Appeal from district court, Logan county; before Chief Justice Frank Dale.

On the 1st day of April, 1893, the United States grand jury within and for Logan county returned an indictment against John Dossett, charging him with the crime of murder. On the 18th day of August, 1893, his trial commenced before Chief Justice E. B. Green, then presiding judge of the First judicial district, and was finished on the 28th day of August, 1893, the court sitting with the powers of a United States district and circuit court. On the date last named the jury returned a verdict of guilty, and on the same date the defendant filed his motion for a new trial. On the 6th day of November, 1893, Hon. Frank Dale, successor to Chief Justice E. B. Green, presiding as judge of the First judicial district, overruled the motion for a new trial, and on the 9th day of November, 1893, the appellant, John Dossett, was sentenced by the court to be

hanged on the 8th day of January, 1894. From this judgment, Dossett appeals to this court. Reversed.

Certain questions were presented to this court on an application by Dossett for a writ of habeas corpus. That case is reported in 37 Pac. 1068.

George Gardner and A. H. Houston, for appellant. C. R. Brooks, U. S. Atty., for the United States.

SCOTT, J. While there are numerous assignments of error made by appellant, we think it unnecessary, in the consideration of the case, to take up any but the first, which involves the following instruction given by the trial court to the jury: "The court instructs the jury that, when circumstances alone are relied upon by the prosecution for a conviction, the circumstances must be such as apply exclusively to the defendant, and such as are reconcilable with no other reasonable hypothesis than of the defendant's guilt; and they must satisfy the mind of the jury, beyond a reasonable doubt, of the guilt of the defendant. And in this case, if the jury find from the evidence that all the criminating circumstances relied upon by the prosecution for a conviction will as well apply to another person as to the defendant, or if they are reconcilable with any reasonable hypothesis other than that of the defendant's guilt, or if they do not satisfy the mind of the jury, beyond any reasonable doubt, of the guilt of the defendant, then he cannot be legally convicted, and you must acquit him." A consideration of this instruction will determine the case, without reference to other questions involved.

This is a case of supreme concern to the defendant and the public. If this court should affirm the judgment of the court below, the defendant would suffer the death penalty. While this is not an unusual sentence in this country, yet the court should carefully consider whether the defendant's rights have been properly protected, and whether, from the entire record, it appears that the jury have been, or might have been, misguided, in considering the instructions of the court. Counsel for appellant contend that the instruction above quoted is erroneous for the reason that the court instructed the jury that if "all of the criminating circumstances relied upon by the prosecution for a conviction will as well apply to another person as the defendant," etc., he cannot be convicted. Counsel claim that this is error, for the reason that all the criminating circumstances must apply exclusively to the defendant, in order to warrant a conviction, and if some of them, or any one of them, do not apply to him, but to some one else, the proof is not sufficient, and the appellant should have been acquitted, and, further, that the jury were misled by this instruction, for under it, if any part of the criminating circumstances, or all of them

but one, should apply to some other person than the defendant, it would have availed him nothing, because the court had said that all must apply. We are of the opinion that the instruction, even taken in connection with all the others given, is misleading, and might have misguided the jury. The courts have universally held that, in order to warrant a conviction upon circumstantial evidence, each material fact must be proved by competent evidence beyond a reasonable doubt, and if there is any doubt upon a single material question the defendant should be acquitted. If this is law, it has been incorrectly stated in this instruction, for under it, unless the jury could say that all the circumstances relied upon by the prosecution for a conviction could be reconciled with the defendant's innocence, the fact that a portion of them might have been so reconciled availed him nothing with the jury. The famous case of *Com. v. Webster*, reported in 5 Cush. 295, lays down the following doctrine: "The several circumstances upon which the conclusion depends must be fully established by proof. They are facts from which the main fact is to be inferred, and they are to be proved by competent evidence, and by the same weight and force of evidence as if each one were itself the main fact in issue." The case just cited has been followed by the Texas courts, and in *Campbell v. State*, 10 Tex. App. the doctrine here laid down is cited with approval at page 565, where the lower court had given the above instruction, in substance. The supreme court of California have said, in *People v. Phipps*, 39 Cal. 333: "Each essential or independent fact in the chain or series of facts relied upon to establish the main fact must be established to a moral certainty, or beyond a reasonable doubt." In the case of *People v. Anthony*, 56 Cal. 397, the court say: "When the evidence against the defendant is made up wholly of a chain of circumstances, and there is a reasonable doubt as to one of the facts essential to establish guilt, it is the duty of the jury to acquit." See, also, *Johnson v. State*, 18 Tex. App. 385; *Scott v. State*, 19 Tex. App. 330; 3 Greenl. Ev. § 30; 3 Rice, Ev. p. 547; *People v. Alken*, 66 Mich. 481, 33 N. W. 821. In *Clare v. People*, 9 Colo. 123, 10 Pac. 799, the court instructed the jury, "that the rule requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. * * * The supreme court of that state, in reversing the lower court, say: 'The metaphor used is inaccurate, and liable to misconception. It is incorrect to speak of a body of circumstantial evidence as a chain, and allude to the different circumstances as the links constituting such chain; for a chain

cannot be stronger than its weakest link, and if one link falls the chain is broken. This figure of speech may perhaps be correctly applied to the ultimate and essential facts necessary to a conviction in a criminal case, since, if one be omitted, or be not proven beyond a reasonable doubt, an acquittal must follow. * * * The word 'circumstantial' and the word 'fact' are frequently used interchangeably. * * * In cases where the conviction depends upon circumstantial evidence, it often happens that one or more of the ultimate or essential matters may be appropriately called circumstances; and such matters, whether spoken of as circumstances or facts, must be established by the state beyond a reasonable doubt. * * * We deem it quite as reasonable to suppose that the jury misunderstood and misapplied the language used, as that they comprehended its appropriate meaning and application. For this reason the judgment must be reversed. * * * To prevent reversal for error in the charge, it must appear that the prisoner could not have been prejudiced thereby." A further discussion of this proposition would seem unnecessary, although counsel for appellant discuss the question at great length, in a very excellent brief, which has aided the court materially in a determination thereof. It is sufficient to say, however, in conclusion, that the jury, in the case now under consideration, may have thought that some of the "criminating circumstances" did not apply to the defendant, but may have been consistent and reconcilable with some other reasonable hypothesis, other than that of the defendant's guilt, but, under the instruction, believed it their duty to return a verdict of guilty because of the word "all." If every material fact and circumstance surrounding the crime must be proven beyond a reasonable doubt, and if any single material fact or circumstance remains unproven, or is consistent with any reasonable hypothesis other than the defendant's guilt, or applies to another person, then the instruction given by the court was wrong, and the defendant's rights were prejudiced thereby. The judgment of the lower court will be reversed, and the cause remanded for a new trial. It is so ordered. All the justices concurring.

DALE, C. J., having passed on the motion for a new trial below, not sitting.

CONKLING v. CAMERON et al.
(Supreme Court of Oklahoma. Sept. 7, 1895.)

APPEAL—FAILURE TO COMPLY WITH RULES OF COURT.

In cases on appeal or error to this court, unless counsel comply with the prescribed rules such cases will be dismissed, continued, affirmed, or reversed, as the court may order and direct.

(Syllabus by the Court.)

Error from probate court, O county.

Action by William Cameron & Co. against Ivan G. Conkling, as receiver of the Merchants' Bank of Enid, for the recovery of money in the hands of said Conkling as receiver, filed in probate court of O county April 27, 1894. Judgment for the plaintiffs. Defendant brings error. Dismissed.

Conkling, Steen & Conkling, for plaintiff in error. Denton & Chambers and S. L. Overstreet, for defendants in error.

SCOTT, J. The transcript in this case was filed in this court on the 23d day of November, 1894, and on January 3, 1895, counsel for defendants in error filed a motion to dismiss, specifying grounds—First, because counsel for appellant or plaintiff in error has not numbered the pages of the petition in error and the record before filing the same; second, because counsel for appellant or plaintiff in error has not filed 10 printed briefs in said cause; third, because counsel for appellant or plaintiff in error has not furnished a copy of their brief to counsel for defendants in error; fourth, because there is no proof of service of brief in said cause; fifth, because the transcript or record in said cause is wholly insufficient to present to the court any question of fact or law for review; and, sixth, because the papers on file in said cause are wholly insufficient to present any question of fact or law to the court for consideration or review. The rules of the supreme court affecting the state of the record and briefs in this case are: First. "Rule 3. Counsel for appellant or plaintiff in error shall number the pages of the petition in error and the record before filing the same." Second. "Rule 4. Counsel shall file ten printed briefs in each case,—six copies for the court and four for the reporter and librarian. The briefs must refer specifically to the pages of the record which counsel desire to have examined." Third. "Rule 6. In each civil cause, counsel for plaintiff in error shall furnish a copy of his brief to counsel for defendant in error at least thirty days before the first day of court, and the counsel for defendant in error shall furnish a copy of his brief to counsel for plaintiff in error at least ten days before the first day of said term. Proof of service of the briefs must be filed with the clerk of the court seven days prior to the first day of said term. In case of a failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or affirm or reverse the judgment." In this case the plaintiff in error was allowed five days within which to file briefs and ordered to page the record, by special order of court, after failure to comply with the rules of the court as above set forth; and, having still failed to do so, the petition in error will be dismissed, at the cost of the plaintiff in error, and the cause remanded to the court below for the enforcement of the judgment therein ren-

dered. The motion to dismiss is sustained upon the first, second, third, and fourth grounds as set out in said motion. All the justices concurring.

DECKER v. ATCHISON, T. & S. F. R. CO. (Supreme Court of Oklahoma. Sept. 7, 1895.)
EJECTION OF PASSENGERS—RULES OF RAILROAD COMPANY.

1. A railroad corporation has the right to establish reasonable rules and regulations for the government and use of its property.

2. On the 16th day of September, 1893, the defendant railroad company prescribed a certain rule for the government of its trains entering the Cherokee Outlet, providing that no train should enter said outlet within six hours of 12 o'clock noon of said day, and that trains, before entering said outlet, should be stationed at the edge of said land 30 minutes before the hour of opening, and should not be entered by passengers earlier than 30 minutes before the said hour of 12 o'clock noon. *Held* to be a reasonable rule, and, where a party is ejected from the train of the defendant company for failing to comply with said rule, he cannot recover damages from said company for being so ejected.

(Syllabus by the Court.)

Error from district court, Logan county; before Chief Justice Dale.

Action for damages by S. D. Decker against the Atchison, Topeka & Santa Fé Railroad Company. The jury were instructed to return a verdict for the defendant. Motion for a new trial filed and overruled. Exception taken, and plaintiff brings error. Affirmed.

S. D. Decker and P. O. Cassidy, for plaintiff in error. Henry E. Asp, J. W. Shartel, and J. R. Cottingham, for defendant in error.

SCOTT, J. This is an action commenced by the plaintiff in error, plaintiff below, in the district court of Logan county, against the defendant in error, the Atchison, Topeka & Santa Fé Railroad Company, for damages for the expulsion of plaintiff from the passenger train of the said defendant. The petition alleges that on the morning of the 16th day of September, 1893, the plaintiff, who is a resident of the city of Guthrie, purchased a ticket from the defendant's agent at Guthrie, paying 90 cents therefor, by the terms of which said defendant bound itself to carry plaintiff from Guthrie to Wharton, without delays or stoppages other than those incident to the usual business of said defendant and its said road in the ordinary course of traffic; that, after purchasing said ticket, plaintiff boarded the regular north-bound passenger train, due at Guthrie at 5:45 o'clock a. m., and peaceably and quietly took a seat in one of defendant's coaches; that, when said train arrived at Orlando, the conductor in charge of said train stopped the same, and ordered plaintiff to leave said coach, and get off the train; that plaintiff refused to do so; that said conductor then, calling to his aid other employes of said train, assaulted plain-

tiff, and did then and there violently, unlawfully, forcibly, willfully, and maliciously eject plaintiff from said train, and violently and wrongfully threw him to the ground, thereby subjecting him to great inconvenience, disgrace, outrage, and insult; that the health of plaintiff was very poor, and by reason of being so ejected he was compelled to stand for hours in the heat and dust in an immense throng of people, with no protection from the great heat of the sun, thereby subjecting him to and causing him great bodily pain, and greatly injuring his health, and causing him great mental anguish and suffering, to his great damage in the sum of \$2,000. The defendant, answering, admits that at the time mentioned in the petition it operated a line of railroad through the territory of Oklahoma and through the territory known as the "Cherokee Strip"; that the north line of Logan county borders on the south line of said Cherokee Strip; that said Guthrie, the county seat of Logan county, is situated on the line of said defendant's road; that the said defendant had a station at Guthrie for the purpose of receiving and disembarking passengers from its trains; that said defendant owned a station at Orlando, as alleged in said petition; that said defendant owned and had a station at Wharton, in the Cherokee Strip, as alleged in said petition. Defendant further admits that on the 16th day of September, 1893, by proclamation of the president of the United States, said Cherokee Strip was thrown open to settlement by the public, but avers: That on the 11th day of September, 1893, the honorable secretary of the interior duly made and promulgated the following order: "Department of the Interior, Washington, September 11th, 1893. Order. In view of the proclamation issued by the president of the United States, fixing twelve o'clock noon of September 16th, 1893, as the hour at which the Cherokee Outlet will be opened to settlement, and to the end that the rules and regulations heretofore prescribed for said opening may be the more effectually executed, I hereby direct that no railroad train be permitted to enter said outlet during the six hours before said time of opening. For three hours after said time of opening, trains will be allowed to enter said outlet only under the following regulations: (1) They must be for general use, and not leased or chartered to any favored passenger or passengers. (2) Trains must be stationed at the edge of said land at least thirty minutes before the hour of opening, and shall not be entered by passengers earlier than thirty minutes before the hour of opening. (3) No one shall enter either of said trains as a passenger unless he holds a certificate from one of the booths. (4) The trains may start upon said land any time after the hour of opening. (5) Trains must stop at every station, and at intermediate points not more than five miles apart. (6) The trains will be limited in speed to 15 miles an hour. (7)

The regular local rates of passenger charges shall not be exceeded. (8) No one shall be allowed to board said train after they enter the strip. United States officers in charge will give effect to this order. Hoke Smith, Secretary of the Interior." That such order was duly published in the territory of Oklahoma, and of which said order and the terms thereof said plaintiff was fully advised. That the Atchison, Topeka & Santa Fe Railroad Company ran its trains on said date into said Cherokee Strip in conformity with said order, of which the plaintiff and the general public had notice, and trains were not run on said date on the regular schedule of said company. Said defendant further avers that if the said plaintiff was ejected from the train of this defendant, as alleged in said complaint, he was so ejected by the officers and agents of the United States, and not by the servants or employees of the defendant. The plaintiff replied, admitting that on the 16th day of September, 1893, the Cherokee Strip was opened for settlement, as set out in the answer, and that the proclamation of the honorable secretary of the interior was truly set out in said answer, and that the plaintiff had notice thereof. Plaintiff denied that he was ejected from the cars of the defendant by the officers of the United States government, or that he was ejected from said cars by virtue of or under color of said proclamation of the honorable secretary of the interior, but that he was unlawfully and violently ejected from said cars by the servants and employees of the defendant, as set out in the petition. Plaintiff denied that he in any manner disobeyed the directions and rules in said proclamation, or did anything therein prohibited. On the 9th day of October, 1894, the case was tried by jury before Chief Justice Dale, presiding judge of the First judicial district. Plaintiff introduced his testimony, and a demurrer was interposed by the defendant. The court took the case from the jury, entered up a judgment for costs against the plaintiff and in favor of the defendant, and held the cause for dismissal. Thereupon the plaintiff filed his motion for a new trial, which was by the court overruled. The plaintiff brings error, and asks that the cause be reversed, assigning as error: First, the sustaining of the defendant's demurrer to plaintiff's evidence; second, discharging the jury and rendering judgment against the defendant for costs; third, overruling plaintiff's motion for a new trial.

The entire question will be considered together briefly, as a lengthy discussion is unnecessary. As we view it, the case turns largely upon the proposition as to the right of a railroad company to prescribe reasonable rules and regulations for the government and use of its property, and as to whether the rule prescribed by the defendant in error on this day, in obedience to the order of the secretary of the interior, or in pursuance of an

exigency by the company, on their own responsibility, as sufficient, was a reasonable rule. The evidence fails to sustain the allegations of the petition as to violence, and we think the case can be decided properly upon the question of the reasonableness of the rule established for the 16th day of September, 1893, without discussing the proposition as to whether the order made by the secretary of the interior was binding upon the company or not. It is sufficient upon this question to say that the order of the secretary was obeyed to the letter by the defendant in error, and it will certainly occur to an impartial mind that the company can stand upon its own rights under the law without seeking shelter behind the order of the secretary of the interior.

There is no doctrine of corporation law better settled than the right of a railroad corporation to prescribe reasonable rules and regulations for the government and use of its property. The only restriction under the law is that the rules must be reasonable. It is equally well settled that it is the duty of the purchaser of a ticket to inform himself of such rules and regulations, and upon doing so to conform to the customs of the road in transporting passengers. We take it that these propositions admit of no controversy. If it be true that a railroad corporation has this right under the law, why should it not be true also that on such an occasion as the opening of several million acres of land to settlement under a specific law of congress, and by special direction and supervision of the secretary of the interior, it should have the right to prescribe reasonable rules and regulations for carrying into effect the purpose of the law? It was the duty of the company as a carrier of passengers to carry passengers, but only according to law. Congress had passed a law providing for the opening of the Cherokee Outlet. The president, under this law, proceeded to carry out its provisions. The secretary of the interior prescribed certain rules and regulations in order that the intention and purpose of the law might be better effected. The defendant in error did the same. The rule complained of by the plaintiff in error is that he was required to debark at the line. This rule was established by the defendant in error to give effect to the following clause of the order of the secretary of the interior: "That the trains must be stationed at the edge of said land thirty minutes before the hour of opening, and shall not be entered by passengers earlier than thirty minutes before the hour of opening." Whether bound to conform to this order or not, the railroad company regarded it as a reasonable rule to establish on a great occasion of this kind and put it in force, and, in order to give effect thereto, were compelled to eject the plaintiff in error from the train upon his refusal to debark. If the plaintiff in error was desiring to enter the lands to be opened to settlement, he cannot complain of the company obeying the order of the secretary of the interior, and,

if not, and the rule is a reasonable one, he was bound to know that six hours before 12 o'clock noon of September 16, 1893, no passenger train would pass the north line of said territory; that on said 16th day of September, 1893, regular passenger trains were not scheduled as through trains at the hour said plaintiff in error sought for through passage. Was this rule prescribed by the defendant in error on the 16th day of September, 1893, a reasonable rule? The opening of the Cherokee Outlet to settlement has gone down into history as a scene and an occasion unequalled by any similar event of modern times. A vast domain was opened to homestead settlement in a day, and more than 100,000 people waited upon the borders for the hour of noon, when they could break forth on a wild rush for either town lots or homestead lands. At the particular point where the trains of the defendant in error were located, thousands thronged to board the first train to enter, and, if possible, gain some advantage and get to the promised land before the awful rush. Had trains gone into the country prior to 12 o'clock, hundreds would have become violators of the law, no doubt, and, had the defendant in error permitted those already aboard when the trains arrived at the line to remain in the coaches, those waiting on the line to enter trains according to the order of the secretary of the interior and the rules prescribed by the company would have been placed at a disadvantage, and their rights under the law would have been unequal and prejudiced thereby. Yes, this rule was a reasonable one, and, in addition to this, was adopted by defendant in error by order of the secretary of the interior; and for this court to hold, or the court below to have held, as a matter of law, that it was an unreasonable rule, would, we think, have been error. The lower court did not err in sustaining the demurrer to the evidence, and ordering a dismissal of the case under the state of the pleadings and proof; and the judgment rendered below will be affirmed, with costs. It is so ordered. All the justices concurring.

DALE, C. J., having presided below, not sitting.

LE ROY v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 7, 1895.)
CRIMINAL LAW—PRESENCE OF DEFENDANT—CASE MADE—AMENDMENTS.

1. In a criminal prosecution for a felony, the defendant must be actually present at every step in the trial, and in cases where it is necessary the record must show affirmatively the fact of his presence.

2. A case made cannot be so amended by the trial judge as to contradict the records of the court. *Territory v. Day* (Okl.) 37 Pac. 806, followed.

(Syllabus by the Court.)

Appeal from district court, Logan county; before Chief Justice Frank Dale.

Louis Le Roy was convicted of grand larceny, and sentenced to three years in the penitentiary, and appeals. Reversed and remanded.

C. R. Buckner, for appellant. C. A. Galbraith, Atty. Gen., and A. H. Huston, for the Territory.

SCOTT, J. This is a criminal prosecution by the territory of Oklahoma, by indictment, against the appellant, Louis Le Roy, charging him with the crime of grand larceny. The indictment was returned into the district court of Logan county on the 29th day of September, 1893, and contained two counts. On the 10th day of October, 1893, the appellant was arraigned upon the indictment, and entered a plea of not guilty, a demurrer thereto having been previously overruled. The case was set and called for trial on October 12, 1893, and on the same day a motion for a change of judge and a motion to elect were respectively overruled, and on the 13th the case was given to the jury. Before retiring, the court instructed the jury to return a verdict of not guilty on the first count of the indictment, and submitted the issue of the guilt or innocence of the defendant on the second count. On October 14, 1893, the jury returned a verdict of guilty as charged in the second count of the indictment, and found the value of the property stolen to be in the sum of \$315. Motions for a new trial and in arrest of judgment were filed and overruled on November 6, 1893, and exceptions taken thereto; and on the 11th day of November, 1893, the appellant was sentenced to three years in the penitentiary at Lansing, Kan., and an appeal was allowed and taken from the judgment thus pronounced, and the case is now before this court for review.

We deem it unnecessary to consider any assignment of error but the fourteenth, which charges that the record fails to show that the appellant was present at every step in the trial. An examination of the record discloses a state of facts similar to those found in the case of *Territory v. Day* (Okl.) 37 Pac. 806, which is decisive of this case. In that case we decided: "In a criminal prosecution for a felony, the defendant must be actually present during the trial, and when his personal presence is necessary in point of law the record must show the fact. It is not allowable to indulge in the presumption that everything was rightly done to the extent of presuming that the defendant was present." We further decided: "An amendment to a case made, presented to the trial judge for signature and settlement, cannot be so amended as to contradict the records of the court." The record in this case discloses that proceedings were had on the 10th, 12th, 13th, 14th, and 30th days of October, 1893, and on the 6th and 11th days of November, 1893. On October 10th the demurrer to the indictment was overruled, and the record fails to show that the defendant was present. On October 10th the

record shows that the defendant was arraigned and entered a plea of not guilty, being the only evidence that he was actually present. On this day the cause was also set for trial on October 12, 1893. On October 12th the record recites that the "defendant appears before the court and makes a motion for the calling of another judge, etc., and that said motion was overruled." It then shows that the case came regularly on for trial, but does not recite the presence of the defendant. On the same day an evening session is noted in the record, and the trial resumed, but no reference to the presence of the defendant. October 13th the record recited the presence of the defendant, but on the same day, at an evening session, it fails to show his presence, yet the trial is noted as having been resumed at that time. On October 14th the record recites the presence of the defendant when the verdict was received. On October 30th the motion for new trial was continued until November 6, 1893, but fails to recite the presence of defendant. On November 6th the motion for a new trial was heard and overruled, but the record does not show that defendant was present. On November 11, 1893, the judgment shows that the defendant was present when sentence was pronounced. The record fails to show that the defendant was present when the demurrer to the indictment was overruled on October 10th; on October 12th when the case was regularly called for trial; at the evening session on the same date; also at the evening session on October 13th; on October 30th when the motion for a new trial was continued; and on November 6th when the motion for a new trial was overruled. As stated in the *Day Case*, it is perhaps true that the defendant was at all times present, and that the error is attributable to the oversight of the clerk; but we cannot presume this. It is a constitutional right of the defendant to be present at every stage of a prosecution for a felony against him, and when this is necessary he cannot waive it, and the record must affirmatively show the fact. Were we to refuse to reverse this case, it would be equivalent to deciding that a demurrer or a motion for a new trial may be argued and overruled in the absence of a defendant charged with a felony, or an evening session of court or a trial begun or resumed. It is just as necessary for the record to show that the defendant in such a case be present as it is for such defendant to be actually present. The territory attempts to avoid this fatality in the record by amendments to the case made, which were allowed by the trial judge, reciting that at the times named the defendant was actually present; but, as decided in the *Day Case*, an amendment to the case made cannot be allowed that will contradict the records of the court, consequently the attempted amendments can avail nothing. The records of the court, in a proper proceeding, should have been amended, and the case made then might have been amended to con-

form thereto. This point being decisive of the case, a reference to the 13 additional assignments of error is unnecessary. Upon the authority of *Territory v. Day*, 37 Pac. 806, decided by this court September 8, 1894, this cause will be reversed and remanded to the lower court for a new trial. It is so ordered. All the justices concurring.

DALE, C. J., not sitting, having presided in the court below.

BRINK v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

CRIMINAL LAW—RECORD ON APPEAL—MOTION FOR NEW TRIAL—ADMONISHING JURY.

1. Where the journal entry of judgment, approved by counsel for defendant, shows "that, upon issue joined, the jury duly impaneled and sworn to try the cause had returned into open court, in the presence of said defendant, a verdict of guilty against said defendant," and the verdict of the jury, signed by the foreman, and returned into court, states that, upon their oaths, they find the defendant guilty of murder, *held*, that this is ground amply sufficient for this court to find that the record shows affirmatively that the jury were sworn according to law.

2. Where the motion for a new trial alleges error on the part of the court in overruling a motion for a new trial, based upon alleged misconduct of the county attorney and jury, but the record contains no affidavits or evidence of any character as to the truthfulness of the allegations of said motion, said assignment of error will not be considered by this court on appeal.

3. If the court has failed to admonish the jury upon adjournments as required by law, a motion for a new trial on that ground should be supported by competent evidence showing that fact. It is proper, if the court deems it so, to permit the jury to separate, upon admonishing them as required by law; but unless the record shows affirmatively, by proof or otherwise, that the court permitted the jury to separate without the admonition, it must be presumed that the court performed its duty properly, by admonishing them. *Redman v. Territory* (Okl.) 37 Pac. 826.

(Syllabus by the Court.)

Appeal from district court, Logan county; before Chief Justice Frank Dale.

Frank Brink was convicted of murder, and sentenced to imprisonment for life, and appeals. Affirmed.

Buckner & Son, for appellant. C. A. Galbraith, Atty. Gen., and Houston & Houston, for the Territory.

SCOTT, J. This is a criminal prosecution in the district court of Logan county by the territory of Oklahoma against Frank Brink and Fred Palmer. Brink was convicted of the crime of murder, and sentenced by the court to imprisonment for life, and he brings the case to this court on appeal. We shall take up the assignments of error necessary to a determination of the questions involved as follows:

1. It is contended that the jury was not sworn to try the cause as the law requires.

We think this objection and assignment of error are disposed of by the record. In the journal entry of judgment it is stated "that, upon issue joined, the jury duly impaneled and sworn to try the cause had returned into open court, in the presence of said defendant, a verdict of guilty against said defendant." This journal entry was approved by counsel for defendant before the same was filed. In the verdict of the jury, signed by the foreman, and returned into court, they state that, upon their oaths, they find the defendant guilty of murder. This is ground amply sufficient for this court to find that the jury were sworn according to law, and hence there is no reason for reversal in this assignment.

2. It is further contended that the court erred in overruling appellant's motion for a new trial, in which he alleges that certain statements made by the county attorney were prejudicial to his interests; that the court permitted the jury to separate at will during the recess of court, and at nights, during the pendency of the trial; and that the jury read newspapers, with the comments made regarding the trial of said cause. But, as the record contains no affidavits or other evidence as to the truthfulness of the facts set out in said motion, this assignment of error will not be regarded. As to the question of the separation of the jury, the case of *Redman v. Territory* (Okl.) reported in 37 Pac. 826, is in point. In that case it is held: "If the court has failed to admonish the jury, upon adjournments, as required by law, a motion for a new trial on that ground should allege such failure, and the motion for new trial should be supported by competent evidence showing that fact." It is proper, if the court deems it so, to permit the jury to separate, upon admonishing them as required by law; but unless the record shows affirmatively, by proof or otherwise, that the court permitted the jury to separate without the admonition, it must be presumed that the court performed its duty properly, by admonishing them. *Redman v. Territory*, *supra*.

We can hardly believe that counsel for appellant can regard as serious any of the six grounds of error assigned. The two we have discussed are the only ones there can be any merit whatever in, viewed upon the record as it is presented. We could not, in the absence of record evidence necessary, determine any question sought to be raised with reference to the impaneling of the grand jury, or the returning of the bill. We have examined the indictment carefully, and consider it as amply sufficient, in substance and form, to sustain the conviction of appellant, and thus dispose of this question. The judgment of the lower court will be affirmed. It is so ordered. All justices concurring.

DALE, C. J., having presided in the court below, not sitting.

Ex parte LE ROY.

(Supreme Court of Oklahoma. June 7, 1895.)

HABEAS CORPUS—QUESTIONS DETERMINED—SUFFICIENCY OF INDICTMENT.

1. When a crime is charged in two counts in an indictment, and the defendant is acquitted on the first count and convicted on the second, he is not entitled to discharge by habeas corpus if the trial court had jurisdiction of the person and of the crime.

2. The sufficiency of the indictment is a question of law for the trial court; and if such court errs in its conclusions the remedy is by appeal or writ of error, and not by habeas corpus. Ex parte Harlan, 27 Pac. 920, 1 Okl. 48; St. Okl. 1893, par. 4578.

(Syllabus by the Court.)

Petition for writ of habeas corpus. Louis Le Roy, petitioner, was convicted in the district court of Logan county, and sentenced to three years in the penitentiary. Writ denied.

C. R. Buckner, for petitioner. C. A. Galbraith, Atty. Gen., and A. H. Huston, Co. Atty., for the Territory.

SCOTT, J. On the 19th day of February, 1894, the petitioner, Louis Le Roy, filed his petition for a writ of habeas corpus in this court, alleging: That he was unlawfully restrained of his liberty in the county jail of Logan county, Oklahoma territory, by W. W. Painter, sheriff and jailer of said county. That the pretended cause of restraint was grand larceny. That said imprisonment is illegal, in this: First. That the charge upon which the prisoner is held has been fully investigated by a court of competent jurisdiction, and a trial had, upon which this petitioner was duly acquitted of grand larceny. Second. That said petitioner says that no further proceedings under the charge upon which he is held ought to be had or taken against him, because at the September term of the district court of Logan county, Oklahoma territory, the said petitioner was put upon his trial in said court for grand larceny upon his plea of not guilty, and the jury impaneled and sworn to well and truly try said issue, and a true verdict render according to the law and the evidence, after hearing all of the evidence, the instructions as given by the court, the argument of counsel for the territory and the petitioner, returned a verdict of not guilty of said charge; that no other charge or indictment has been brought against him, nor is he held upon any other charge. Third. The court had no jurisdiction to pronounce the judgment or pass the sentence on petitioner in this case. Fourth. The judgment and sentence upon which petitioner is imprisoned is void. The petitioner therefore prayed that a writ of habeas corpus be granted him, and that he, the said Louis Le Roy, be discharged from such unlawful restraint and imprisonment, and for such other relief as justice may demand. Said petition was verified by the petitioner, and attached to the same is service of notice on the county attorney. On the 2d day of March, 1894, the

following stipulation was filed: "We, the undersigned, agree that the defendant, Louis Le Roy, was acquitted on the first count of the indictment, and convicted on the second count; and we further agree to waive the issuing of the writ of habeas corpus, and that the supreme court take and pass upon the same. [Signed] A. H. Huston, County Attorney. C. R. Buckner, Attorney for Petitioner."

It appears that an indictment was returned into the district court of Logan county charging the crime of grand larceny in two counts against the petitioner; that his case was called for trial, and when submitted the court instructed the jury to return a verdict of not guilty on the first count of the said indictment, and, after deliberating, the jury returned a verdict of guilty as to the second count. Motion for a new trial was overruled, and the petitioner sentenced to three years in the penitentiary. The petitioner now seeks to test the sufficiency of the second count of the indictment by this proceeding, which must be denied. In Ex parte Harlan, 1 Okl. 48, 27 Pac. 920, it is held: "After conviction of perjury, the accused cannot be discharged on habeas corpus if the trial court had jurisdiction of the person and of the crime, however erroneous its proceedings may be." In the case just cited it was contended in behalf of the petitioner that the indictment did not state facts sufficient to constitute the crime of perjury, or a public offense under the laws of the United States, and for that reason the court had no jurisdiction, and the judgment was void, and the imprisonment illegal, and that the prisoner should be discharged. Where the trial court has jurisdiction of the person of the defendant and of the offense charged, it is well settled that after final judgment the remedy is by appeal or error, and not by a writ of habeas corpus. See St. 1893, par. 4578. This point being decisive of the case, a discussion of the sufficiency of the second count of the indictment is unnecessary. The writ will be denied, it appearing from the record that the trial court had jurisdiction of the petitioner and of the offense charged against him in the indictment. It is so ordered. All the justices concurring.

DALE, C. J., not sitting, having presided in the court below.

KELLEY v. SEAY.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

ACTION ON BOND—DAMAGES—RECOVERY OF PENALTY.

1. When suit is instituted upon a bond containing a penalty clause, unless the petition alleges and the plaintiff establishes that he has sustained damages, he is not entitled to recover.

2. In general, a sum of money in gross to be paid for the nonperformance of an agreement is considered a penalty. It will not, of course, be considered as liquidated damages. Much stronger is the inference in favor of its being

a penalty when it is expressly reserved as one. The parties themselves denominate it a penalty, and it would require very strong evidence to authorize the court to say that their own words do not express their own intention. Tayloe v. Sandiford, 7 Wheat. 13 (Marshall, C. J.).

3. It has become a settled rule that no other sum can be recovered under a penalty than that which shall compensate the plaintiff for his actual loss.

(Syllabus by the Court.)

Error from district court, Kingfisher county; before Justice John H. Burford.

This is an action filed in the probate court of Kingfisher county, on the 24th day of September, 1892, by E. J. Kelley against A. J. Seay, praying for judgment on a promissory note for the sum of \$225 and interest, on his first cause of action, and for his second cause of action prays for judgment for \$312.50 and interest, for failure to comply with the conditions of a contract and obligation which is in words and figures following, to wit: "Know all men by these presents that I, A. J. Seay, of the village of Kingfisher, county of Kingfisher, and territory of Oklahoma, do hereby hold and firmly bind myself unto E. J. Kelley, of the same village, county, and territory, in the sum of three hundred and twelve and $\frac{50}{100}$ dollars, to be paid to the said E. J. Kelley, his heirs, executors, administrators, or assigns, to which payment, well and truly made, I bind myself, my heirs, executors, assigns, and administrators. The conditions of this obligation are such that, in consideration of the said E. J. Kelley selling and conveying by deed of general warranty to said A. J. Seay a certain tract of land situated in the county of Kingfisher, territory of Oklahoma, described as follows, to wit: Commencing at the N. W. corner of the S. W. $\frac{1}{4}$ of section 22, Tp. 17, R. 7 W. of I. M., running thence south 40 rods along the section line, thence east 60 rods, thence north 40 rods, thence west 60 rods along the half section line of said quarter section to place of beginning, containing 15 acres,—for the sum of six hundred and thirty-seven and $\frac{50}{100}$ (\$37.50) dollars, said A. J. Seay agrees with the said E. J. Kelley that he, the said A. J. Seay, will erect and build on said described tract of land, between the date hereof and the first day of February, 1892, a residence house costing not less than the sum of fifteen hundred (1,500) dollars. Now, if the said A. J. Seay does build, erect, and complete the said residence house, as aforesaid, in the time and at the cost aforesaid, then this obligation to be null and void, otherwise to be in full force and effect. Witness my hand this 28th day of July, 1891. [Signed] A. J. Seay." On the 14th day of November, 1892, the defendant, A. J. Seay, filed a plea in abatement to the first cause of action, and his answer to the second cause of action, admitting in the first count the execution of the note sued on, but denying that the same was due at the time suit was instituted, and alleging conditions upon which the note was due and pay-

able. In the second count the defendant admitted the execution of the contract, but denied that there was any breach thereof. Afterwards, on the 28th day of November, 1892, the first cause of action was dismissed by stipulation of plaintiff and defendant. On the 29th day of November, 1892, the defendant filed his amended answer to the second cause of action, denying that the plaintiff had been injured in any sum, and denying, further, any breach of the conditions of the obligation. The amended answer reads as follows: "Comes now the defendant, and for his amended answer to plaintiff's second cause of action herein alleges: Paragraph first. Defendant, for his second and further answer to plaintiff's complaint as set out in his second cause of action, says: He admits the execution and delivery of the paper sued on, but denies that the condition in said writing has been broken by him, and alleges that said contract was made between plaintiff and defendant, and that said writing was made and delivered to said plaintiff with the understanding between plaintiff and defendant that the same was given for the sole and only purpose of compelling defendant to use and occupy said tract of land as a place for residence, and for that purpose to erect a dwelling house thereon, within a reasonable time, of the value of no less than \$1,500.00; that, for the purpose of carrying out these conditions, this defendant did commence the construction of a dwelling, the ultimate cost of which was largely in excess of said sum of \$1,500.00, and on the 1st day of February, 1892, had on said tract of land a partially completed dwelling house, for his personal use as a residence, and then of the value of about \$4,000.00, but which was, when finished, to be at a cost of about \$10,000.00. Defendant denies that the plaintiff, on account of the premises, has been injured in the sum sued for, or in any other sum, and that he is entitled to recover anything on account of his second cause of action. Wherefore, plaintiff having fully answered, he prays that this cause be dismissed, and that he have judgment for his costs herein expended, and for such other relief as in equity and good conscience he may be entitled to." On the 29th day of November the plaintiff filed his demurrer to the amended answer of the defendant, which was overruled by the court, and the case tried, without the intervention of a jury, on the issues thus joined, and the court rendered judgment for the plaintiff for the sum of \$312 and interest and costs, and the case was then appealed to the district court of Kingfisher county. On October 26, 1893, a jury was waived and the cause tried by the court, the evidence introduced, and the judgment of the lower court reversed. Motion for a new trial was overruled, and the case is now before this court on error.

Hobbs & Kane, for plaintiff in error. A. J. Seay and Robberts & Brownlee, for defendant in error.

SCOTT, J. The written instrument sued on in this case is a bond or obligation dated July 28, 1891. In the first clause of the instrument the obligor binds himself in terms to pay the sum of \$312.50. The condition of the bond is that if the obligor shall build, erect, and complete a residence house on his certain land, bought from the obligee, in the time (by February 1, 1892) and at the cost (\$1,500) aforesaid, "then this obligation to be null and void, otherwise to remain in full force." And the defendant answers that he forthwith commenced the construction of the said dwelling house on the said land, the cost of which on February 1, 1892, although but partially finished, was largely in excess of \$1,500, to wit, \$4,000, the ultimate cost to be \$10,000. It appears from the evidence that the house was completed during the spring before the suit was brought, on the 24th day of September, 1893. There is no allegation of damage in plaintiff's complaint, or any injury or damage attempted to be proven in the evidence. If this suit had been brought prior to the time of Sir Thomas More, in the reign of Henry VII., there is but little question what would be the fate of the defendant in this case. No defense would avail him but a release under seal, as the original bond must then have been under seal, which alone implies consideration. In vain he might have protested the failure of plaintiff to allege or prove specific breaches or damages, or have asserted the doctrine that time is not the essence of the contract, or invoked the equitable principle now well established in relation to penalties and forfeitures. These humane ameliorations of the severity of the common law were then unknown, and now they mark the gradual development of law, as a moral science, from the early barbarous technical practices of pristine jurisprudence to the broader, more discriminating, and substantial requirements of modern conceptions of justice. In vain might the distinguished defendant have then pointed to the pandects of Justinian, and discovered there the rich treasures of legal lore and practical moral value to which the equity jurisprudence of our own age is so much indebted, for he would have received the same answer that Sir Thomas More did from the judges whom he then unsuccessfully attempted to persuade: "We cannot relieve against the penalty." Mr. Story says, in relation to penalties and forfeitures: "The general principle now adopted is that, whenever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only accessory, and therefore as intended only to secure the due performance thereof, or the damage really incurred by the nonperformance. * * * If the penalty is to secure the performance of some collateral act or undertaking, then courts of equity will re-

tain the bill and direct an issue of quantum damnificatus; and, where the amount of damages is ascertained by a jury, upon the trial of such an issue they will grant relief upon payment of such damages." 2 Story, Jur. § 1314. The same great jurist further says that the "true foundation of the relief in equity in all these cases is that, as the penalty is designed as a mere security, if the party obtains his money, or his damages, he gets all that he expected, and all that in justice he is entitled to." Id. § 1316. Applying these principles to the case before us, and treating the penalty of the bond as a security for the performance of defendant's undertaking to complete a house by a given date, it certainly should appear where the plaintiff has sustained damages by failure on the part of the obligor to complete the house, for which the penalty in the bond stands as security only. Now, if there is no damage, there is no more reason for enforcing the penalty than for foreclosing a mortgage when the debt is already paid. The principal thing is the debt or damage; the security is collateral,—and when the first is extinguished, or does not come into existence, the collateral incident is affected in like manner. In order for plaintiff to avail himself of the security of the penalty, it must appear that he has sustained damages by the nonperformance of defendant's undertaking, and the extent of such damage should appear. One party is not entitled to prosecute another in a court of justice for the redress of a wrong which does not exist,—where there is no actual damage shown. See *Wilcus v. King*, 87 Ill. 107. It has become a settled rule that no other sum can be recovered under a penalty than that which shall compensate the plaintiff for his actual loss. 1 Sedg. Dam. (8th Ed.) § 393. The subject has also been considered by the supreme court of the United States. A written contract was entered into, by which the defendants in error, T. and S. Sandiford, agreed to build for the plaintiff three houses on Pennsylvania avenue in Washington City. A subsequent contract, under seal, was entered into between the same parties for the building of three additional houses, "the said houses to be completely finished on or before the 24th day of December next, under a penalty of one thousand dollars in case of failure." The three houses were not finished at the day. The plaintiff in error retained the sum of \$1,000 as stipulated damages out of the money due defendant in error. The suit was brought, and on the trial the plaintiff in error (the defendant below) offered to set off the \$1,000 as stipulated damages, which was not allowed; and the supreme court held the charge on this point right, though a new trial was ordered on other grounds. Marshall, C. J., said: "In general, a sum of money in gross to be paid for the nonperformance of an agreement is considered as a penalty. It

will not, of course, be considered as liquidated damages. Much stronger is the inference in favor of its being a penalty when it is expressly reserved as one. The parties themselves denominate it a penalty, and it would require very strong evidence to authorize the court to say that their own words do not express their own intention." *Taylor v. Sandiford*, 7 Wheat. 13. In view of the law now applicable to this case, it is obvious enough that the plaintiff, having suffered no injury, is not entitled to recover; and the judgment of the court below is hereby confirmed in all things, and the cause remanded to the lower court for appropriate action. It is so ordered. All the justices concurring.

BURFORD, J., having presided in the court below, not sitting.

TERRITORY v. DE LENA et al.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

JURY CERTIFICATE—FORGERY—INVALID INSTRUMENT.

1. A certificate issued by the clerk of a district court, setting forth that a juror has attended a certain number of days, and is entitled to a certain number of dollars, as his pay therefor, is unauthorized, absolutely void, and of no effect in law.

2. An indictment setting forth the forgery of a juror's certificate issued by the clerk of a district court does not state a public offense, and a demurrer thereto should be sustained.

3. It is a general rule that if an instrument is void or invalid upon its face, and cannot be made good by averment, the crime of forgery cannot be predicated upon it.

4. The law is that forgery may be committed of any instrument of writing, which, if genuine, would or might operate as the foundation of another man's liability, or the evidence of his rights. *Shannon v. State*, 10 N. E. 87, 109 Ind. 407.

(Syllabus by the Court.)

Appeal from district court, Canadian county; before Chief Justice Dale.

John De Lena and Charles W. Beacom were indicted for forgery. A demurrer to the indictment was sustained, and the territory appeals. Affirmed.

The indictment was in words and figures as follows, to wit:

"Of the November term of the district court of the Second judicial district of the territory of Oklahoma, within and for Canadian county, in said territory, in the year of our Lord 1894, the grand jurors chosen, selected, and sworn in and for the county of Canadian, in the name and by the authority of the territory of Oklahoma, upon their oaths present: That John De Lena and Charles W. Beacom, late of the county aforesaid, on the 10th day of November, in the year of our Lord 1894, in the county of Canadian and territory of Oklahoma aforesaid, having then and there in their possession a certain juror's certificate issued under the authority

of the laws of the territory of Oklahoma aforesaid, by Benj. F. Hegler, clerk of the district court in and for the Second judicial district of the aforesaid territory of Oklahoma, and issued at the city of Kingfisher, in the county of Kingfisher, in the Second judicial district and territory of Oklahoma aforesaid, and signed by Benj. F. Hegler, clerk district court, by W. R. Benson, deputy, which said juror's certificate was issued as aforesaid to one C. R. Grinstead in payment for two days' service as a petit juror at the district court in said county of Kingfisher and territory aforesaid, and was evidence of a debt of four dollars in money owing by said county of Kingfisher to C. R. Grinstead for his two days' service as a petit juror aforesaid, and the said juror's certificate issued as aforesaid was, when so issued, in the words and figures following, that is to say:

"No. 16. \$4.00. The Territory of Oklahoma, 2nd Judicial District, County of Kingfisher—ss.: February Term, 1894. I, Benj. F. Hegler, clerk of the district court in and for said county, do hereby certify that C. R. Grinstead was duly summoned as a petit juror on the petit jury venire, and that he has been in attendance on said court, at the February term thereof, A. D. 1894, 2 days, and he necessarily traveled ——— miles, and is entitled to \$4.00 as pay for such services. Witness my hand and the seal of said court, affixed at my office in Kingfisher, territory of Oklahoma, this 16th day of February, A. D. 1894. Benj. F. Hegler, Clerk District Court, by W. R. Benson, Deputy. [Seal.]

"And said juror's certificate, when so issued as aforesaid, had printed in words and figures on the back thereof the following indorsements, and blank form of transfer and assignment, that is to say:

"Certificate of Juror's Attendance. District Court, ——— County, Territory of Oklahoma. To ——— Term, 189—. Filed this ——— day of ———, A. D. 189—. ———, County Clerk."

"Amount certified, ———. Amount allowed, \$——, this ——— day of ———, A. D. 189—. ———, Chairman Board Commissioners."

"Warrant No. ———, Territory of Oklahoma, ——— County—ss.: For value received, I hereby assign, sell, and transfer and make over to ——— all my right, title, and interest in and to the within certificate, and the fees therein described; and I authorize said ——— to receive the county order issued therefor, and receipt the same in my name, when the same shall have been issued. ———. Oklahoma Territory, ———, 189—."

"And said juror's certificate, after being so issued as aforesaid, was transferred, and assigned by the said C. R. Grinstead in words and figures written and printed on the back thereof as follows, that is to say:

"Territory of Oklahoma, — County —ss.: For value received, I hereby sell, assign, transfer, and make over to Brown & De Lena, Chas. W. Beacom, of El Reno, O. T., all my right, title, and interest in and to the within certificate, and the fees therein described; and I authorize said Chas. W. Beacom to receive the county order issued therefor, and receipt the same in my name, when the same shall have been issued. C. R. Grinstead. Kingfisher, Oklahoma Territory, 2/10/1894."

"And the said John De Lena and Chas. W. Beacom then and there, that is to say, in the county of Canadian and territory of Oklahoma aforesaid, on the 10th day of November, in the year of our Lord 1894, unlawfully and feloniously, with intent to defraud the aforesaid county of Kingfisher and other parties to the grand jurors unknown, did falsely forge, counterfeit, and alter the aforesaid juror's certificate, then and there falsely forging, counterfeiting, and altering the 'four dollars' written in figures at the head of said certificate, which said 'four dollars,' written in figures, represented the amount of money said certificate was issued for, and by so altering, counterfeiting, and forging the 'four dollars' written at the head of said certificate the same became 'fourteen dollars,' in figures, and by then and there falsely forging, counterfeiting, and altering the figure '2,' written in the body of said certificate, which figure '2' represented the number of days' attendance as a juror said certificate was issued for, and by so altering, counterfeiting, and forging the figure '2' written in the body of said certificate the said figure '2' became a figure '7,' and by reason of the said John De Lena and Chas. W. Beacom then and there falsely forging, counterfeiting, and altering as above set forth the aforesaid juror's certificate issued as aforesaid for four dollars for two days' attendance as a juror, the said juror's certificate did import, signify, and become a juror's certificate issued as aforesaid for fourteen dollars, for seven days' attendance as a juror, which said falsely forged, counterfeited, and altered juror's certificate is in words and figures following, that is to say:

"No. 16. \$14.00. The Territory of Oklahoma, 2nd Judicial District, County of Kingfisher—ss.: February Term, 1894. I, Benj. F. Hegler, clerk of the district court in and for said county, do hereby certify that C. R. Grinstead was duly summoned as a juror on the petit jury venire, and that he has been in attendance on said court, at the February term thereof, A. D. 1894, 7 days, and he necessarily traveled — miles, and is entitled to \$4.00 as pay for such services. Witness my hand and the seal of said court, affixed at my office in Kingfisher, territory of Oklahoma, this 16th day of February, A. D. 1894. Benj. F. Hegler, Clerk District Court, by W. R. Benson, Deputy. [Seal.]"

"And the said falsely forged, counter-

fected, and altered juror's certificate is indorsed in blank as follows, that is to say:

"Certificate of Juror's Attendance, District Court, — County, Territory of Oklahoma. To —, — term, 189—. Filed this — day of —, A. D. 189—. —, County Clerk."

"Amount certified, \$—. Amount allowed, \$—, this — day of —, A. D. 189—. —, Chairman Board County Commissioners. Warrant No. —."

"And the said falsely forged, counterfeited, and altered juror's certificate has the following transfer and assignment by the aforesaid C. R. Grinstead on the back thereof, that is to say:

"Territory of Oklahoma, — County—ss.: For value received, I hereby sell, assign, transfer, and make over to Brown & De Lena, Chas. W. Beacom, El Reno, O. T., all my right, title, and interest in and to the within certificate, and the fees therein described; and I authorize said Chas. W. Beacom to receive the county order issued therefor, and receipt the same in my name, when the same shall have been issued. C. R. Grinstead. Kingfisher, Oklahoma Territory, 2/10/1894."

"Contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the territory of Oklahoma.

"A. J. Jennings, County Atty."

Indorsed as follows:

"299, Indictment. District Court, Canadian County. Doc. —, No. —, page —. Territory of Oklahoma, vs. John De Lena, Charles W. Beacom. Indicted for forgery. A true bill. T. F. Addington, Foreman of the Grand Jury. Filed in open court Dec. 22, 1894. Benj. F. Hegler, Clerk, by Ed. M. Hegler, Deputy. Witnesses: J. H. McGee, J. V. Moffett, C. R. Grinstead, B. F. Hegler, A. J. Jennings, County Attorney. Bail, \$1,000 each. Jno. H. Burford, Judge."

On the 4th day of March, 1895, the defendants appeared by their attorneys, and filed a demurrer to said indictment, which, omitting caption, reads as follows:

"Comes now John De Lena, defendant in said cause, and, for demurrer to the indictment therein, severally avers: First. That it does not substantially conform to the requirements of chapter 68 of the Statutes of Oklahoma, in this, to wit: (a) It is not entitled in a court having authority to receive it; (b) it does not state the name of the court to which it is presented. Second. The facts stated therein do not constitute a public offense. John I. Dille, John Schmooke, Jr., Attys. for Defts."

On the 6th day of March, 1895, the court (Chief Justice Dale presiding, by assignment of the supreme court) sustained the demurrer to the indictment, and held the defendant to await the action of the next grand jury. To this ruling the counsel for the territory excepted, and appealed the cause to this court.

C. A. Galbraith, Atty. Gen., Thos. R. Reid, Co. Atty., and A. J. Jennings, for the Territory. John I. Dille and John Schmooke, Jr., for appellees.

SCOTT, J. Counsel for the territory contend that the court below committed error in sustaining the defendant's demurrer to the indictment. The prime question is, does the indictment state a public offense? Did the facts set out in the indictment amount, in law, to forgery? The determination of these questions will decide the case.

Maxwell, in his work on Criminal Procedure, holds that "forgery may be committed by any writing which, if genuine, would form the basis of another man's liability, or evidence of his right." Is the instrument or certificate set out in the indictment capable of being forged or counterfeited? Is it a certificate or statement provided and required by law? Does it give to the juror or witness holding it any greater right than he would possess if he did not have it? Could the claim of the juror or witness be a valid claim against the county, if no certificate were ever issued? It appears that there is no statutory authority for the issuance of the certificate set out in the indictment. It seems to be the voluntary act of the clerk of the court; given, perhaps, to enable the witness or juror to know what his fees amount to, or may be, as suggested by counsel, to enable the party to negotiate it. It is not binding upon the county, and the commissioners are not bound to, nor should they, accept it for any more than an open account. If the party presenting it, and claiming a bill against the county, swears to it, the same as any other claim is subscribed to, it might be evidence that the party owns the claim. The county treasurer would not recognize the certificate of the clerk as authority for him to pay money out of the county treasury, and the board of county commissioners would not recognize it as binding upon the county. It is not a contract between the county and the person set forth to have rendered certain services. It is not a contract between the clerk and the witness or juror. It is unauthorized by law, issued without authority, and cannot possibly be a thing of any value. If it has been used as a negotiable instrument, parties taking it must be presumed to have known that there was no law for its issuance. In the case of *Shannon v. State*, 109 Ind. 407, and reported in 10 N. E. 87, the court uses the following language: "It is clear that such instrument was not one of those specifically mentioned in our statute defining the crime of forgery. But the law is that forgery may be committed of any instrument of writing which, if genuine, would or might operate as the foundation of another man's liability, or the evidence of his rights." In the case of *King v. State*, 27 Tex. App. 567, 11 S. W. 525, the defendant was charged with attempting to pass as true a forged instrument in writing as follows:

Weighed on Fairbanks' standard scales, Dec. 1, 1888:

Load of one load of corn.
From Sam Simpson, to Patty & Brockington.
On gross 2,513 lbs.
Off tare 1,011 lbs.

Fees, net 1,502 lbs.
Net bus. Weigher. [Space for figuring on back side.]

A motion to quash the indictment was filed, and overruled by the court, and the defendant appealed to the court of appeals. The opinion states that: "The assistant attorney general confesses error, and admits that 'upon the face of the indictment the instrument [declared on] does not create any liability upon the part of any one to be responsible for anything. (2) There are no innuendo averments showing the facts or reasons why said instrument created such liability, nor are there requisite explanations set out that make the alleged forged instrument a forged instrument in law.' 'If a writing is so incomplete in form as to leave an apparent uncertainty in law whether it is valid or not, a simple charge of forging it fraudulently, etc., does not show an offense, but the indictment must set out such extrinsic facts as will enable the court to see that if it were genuine it would be valid.' 2 Bish. Cr. Law (7th Ed.) § 545. And 'when an instrument is incomplete on its face, so that, as it stands, it cannot be the basis of any legal liability, then, to make it technically subject to forgery, the indictment must aver such facts as will invest the instrument with legal force.'" It seems that the case just cited is properly analogous to the one under consideration. The statement in the Texas case might as properly be called the subject of legal forgery as the one at bar. The statement made by King in the case just cited does not attempt to confer any rights upon any one, but is a simple statement, without any liability. In the case at bar the clerk makes a certificate, and states that a party has attended as a juror for a certain number of days, and is entitled to so many dollars. It is of no value, except as a memorandum. No rights are conferred by it which would not exist if it had never been put into existence. In the case of *People v. Shall*, 9 Cow. 778, the defendant was convicted of forging an instrument which, as set forth in the indictment, was as follows: "Three months after date, I promise to pay Sebastian I. Shall, or bearer, the sum of three dollars, in shoemaking, at cash price; the work to be done at his dwelling house, near Simon Vrooman, in Minden, August 24th, 1826. David W. Houghtailing." A motion was made to arrest the judgment. Mr. Justice Cowen, in considering the case, says: "It is scarcely necessary to observe that the instrument set out in this indictment is not a promissory note, within the statute of Anne; and it is agreed that the writing does not come within any of the statutes of forgery, it being payable neither in money nor goods, but labor. The indictment is therefore based upon

the common law. Another defect renders it utterly void, of itself, as a common-law contract. It expresses no value received, nor any consideration whatever; and no action could be maintained upon it, if genuine, as a special agreement to perform labor, without averring and proving a consideration dehors the instrument. * * * The question presented is whether the fraudulent making of a writing void in itself, and so appearing in the indictment, be the subject of a prosecution for forgery." The learned judge then discusses a number of cases on the question of forgery, and continues: "In the principal case I have shown that the paper forged, if genuine, would be a mere nullity for any purpose. Nor, to my mind, could it be made good by any possible averment. It could not be made the foundation of liability, like the letter of credit. It does not come within any of the cases sustaining indictments, but to me appears to be directly within the cases cited, holding that an instrument purporting to be void on its face, and not shown to be operative by averment, if genuine, is not the subject of forgery. How is it possible, in the nature of things, that it should be otherwise? 'Void things are as no things.' Was it ever heard of, that the forgery of a nudum pactum—a thing which could not be declared on or enforced in any way—is yet indictable? It is the forgery of a shadow." Again, in conclusion, the learned justice says: "I agree that a man ignorant of the technical requisites of a special agreement might be imposed upon by the paper in question. This remark probably embraces a majority of the community in which we live, and most likely the very parties named in the false instrument. In this view, no doubt, the deed of which the defendant stands convicted involves all the moral guilt of forgery. He believed that he had succeeded in fabricating what purported to be a valid promissory note. But legal forgery cannot be made out by imputing a possible or even actual ignorance of the law to the person intended to be defrauded. However dark may be the moral hue of a transaction, courts of justice can only act upon legal crime,—upon criminal breaches of perfect legal obligation. Had this paper been used as a token, and thus made the medium of actual fraud by the defendant, he would be punishable as for a cheat. The instrument might, in that relative sense, become the subject of an indictment. It here stands alone, and we do not think that legal forgery can be predicated of such writing, for the reasons fully established by authority and principle,—that it is not, on the face of the indictment, of any apparent legal effect." The Colorado court of appeals, in the case of Raymond v. People, reported in 30 Pac. 504, by a majority of the court, holds an instrument in the following language not to be capable of forgery:

"Auditor's Office, City of Denver. No. E. 1,974.

"Treasurer of the City of Denver: Pay to

Joahn & Son, or order, \$3.50, three 50 dollars, out of any money in the treasury not otherwise appropriated, for —, and charge the same to the miscellaneous fund; and this shall be your voucher. By order of the city council of date July 31, 1890.

"Issued Aug. 1, 1890.

"[City Seal.] Countersigned by
 "Attest: A. A. Knight,
 "W. H. Milburn, City Auditor.
 "City Clerk.
 "—, Deputy. Wolfe Londoner,
 "Mayor."

This warrant was raised from \$3.50 to \$303.50. The defendant was indicted and convicted, and brought error to the court of appeals. Mr. Justice Bissell dissented from the opinion of the court reversing the lower court, but it was upon the theory that the warrant was not void. The charter of Denver contains the following provision: "No money shall be paid out by the city treasurer for any purpose, except upon the warrants drawn upon him by order of the city council and signed by the mayor, countersigned and registered by the auditor, and attested by the clerk; and every such warrant shall show upon its face the date of its issue, the date of the order of the city council, to whom and for what purpose issued, and from what fund payable." Under this section, counsel for the appellant contended that the instrument was absolutely void,—of no legal effect,—because the warrant did not specify for what it was issued, and therefore not indictable. The majority of the court, by Richmond, P. J., reversed the decision of the lower court, and held that the warrant was void, and that a prosecution for forgery would not lie. The opinion is very lengthy, and reviews the entire field of English and American authority upon the subject. In the dissenting opinion of Justice Bissell, the following language is found: "If the paper forged is not absolutely worthless for all legal purposes, forgery may be committed. * * * The conclusion is irresistible that the writing must be absolutely void, and worthless for all purposes, not to be the subject of forgery."

The case of State v. Evans, decided by the supreme court of Montana, and reported in 39 Pac., at page 850, was a criminal prosecution against Evans for the forgery of the following instrument or writing: "Bozeman, December 25, '94. Schumacher, Esq.: Please pay to the order of W. L. Evans the amt. of twenty dollars (\$20.00), and charge to him at my office. Johnson & McCarthy." The defendant was convicted. The court, in considering this case, followed the authorities cited herein, and held that the instrument was not the subject of forgery. The court held that the instrument, if genuine, could do no possible damage, even if accepted; that Johnson & McCarthy were not made responsible, and Evans could accomplish as much without the instrument as with it. Johnson

& McCarthy did not ask to have the amount charged to them, but to Evans. The court say: "The order, as it appeared on its face, would not accomplish the advancing of the money by Schumacher to Evans on the credit of Johnson & McCarthy. Schumacher would as readily have advanced it without the order as with it. There were no extrinsic facts alleged in the information to show that the instrument was available for the fraudulent purpose alleged in the information."

See, also, *People v. Heed*, 1 Idaho, 531; *Rembert v. State*, 53 Ala. 467; *Roode v. State*, 5 Neb. 174; *Arnold v. Cost*, 22 Am. Dec. 315, note; *Waterman v. People*, 67 Ill. 92; 3 Greenl. Ev. p. 103; *Com. v. Ray*, 3 Gray, 441; 2 Bish. Cr. Law (8th Ed.) §§ 533, 538; *Maxw. Cr. Proc.* 147-149; *Hendricks v. State*, 8 Am. St. Rep. 463, note p. 466 (Tex. App.) 9 S. W. 555.

The supreme court of Indiana, in *Garmire v. State*, reported in 4 N. E., at page 55, states the rule, unquestionably, to be that the indictment must show that the instrument is one having some legal effect, but it is not necessary that it should be shown to be a perfect instrument.

In *Rollins v. State*, 22 Tex. App. 548, 3 S. W. 759, the court say: "It is an established rule that a written instrument, to be the subject of indictment for forgery, must be such as would be valid, if genuine, for the purpose intended. If void or invalid upon its face, and it cannot be made good by averment, the crime of forgery cannot be predicated upon it. In other words, if the instrument is absolutely void upon its face, it cannot be made the subject of forgery; but if the legality be doubtful, and by proper allegations its legality is capable of being shown to the court, it is a subject of forgery." *Anderson v. State*, 20 Tex. App. 595; *State v. Briggs*, 34 Vt. 503.

The supreme court of Ohio, in the case of *Clarke v. State*, reported in 8 Ohio St. 630, uses the following language in discussing the question: "An indictment for forgery must not only allege the false making or alteration of a writing specified in the statute, with the intent to defraud some named person or body corporate, but it must also appear on the face of the indictment that the fabricated writing, either of itself, or in connection with the extrinsic facts averred, is such that, if genuine, it would be valid, in the law, to prejudice the rights of the person or body corporate thus named."

We now come to the consideration of the authorities cited by the appellant. The first case brought to the notice of the court is that of *State v. Woodward*, 20 Iowa, 541, decided by Mr. Justice Dillon. We have a very high regard for the opinion of Judge Dillon, and believe that the case cited by counsel fails to sustain the theory advanced by them, but, on the contrary, sustains the theory of the court in this case. The quotations made by

counsel do not fairly state the law of the case as announced in that decision. Counsel, in their brief, use the following language: "Mr. Justice Dillon, in the case of *State v. Woodward*, 20 Iowa, 541, defines 'forgery' to be 'the making or alteration of any writing with a fraudulent intent, whereby another may be prejudiced. It is not essential that any person should be actually injured.'" The case just cited was one where the defendant was charged with changing two receipts, and the court holds, in the very first part of its decision, after a discussion of the subject, that the two receipts, if genuine, would found a liability. The court says: "It is plain that the receipts in question, if genuine, would found a liability, or be evidence of a liability, on the part of Armstrong,"—counsel having altogether a mistaken view of this case, as a careful review of it will disclose. Counsel also cite 22 Am. Dec. 306. We presume counsel refer solely to the note to the decision of *Arnold v. Cost*, as the case itself does not bear out the theory stated; and the note itself is not a correct statement of the law, nor the law as laid down in the textbooks and cases cited. Counsel for appellant cite *State v. Johnson*, 26 Iowa, 407, and say: "We understand the general rule to be that if an instrument is void on its face it cannot be the subject of forgery. Still, this rule must be taken with this limitation: 'When the instrument does not appear to have any legal validity, or show that another might be injured by it, but extrinsic facts exist, by which the holder of the paper might be enabled to defraud another, then the offense is complete, and an indictment averring the extrinsic facts disclosing its capacity to deceive and defraud would be supported.'" We fail to understand why counsel cite this authority or suggest this rule, for surely they cannot say that any extrinsic facts are pleaded which would take the instrument contained in the indictment out of the general rule, viz. that a void instrument is not the subject of forgery. We do not think, however, that the rule stated by counsel is correct, or that the citation is a correct or fair statement of the decision. The court expressly say: "True it is, there can be no forgery if the paper is invalid on its face, for it can then have no legal tendency to effect a fraud. If its invalidity, however, is to be made out by extrinsic facts, it may be capable of effecting a fraud, and the party making the same be punished." We do not think the various cases cited by counsel for appellant are in point, or state the law correctly. Some of them do not appear to be well considered, and others do not support counsel's theory.

We believe, from a careful review of all the authorities, that the instrument set out in the indictment is not the subject of forgery, as it is absolutely void. No extrinsic facts are set forth to take it out of the general rule, and we believe that the ruling of the court in sustaining the demurrer was correct.

The judgment of the lower court will be affirmed, with costs. It is so ordered. All the justices concurring.

DALE, C. J., not sitting, having presided below.

TERRITORY v. WRIGHT et al.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

FORGERY OF JUROR'S CERTIFICATE.

A certificate issued by the clerk of a district court, setting forth that a juror has attended a certain number of days, and is entitled to a certain number of dollars as his pay therefor, is unauthorized, absolutely void, and of no effect in law; and an indictment charging a forgery thereof fails to state facts sufficient to constitute a public offense. *Territory v. De Lena*, 41 Pac. 618, followed.

(Syllabus by the Court.)

Appeal from district court, Canadian county; before Justice Dale.

Prosecution of Fred H. Wright and Jerry O'Rourke for forgery. Demurrer to indictment sustained. The territory excepts, and appeals. Affirmed.

C. A. Galbraith, Atty. Gen., Thos. B. Reid, and A. J. Jennings, for the Territory. John I. Dille and John Schmooke, Jr., for appellees.

SCOTT, J. This is a prosecution by indictment against Fred H. Wright and Jerry O'Rourke, returned into the district court of Canadian county by the grand jury on the 22d day of December, 1894, charging the forgery of a certificate of attendance of a juror of the said district court, issued by the clerk thereof. Upon arraignment on the 4th day of March, 1895, the defendants, Wright and O'Rourke, interposed a demurrer to said indictment, alleging—First, that the indictment was not entitled in a court having authority to receive it; second, that it did not state the name of the court to which it was presented; and, third, that the facts stated therein did no constitute a public offense. And on the 6th day of March, 1895, said demurrer was sustained, the indictments dismissed, and the defendants held to await the action of the next grand jury. The territory, feeling aggrieved at the action of the court, appeals to this court, and asks a reversal thereof.

This case presents the same questions as those decided by this court in the case of *Territory v. De Lena*, 41 Pac. 618, except that the indictment in this case alleges the forgery of another and different juror's certificate; and, upon the same reasoning and authority supporting our views of that case, the action of the lower court in this case will be affirmed. It is so ordered. All the justices concurring.

DALE, C. J., having presided below, not sitting.

KANSAS MOLINE PLOW CO. v. SHERMAN.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

FRAUDULENT CONVEYANCE—NOTICE.

Where a transfer of property is made for the purpose, or with the intent, on the part of the person making such transfer, to hinder and delay creditors, it is fraudulent and void; and the conveyance is fraudulent and void, also, as to the transferee, if at the time or before the making of the transfer the transferee had notice of such facts and circumstances as would arouse the suspicion of an ordinarily prudent man, and cause him to make inquiry as to the purpose for which such transfer is being made, which would disclose the fraudulent intent of the maker; and it is not necessary, in order to defeat such a transfer, to show that the transferee had actual notice of, or was a participant in, the fraud of the maker of the transfer. The former holding of this court on this question in the case of *Chandler v. Colcord*, 32 Pac. 330, 1 Okl. 260, is overruled.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice Scott.

Action by the Kansas Moline Plow Company against J. R. Sherman. G. W. Sherman interpleaded. Judgment for the interpleader, and plaintiff appeals. Reversed.

Selwyn Douglass, for plaintiff in error. Amos Green & Son, for defendant in error.

BIEREK, J. The Kansas Moline Plow Company brought suit in the district court of Oklahoma county on the 11th day of September, 1893, against J. R. Sherman, to recover the sum of \$1,821.76, in which amount the plaintiff claimed J. R. Sherman was indebted to it upon certain promissory notes and an open account for goods, wares, and merchandise sold and delivered to J. R. Sherman. The next day an order of attachment was issued in the case, and the property in controversy levied upon. G. W. Sherman, by leave of court, interpleaded in the cause, claiming that he was the owner of the goods attached, by virtue of a purchase made from J. R. Sherman on the 6th day of September, 1893. Upon issues being formed upon this interplea, a trial was had before the court and a jury, and a verdict and judgment given and rendered for the interpleader, G. W. Sherman, for the value of the property and damages, from which the plaintiff appeals.

The evidence given upon the trial of the case is quite voluminous, and it is unnecessary to give it in detail. It is sufficient to state, briefly, that there is evidence tending to show that J. R. Sherman engaged in the hardware and implement business in Oklahoma City in July, 1892, having purchased a stock of a former merchant; that on the 6th day of September, 1893, he was largely indebted to various creditors, a part of which indebtedness was falling due and was unpaid. G. W. Sherman, a brother of J. R. Sherman, who had been residing in Northern Ohio, after some correspondence with J. R. Sher-

man, came to Oklahoma City, during the latter part of August, 1893, and went into his brother's store, where he clerked for a couple of weeks before September 6, 1893. He brought with him from Ohio some \$600 or \$700, and with little, if any, other visible means, knowing that his brother was indebted to various creditors in amounts which he states he believed to be about \$2,500, he purchased the entire stock of goods of his brother, which was all the visible assets his brother had, and all the property subject to execution, although J. R. Sherman states that he had notes in the bank, uncollected, and some in his own possession, amounting to several thousand dollars. An invoice hurriedly made, and without attracting the attention of the clerks in the store, up to the very date of the alleged transfer of the stock of goods, amounted to about \$4,000, and the stock and about \$600 worth of notes were transferred by contract and bill of sale to G. W. Sherman, in consideration of the payment of \$600 in cash and of eight notes (though J. R. Sherman says he does not know whether there were eight or nine) of \$500 each, due in successive payments, one each two months, beginning two months from the date of the sale. The stock was transferred to G. W. Sherman, he giving back to his brother a chattel mortgage thereon to secure these deferred payments. J. R. Sherman remained in and about the store, transacting business, to all appearances, as before, and made purchases of goods, which were charged to him, the same as before, excepting that G. W. Sherman employed the clerks. Before the goods were attached G. W. Sherman paid from the sales of the goods \$300 additional in cash, and subsequently, and before the trial, turned back to his brother the accounts which he had purchased with the stock, it is stated, for collection, and J. R. Sherman delivered back to his brother all of the \$500 notes excepting three, although no further payments were made thereon. There is also testimony tending to show that about the 9th of September, 1893, the representative of one of the wholesale houses to which J. R. Sherman was indebted presented an account of \$165 for payment, but J. R. Sherman told him that he could not pay this account, because he had not gotten his money yet from the sale of the stock. J. R. Sherman denied that the transfer was made with the intent to hinder, delay, or defraud his creditors, as did also his brother. The case was submitted to the jury, evidently, on the theory that the evidence was such as made the question of the existence of fraud a question of fact for the jury to determine. And this theory of the case seems to have been considered proper on both sides,—at least, no objection seems to have been made to the court considering it in this way,—and it was so considered.

The only question raised in the case is as to the correctness of the instructions given by the court to the jury; and it is claimed

that the court erred in refusing, on the application of plaintiff, to instruct the jury that, if the transfer was made by J. R. Sherman to defraud his creditors, it was also fraudulent as to the vendee, G. W. Sherman, if he was in a position where a reasonably prudent man could and would have known of the fraudulent intent of the vendor, and that if the vendee had notice of such facts as would awaken the suspicion of a man of ordinary prudence, and lead him to make inquiry, which, if pursued, would have led to his full knowledge of the fraud of the vendor, he was chargeable with notice of the vendor's fraudulent intent. The plaintiff asked these instructions in different forms, so that the question as to whether or not the plaintiff was entitled to an instruction of this character is clearly raised. The court refused this request, but gave the instruction in a modified form, to the effect that the jury could not find that the transfer was fraudulent and void as against G. W. Sherman unless they should find from a preponderance of the evidence that he had notice or knowledge of the fraudulent intent on the part of J. R. Sherman. It is claimed by plaintiff in error, and it is not disputed by the defendant in error, that it was the view of the learned judge who tried the case below that it was entitled to the instruction asked, but that it could not be given because of the decision of this court in the case of *Chandler v. Colcord*, 1 Okl. 260, 32 Pac. 330, where it was held erroneous to give the jury just such an instruction. If we considered the decision of *Chandler v. Colcord* upon this question to be good law, no further consideration of this case would be necessary, but the matter would end at once by affirmation of the judgment of the court below. But we do not believe that the conclusion there reached on the proposition of law here involved was correct, either as a determination of what the law of fraudulent conveyances is in this territory by virtue of the adoption of the laws of another jurisdiction, or from a consideration of the decisions generally upon the question. We would, in fact, were it not for the *Chandler v. Colcord* decision, consider the question so well settled by the authorities as to make it entirely unnecessary for us to consider the matter at any length. But, this court having decided the law differently from what it is contended to be by plaintiff in error, the overruling of our former decision should be attended by such a consideration of the matter as to show that we are not only justified, but are required to do so. The question involved in the *Chandler v. Colcord* case in point in this was as to the correctness of two instructions given by the probate court, the one of which pertinent to the case at bar is as follows: "First. The court further instructs the jury that when a transfer of property is made with intent on the part of the person mak-

ing it to hinder, delay, or defraud his creditors, and the party to whom the transfer is made had knowledge of the facts and circumstances from which such fraudulent intent might reasonably and naturally be inferred by an ordinarily cautious person, then such transfer is fraudulent and void as against the rights of the creditors." Concerning this instruction, the court held: "As to the instructions, which appear to have been given at the instance of appellee, the first and third were erroneous, and should not have been given. A fraudulent intent on the part of a vendor or mortgagor to hinder, delay, and defraud his creditors is not of itself sufficient to defeat the sale or mortgage. It is essential to that end that the vendee or mortgagee should participate in that design. The fraudulent intent must be mutual. *Meixsell v. Williamson*, 35 Ill. 529; *Herkelrath v. Stookey*, 63 Ill. 486." The matter for consideration in that case was, as is also in the case at bar, a question of notice, rather than the question of fraud itself. It was a question of good faith on the part of the transferee, rather than the question as to whether or not the transfer itself was in violation of the rights of creditors, and therefore void. The conclusion reached by the court, that the instruction there given, and designated as "first" of the two which were being considered together, was erroneous, is not, in our judgment, supported either by the authorities upon which the conclusion was based or by the law on the question. In the case of *Meixsell v. Williamson* the trial court was asked to instruct the jury that if they believed from the evidence that the mortgage was not bona fide, but was made to hinder and delay creditors of said *Meixsell*, then the jury are to find the defendant not guilty. The supreme court held that the objections to this instruction were obvious; that "the intent of P. Meixsell to delay and hinder his creditors is not, under repeated decisions of this court, sufficient. This intent must be mutual. Both the mortgagor and mortgagee must harbor the intent." And in the case of *Herkelrath v. Stookey* the trial court instructed the jury that, if the mortgage was made to hinder, delay, and defraud creditors, it was void, even though the mortgagee had just claims against the mortgagor; and the court held: "If this instruction had been so framed as to require both the mortgagor and mortgagees to have participated in the fraudulent intent in order to avoid the mortgage, it would have been unobjectionable. The jury, however, would probably understand such an instruction as referring only to the intent of the mortgagor. A fraudulent intent on his part alone would not vitiate the instrument."

It will be observed that the decision in neither of these cases was upon the question as to whether, if the transfer was fraudulent,—that is, if it was a transfer which the

party making the conveyance was prohibited by law from making, or if the conveyance was one which was made in violation of the rights of creditors,—the transferee must have had actual notice of such fraud and such fraudulent intent on the part of the maker of the transfer, or whether or not notice of such facts and circumstances as would put a reasonably prudent man on inquiry would have been sufficient to deprive him of the character of a bona fide purchaser. Manifestly, in order to make a transfer void as against the rights of creditors, there must be something more than simply fraud on the part of the parties making the transfer. If the transferee has no notice, he is not, under the Illinois decisions, a participant in the fraud, and the conveyance cannot be held void as to him simply because the transfer is fraudulently made by the maker thereof; and an instruction which made the transfer fraudulent simply because of the conduct of the person making the transfer, and which left entirely out of consideration the conduct of the transferee, was manifestly erroneous. The learned chief justice was probably drawn into the error which was committed in holding that the instruction under consideration in the case of *Chandler v. Colcord* was erroneous by giving too much consideration to the term "participation," as he drew it from the Illinois decisions, and gathering from them that the participation on the part of the transferee which would make the conveyance fraudulent must be some affirmative action on his part in consummating the fraudulent intent of the maker of the instrument. It does not mean this when used with reference to fraudulent conveyances. It does not mean that the vendee or mortgagee should do any act, in furtherance of the fraudulent design of the maker, other than the taking of the fraudulent conveyance with knowledge or notice, direct or constructive, that the conveyance is a prohibited one, and is made by the person who makes it with the fraudulent intent to hinder or defeat his creditors. The transferee is a participant in the fraud, where that term is used, if he takes the fraudulent conveyance under circumstances where the law will impute to him knowledge of the purpose of the maker of the conveyance, without his actively taking part in the fraudulent design of the transfer other than the taking of it.

Bump, in his valuable work on *Fraudulent Conveyances*, on page 200, says: "If the grantee has notice of the debtor's fraudulent intent, the transfer is void, without reference to his actual intent. The law in such case charges him with that guilty knowledge which makes him a participant in the fraud." Again, on page 202, he says: "If he has notice of such facts and circumstances, he is considered either to know the fraudulent intent or to purposely omit to make those inquiries which an ordinarily cautious

and prudent man in the same situation would make. And in either case he is chargeable with participation in the fraud." So the question as to whether or not the transferee must participate in the fraud of the vendor in order to make a conveyance void does not determine the question in controversy. If that term is used to designate the conduct of the vendee or mortgagee which will make the transfer void, it does not determine that the instruction which was given by the lower court in *Chandler v. Colcord* was erroneous, for he is a participator if he takes it with knowledge of the fraudulent design and purpose of the person making the fraudulent conveyance. We do not think, however, that this is an apt word to use. Its ordinary meaning might be taken to imply the requirement of more activity on the part of the transferee than is necessary to be shown, and it does not properly comprehend the great variety of cases in which the conduct on the part of the transferee will make the transfer which is fraudulent on the part of the person making it also fraudulent on the part of the person who takes the transfer. To make a transfer which is fraudulent as to the person making it also fraudulent as to the person taking it, requires nothing more to be shown than simply that the vendee had notice of such facts as would, under the law, prevent his taking it.

Our statutes defining the rights of debtor and creditor, and with reference to the law of notice, actual and constructive, are adopted from Dakota; and there it was held, in *Gress v. Evans*, 1 Dak. 387, 46 N. W. 1132, prior to the time we adopted its statute, that: "Actual notice of a prior unrecorded conveyance, or of any title, legal or equitable, to the premises, or knowledge and notice of any facts which would put a prudent man upon inquiry, impeaches the good faith of the subsequent purchaser. There should be proof of actual notice of prior title or prior equities, or circumstances tending to prove such prior rights, which affect the conscience of the subsequent purchaser. Actual notice, of itself, impeaches the subsequent conveyance. Proof of circumstances, short of actual notice, which would put a prudent man upon inquiry, authorizes the court or jury to infer and find actual notice. Or, to express it exactly, good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms and technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. And notice is either actual or constructive. Actual notice consists in express information of a fact. Constructive notice is notice imputed by the law to a person not having actual notice; and every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence,

is deemed to have constructive notice of the fact itself."

In *Young v. Harris*, 4 Dak. 367, 32 N. W. 97, decided in 1887, the following instruction: "I also instruct you that a transfer of personal property made with intent on the part of the seller to delay and defraud his creditors, and the party to whom the transfer is made has knowledge of the facts and circumstances from which such fraudulent intent might reasonably and naturally be inferred by an ordinarily cautious person, is fraudulent and void against the rights of creditors,"—while it was held to be as liberal as the person attacking the conveyance on the ground of fraud could claim the law to be, was yet held to be proper as limiting and qualifying the expression "in good faith" used in another part of the instructions.

In *Shauer v. Alterton*, 151 U. S. 607, 14 Sup. Ct. 442, the proper construction of the Dakota statute with reference to fraudulent transfers was before the supreme court of the United States. Concerning it, Mr. Justice Harlan, after referring to the construction placed upon the law in Dakota, and in holding that the instruction which was given by the trial court, under the Dakota statute, similar to that which was asked for by the plaintiff below, was proper, said: "A less stringent rule cannot be applied to the Dakota statute relating to transfers of property with intent to delay or defraud creditors. The plaintiff had the right, by a purchase of his brother's stock of merchandise, to obtain payment of his claims in preference to the claims of other creditors. But the statute of Dakota, however liberally construed in favor of purchasers from a fraudulent debtor, will not permit him to enjoy, to the exclusion of other creditors, the fruits of his purchase, when the sale was made with the intent to delay or defraud other creditors, if he had, at the time, actual notice of such intent or knowledge of such circumstances or facts as were sufficient to put a prudent person upon an inquiry that would have disclosed the existence of such intent upon the part of the vendor. The plaintiff could not properly have claimed a more favorable interpretation of the Dakota statute than was given to it by the court below. A statute that declares every transfer of property made with intent to delay or defraud any creditor of his demands void against all creditors of the debtor would be wholly defeated in its operation if the rights of the transferee were not subject to the rule that 'whatever is notice enough to excite attention and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led.' *Wood v. Carpenter*, 101 U. S. 135, 141; *Kennedy v. Green*, 3 Mylne & K. 699, 722." The case of *Shauer v. Alterton* was an appeal from a decision of the supreme court of the territory of Dakota, rendered also before we adopted the Dakota statute; and these citations and excerpts from decided cases will

certainly be amply sufficient to show what the law is, and was, in the jurisdiction from which we have borrowed our statute, and what the law is, by adoption, here; and the rule, which we think the proper one, not only has the law itself ingrafted into the jurisprudence of this territory to support it, but is amply supported by the decisions of the highest courts in the states.

In *Hough v. Dickinson*, 58 Mich. 89, 24 N. W. 809, the trial court had given the following instruction: "(9) Fraudulent intent cannot be inferred by the jury without proof, but it must be proved, like any other act, to the satisfaction of the jury; and, unless such fraudulent intent is proved on the part of both Pier & Wagley and Hough & Wagley by a preponderance of the evidence, the verdict of the jury should be for the plaintiffs." Concerning this, the court said: "The charge as given in the ninth request is not in accordance with the rule as laid down by the courts upon that subject. A fraudulent intent on the part of Pier & Wagley, and notice or knowledge of such intent on the part of Hough & Wagley, is sufficient to avoid the sale, without any proof whatever of actual fraudulent intent on the part of these latter parties. It is generally held that knowledge of facts sufficient to put an ordinarily prudent man on inquiry is all that is required, and the charge of the court went too far."

A very late expression of the rule in Kansas is found in the following language taken from the opinion in *Martin v. Marshall*, 54 Kan. 147, 37 Pac. 977: "That good faith is essential to support the sale cannot be questioned. If Martin & Co. knew of the fraudulent intent of the Pelletiers, and bought with that knowledge, they cannot claim to be bona fide purchasers. 'Knowledge of facts sufficient to excite the suspicions of a prudent man, and put him upon inquiry, is, as a general proposition, equivalent to a knowledge of the ultimate fact.' *Phillips v. Reitz*, 16 Kan. 396; *Tied. Sales*, § 329; *Schulein v. Hainer*, 48 Kan. 249, 29 Pac. 171."

By Mr. Justice Johnson, speaking for the court, in *Gollobar v. Martin*, 33 Kan. 252, 6 Pac. 267, it is said: "Actual knowledge by a vendee of the fraudulent intent of the vendor is not essential to render the sale void. If the facts brought to his attention are such as to awaken suspicion, and lead a man of ordinary prudence to make inquiry, he is chargeable with notice of the fraudulent intent, and with participation in the fraud,"—citing *Phillips v. Reitz*, 16 Kan. 396; *Kurtz v. Miller*, 26 Kan. 314; *McDonald v. Gaunt*, 80 Kan. 693, 2 Pac. 871.

In *Bollman v. Lucas*, 22 Neb. 796, 36 N. W. 465, Mr. Justice Cobb, in defining the rule in that state, and speaking for the court, said: "Throughout the series of instructions given at the request of the plaintiff, the jury are told, more or less explicitly, that while the sale of the goods by McClintock & Wilson may have been made with whatever fraudu-

lent intent to hinder, delay, and defraud their creditors, although this fraudulent intent on their part may have been known to the plaintiff, yet if the purchase on his part was made bona fide, and solely for the purpose of collecting a debt due him from them, then the sale is good and unaffected by the fraudulent intent of McClintock & Wilson. This is not the law as understood by this court. In the case of *Temple v. Smith*, 13 Neb. 513, 14 N. W. 527, cited by counsel for plaintiff in error, the court, in the opinion of the present chief justice, say: 'But where a purchaser has notice of the fraudulent intent of the person from whom he purchases, or has notice of such facts as would put a man of ordinary prudence upon inquiry which would have led to a knowledge of the fraudulent purpose of the person selling the goods, he is not a bona fide purchaser,'—citing *Zuver v. Lyons*, 40 Iowa, 510; *Jones v. Hetherington*, 45 Iowa, 681; *Bradford v. Beyer*, 17 Ohio St. 388; *Brown v. Cutler*, 8 Ohio, 142."

The same rule is announced in *Dorrington v. Minnick*, 15 Neb. 397, 19 N. W. 456.

In *Hooser v. Hunt*, 65 Wis. 71, 26 N. W. 442, *Cole, C. J.*, announces the well-settled rule of that state in the following language: "The words 'actual notice' in section 2243, Rev. St., and 'previous notice' in section 2324, Rev. St., are equivalent expressions; and the rule is stated in the opinion 'that notice must be held to be actual when the subsequent purchaser has actual knowledge of such facts as would put a prudent man upon inquiry which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with that which he is about to purchase. Where the subsequent purchaser has knowledge of such facts, it becomes his duty to make inquiry; and he is guilty of bad faith if he neglects to do so, and consequently he will be charged with the actual notice he would have received had he made the inquiry.'" This language was used in a case involving, as the one at bar does, the question of a fraudulent conveyance to hinder and delay creditors, and the case is fully parallel to the one at bar, because, as heretofore suggested, we have a statute with reference to actual, and constructive notice in this territory, and which provides that (St. 1893, par. 2673) "every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself."

In *Singer v. Jacobs*, 11 Fed. 559, Judge Caldwell, stating the opinion for the court, after holding that, to avoid a sale on the ground of fraud, it is not necessary that the purchaser should have actual notice of the fraudulent purpose of the vendor, uses the following language of Bigelow, *Fraud* (page 289): "If facts are brought to the

knowledge of a party which would put him, as a man of common sagacity, upon inquiry, he is bound to inquire; and if he neglects to do so he will be chargeable with notice of what he might have learned upon examination."

Bump, in his treatise on Fraudulent Conveyances, sums up the rule, on page 201, as follows: "It is not necessary that the grantee shall have actual knowledge of the debtor's intent to delay, hinder, or defraud his creditors, in order to render the transfer void. A knowledge of facts sufficient to excite the suspicions of a prudent man, and to put him on the inquiry, or to lead a person of ordinary perception to infer fraud, or the means of knowing by the use of ordinary diligence, amounts to notice, and is equivalent to actual knowledge, in contemplation of law. * * * If he has notice of facts sufficient to put him on the inquiry, he cannot be deemed a bona fide purchaser." On page 203 he says: "It is not necessary that the debtor and the grantee shall be actuated by like motives to cheat and defraud the grantor's creditors. The motives and intentions of the debtor and grantee may be different. If the grantee has notice at the time that the debtor is transferring his property to delay, hinder, or defraud his creditors, it will make the transfer void, although he has no wish to defraud them, for the motive is imputed to him as a fraud in law, and makes him a mala fide purchaser."

A consideration of the numerous cases cited can certainly leave no doubt but that the instruction on the question here in controversy, and which was in the case of *Chandler v. Colcord* held erroneous, was correct, and that the instruction which was asked for in the court below should have been given. The jury were directly told that they could not hold the transfer void as to G. W. Sherman, even though they should find it was fraudulently made by J. R. Sherman, unless they should find that G. W. Sherman had notice of the fraud which J. R. Sherman was perpetrating upon his creditors, if his conduct was fraudulent. This did not go far enough, in view of the request made by the plaintiff. The plaintiff was entitled, on his request, to have had the jury directed that it was not necessary that G. W. Sherman should have had actual notice of the fraud of J. R. Sherman, if there was any, but that plaintiff was entitled to a verdict if there was fraud in the transfer, and if G. W. Sherman had notice of such facts as would cause him, as a prudent man, to suspect the fraudulent conduct of the brother, if the jury should find there was any. The instruction there given, at least against the plaintiff's request, required too high a standard of proof in order to enable the plaintiff to sustain its charge of fraud as against the vendee, G. W. Sherman. The decision in the case of *Chandler v. Colcord*, therefore, so far as it involves this question, is overruled, and

the judgment of the court below in this case is reversed, and a new trial granted, at the costs of defendant in error. All the justices concurring, except SCOTT, J., not sitting.

(3 Okl. 334)

BANK OF PERRY v. COOKE et al.
(Supreme Court of Oklahoma. Sept. 7, 1895.)
CHATTEL MORTGAGE—POWER IN MORTGAGOR TO SELL.

1. Where, at the time of the execution of a chattel mortgage, it is understood and agreed between the parties that the mortgagor shall be allowed to remain in possession of the mortgaged property, and sell and dispose of the same in the ordinary course of trade, and apply the proceeds to his own use, the mortgage is absolutely void as to creditors of the mortgagor.

2. It does not matter whether such agreement is oral or in writing, contained within the mortgage or without; if such an agreement was had, the mortgage is fraudulent and void as to creditors.

(Syllabus by the Court.)

Error from district court, P county; before Justice A. G. C. Blierer.

Actions by Nix, Halsell & Co. and others against Brogan & Jackson. Certain chattel mortgages interpleaded. From a judgment holding a mortgage of the Bank of Perry void, the bank brings error. Affirmed.

On the 9th day of February, 1894, Brogan & Jackson, a firm composed of J. M. Brogan and Junius E. Jackson, at the city of Perry, in P county, executed a certain chattel mortgage to the bank of Perry for the sum of \$425, due in 10 days after date, and secured the same on the entire stock of groceries, flour, feed, etc., of the said firm. Said mortgage was on the 20th day of February, 1894, filed in the office of the register of deeds in said county, at 4:30 o'clock p. m. On the 10th day of February, 1894, J. E. Jackson made, executed, and delivered to the Bank of Perry at Perry, Okla., a certain chattel mortgage on all of the stock of groceries, tobacco, etc., of the said Jackson, to secure the sum of \$225, due in 30 days after date, said mortgage being filed for record on the 20th day of February, 1894, at 4:30 p. m. On the 9th day of February, 1894, Brogan & Jackson were partners doing a general merchandise business. On the 10th day of February, 1894, the said firm dissolved partnership, J. E. Jackson assuming control of the business. On the 20th day of February, 1894, J. E. Jackson made, executed, and delivered to E. H. Cooke a certain chattel mortgage on the entire stock of goods of the said Jackson, to secure the sum of \$700, due on demand, said mortgage being filed for record in the office of the register of deeds of said P county on the 20th day of February, 1894, at 5 o'clock p. m.; said mortgage being subject to said mortgages to the Bank of Perry. At 4 o'clock p. m. on the 20th day of February, 1894, the plaintiff in error took possession of the stock of goods in question, under the mortgages above set out. On the same day Nix, Halsell & Co., Henry

Flock, and Reid, Murdock & Co. levied upon the stock of goods in question, under an order of attachment, in the order named. Following these attachment creditors, E. H. Cooke filed his chattel mortgage on said stock, and Dale & Nessly, Armour Packing Company, and Symms Grocery Company followed with writs of attachment in the order named. On the 11th day of June, 1894, a jury being waived, a trial was had before the court, and the court made the following findings of fact and conclusions of law:

"Findings of Fact.

"(1) On February 8, 1894, J. E. Jackson, being indebted to E. H. Cooke, executed and delivered to Cooke his promissory note, payable on demand, for the sum of \$700, on which note demand for payment was made on February 20, 1894, and which remains unpaid. On February 20, 1894, J. E. Jackson executed and delivered a chattel mortgage to E. H. Cooke on a certain stock of groceries, with all fixtures, furniture, and goods of every kind and character, in the storeroom in Perry, P County, Oklahoma Territory, theretofore owned and managed by Brogan & Jackson, the Jackson of said firm being J. E. Jackson, who executed this mortgage. The mortgage contained provisions authorizing the mortgagee to take possession of the property at any time he should feel unsafe and insecure. It also contained a provision: 'And said mortgagor hereby represents that he is the sole and exclusive owner of the property above described, and that there is no other mortgage or lien of any kind thereon, except to the Bank of Perry.' This chattel mortgage was executed in Oklahoma City, Oklahoma Territory, and on the afternoon of the same day Jackson and Cooke both came to Perry, arriving in Perry about 5 o'clock p. m. E. H. Cooke went to the Bank of Perry, and from there to the register of deeds' office, where he filed the chattel mortgage at 5 o'clock p. m.

"(2) On February 9, 1894, J. M. Brogan and J. E. Jackson were partners engaged in the mercantile business in the city of Perry, having a stock of groceries, flour, feed, etc., and were largely indebted to numerous wholesale merchants for goods bought on credit. On the same day, February 9, 1894, J. E. Jackson went to the Bank of Perry, in Perry, O. T., said bank being a banking institution, of which T. K. Robinson was president, and F. W. Farrar was cashier, and borrowed of said bank the sum of \$425, and gave therefor his note, payable 10 days after date, and to secure the same gave a chattel mortgage signed by 'Brogan & Jackson, per J. E. Jackson, Partner.' This mortgage contained provisions authorizing the mortgagor to remain in possession of the goods and property mortgaged. Also contained a provision that in case of default in payment of the note at maturity, or in case the mortgagee should at any time feel unsafe or inse-

cure, 'it shall be entitled to and may take and hold possession of said mortgaged property, at the expense of the mortgagors, until the payment of the note or performance of the act for the performance of which the mortgage is security.' On the 10th day of February, 1894, the firm of Brogan & Jackson having dissolved partnership on that day, J. E. Jackson succeeding said firm, said J. E. Jackson again went to the Bank of Perry, and borrowed, in his own name, the sum of \$250, and gave therefor his note, payable 30 days after date, and another chattel mortgage on the same stock of merchandise as the first; said chattel mortgage being in the same form and containing the same conditions as the mortgage made on the 9th day of February by Brogan & Jackson. These mortgages were signed in the presence of T. K. Robinson, the president of the said bank, but not in the presence of any other person, and were not signed by attesting witness in the presence of Jackson; but afterwards T. K. Robinson and V. C. Talbert signed the mortgages as attesting witnesses, Jackson not being informed or knowing that said parties signed the mortgage as attesting witnesses. By agreement between the Bank of Perry, through T. K. Robinson, as president, and J. E. Jackson, these mortgages were retained by the bank, and not filed of record until the 20th day of February, 1894, at 4:30 o'clock p. m., for the reason that if said mortgages were so filed they would injure and ruin the commercial credit of J. E. Jackson.

"(3) J. E. Jackson continued to run his mercantile business and buy and sell goods and merchandise in the usual course of trade, after said mortgages were given, the same exactly as before, no notice of any kind being given to any person of said chattel mortgages until the 20th day of February, 1894, the goods being sold from said stock, and new goods bought and placed therein daily, some of the purchases being made during that time from Nix, Halsell & Co., and some from the Armour Packing Company, and during the time from the 10th of February, 1894, to and including the 20th day of February, 1894, before these mortgages were filed for record, more than \$700 worth of goods, and more than the amount of the notes and interest given to the Bank of Perry, was sold from this stock of goods by J. E. Jackson; no account being kept of the same excepting of the amount of the proceeds of such sales, which were deposited by J. E. Jackson in the Bank of Perry, \$465 of such amount being deposited in the Bank of Perry (\$100 of the amount of such sales was retained by J. E. Jackson), and the balance of the proceeds of such sales being expended in the purchase of goods for said store and in running expenses of said store and other expenses of said J. E. Jackson. From February 10, 1894, to February 17, 1894, inclusive, J. E. Jackson deposited in the Bank of Perry

the sum of \$1,001.50, of which sum there remained in the Bank of Perry to the credit of J. E. Jackson on the 20th day of February, 1894, the sum of \$155.74.

"(4) On the 19th day of February, 1894, J. E. Jackson went to Oklahoma City, Oklahoma Territory, leaving in charge of said store W. G. Shapland, as clerk in said store. Said Shapland was given no authority whatever to turn the possession of said store over to the Bank of Perry or to any other person.

"(5) Shortly after 4 o'clock on the 20th day of February, 1894, F. W. Farrar, cashier of the Bank of Perry, deeming the bank insecure in its claim of a chattel-mortgage lien on said stock of goods under the said two mortgages of February 9 and 10, 1894, went to the store and place of business of J. E. Jackson, and found W. G. Shapland in charge and possession thereof, and demanded possession of the store under said chattel mortgages; and said Shapland, believing that said Farrar had or would have an officer with him to enforce his demand, delivered the key to the front door of the store to said Farrar, but refused to deliver the possession of the store to said Farrar, and said Shapland, together with Miss Harbalds, another clerk in said store, remained in the store building, and in possession of said store, together with one Hart, who had come to said store with said Farrar to procure said possession, and the front door of the store was locked at that time. Some of the goods of said stock, when the door was locked, were left outside in front of said place of business as usual.

"(6) On the 20th day of February, 1894, and at the time F. W. Farrar went to the store of said J. E. Jackson to obtain possession of said stock, J. M. Brogan and J. E. Jackson, as partners, and J. E. Jackson, since the dissolution of the partnership in the name of Brogan & Jackson (no notice of such dissolution having been given the creditors, so far as the evidence shows), were indebted to numerous parties, among others, in the following amounts, to wit: Nix, Halsell & Co., \$954.49; Henry Flock, \$370; Reid, Murdock & Co., \$986.17; Dale & Nessly, \$203.89; Armour Packing Company, \$249.08; Symns Grocery Company, \$429.11,—said creditors being entirely unsecured. Immediately after the front door of the store was locked, an order of attachment issued out of the probate court of P county, Oklahoma Territory, in the suit of Nix, Halsell & Co. against Brogan & Jackson, for the sum of \$954.49 and costs, was delivered to the sheriff, who immediately proceeded to the store of said Jackson, and the former place of business of Brogan & Jackson; and immediately thereafter, and within a very few minutes, and while the sheriff was at the door of said store, orders of attachment were also delivered to the sheriff in the case of Henry Flock and Reid, Murdock & Co., which were attachment suits brought to recover the accounts of said creditors against Brogan & Jackson. The sheriff immediately

seized upon the goods on the outside of the store, and the door being closed, and he being unable to obtain admittance, declared that he attached said goods on the outside of the store and the goods in the store under and by virtue of said writs of attachment; and the sheriff remained at the door of said store—that is, the deputy sheriff so did—until when a short time thereafter, and about 5 o'clock, J. E. Jackson came to the store and delivered to the sheriff the key to the doors, and the store was unlocked, and the sheriff entered the store with said writs of attachment, and remained in the above possession of the same; the sheriff and Farrar agreeing then that the matter should rest as it was until an indemnity bond should be given, which bonds were given the next day, and the goods and property were inventoried and appraised under the writs of attachment. When the sheriff, with J. E. Jackson and representatives of the creditors, entered the store, Farrar was there, and J. E. Jackson and his clerk, W. G. Shapland, both protested that Farrar had no right to take possession of said stock, and both refused to give the said Farrar possession of said stock under the two mortgages to the Bank of Perry.

"(7) The writ of attachment in the case of Nix, Halsell & Co. was levied on the outside of the store by taking possession of the goods there, and by declaration of the sheriff that he attached the goods within, at 4:28 o'clock p. m. of said day, and the same proceeding was had under the Henry Flock order at 4:29 o'clock. The mortgages to the Bank of Perry were filed at 4:30; the order of attachment in the case of Reid, Murdock & Co. was levied in a similar manner at 4:41 o'clock in the afternoon of said 20th day of February, 1894; the mortgage to E. H. Cooke was filed at 5 o'clock p. m., February 20, 1894; at 5:13 o'clock p. m., February 20, 1894, a writ of attachment was delivered to the sheriff in the case of Dale & Nessly against Brogan & Jackson, upon their claim; and at 10:07 o'clock a. m., February 21, 1894, a writ of attachment was delivered to the sheriff upon the claim of the Armour Packing Company against Brogan & Jackson; and February 23, 1894, at 10:08 a. m., a writ of attachment was also delivered to the sheriff in the case of Symns Grocery Company against Brogan & Jackson. The goods were held by the sheriff, and were sold by him, under the order of the probate court, in said various attachment suits; and said goods sold for \$3,700, which money is in the hands of the receiver appointed in this cause.

"(8) On the 22d day of February, 1894, judgments were taken in the probate court for the amounts of the claims stated in the case of Nix, Halsell & Co., Henry Flock, and Reid, Murdock & Co. against Brogan & Jackson, and on the 5th day of June, 1894, judgment was taken for the amount of the claim of Dale & Nessly. The suits of Armour Packing Company and Symns Grocery Company

are still pending. The attachments and all of the suits in which judgments were taken were sustained; in the others, not determined, the attachments are still in force and not dissolved.

"(9) That the chattel mortgage made by J. E. Jackson for Brogan & Jackson on February 9, 1894, and the chattel mortgage made by J. E. Jackson on February 10, 1894, both to the Bank of Perry, were made by both J. E. Jackson and the Bank of Perry with the fraudulent intent to hinder and delay the creditors of Brogan & Jackson and J. E. Jackson, and with the fraudulent intent and purpose to deprive the creditors of Brogan & Jackson and J. E. Jackson of their rights as such creditors.

"To which findings of fact, and each and every one thereof, the Bank of Perry excepts.

"Conclusions of Law.

"(1) The court concludes as a matter of law that the chattel mortgages made by J. E. Jackson to the Bank of Perry on the 9th and 10th of February, 1894, were fraudulent and void as to the creditors of Brogan & Jackson and J. E. Jackson.

"(2) That the mortgage made by E. H. Cooke to J. E. Jackson was given subject to the mortgages of the Bank of Perry, but that, on account of the fraud in the transactions between the Bank of Perry and J. E. Jackson, as against the creditors of Brogan & Jackson and J. E. Jackson, the attachment creditors of J. E. Jackson procured a lien upon the assets of the insolvent debtors which was prior to the lien of the Bank of Perry; and to place the claim of E. H. Cooke subject to the claim of the Bank of Perry would wholly defeat the claim of said E. H. Cooke, on account of there not being sufficient proceeds to pay the other claims, which are, on account of fraud, prior to the Bank of Perry, and E. H. Cooke being in no way responsible for the fraudulent conduct of the Bank of Perry, by which other creditors were given priority over the claim of the Bank of Perry, in equity the claim of E. H. Cooke must be paid prior to the Bank of Perry, and so as not to defeat the lien and claim of E. H. Cooke because of such fraudulent conduct of the Bank of Perry.

"(3) That the chattel mortgages made by Brogan & Jackson and J. E. Jackson to the Bank of Perry on the 9th and 10th days of February, 1894, were not signed in the presence of two attesting witnesses, so as to entitle them to be placed of record, and no notice was given thereby.

"(4) That all of the attachments in this case are senior and superior liens on the fund derived from the sale of said goods to that of the Bank of Perry, and the order of priority of the claims of said creditors of Brogan & Jackson and J. E. Jackson is as follows: (1) Nix, Halsell & Co.; (2) Henry Flock; (3) Reid, Murdock & Co.; (4) E. H. Cooke; (5) Dale & Nessly; (6) Armour Packing Com-

pany; (7) Symms Grocery Company; and (8) the Bank of Perry.

"A. G. C. Blerer, Judge."

The Bank of Perry appeals. Judgment affirmed.

Keaton & Cotteral, for plaintiff in error. Selwyn Douglas and MacGregor Douglas, for defendant in error E. H. Cooke. Cunningham & De Bois, for defendant in error Reid, Murdock & Co.

SCOTT, J. The petition in error states nine assignments of error, but in the brief but four are argued and brought to the attention of the court. Without taking up the assignments of error in the order in which they are presented, we will say, at the outset, that, if the Bank of Perry's mortgage is void as to the creditors of Brogan & Jackson and J. E. Jackson, the plaintiff in error cannot complain. Naturally the first question which presents itself is, were the mortgages executed by Brogan & Jackson and J. E. Jackson to the Bank of Perry, in law, void, or given with the intent to hinder, delay, and defraud the creditors of the said Brogan & Jackson and J. E. Jackson? The evidence shows, and the court so finds, "that these mortgages were retained by the bank, and not filed of record until the 20th day of February, 1894, at 4:30 o'clock p. m., for the reason that if said mortgages were so filed they would injure and ruin the commercial credit of J. E. Jackson." The court further finds that: "J. E. Jackson continued to run his mercantile business and buy and sell goods and merchandise in the usual course of trade, after said mortgages were given, the same exactly as before, no notice of any kind being given to any person of said chattel mortgages until the 20th day of February, 1894, the goods being sold from said stock, and new goods bought and placed therein daily, some of the purchases being made during that time from Nix, Halsell & Co. and some from the Armour Packing Company, and during the time from the 10th of February, 1894, to and including the 20th day of February, 1894, before these mortgages were filed for record, more than \$700 worth of goods, and more than the amount of the notes and interest given to the Bank of Perry, was sold from this stock of goods by J. E. Jackson; no account being kept of the same excepting of the amount of the proceeds of such sales, which were deposited by J. E. Jackson in the Bank of Perry, \$465 of such amount being deposited in the Bank of Perry (\$100 of the amount of such sales was retained by J. E. Jackson) and the balance of the proceeds of such sales being expended in the purchase of goods for said store and in running expenses of said store and other expenses of said J. E. Jackson." From this statement, can the Bank of Perry, mortgagee, have a prior and valid lien upon the stock of goods in question, as against the creditors of Jackson who claim by mortgage or attach-

ment lien? This is not a new question, but has been passed upon by nearly every court in the country, and from a very early day in our jurisprudence. Many of the courts have disagreed, and a conflict of authorities has arisen, but the disagreement has arisen principally upon the question whether an instrument allowing the mortgagor to remain in possession and deal with the property as his own is absolutely void upon its face as a matter of law, or whether it is fraudulent per se; the power to sell being only evidence of a fraudulent intention, which should go to the jury along with other questions of fact affecting the transaction. In this case the question was submitted to the court, and a jury waived, and the court found that there was fraud. We are asked to review the judgment of the court upon the facts, and to say that the conclusions of law are correct. In determining this question, we take it that it is unnecessary to enter upon a long discussion of the principles involved, or to quote at length from the authorities. While there has been some difference in many of the courts as to whether such a mortgage as given in this case, not followed by possession of the mortgagee, is absolutely void, or simply a badge of fraud, or whether it is a question for the jury, yet in this case there can be but little doubt. The court found upon the facts that the mortgage was fraudulent, and given for the purpose of hindering and defrauding the creditors of the mortgagors, Junius E. Jackson and John Brogan. Plaintiffs in error cite but one authority to sustain their position,—*Mercantile Co. v. Gardiner* (S. D.) 58 N. W. 557. This case does not seem to be upheld by the weight of authority. In that case, on the 3d day of May, 1892, a mortgage was given on a stock of goods for \$1,950, and on the 6th day of May, 1892, another mortgage was given on said stock for \$1,700. The second mortgage was filed for record on May 24th, and the other on May 23d. From the time of the execution of the mortgages until the attachment the mortgagors were allowed to remain in possession of the stock the same as before the mortgages were given, and sold goods in the ordinary course of trade, and retained the proceeds. The mortgages contained no clause allowing the mortgagors to remain in possession, but the mortgagees allowed them to do so. The supreme court held that the mortgages were good, and that the evidence did not show any fraud. Plaintiffs in error rely upon this case as presenting the law on the subject.

This question has never been definitely settled in this court, and therefore we should with care endeavor to arrive at the proper conclusion in the matter. Courts have disagreed upon the question involved, and there is a great mass of irreconcilable decisions on the subject. It is impossible to harmonize them, and it will be useless for us to try to do so. We will simply try to arrive at a just conclusion in the matter, and have our

opinion supported by the weight of authority and the better reasoning on the subject as we take it.

Chief Justice Bronson, in *Griswold v. Sheldon*, 4 N. Y. 581, early announced the doctrine that a mortgage of the character in question was fraudulent and void. While the decision of the court was not unanimously concurred in, yet since that time the doctrine has been well settled in that state. The chief justice in that case says: "But if the intention to allow Burdick to dispose of the mortgaged property as owner cannot be gathered from the face of the deed, still the goods were left in his possession, and he was in fact allowed to deal with them as owner, and disposed of them, as a merchant, to his customers, from the date of the conveyance down to the time of the levy. Such a transaction the law always has, and I trust always will, pronounce a fraud upon creditors and purchasers."

In *Southard v. Benner*, 72 N. Y. 424, the court, in discussing the subject, say: "Where, at the time of the execution of a chattel mortgage upon a stock of merchandise, it is understood and agreed between the parties that the mortgagor may go on and sell the stock and use the proceeds, generally, in his business, and the agreement is carried out by permitted sales, the transaction is fraudulent in law as against the creditors of the mortgagor." And again in the same decision the learned court use the following language, which expresses the correct doctrine, as we think: "Such an agreement included in and making a part of the written instrument of mortgage would clearly invalidate it as fraudulent in law, as that term is understood; that is, would be conclusive evidence of fraud in fact, and would be so held by the court as a matter of law. This was decided in *Edgell v. Hart*, 9 N. Y. 213. Whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference in principle. Its effect as characterizing the transaction would be the same. The difference in the modes of proving the agreement cannot take the sting out of the fact and render it harmless. If it is satisfactorily established, the result upon the security must be the same. It is the fact that such an agreement has been made and acted upon that in law condemns the security, and not the fact that it is proved by the instrument of security, instead of by parol or in some other way."

In *Potts v. Hart*, 99 N. Y. 168, 1 N. E. 605, the court use the following language: "A chattel mortgage is fraudulent and void as to creditors where it was given with the tacit or express understanding and arrangement that the mortgagee may sell and dispose of the mortgaged property, and apply the avails to his own use. Such an agreement may be inferred from the fact that the mortgagor does, with the knowledge and assent of the mortgagee, so sell and dispose of the prop-

erty, and apply the avails." In the same case the court, after discussing the proposition as to allowing the mortgagor to remain in possession, and sell and apply the proceeds to his own use, say: "The parties to a mortgage cannot thus play fast and loose with the mortgaged property, and thus hinder and delay creditors."

Chief Justice Ryan of Wisconsin, one of the ablest judges that court ever had, in the case of *Blakeslee v. Rossman*, 43 Wis. 124, in reviewing this same question, except that the mortgagor was allowed to retain one-half of the proceeds of the sale for his own use, and apply the other half to the payment of the mortgage debt, says: "But we prefer to rest our judgment on the ground first stated. The license given to the mortgagor to retain half the proceeds and use them at his pleasure makes the written contract of the parties fraudulent and void in law as against creditors; absolutely void as to them, beyond all aid from extrinsic facts. Parol evidence can make it neither better nor worse. Intent does not enter into the question. Fraud in fact goes to avoid an instrument otherwise valid. But intent, bona fide or mala fide, is immaterial to an instrument per se fraudulent and void in law. The fraud which the law imputes to it is conclusive. So a fraudulent agreement of parties by parol goes as fraud in fact to impeach a written instrument valid on its face. Fraud in fact imputed to a contract is a question of evidence, not fraud in law. And no agreement of the parties in parol can aid a written instrument fraudulent and void in law. *Wood v. Lowry*, 17 Wend. 492; *Edgell v. Hart*, 9 N. Y. 213; *Robinson v. Elliott*, 22 Wall. 513."

It was said by the supreme court of Ohio, as early as 1847, in the case of *McElroy v. Myers*, 16 Ohio, 547: "A mortgage upon a specific article, with possession and power of disposition left in the mortgagor, is, in truth, no mortgage at all. It is no certain lien. The power to hold possession and dispose of the property is inconsistent with the very nature of a mortgage. It, indeed, would not, perhaps, be going too far to say that such an instrument was a nullity. It is the next thing to a sale of a horse with possession and power of disposition retained to the vendor. Except in the case of a mortgage, it would be contended that a time might happen when the mortgagee could assert possession; but, before condition broken and possession taken, it would be hard to discover any difference. * * * As to all the world except as to the parties themselves, such a mortgage will be held void as against the policy of the law." It was further said in the case just cited that there was no specific lien, but a floating mortgage, which attaches, swells, and contracts, as the stock in trade changes, increases, and diminishes.

It was held by the supreme court of Kansas, in the case of *Leser v. Glaser*, 4 Pac. 1030, 32 Kan. 546, after quoting the following

remarks by James O. Pierce in 17 Am. Law Rev. 350 et seq.: "All cases in which a power of sale of the goods by the mortgagor is provided for are, therefore, to be tested by the question whether such sales are to be made in his own behalf, and at his own discretion, and with control of the proceeds reserved to him, or whether they are to be made solely in pursuance of the trust as a real one; that is, for the benefit of the grantee or mortgagee, and with provision that the proceeds shall be applied on his debt." The supreme court, following, say: "We think there is much reason for the distinction made by Mr. Pierce. The first class of mortgages mentioned by him ought generally to be held void, while the other class of mortgages ought generally to be held valid."

It was held by the supreme court of New Mexico, in the case of *Speigelberg v. Hersch*, 4 Pac. 705, 3 N. M. 185: "Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell their goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and, where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. * * * That this fraudulent transaction should be carried on under the forms of law is simply a scandal to an honorable profession. The law gives no sanction to such arrangements, and will hold them void as against creditors, as tending to encourage and sustain frauds, and to hinder creditors in the collection of their just demands."

In the case of *Brasher v. Christophe*, 10 Colo. 284, 15 Pac. 403, where the same question was under discussion, the court say: "Whatever the motives of the parties to such a transaction may be, viewed as a moral question in the business of everyday life, its effects are injurious, and in law and equity such agreements are fraudulent per se as against creditors and subsequent incumbancers."

This question has had the careful consideration of the supreme court of the United States, in the case of *Robinson v. Elliott*, 22 Wall. 513, and it was held by the full bench, unanimously, that where a mortgagor was allowed to retain the possession of a stock of goods, with the power to sell and dispose of the mortgaged property and apply the proceeds to his own use, the mortgage was absolutely void. The opinion of the court was delivered by Justice Davis, and in commenting upon the question he uses the following language: "But the creditor must take care, in making his contract, that it does not

contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract. These principles are not disputed, but the courts of the country are not agreed in their application to mortgages with somewhat analogous provisions to the one under consideration. The cases cannot be reconciled by any process of reasoning, or on any principle of law. As the question has never before been presented to this court, we are at liberty to adopt that rule on the subject which seems to us the safest and wisest. * * * Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and, where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. The views we have taken of this case harmonize with the English common-law doctrine, and are sustained by a number of American decisions."

The courts of Colorado, Illinois, Mississippi, Nevada, Oregon, Tennessee, Texas, Virginia, Washington, West Virginia, Ohio, Wisconsin, New York, New Mexico, Minnesota, Missouri, Pennsylvania, Arkansas, the District of Columbia, and the United States supreme court, as well as others, have held that where a mortgagor is allowed to retain the possession of the mortgaged property, with an agreement to sell the same and apply the proceeds to his own use, it is absolutely void as against creditors. This doctrine we believe to be the sound reasoning of the subject, supported by the great weight of authority, and should be announced as the law of this court. Among the cases which hold to this doctrine are the following: *Bank v. Goodrich*, 3 Colo. 139; *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. 966; *Brasher v. Christophe*, 10 Colo. 284, 15 Pac. 403; *Wilson v. Voight*, 9 Colo. 614, 13 Pac. 726; *Greenbaum v. Wheeler*, 90 Ill. 296; *Dunning v. Mead*, Id. 376; *Goodheart v. Johnson*, 88 Ill. 58; *Simmons v. Jenkins*, 76 Ill. 479; *Joseph v. Levi*, 58 Miss. 843; *Harman v. Hoskins*, 56 Miss. 142; *In re Morrill*, 2 Sawy. 356, Fed. Cas. No. 9,821; *Jacobs v. Ervin*, 9 Or. 52; *Bremer v. Fleckenstein*, Id.

266; *Catlin v. Currier*, 1 Sawy. 7, Fed. Cas. No. 2,518; *Bank v. Haselton*, 15 Lea, 216; *McCrasly v. Hasslock*, 4 Baxt. 1; *Bank v. Ebbert*, 9 Helsk. 153; *Bank v. Lovenberg*, 63 Tex. 506; *Wray v. Davenport*, 79 Va. 19; *Perry v. Bank*, 27 Grat. 755; *Lang v. Lee*, 3 Rand. (Va.) 410; *Wineburgh v. Schaer*, 2 Wash. T. 328, 5 Pac. 299; *Fox v. Davidson*, 1 Mackey, 102; *Gauss v. Doyle*, 46 Ark. 122; *Gauss v. Orr*, Id. 129; *Lund v. Fletcher*, 39 Ark. 325; *Potts v. Hart*, 99 N. Y. 168, 1 N. E. 605; *Brackett v. Harvey*, 91 N. Y. 214; *Southard v. Benner*, 72 N. Y. 424; *Griswold v. Sheldon*, 4 N. Y. 581; *Collins v. Myers*, 16 Ohio, 547; *Blakeslee v. Rossman*, 43 Wis. 116; *Stelnart v. Duester*, 23 Wis. 136; *Place v. Langworthy*, 13 Wis. 629; *Leser v. Glaser*, 4 Pac. 1030, 32 Kan. 546; *Pierce, Mortg.*; *Spiegelberg v. Hersch*, 4 Pac. 705, 3 N. M. 185; *Robinson v. Elliott*, 22 Wall. 512; *Twyne's Case*, 3 Coke, 80; 1 Smith, Lead. Cas. p. 1; *Freeman v. Rawson*, 5 Ohio St. 1; *Harman v. Abbey*, 7 Ohio St. 218; *Ball v. Slafter*, 26 Hun, 353; *Putnam v. Osgood*, 52 N. H. 148; *Horton v. Williams*, 21 Minn. 187; *Walter v. Wimer*, 24 Mo. 63; *Stanley v. Bunce*, 27 Mo. 269; *White v. Graves*, 68 Mo. 218; *Welsh v. Biley*, 1 Pen. & W. 57; *Hower v. Geesaman*, 17 Serg. & R. 251; *Williams v. Lord*, 75 Va. 390; *Mann v. Flower*, 25 Minn. 500.

There is no question from the evidence but what, at the time of the execution of the mortgages in question, there was an agreement and understanding between the mortgagor and mortgagee that the mortgages were not to be placed of record for some time; that, as a matter of fact, they were not placed of record for 10 days after their execution; that there was a tacit understanding or agreement that the mortgagor should carry on the business in the usual way; that he sold goods and bought others, paid debts, and applied the proceeds arising from the sales to his own use. The evidence shows that the average sales per day were over \$100, and sufficient was realized from the stock of goods, after the mortgages were executed and before they were placed of record and possession taken, to have paid the entire debt of the mortgagee. The mortgages were placed of record at 4:30 o'clock on the 20th day of February, and the first attachment was levied, as shown by the sheriff's return, at 4:28 o'clock p. m. on the 20th day of February, 1895, and the other attachments followed closely thereafter. Under this statement of facts we are asked to hold that the court erred in finding that the mortgages executed to the Bank of Perry were fraudulent and void. It may be contended that the mortgage does not show upon its face sufficient facts to warrant a court in holding that the mortgage is fraudulent and void; but, even conceding this, the facts allude clearly bring it within the rule, and the court would have erred had it not held the mortgage to have been so. It seems that this case comes

clearly within the rule as laid down by the authorities cited, and that it cannot meet the test. The mortgagor undoubtedly was allowed to retain possession of the stock of goods, carry on his business in the usual course of trade, and apply the proceeds to his own use. We believe that the better rule is that such a mortgage should be held as absolutely void as to creditors. We do not think that when such a state of facts presents itself it becomes a question of fact as to fraud, but that it is a question of law. Being a question of law, we cannot say that the court erred in holding the mortgages void.

Neither is it apparent that plaintiff in error ever gained lawful possession under its mortgages. The finding of fact by the court upon this question is clearly supported by the evidence, and possession thus gained can avail nothing under the law. This being true, a discussion of the effect of a lawful possession need not be had.

The other questions raised by counsel are immaterial under this holding of the court, and, if well taken, could avail them nothing. The judgment of the court below will be affirmed. It is so ordered. All the justices concurring.

BIERER, J., having presided below, not sitting.

GUTHRIE DAILY LEADER v. CAMERON, Territorial Auditor.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

WHO ARE PUBLIC OFFICERS—STATE PRINTER—
CONSTITUTIONAL LAW—SPECIAL PRIVILEGES
—MANDAMUS TO TERRITORIAL AUDITOR.

1. A public office is the right, authority, and duty created and conferred by law, by which, for a given period, either fixed by law, or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, either executive, legislative, or judicial, to be exercised for the benefit of the public; and unless the powers conferred are of this nature the individual is not a public officer.

2. Section 25 of the appropriation act of 1895 (page 47, Sess. Laws) does not create the office of public printer, and does not delegate any of the sovereign functions of the territory to the State Capital Printing Company.

3. The act of congress approved July 30, 1886 (24 Stat. 170), prohibits the territorial legislature from passing any special law granting to any corporation or individual or association any special or exclusive privilege, immunity, or franchise whatever.

4. A privilege is a particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantage to other citizens.

5. A statute relating to persons or things as a class is a general law. One relating to particular persons or things of a class is special. The number of persons upon whom the law shall have any direct effect may be very few, by reason of the subject to which it relates, but it must operate equally and uniformly upon all brought within the relations and circumstances for which it provides.

6. A statute, in order to avoid a conflict

with the prohibition against special legislation, must be general in its application to a class, and all of the class within like circumstances must come within its operations. If it is limited in its application to one person or thing, and is enacted for one purpose and for one person, it then becomes special in its subject-matter and operation, and is void.

7. Section 25 of the appropriation act of 1895 is a special act conferring a special privilege upon the State Capital Printing Company, and is void for conflict with the congressional inhibition. The act imposes a duty upon the officers of the territory, and imposes no duty or obligation upon the State Capital Printing Company, but confers a privilege, which the company may accept or reject, at its option, without incurring any liability for a refusal to perform any work required by the act.

8. The return of the auditor fails to show any valid reason for a failure to audit the accounts of the petitioners, and the peremptory writ should issue.

(Syllabus by the Court.)

Application by the Guthrie Daily Leader for a writ of mandamus against E. D. Cameron, territorial auditor. Writ granted.

John F. Stone, for plaintiff. C. A. Galbraith, Atty. Gen., for defendant.

BURFORD, J. This is an original application for writ of mandamus. The Guthrie Daily Leader, a copartnership, filed their petition with the chief justice, in which they allege that on May 14, 1895, the clerk of the supreme court ordered for the use of said court 200 bar dockets, which they printed, bound, published, and delivered, and which were of the value of \$78; that on the 14th day of March, 1895, the secretary of the territory ordered from them 1 six-quire insurance record, which they manufactured and delivered to said secretary, and which was of the value of \$16; that statements of the amounts due upon said contracts for said materials furnished and printing and binding so done, duly approved by the clerk and secretary, respectively, and duly certified, were filed with E. D. Cameron, territorial auditor, and said auditor was requested to audit and allow said accounts, and draw his warrants on the territorial treasurer for said amounts, which said auditor refused to do. An alternative writ was allowed by the chief justice, returnable before the supreme court. The auditor made his return, in which he shows that by the provisions of section 25, c. 4, Sess. Laws 1895, all printing and binding done, and stationery required, shall be done and furnished by the State Capital Printing Company, and that said clerk and secretary had no authority to contract with the Daily Leader for said work, and that he had no authority to draw a warrant for such supplies in favor of any other person than the State Capital Printing Company. To this return the petitioners demurred on the ground that said return does not state facts sufficient to constitute an answer to the alternative writ.

This presents the question of the validity of the section of the appropriation act re-

ferred to by the return. Section 25 of the act making appropriations for current expenses for the territory of Oklahoma for the year 1895 (Sess. Laws, p. 47), reads as follows: "Sec. 25. All printing, binding, stereotyping and stationery of whatever character, which is paid out of the territorial treasury, the treasurer of the board of regents of any territorial institution or from the territorial school land fund, shall be done and furnished by the State Capital Printing Company of Guthrie, Oklahoma, and every territorial officer, having work of this nature to be done, or stationery to purchase, shall furnish the copy to and have the same done and furnished by the State Capital Printing Company, and such printing shall be paid for at the price established by the government of the United States through the printed instructions of the secretary of the interior to the secretary of the territory for territorial printing, unless the price is otherwise established by the territorial statutes. All proclamations and notices issued by the governor and other territorial officers to be paid for out of the territorial treasury, the treasury of the board of regents of any territorial institution, or the territorial school land fund, shall be published in the Daily and Weekly Oklahoma State Capital of Guthrie, Oklahoma, and paid for as provided by the statutes of Oklahoma for legal publications, said publications to be made in both daily and weekly editions of said paper at the same price as though published in the daily edition only. All acts and parts of acts in conflict with this section of this act are hereby repealed." If this act is valid, the return is sufficient. If it is invalid, then the peremptory writ should issue. The petitioners contend that the act either creates the office of public printer, and takes from the executive the right to fill the office by appointment, or that it grants a special privilege, and is void for conflict with the act of congress limiting the powers of territorial legislatures.

We will consider these questions in the order they are presented in the briefs; and, first, does section 25 create an office? The position of public printer may or may not be an office. The name does not necessarily imply an office, and, if it is such, it is clearly a creation of statute. In some of the states such position is denominated an "office," and its incumbent an "officer," while in others it is an employment, or the public printing and furnishing of stationery is supplied under contract, and there is no general rule on the subject. Each particular case must be determined by the law governing it. Ordinarily, such agencies are not classed as offices, unless so declared by the legislature, yet it is true that if such a position embraces all the elements of a public office the person filling the same will be treated as a public officer, whether the legislature calls him an officer or not. Mechem, in his valuable work

on Public Officers (section 1), defines a "public office" as follows: "A public office is the right, authority, and duty created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised for the benefit of the public. The individual so invested is a public officer." And this definition is supported by an abundant weight of authority. The same author, in section 4, in stating the difference between an office and an employment, says: "The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer." In *U. S. v. Hartwell*, 6 Wall. 385, Mr. Justice Swayne said: "An office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." Mr. Justice Grier, in *Sheboygan Co. v. Parker*, 3 Wall. 94, said: "An officer of the county is one by whom the county performs its political functions,—its functions of government." That profound jurist and eminent author, Judge Cooley, in the case of *Throop v. Langdon*, 40 Mich. 673, defines an "office" thus: "An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual, who for the time will be the officer. The officer is distinguished from the employé in the greater importance, dignity, and independence of his position; in being required to take an official oath, and, perhaps, to give an official bond; in the liability to be called to account, as a public offender, for misfeasance or nonfeasance in office; and usually, though not necessarily, in the tenure of his position. In particular cases other distinctions will appear which are not general." The celebrated expounder of American jurisprudence, Chief Justice Marshall, while on the circuit, in the case of *U. S. v. Maurice*, 2 Brock. 103, Fed. Cas. No. 15,747, said: "Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who

enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer." In the case of *Bunn v. People*, 45 Ill. 403, Chief Justice Breese, speaking for the court, said: "The term 'office' implies a delegation of some portion of the sovereign power to, and a possession of it by the person filling the office, and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still, it is a legal power, which may be rightfully exercised, and, in its effects, will bind the rights of others, and be subject to revisions and corrections only according to the standing laws of the state." In the Opinion of the Judges to the Governor (3 Greenl. 481), the supreme court of Maine said: "There is a manifest difference between an office and an employment under the government. We apprehend that the term 'office' implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still, it is a legal power, which may be rightfully exercised, and, in its effects, it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment, merely, has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act of law. And, if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the execution of any standing laws, which are considered as rules of action and the guardians of rights." Mr. High, in his work on *Extraordinary Remedies* (section 620), says: "An office admitting of the remedy of *quo warranto* is a public position, to which a portion of the sovereignty of the country, either legislative, judicial, or executive, attaches for the time being." In *Olmstead v. Mayor, etc.*, 42 N. Y. Super. Ct. 481, the court held that one who receives no certificate of election or appointment, takes no oath of office, has no tenure or term of office, discharges no duties and exercises no powers depending directly on authority of law, but simply performs such duties as are required of him by public officers, and whose responsibility is limited to them, is not an

officer, and does not hold an office, although he is employed by public officers, and is engaged about public work. In the state of North Carolina the office of public printer was created. Afterwards, the legislature abolished the office, and directed that the joint committee on printing of the two houses of the general assembly make a contract for the public printing on behalf of the state. It was contended that the act was void, upon the ground that the legislature had no power to make contracts, it being an executive function. In the case of *Brown v. Turner*, 70 N. C. 99, the supreme court of that state said: "As was said of the word 'contract,' we say that there is no magic in the word 'office.' When the legislature created and called it an 'office,' it was an office, not because the peculiar duties of the place constituted it such, but because the creative will of the lawmaking power impressed that stamp upon it. Therefore, when that stamp was effaced by the repealing act of 1869-70, it shrank to the level of an undefined duty. The authority that vested these duties with the name and dignity of a 'public office' afterwards divested them of that name and authority. There being now no law of the land declaring it to be a public office, our next inquiry is, do the duties of public printer constitute it an office? The place is really *sui generis*, and therefore ordinary criteria by which we distinguish and classify public offices cannot aid us to a conclusion here. It occupies that neutral ground where it may 'shade into' a legislative or executive function without disturbing the harmony of either. It comes within the definition of a 'public office' because its duties relate to the public, and are prescribed by public law; but so may the duties of a contractor or workman upon a public building. It seems not to be an office, because all the duties of public printer, as prescribed by law, are mechanical only,—as much so as those of a carpenter or brickmason,—calling for neither judgment nor discretion, in a legal sense, and which may be performed by employes, men, women, or children, in or out of the state; and, on his death, every unfinished duty of the printer can and must be, under existing law, completed by his personal representative. If it is an office, there is no law prescribing the term of duration of it, and it may be held for life as well as a term of years, which puts it out of harmony with the whole spirit and genius of our political institutions,—a conclusion which can be forced upon us only on the most evident necessity."

Tested by the foregoing rules, it is clear that the act in question does not create a public office. The legislature has not designated the place an "office." No oath or bond is required. No term of duration is fixed. No certificate of appointment or commission is provided for. No qualifications are prescribed, and none of the sovereign functions

of the government are delegated. Certainly, it cannot be said that in doing the mechanical work of manufacturing a blank book, printing a notice, order, or proclamation, or supplying blanks, stationery, and letterheads for the territorial officers, or a docket for the supreme court, any of the sovereign functions of government are being exercised; and, unless such powers are conferred or exercised, the individual performing the duties is not a public officer.

A public officer is required by law to perform the duties pertaining to his office, and for a refusal to perform such duties he may be removed from office. Under the provisions of section 25 of the appropriation act, the State Capital Printing Company is under no obligations to perform any of the labors or supply any of the materials prescribed in said section. It is purely optional with said corporation whether it accepts any of the work, or not; and there is no liability, criminal or civil, for a refusal to supply or furnish any of the articles which it is given the privilege of supplying. A duty is imposed upon the several territorial officers to furnish the copy and give orders to the State Capital Printing Company for public supplies; and the privilege of doing the work, filling the orders, and furnishing the supplies is conferred upon the State Capital Printing Company. The acceptance of these orders becomes an employment, and creates a contract, in each instance, between the State Capital Printing Company and the territory. While the officer requiring the work or stationery is directed to apply to the State Capital Printing Company for the same, the company may accept that which is profitable, and refuse that which is unprofitable, at its pleasure. Hence, it seems to us, the act imposes a duty upon one party, and confers a privilege upon the other. Evidently, this act does not create a public office, and there is no such office as public printer, in this territory.

The next question presented for our consideration is, do the provisions of section 25 conflict with the limitation imposed by the act of congress approved July 30, 1886 (24 Stat. 170)? Said act is entitled, "An act to prohibit the passage of local or special laws in the territories of the United States; to limit territorial indebtedness, and for other purposes." So much of the act as relates to the question before us is as follows: "The legislatures of the territories of the United States now or hereafter to be organized, shall not pass local or special laws in any of the following enumerated cases, that is to say, granting to any corporation or individual or association any special or exclusive privilege, immunity or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted in any of the territories of the United States by the territorial legislatures thereof." Counsel upon both sides, in the

case at bar, have supplied us with voluminous briefs, which display a vast amount of research, but do not evidence a very clear discrimination in the citation of authorities. Many of the cases cited deal with constitutional provisions and limitations, which, while somewhat similar to those of the act of congress referred to, are sufficiently dissimilar to render the authorities useless as precedents in the case before us. In a number of the cases cited the constitutional provisions prohibit the enactment of special or local laws, in certain enumerated cases, where a general law can be made applicable. Under a provision of this character, the courts have almost invariably held that the power to determine whether or not a general law could be made applicable to a given subject-matter was a legislative, and not a judicial, one, and when the legislature has exercised its prerogative the courts will not interfere. In other cases the constitutional provision is that all laws shall be general, and operate throughout the state, upon all persons or subjects alike. Many of the cases cited relate solely to police regulations of the government, wherein the legislative power is supreme, and are not applicable to the question presented in this case. We have examined all the cases cited by counsel, but it is not our purpose to review them here. It will be observed that the act of congress supra specifically provides that no special law shall be passed by the legislature of the territory, granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever, and in all other cases, except the ones enumerated in the act, no special law shall be enacted where a general law can be made applicable. This limitation amounts to an absolute prohibition on the legislature's enacting any special law in reference to the subjects enumerated. It was conceded in the argument that the State Capital Printing Company is a corporation, and it must be conceded that the legislature has no power to pass any special law granting to such corporation any special or exclusive privilege. Does section 25 confer a privilege? It confers upon the State Capital Printing Company the right to do and furnish all the printing, binding, stereotyping, and stationery, of whatever character, which is paid for out of the territorial treasury, the treasury of the board of regents of any territorial institution, or from the territorial school fund. And any territorial officer having work of this kind to be done is required to furnish the copy to and have the work done by said State Capital Printing Company. This is an exclusive right, because the grant carries with it the right to all the work of the character therein named. No other person or corporation can share this privilege, or enjoy an equal privilege; nor can the legislature confer equal rights upon other persons or corporations, because the

entire privilege is granted to the former corporation, and there is no residue for distribution, nor can a like privilege be conferred upon similar corporations for the same reasons. The right to furnish all the printing, binding, stereotyping, and stationery for all of the territorial officers, the boards of regents of the public institutions, the school-land board, and the supreme court, including publication of the court reports, is not only a special privilege, but is a valuable privilege, and ought, upon sound business principles of economy and right, to be let to the lowest competitive bidder, under the supervision and control of some bonded officer or board. A privilege is "a particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantage of other citizens." Black, Law Dict. 941. A special privilege, in constitutional law, is "a right, power, franchise, immunity, or privilege granted to or vested in a person, or class of persons, to the exclusion of others, and in derogation of common right." Id. 1113. "The state, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discriminations against persons or classes are still more so; and, as a rule of construction, it is to be presumed they were probably not contemplated or designed." Cooley, Const. Lim. p. 485. Anderson, in his Law Dictionary, defines special or exclusive privilege to be "any particular or individual authority or exemption existing in a person or class of persons, and in derogation of common right; as the grant of a monopoly." A monopoly is an exclusive privilege not enjoyed by others, and we think the grant to the State Capital Printing Company comes within all the terms of the above definitions, and that section 25 of the appropriation act does grant a special and exclusive privilege to a corporation.

The next question for consideration is whether or not such privilege is granted by a special law, as contemplated in the act of congress of July 30, 1886. "A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special." Suth. St. Const. § 121; Wheeler v. Philadelphia, 77 Pa. St. 338. "The number of persons upon whom the law shall have any direct effect may be very few, by reason of the subject to which it relates, but it must operate equally and uniformly upon all brought within the relations and circumstances for which it provides." Suth. St. Const. § 124. In McAunich v. Railroad Co., 20 Iowa, 338, the Iowa supreme court defined the distinction between general and special laws thus: "These laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the law. They are general and uniform

in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." Special laws are those made for individual cases, and for less than a class. Laws are general if they apply to a class, though the class may be very limited, or even where there is but one of the class; but the law must be general in its application, and embrace all of the given class, and not be specific in its application, to a particular person or thing. The supreme court of Minnesota, in State v. Cooley, 58 N. W. 150, said: "Another proposition that may be laid down as beyond question is that, if the basis of classification is valid, it is wholly immaterial how many or how few members there are in the class. One may constitute a class, as well as a thousand, although, of course, the fewer the members the closer the courts will scrutinize the act to see that it is not an evasion of the constitution." Mr. Sutherland, in his valuable work, further says: "Within certain limits, subjects may be grouped on the basis of such differences for general legislation. Beyond those limits, such differences would not be the basis of classification, but the ground of segregation, by which each individual would be distinguished for special enactment. The prohibition is in the way of legislation for individual cases. It is equally fatal to such legislation, though it be general in form. If a statute is plainly intended for a particular case, and looks to no broader application in the future, it is special or local, and, if such laws are prohibited on the subject to which it relates, is unconstitutional." Suth. St. Const. § 129. This question was quite extensively and ably treated by the supreme court of New Jersey in the case of Rutgers v. City of New Brunswick, 42 N. J. Law, 53. The court said: "In the strictest sense, special or local laws would comprise all such laws as are confined in their application to a limited number of localities or subjects, and a general law be one universal in its application. In this sense, acts of the legislature relating to a particular kind of private corporations, or to a particular class of municipalities, would fall within the prohibition of the constitutional interdiction, as being special or local, however general they might be in their application within the scope of the purpose of such legislation. But this is not the signification given to their terms by this court in the case of Van Riper v. Parsons, 40 N. J. Law, 1, 123. When the case was first before this court, it was held that, within the sense of these prohibitory clauses, a general law, as contradistinguished from one special or local, is a law that embraces a class of subjects or places, and does not omit any subject or place naturally belonging to such class. The second time that case passed under judicial examination in this court, the holding was that a law framed

in general terms, restricted to no locality, and operating equally upon all of a group of objects, which, having regard to the purpose of the legislature, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law, without regard to the consideration that, within this state, there happens to be but one individual of the class, or one place where it produces effects." It is further said by Mr. Sutherland: "A law may be general in its terms, and apply to a class constituted by having characteristics which make it a class, and yet be an illusory classification, which will not warrant legislation confined to it, where special or local legislation is prohibited. The grouping must be founded on peculiarities requiring legislation, and legislation which, by reason of the absence of such peculiarities, is not necessary or applicable outside of that class. In other words, the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which will thus serve as a basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for and justify the restriction of the legislation. Distinctions which do not arise from substantial differences, so marked as to call for separate legislation, constitute no ground for supporting such legislation as general." Suth. St. Const. §§ 127, 128.

These authorities fully establish the doctrine that a law, in order to avoid a conflict with the prohibition against special legislation, must be general in its application to a class, and all of the class within like circumstances must come within its operations. The law under consideration does not have this effect. It is limited in its application to the State Capital Printing Company, and is thus special in its subject-matter and its operation. It is a law enacted for a particular purpose, and for a particular person, and does not operate alike upon all of a class. The authorities cited which hold that a law is general if it applies to all of a class, although there is but one of the class, do not apply to a statute like the one under consideration. In those cases the legislature did not attempt to name the beneficiary of the act, but the law was general in its terms, and it happened that there was but one of the class that came within its general provisions. If

the legislature had provided that all the public printing and binding should be done by a corporation equipped with a bindery, printing presses, and lithographing department, and the State Capital Printing Company had been the only institution of this class, it would then be entitled to the contract or employment, and the law would not be subject to the objection now made. Or if the law had granted this privilege to any other classification, without making it exclusively applicable to some particular person or corporation, it would withstand such assault, under the authorities quoted. In our judgment, the statute in question comes directly within the prohibition imposed by the act of July 30, 1886, and is therefore void.

We have given consideration to the argument of counsel for the respondent, that the terms "privileges, immunities, or franchises" must be treated collectively, and that, before a law can be held invalid, it must violate all embraced in said collective terms. But we cannot assent to this proposition. It would destroy much of the force of the statute, and defeat some of the most evident purposes of congress. Our conclusion is that section 25 is a special law, granting a special and exclusive privilege to the State Capital Printing Company, and is invalid.

It has been contended at some length that the court should refuse jurisdiction in this case, for the reason that the State Capital Printing Company is not made a party. This contention would have considerable weight, were it not for the fact that the only question presented is one of law, and, while the State Capital Printing Company is interested in having the law properly determined, there is nothing in the case that affects adversely their substantial rights, and nothing that can bind such corporation.

It is not denied that the petitioners performed the work for which they are demanding pay, and that the officers of the territory received and accepted the articles mentioned in the writ. The only objection the auditor makes to allowing and auditing the account is that the law in question makes it his duty to audit accounts for such purposes only in favor of the State Capital Printing Company, and when this law fails the petitioners are entitled to have the accounts audited and paid. The demurrer to the return is sustained, and peremptory writ ordered to issue. There is no question raised as to the practice in this case, or objection made that a demurrer is not the proper mode of raising the questions discussed; and we do not determine the question of practice, but treat the case on the theory on which it is presented.

DALE, C. J., and SCOTT, BIERER, and McATEE, JJ., concurring.

ATCHISON, T. & S. F. R. CO. v. JOHNSON.
(Supreme Court of Oklahoma. Sept. 7, 1895.)

TRIAL—SPECIAL FINDINGS—INSTRUCTIONS TO JURY—INDEFINITE ANSWERS—CARRIERS—INJURIES TO TRESPASSERS—CONTRIBUTORY NEGLIGENCE.

1. Under the Code of Civil Procedure (St. Okl. 1890, par. 4574), which provides that "the court in all cases when requested by either party, shall instruct them, if they render a general verdict, to find specially upon material questions of fact, to be plainly stated in writing," it is not error to refuse an instruction which, upon the submission of special questions for the jury, instructs them that "it is your duty to answer each of said questions fairly as you shall find the truth to be under the evidence, without regard to your general verdict." The provision of the statute is that the jury shall make special findings only upon condition that they return a general verdict, and it shall be error to instruct them to make such findings without regard to such general verdict.

2. If the record discloses that special interrogatories have been submitted to the jury, and that they have been returned into court by the jury in connection with their general verdict, at the request of the defendant, and that "the court submitted said certain special questions of fact for the jury to answer and return," such statements made in the record will be sufficient to show that special interrogatories were in fact submitted and answered by the jury, as provided by the statute, notwithstanding that no express and written instruction from the court to the jury to that effect appears in the record.

3. If the jury returns evasive or equivocal answers to some of the special interrogatories proposed, and a motion is made to the court to remand the jury and require them to return definite answers to such interrogatories, and the motion is refused, and the party to the cause making such motion is not damaged by such evasive or equivocal answers, such refusal of the court to remand and direct the jury is not reversible error.

4. If the jury, in making a return to special interrogatories in connection with the general verdict, returns evasive, equivocal, or uncertain answers, not stating the result of the evidence, either in the affirmative or in the negative, upon the point, it is simply a finding that adequate proof has not been produced at the trial of the existence of the fact upon which the question has been proposed, and that it is not made out by proof, and is equivalent to a finding against the party holding the affirmative upon such facts.

5. A person who gets upon the freight train of a railroad company without the knowledge of the conductor, and, under the direction of a brakeman of the train, places himself in a box car, making a payment, and accepting such direction from the brakeman, does not contract with the railroad company for his passage. He is not a passenger, but a trespasser. He is not entitled at the hands of the railroad company to that high degree of care to which a passenger is entitled, but only to the right to be exempt from wanton and willful injury at the hands of the company.

6. The caboose of a freight train is the proper place to which persons must go, and take their places, who intend to become passengers upon the train. A box car is the place of increased danger, and if one seeks to be a passenger, and voluntarily places himself in such a car, he will be guilty of such contributory negligence as will preclude recovery against the company for an injury while occupying such a position.

7. If one who undertakes to be a passenger upon a freight train voluntarily places himself in a box car, leaves his place back in the car, and goes to the open door of the car, while the

train is in motion, and is by sudden shock of the train thrown from the door and injured, he is guilty of such contributory negligence as will preclude recovery from the railroad company.

8. In a case in which the plaintiff takes passage upon a freight train of defendant, which has a caboose attached, and goes into the box car upon the train, which is not provided by the company for the accommodation of passengers; and the plaintiff was not allowed to take passage upon such train under the rules of the company, and his presence on the freight train was unknown to the conductor, engineer, or fireman, but was known to a brakeman, to whom the plaintiff gave a dollar for his ride, which was less than the regular fare; and the brakeman had no authority to collect the dollar from the plaintiff, and the plaintiff knew that the train on which he took passage was not a passenger train, and that the car in which he took passage was not provided by the company for carrying passengers; and the plaintiff was thrown from the car, by the stopping of the train, while he was leaning from the door of the car, and would not have been injured if he had remained back in the car until the train stopped; and these facts were all found by the jury, upon special interrogatories proposed by the defendant, in connection with the general verdict for the plaintiff for damages in his behalf; and the defendant thereupon filed his motion for judgment on the answers of the jury to the special questions,—it was error in the court to overrule such motion, and the ruling of the court should have been for judgment in favor of the defendant upon such special findings of fact.

(Syllabus by the Court.)

Error to district court, Logan county.

Action by John R. Johnson against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Henry E. Asp, John W. Shattell, and J. R. Cottingham, for plaintiff in error. Keaton & Cotteral and E. Turner, for defendant in error.

McATEE, J. On the 11th day of August, 1891, the defendant in error, as plaintiff, filed his complaint in the district court for Logan county to recover damages for personal injuries received by him at Guthrie, Okl., while riding from Purcell, I. T., to Guthrie, in a box car in one of defendant's freight trains. Plaintiff claimed in his petition that he was a passenger, and that he was jerked and thrown from the car in question by reason of the negligence of the defendant's servants. The defendant pleaded by a general denial and by the allegation that the plaintiff was not a passenger, but was a trespasser on the train, and that the injuries were received in consequence of his own negligence in jumping from the train while it was in motion. To the answer of the defendant the plaintiff replied, denying generally the allegations of the answer, and setting up a specific denial of the matters set up in the answer as a defense. The case was tried on the 26th and 27th days of October, 1893, and resulted in a verdict for the plaintiff for the sum of \$5,000.

It was alleged by the plaintiff that on the

3d day of February, 1891, at about 8 o'clock p. m., the defendant, in consideration of the sum of one dollar, then and there paid to its agent, a brakeman on one of its freight trains, by the plaintiff, undertook and agreed, as a common carrier, to transport and convey the plaintiff from the town or village of Purcell to the town or village of Guthrie, as a passenger, and the plaintiff, being so directed by one of the agents of the defendant, thereupon entered one of its freight cars, to be conveyed from the town or village of Purcell to the town or village of Guthrie; that while being so conveyed in said freight car the plaintiff saw the conductor of the freight train to which the freight car was attached, and that said conductor was fully cognizant of the fact that plaintiff and other persons were being conveyed on said train, and also that plaintiff and "many other persons had upon various occasions been transported upon defendant's freight train by and with the consent of, and by paying fare to, the conductor thereof." It was further alleged that the plaintiff, while he was such passenger, at the town or village of Guthrie, and without negligence or fault on his part, but while he was standing in or near the door of said freight car, preparatory to getting off the same, was, through the unskillfulness, carelessness, negligence, and fault of defendant and its agents in causing the said train to greatly slacken its rate of speed, and then to suddenly start forward at a much more rapid rate, without allowing him sufficient time to safely get off, thrown from said car and run over by a portion of said train. With their special verdict the jury returned into court special findings as follows: "Q. 1. When was the plaintiff injured? A. February 3, 1891. Q. 2. Was the train upon which plaintiff took passage from Purcell to Guthrie a freight train or a passenger train? A. Freight train. Q. 3. If you answer question two that the train was a freight train, did such freight train have a caboose car attached? A. Yes. Q. 4. In what kind of a car did the plaintiff take passage? A. Box car. Q. 5. If, in answer, to the last question, you say the plaintiff took passage in a box car, please state if such box car was provided by the company for the accommodation of passengers. A. No. Q. 6. Was the train on which the plaintiff took passage allowed by the rules of the company to carry passengers? A. No. Q. 7. Who was the conductor of the train? A. E. P. Anderson. Q. 8. If, in answer to the last question, you say that E. P. Anderson was the conductor of the train, you may state whether or not he was in charge of the train. A. Yes. Q. 9. Did the conductor know that the plaintiff was on the train? A. We do not know. Q. 10. Who was the engineer in charge of the engine that was pulling the train? A. Spunaugle. Q. 11. Did the engineer know that the plaintiff was on the train before he was injured? A. No.

Q. 12. Who was the fireman of the engine that was pulling the train? A. J. W. Cooper. Q. 13. Did the fireman know that the plaintiff was on the train until after he was injured? A. No. Q. 14. Did the plaintiff pay Harry Hill one dollar to ride from Purcell to Guthrie? A. Yes. Q. 15. Was Harry Hill a brakeman on the train on which the plaintiff took passage? A. Yes. Q. 16. Did Harry Hill, as such brakeman, have any authority to collect the dollar from plaintiff? A. No. Q. 17. What did Harry Hill do with the dollar so collected from the plaintiff? A. He 'divvied' with Reynolds. Q. 18. What was the regular passenger fare from Purcell to Guthrie? A. \$1.94. Q. 19. Did the plaintiff know that the train on which he took passage was not a passenger train? A. Yes. Q. 20. Did the plaintiff know that the car in which he took passage was not provided by the company for carrying passengers? A. Yes. Q. 21. Did the plaintiff know that the train on which he took passage was not allowed to carry passengers? A. No. Q. 22. Did the plaintiff jump from the train while in rapid motion? A. No. He was thrown off. Q. 23. Did the plaintiff lean from the door of the box car in which he was riding, so that the stopping of the train threw him out and caused the injury? A. Yes. Q. 24. Would the plaintiff have been injured had he remained back in the car until the train stopped? A. No. Q. 25. Would the plaintiff have been injured had he taken passage in the caboose attached to the train? A. We do not know. Q. 26. Did the plaintiff have sufficient time at Oklahoma City to leave the box car and go back and get into the caboose attached to the train? A. We do not know."

At the time the jury returned their special findings into court the defendant objected to the reception of the verdict of the jury until special interrogatories numbered 9, 25, and 26 should be answered by the jury, and that the jury be required to answer said findings with more definiteness and certainty, which objection and requests were by the court overruled, and duly excepted to by the defendant at the time, and the court received the verdict, to which reception the defendant then and there excepted. This action of the court constitutes the first assignment of error. It is argued by the defendant in error that the special interrogatories submitted by counsel for plaintiff in error were not properly a part of the record in the case in this court, and were never in fact submitted to the jury by the trial court, and that counsel for plaintiff in error never made the proper request to have the same submitted to the jury. The provisions of the Code of Civil Procedure in force at the time and for the purpose of the trial of the cause were those of the Statutes of Oklahoma of 1890, which were adopted from the Statutes of the State of Indiana, and are identical with the provisions of the Code of Civil Procedure of that

state. The decision of the supreme court of the state of Indiana, therefore, followed, and this court will be governed by, them, in determining whether error was committed in refusing to submit special interrogatories to the jury, requested by the plaintiff in error, and in determining whether said special interrogatories were at any time or in any manner submitted to the jury, and whether the court erred in refusing to require the jury to answer the interrogatories numbered 9, 25, and 26 with a greater degree of certainty, and in overruling the motion of plaintiff in error for said special findings. It is provided in article 18, tit. "Trial by Jury," § 28, Code Civ. Proc. (paragraph 4574, St. Okl. 1890), that: "In all actions the jury, unless otherwise directed by the court may in their discretion, render a general verdict or special verdict; but the court shall, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues; and in all cases, when requested by either party, shall instruct them, if they render a general verdict, to find specially upon material questions of fact, to be plainly stated in writing. This special finding is to be recorded with the verdict." Upon the trial the following instruction was requested by the plaintiff in error, to wit: "The court, at the request of the defendant, has submitted to you certain special questions, and you are instructed that it is your duty to answer each of said questions fairly as you shall find the truth to be under the evidence, without regard to your general verdict." This instruction was by the court refused, to which exception was duly taken. It is the contention of the defendant in error that, where the party requests of the court that the jury shall be instructed to find specially upon material questions of fact, they shall do so upon condition that "they render a general verdict." This proposition is well founded. The statute is plain. The court cannot be required to instruct the jury that it is their duty to answer special interrogatories upon the evidence "without regard to their general verdict." The statute plainly requires that the court shall in all cases, when requested by either party, instruct them, "if they render a general verdict," to find specially upon material questions of fact. Special interrogatories must be proposed, if at all, in connection with the general verdict, and not "without regard to it." It would not have been proper for the court to give the instruction in the terms proposed. An instruction to the jury to "answer each of said questions, without regard to the general verdict," would have included the instruction to return answers to the special interrogatories whether they elected to return the general verdict or not. The request was properly refused. *Killiam v. Eigenman*, 57 Ind. 480; *Railroad Co. v. Fix*, 88 Ind. 381; *Hadley v. Hadley*, 82 Ind. 75; *Taylor v. Burk*, 91 Ind. 253.

Notwithstanding the fact that the court re-

fused to submit the special interrogatories to the jury with the instructions proposed, "without regard to their general verdict," yet special interrogatories were in fact delivered to the jury and answered, special findings being made thereon, and returned into court in connection with their general verdict. Were the special interrogatories delivered to the jury and the special findings returned thereon properly or improperly? The court having refused to give the interrogatories to the jury as requested, and having yet delivered them to the jury, it would appear that the court, having discharged its duty in rejecting their submission to the jury under an instruction which would have been improper, did thereupon submit them to the jury with proper instructions. It is the duty of the court to give general instructions to the jury, and, the special interrogatories having been tendered with an instruction which the court would not have been justified in giving, we think the presumption would properly arise that they were given to the jury, under the head of general instructions, at the proper time, which it is the duty of the court to give to the jury. *Frank v. Grimes*, 105 Ind. 346, 4 N. E. 414; *Stott v. Smith*, 70 Ind. 298. But the fact of their proper submission to the jury does not depend upon this presumption. The record, upon page 130, discloses the fact that "the said jury, together with said general verdict, returned the interrogatories submitted to the said jury to be answered by them, in connection with their general verdict, and which said interrogatories, together with the answers of the jury thereto, are in words and figures following, to wit." And, again, on page 17 of the record: "The jury returns into court with their verdict and answers to the special questions of fact submitted to them." And, again, on the same page: "And the jury return into court the answers to the special questions of fact submitted to them, which said special questions of fact, and the answers of the jury thereto, are as follows, to wit." And on page 16 that "the court, at the request of the defendant, submits to the jury certain special questions of fact for said jury to answer and return to the court with their general verdict, and thereupon the cause is submitted to the jury, and they retire to deliberate upon their verdict and the said special questions of fact." Which entries were from the journal, signed by the judge, and approved over the signature of counsel for both plaintiff and defendant. It thus appears by the record that the court, at the request of one of the parties, sent the interrogatories to the jury, and it makes no difference that the direction by which they were given to the jury was not in writing. The statute makes no such requirement. *Railway Co. v. Bowen*, 70 Ind. 478; *Stanley v. South-erland*, 54 Ind. 356; *McCallister v. Mount*, 73 Ind. 559; *Lawler v. McPheeters*, Id. 577; *Trentman v. Willey*, 85 Ind. 33. It is, how-

ever, contended by the defendant in error that the approved statement of the record contains "all of the oral rulings of the court incident to the trial of the cause, motions, instructions, and rulings of the court of every kind and character," and shows that no such request was made to the court prior to the time the court instructed the jury and the argument and submission of the cause to the jury. In this condition of the record, we must find that while the certificate to the case made expressly states that it contains all of the oral rulings of the court incident to the trial of the cause, and it does not expressly appear in the record when the instruction referred to was given to the jury, yet the certificate also states that "the case made contains a true, complete, and full transcript of the record of the cause," among which "true, complete, and full" matters are the statements in the record that "the court, at the request of defendant, submits to the jury special questions of fact for said jury to answer and return with their general verdict." We find that the special interrogatories were properly submitted to the jury, and that the findings returned on them are all regularly and properly a part of the record.

It is therefore proper for this court to consider upon this assignment of error whether the trial court erred in overruling the motion of the plaintiff in error to require the jury to answer with more definiteness and certainty the special interrogatories numbered 9, 25, and 26. Testimony was adduced upon the points to which the special interrogatories were directed, and the answer of the jury to each of them was, "We do not know." It may have been evasive and equivocal. It would not have been error for the court to have remanded the jury with directions to make specific answers to the special interrogatories referred to. But it would not do, in the presence of testimony not positive or conclusive in its character, to presume that the jury would, upon being remanded, have given or have been able to give with more certainty a more definite answer to either of these interrogatories. It cannot be said the plaintiff in error was damaged by the refusal of the court to remand the jury and require it to answer the questions as required. It has been repeatedly determined that the failure to answer questions, or the rendition of evasive and equivocal or uncertain answers, not stating the result of the evidence upon the point positively, either in the affirmative or in the negative, simply implies a denial of adequate proof having been produced to the jury, during the trial, of the existence of the fact upon which the question or questions have been proposed. The fact upon which the jury has declined to answer has thus not been made out by proof. If, therefore, for example, as to special interrogatory No. 9, "Did the conductor know that the plaintiff was on the train?" the answer of the jury

was, "We do not know," the result of the question and the answer given by the jury was that the fact as to whether the conductor knew that the plaintiff was on the train or not was not proven, and so, for all the purposes sought by the plaintiff by the assertion of the fact that the conductor did know that the plaintiff was on the train, the answer referred to is equivalent to the statement that the conductor did not know that the plaintiff was on the train. And so with the answers to the other interrogatories. *Noakes v. Morey*, 30 Ind. 103; *Ogle v. Dill*, 61 Ind. 438; *Buntin v. Rose*, 16 Ind. 209; *Johnson v. Putnam*, 95 Ind. 57; *Railroad Co. v. Asbury*, 120 Ind. 289, 22 N. E. 140; *Morrow v. Saline Co.*, 21 Kan. 504; *Railway Co. v. Shannon*, 38 Kan. 476, 16 Pac. 836. A failure to find upon some fact or issue involved is equivalent to finding against the party holding the affirmative upon such fact or issue. *Henderson v. Dickey*, 76 Ind. 264; *Farmater v. State*, 122 Ind. 90, 3 N. E. 382; *Glantz v. City of South Bend*, 106 Ind. 305, 6 N. E. 632; *Railway Co. v. Hart*, 119 Ind. 273, 21 N. E. 753. The plaintiff in error has suffered no loss by the ruling of the court, and we do not think that such ruling of the court is reversible error in its behalf.

Second Assignment of Error. The defendant (plaintiff in error) thereupon moved the court to render judgment in favor of the defendant and against the plaintiff upon the answers of the jury to the special questions of fact submitted to the jury by the court, at the request of the defendant, the general verdict to the contrary notwithstanding, for the reason that the said special findings of fact show that the plaintiff is not entitled to recover; which motion was, upon the 3d day of November, 1893, overruled, to which ruling of the court the defendant at the time excepted. Included in the special findings of the jury were the statements: That the plaintiff was injured on the 3d day of February, 1891. That the plaintiff took passage in a box car, which was not provided by the company for the accommodation of passengers. That a caboose car was attached to the train, and that passengers were, by the rules of the company, not allowed upon said train as passengers. That the conductor, Anderson, was in charge of the train. The jury stated that they "did not know" whether the conductor knew that the plaintiff was on the train or not, which statement is equivalent to the statement that the conductor did not know that the plaintiff was on the train. The presence of the defendant in error was also unknown to the engineer and fireman. That the regular fare from Purcell to Guthrie was \$1.94. That the plaintiff paid the brakeman, Harry Hill, on the train upon which he took passage, a dollar to ride from Purcell to Guthrie. That said brakeman had no authority to collect the dollar from the plaintiff, and that he "divvied" the dollar with Reynolds, another brakeman on the train. The

jury also stated that the plaintiff knew that the train on which he took passage was not a passenger train, and that the car in which he took passage was not a car provided by the company for carrying passengers; that the plaintiff did not know that the train on which he took passage was not allowed to carry passengers; that the plaintiff did not jump from the train while it was in rapid motion, but was thrown off. They found that the plaintiff leaned from the open door of the box car in which he was riding, so that the stopping of the train threw him out, and caused the injury, and that he would not have been injured had he remained back in the car until the train stopped. To the answers, respectively, whether the plaintiff would have been injured had he taken passage in the caboose car attached to the train, and also whether the plaintiff had sufficient time at Oklahoma City to leave the box car and go back and get into the caboose attached to the train, the jury responded that they did not know. It is well settled under the laws of the state of Indiana, under which the case was tried below, as also of the state of Kansas, under the provisions of whose Code of Civil Procedure the case is now being heard, that if, upon finding a general verdict in favor of the plaintiff, the special findings be yet in favor of the defendant, so that it is evident that the jury has misapplied the law to the facts, the general verdict will be set aside and judgment will be given on the findings over the verdict. It will be sufficient in this case if any single controverted fact which it is necessary for the plaintiff to establish in order to recover be found in favor of the defendant. The defendant will be entitled to judgment notwithstanding the general verdict. It has been, in a variety of forms, declared by the supreme court of Indiana to be the law that the general verdict will be set aside where there is an irreconcilable conflict with the conclusion reached in the special verdict; and that "the antagonism must be apparent upon the face of the record, beyond possibility of being removed by any evidence legitimately admissible under the issue, before the court can be successfully called upon to direct judgment in favor of the party against whom the general verdict has been rendered"; and that "the special finding must be irreconcilably inconsistent with the general verdict before the latter can be set aside and the former substituted in its place." *City of Indianapolis v. Cook*, 99 Ind. 10; *Woollen v. Wishmier*, 70 Ind. 108; *Lassiter v. Jackman*, 88 Ind. 118; *Smith v. Zent*, 59 Ind. 362; *Grip-ton v. Thompson*, 32 Kan. 367, 4 Pac. 698; *Amldon v. Gaff*, 24 Ind. 128.

In support of its contention, it is argued by plaintiff in error (1) that defendant in error was a trespasser upon the train in question, and could exact no duty of the defendant except not to willfully or wantonly injure him, which duty it is not claimed by the pleadings

that the defendant violated; and (2) that the plaintiff was guilty of contributory negligence in boarding a box car, instead of taking the caboose; and (3) that the plaintiff was guilty of contributory negligence in placing himself in an attitude of exposure to danger in leaning out of the car door, from which the findings of the jury state that he was thrown off.

1. The jury have found as facts that the fare paid by the defendant in error was not the regular passenger fare from Purcell to Guthrie,—\$1.94,—but was one dollar, and that this dollar was paid to Harry Hill, a brakeman on the train, who had no authority to collect it from the plaintiff. If the brakeman had no authority to collect the fare from the plaintiff, he had no authority to bind the company, or make any contract on its behalf. There are certain facts in railroad passenger and freight traffic of which the public is required to take notice. One is that a passenger train is for the purpose of carrying passengers. Another is that a freight train is for the purpose of carrying freight. One proposing to be carried as a passenger upon a freight train must advise himself upon what terms the company will contract to carry him as a passenger, and with whom he may make the contract. The courts will require that the traveling public shall take notice that freight cars are not intended for the carriage of passengers; that, when passengers are accepted upon freight trains, the caboose attached to the train is the car in which passengers must place themselves, unless otherwise directed by a person having charge of the train; that the railroad company places a conductor in charge of each train, who has charge of its management in all respects, and with whom persons proposing to be carried as passengers must contract, and under whose direction they must act, subject to the rules of the company; that, in order to the manipulation of the mechanical movement of the train, it is necessary that the railroad company should employ an engineer, whose duty is to manage the engine, a fireman, whose duty it is to attend to the fires, and a brakeman, whose employment and duty is to attend to the brakes upon the train. A person proposing to become a passenger must deal with the conductor who has charge of the train, and not with the subordinate employees of the train. It is not within the scope or authority of the engineer, fireman, or brakeman to collect fare or bind the company, and the defendant in error had no right to suppose that the brakeman, Harry Hill, could bind the company by the agreement by which the defendant in error undertook to make the payment which he did. Upon his having undertaken to procure transportation upon the freight train of the plaintiff in error as a passenger, it was the duty of the defendant in error to have informed himself of the rules and regulations of freight trains, intended primarily for the carriage of freight, and to have informed himself by applying to the con-

ductor who had charge of the train, and so ascertain upon what conditions he would be accepted and permitted to ride upon the train as a passenger. He failed to do this, and failed to become a passenger entitled to that high degree of care which railroad companies are held to owe to those who are accepted as, and whom it agrees to carry as, passengers. The defendant in error, in undertaking to negotiate with the brakeman, failed to put himself in charge of the carrier so as to raise the relation of carrier and passenger, and was, in the view of the law, as is claimed by plaintiff in error, a trespasser, entitled only to the duty from the railroad company not to wantonly or willfully injure him. *Flies v. Railroad Co.*, 149 Mass. 204, 21 N. E. 311; *Railway Co. v. Lightcap* (Ind. App.) 34 N. E. 243; *Railway Co. v. Hatton*, 60 Ind. 13; *Railroad Co. v. Nuzum*, Id. 533; *Railroad Co. v. Field* (Ind. App.) 34 N. E. 407; *Lillis v. Railway Co.*, 64 Mo. 464; *Railroad Co. v. Van Houten*, 48 Ind. 90; *Stone v. Railway Co.*, 47 Iowa, 82; *Hibbard v. Railway Co.*, 15 N. Y. 456; *Frederick v. Railway Co.*, 37 Mich. 342; *Ray, Neg. Imp. Dut.* 252; *Candiff v. Railroad Co.*, 42 La. Ann. 477, 7 South. 601; *Mason v. Railroad Co.*, 27 Kan. 83; *Pierce, R. R.* 330.

2. But it is contended by plaintiff in error that, even if the plaintiff was a passenger, he was guilty of contributory negligence in riding in the box car. The defendant in error entered the box car and took his position there of his own choice. In order to entitle himself to the high degree of care which the carrier of passengers must exercise, the passenger must go into and remain in the car which is provided for passengers. It has been repeatedly held that if the passenger takes any other position upon the train, of his own choice, either on the engine, cowcatcher, tender, baggage-car, platform, or other car, he is guilty of such contributory negligence as, if he should be injured, would deprive him of the right to recover, even though the negligence itself might not have been contributed to by the injury. It has in some cases been held that if another place on the train, aside from the car provided for passengers, and which is assumed to increase the danger of travel by rail, has been taken by the passenger, by the authority or consent of the conductor or other agent in charge of the vehicle or train, the carrier may be liable. This doctrine has been upheld by some courts and denied by others. But it does not apply in cases where the passenger assumes a dangerous and improper place at the instance and with the consent of one of the subordinate employes of the carrier company, such as an engineer, fireman, or brakeman of a railway train. Even if the contract of carriage is complete, and has been made by the proposed passenger with one authorized to make it on behalf of the company, it is a contract for carriage in the car provided for passengers if there be one upon the train. The additional danger incident to transportation on

freight trains requires that the passenger should exercise a correspondingly higher degree of care. It has, in fact, been held that the act of riding upon a freight train, in violation of the company's rules, of which the proposed passenger is required to inform himself if he proposes to make a contract of carriage for himself by that means, is itself such contributory negligence as will preclude the recovery except for wanton or willful injury. We shall accordingly hold that the defendant in error was, by the act of going into the box car on the freight train of the defendant, at the invitation of the brakeman, and without the knowledge of the conductor, guilty of such contributory negligence as would preclude his recovery in this case, and would of itself require that the general verdict should be set aside and that the judgment be reversed. *Carroll v. Transit Co.*, 107 Mo. 653, 17 S. W. 889; *Rucker v. Railway Co.*, 61 Tex. 499; *Railroad Co. v. Clemmons*, 55 Tex. 88; *Railroad Co. v. Langdon*, 1 Am. & Eng. R. Cas. 92; *Doggett v. Railroad Co.*, 34 Iowa, 284; *Railroad Co. v. Lane*, 83 Ill. 448; *Waterbury v. Railroad Co.*, 17 Fed. 683; *Higgins v. Railroad Co.*, 73 Ga. 159.

3. It is, in the third place, contended by the plaintiff in error, under the present assignment of error, that the defendant in error was guilty of negligence in leaning out of the open door of the car, and thereby contributed to the injury for which he here claims damages. The jury found, in response to special interrogatories 23 and 24, that the plaintiff leaned from the open door of the box car in which he was riding, so that the stopping of the train threw him out and caused the injury, and that he would not have been injured had he remained back in the car until the train stopped. It has been repeatedly, and, so far as we have been able to find, uniformly, held that the position of the passenger is in the passenger car while the train is in motion, and in the seat provided for him. If the passenger places himself in an unusual position, which enhances the danger, he will be guilty of contributory negligence. The dangers naturally incident to travel by rail are greater on freight than on passenger trains, and call for a correspondingly higher degree of care on the part of the passenger. It is held that one who is a passenger in a caboose attached to a freight train, leaves his seat, and, while standing up in the car, is thrown down and injured, is guilty of contributory negligence in so standing up, if he would have escaped the injury by keeping his seat. It has been held that a passenger on a freight train getting up from his seat and walking to the door of the car, to see if he was to get off there, while a coupling was being made, causing a violent jar, which threw the plaintiff to the floor and injured him, was guilty of contributory negligence, and could not recover. It has been held that one seated in a passenger train, on the arm back of one of the seats, with his elbow on

the back of the seat, and who was injured by a heavy shock given the car by coupling, was precluded from recovering by his contributory negligence. It is also held that there is danger in standing near an open side door of a caboose when the train is in motion, and that a person of ordinary prudence will abstain from doing so, and that if he does so he is guilty of contributory negligence, and cannot recover. And it is a general rule that if a passenger puts his head or elbow or any part of his body out of the window of the car in which he is riding he is guilty of contributory negligence, and he cannot recover for any injury received in consequence thereof. We must, therefore, sustain the contention of the plaintiff in error upon this point also, and hold that the defendant in error, even if he had been successful in sustaining the contention that he was a passenger, was guilty of contributory negligence in going to the open side door of the box car, by reason of which, as has been found by the jury, he was injured. *Harris v. Railroad Co.* (Mo. Sup.) 1 S. W. 325; *Smith v. Railroad Co.* (N. C.) 5 S. E. 896; *Thompson v. Duncan*, 76 Ala. 334; *Railroad Co. v. Ferguson*, 79 Va. 241; *Beach*, *Contrib. Neg.* § 155.

We therefore find, upon the points enumerated, that the defendant in error was a trespasser upon the train in question, and entitled to no duty from the defendant, except not to willfully or wantonly injure him, which is not charged in the petition; and that he was guilty of contributory negligence in boarding the box car, and in placing himself in a position of special danger at the car door while the train was in motion; that he is not entitled to recover, and that the trial court should have, upon the motion of plaintiff in error, set aside the general verdict, and rendered judgment in favor of the defendant below. It is unnecessary to consider the other assignments of error. It is therefore ordered that the case be reversed and remanded, with instructions to enter judgment for the defendant in the court below. All the justices concurring.

DALE, C. J., having acted as trial judge, not sitting.

CITY OF GUTHRIE v. BEAMER.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

PUBLIC LANDS—TOWN SITES—APPROVAL OF PLAT—DEDICATION OF STREETS—POWERS OF CONGRESS—VESTED INTERESTS.

1. By the terms of the act of congress approved May 14, 1890, for entry of town sites in Oklahoma by three trustees to be appointed by the secretary of the interior, the secretary of the interior may, by rules and regulations promulgated by him, cause the lands occupied for town-site purposes to be surveyed and platted into lots, blocks, streets, and alleys, or he may, through the trustees, adopt any survey and plat which had previously been made by the inhabitants of the town sites. And when a survey and plat had been made and adopted by the inhabitants prior to the passage of this act, and after-

wards the secretary of the interior adopted and approved such survey and plat, the act of congress, and the action of the secretary of the interior thereunder, was, in effect, a dedication to the public uses of all such portions of the town site as were designated on such plat as streets and alleys, and had the effect to divest any individual claim, by settlement or occupancy, to such portions.

2. Congress has exclusive power over the disposition of the public domain, and may, by appropriate legislation, divest any interest acquired by settlement or occupancy at any time prior to an entry of the land.

3. One claiming public lands as a homestead pre-emption or town-site settler acquires no vested interest, as against the United States, until an entry is made at the proper land office.

4. The lands upon which the city of Guthrie is located were settled upon and occupied for town-site purposes on April 22, 1889, before any survey had been made for the town site, and without any reference to the necessity for streets, blocks, and lots, every portion of the tract being occupied by claimants. Within a short time the inhabitants organized a provisional government for their own protection and guidance, and, through such government, adopted a survey and plat of the town site, on which were designated streets, alleys, blocks, and lots; and the same were generally accepted, and the settlers conformed themselves to said survey. Prior to the act of congress approved May 14, 1890, there was no law in Oklahoma under which town sites could be entered. After the adoption of this act the secretary of the interior caused said town site to be entered by three trustees appointed by him, and adopted and approved the survey and plat formerly made by the inhabitants of the town site, and conveyance was made of the lots according to said plat. Beamer claimed, as an occupant, a parcel of ground situated in one of the designated streets. No entry of the town site had been made prior to the approval of the act of May 14, 1890. Held, that the adoption and approval of such plat was a dedication by the United States of the lands designated on such plats as streets, and that the interest of Beamer as an occupant was divested by such action, and he has no claim against the city, or against the trustees for a conveyance.

5. No vested right, as against the United States, is acquired until all the prerequisites for the acquisition of the title have been complied with. *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. 406.

(Syllabus by the Court.)

Error to district court, Logan county.

Action by Henry C. Beamer against the city of Guthrie. Judgment for plaintiff. Defendant brings error. Reversed.

Keaton & Cottrel and B. T. Halner, for plaintiff in error. Harper S. Cunningham, for defendant in error.

BURFORD, J. This was an action brought in the district court of Logan county by the defendant in error, Henry C. Beamer, against the board of town-site trustees appointed by the secretary of the interior, and assigned to the city of Guthrie, under the act of congress approved May 14, 1890, and the city of Guthrie, defendants, to compel a conveyance to him by said trustees of a parcel of ground embraced within the town site of Guthrie, and located on a portion of the tract laid out and used for a public street in said city. Issues were formed, trial had to the court upon an agreed statement of

facts, and a finding had and decree entered in favor of Beamer, by which the parcel of land claimed by him was awarded to him in fee, and a conveyance directed to be made to him of said parcel or lot. From this judgment the city of Guthrie comes to this court by petition in error, praying for a reversal of said judgment. The agreed statement of facts contains all that is necessary for a proper understanding of the case. Said stipulation is as follows: "Be it remembered that on this 28th day of October, 1893, for the purpose of saving expense in said cause, it is hereby agreed and stipulated by and between the above-named parties plaintiff and defendant that the facts in said cause are as follows, viz.: That F. A. Morrison settled upon the piece of land described in the complaint on the 22d day of April, 1889, for the purpose of trade and business, and was in the actual and peaceable and undisputed possession of the same. That on the 23d day of April the plaintiff purchased the possession of the said Morrison, and all his right, title, interest, and claim thereto, and paid him for the same the sum of one hundred dollars, and entered into the actual, peaceable, and undisputed possession thereof, and settled upon, occupied, and claimed the same, for the purpose of trade and business and residence, under the provisions of sections 2387, 2388, Rev. St. U. S. That he at once began improvement of the same, by constructing on the east and west sides thereof, and south end, a fence, and built upon the north end a house 14x16 feet in size, with lumber, and established his residence and place of business therein. That he remained in the peaceable and undisputed possession of said piece of land at all times from the 23d day of April until the 20th day of May, 1889, on which date he was thrown off of said piece of land by J. A. Acklin, B. F. Daniels, and W. W. Angel, acting under the direction of Hendrick D. Baker, who acted as city marshal of the provisional city of Guthrie, pursuant to the orders of the said city government. That he protested against said action. That about June 10, 1889, he went upon said tract again, and built the foundation for a building 16x20 feet in size. That he was again evicted by persons acting in behalf of said city of Guthrie, and thrown off of the land by force of arms. That on the 10th day of August, 1889, he again entered upon said land, hauling several loads of building material upon the same, for the purpose of erecting permanent improvements thereon; and he was again evicted by force of arms, and prevented from occupying said lot, by the said city government. That upon the 2d day of August, 1890, after the alleged provisional city government had ceased to claim to exist, and its officers had ceased to act, he fenced said land, and placed a building 8x10 feet in size (constructed of lumber) thereon, and occupied the same as a place of business,

and that on the 6th day of August, 1890, he was again evicted and dispossessed, and his building and other property thrown from said premises, by one E. P. Kelley, who acted by orders of one W. S. Spencer, who was the mayor of the village of Guthrie, which upon said date had been organized under and by virtue of the laws of Nebraska, which were then in force in said territory. Both said Spencer and Kelley acted without process of law, and by virtue of their claimed authority as municipal officers of the then village of Guthrie. That on the 20th day of August, 1890, he again reduced said premises to actual possession, and fenced the same, and had begun the erection of a stone house thereon, 20x40 feet in size, by grading a foundation, and hauling four cords of stone. That the said city officers above named threatened and were about to again evict this plaintiff from these premises, when he procured from the district court of Logan county a temporary order of injunction, restraining them from in any way interfering with his possession or improvements on said premises until the further orders of said court. That said injunction has remained in force until the present time, and is now in force, and his possession of said premises has continued undisturbed until the present time. That he was the first and prior settler on said lands. That he never consented or acquiesced in the use of any portion of said lands by the public of the city of Guthrie for a street or alley or highway, or any other purpose. That since the 22d day of April, 1889, he has been an actual, bona fide resident of the city of Guthrie, and was duly qualified, under the law, to take a lot and acquire property under the laws of the United States governing town sites in Oklahoma. That on the 2d day of August, 1890, the above-named Daniel J. McDaid, William H. Merriweather, and John H. Shanklin, who had been before that time appointed as town-site trustees, and assigned to duty at Guthrie, under the provisions of the act of May 14, 1890, made proof and acquired title to the east half of section 8, township 16 north, of range 2 west of the Indian Meridian, for the use and benefit of the occupants thereof, and gave notice of publication that they were ready to consider the claims of all occupants. That pursuant to said notice plaintiff duly made and filed his application for said piece of land with said board, and thereby asked them to make, execute, and deliver to him a good and sufficient deed therefor. That no other person whatsoever made or filed any application for said piece of land. That the plaintiff has at all times been willing to prove, by competent testimony, the facts herein, and in said application set forth, but that said town-site board refused to allow a hearing on said application, and, without notice to plaintiff, dismissed his application, for the reason that on the plat which they had theretofore

adopted the tract of land applied for was embraced in the limits and a part of Third street of the city of Guthrie. That the city of Guthrie has never, by the right of eminent domain, instituted condemnation proceedings or purchased from the said Beamer, or sought to extinguish the claim of Beamer to said land. That the plaintiff demanded of the town-site board a deed for said land, and tendered them the amount of their necessary expenses for making the same, and they refused to comply with his request. That on the afternoon of April 22, 1889, several thousand people settled upon the east half of section 8, township 16 north, of range 2 west of the Indian Meridian, and claimed the same as a government town site, and began the erection of buildings and other improvements thereon for town-site purposes. That on the 22d day of April, 1889, and the early days thereafter, the town-site settlers and occupants of said east half of section 8 organized themselves into the provisional government of the city of Guthrie,—said organization being perfected for the purpose of adjusting said town-site inhabitants on said land, and maintaining order thereon, and for the purpose of surveying and platting said town site into lots, blocks, streets, and alleys; and in said organization a mayor, councilmen, city clerk, city marshal, and other officers were selected by said inhabitants, who proceeded to survey and plat said land into lots, blocks, streets, and alleys; and on the 13th day of May, 1889, the said mayor and councilmen adopted a plat of said town site of Guthrie, a true copy of which, excepting the certificates of the engineer and officers thereof, is hereto attached, marked 'Exhibit A,' and made a part of this agreed statement. That the width and length of lots and the width of streets and alleys on said plat are designated in figures thereon. That after said plat was made, executed, and certified by the engineer and the provisional officers of the city of Guthrie, a copy thereof was kept in the office of the register of deeds of the said provisional government of the city of Guthrie, and another copy thereof was filed, with the declaratory statement of the mayor and officers of said provisional government, in the United States land office at Guthrie, Oklahoma, and said plat was thereafter generally recognized by the inhabitants of the said town site. That when said survey and plat was completed the tract of land here in controversy was within Third street, where the same opens up into Harrison avenue, on the south side; it being thirty feet off of the west side of said Third street, extending south from the south side of Harrison avenue 140 feet. That, at the time of the making and approving of said survey and plat by the inhabitants of the said town site and provisional city of Guthrie, the town-site settlement was general from the government acre west and south as far as the lands in dispute were

contiguous, no lots being left unoccupied or vacant for streets; and Harrison avenue, from West Third street, and east to Division street, and Second and First streets, between Oklahoma and Harrison avenues, were, like the other lands adjacent thereto, covered with town-site occupants, and remained so until the occupants were cleared from the streets by the provisional city authorities of Guthrie. That after the entry of said town site by said trustees, and before giving notice to the occupants to present their claims, the said trustees approved the survey and plat marked 'Exhibit A,' of the inhabitants of said town site of Guthrie, and made and executed, in accordance with the instructions of the secretary of the interior, their plat of said town site of Guthrie, conforming to the plat made by the town-site inhabitants in quadruplicate, and filed one of the same in the office of the county clerk, now register of deeds of Logan county, Oklahoma territory, and one of the same in the United States land office at Guthrie, Oklahoma territory, and one of the same in the office of the secretary of the interior, Washington, D. C., and retained one in their own office,—the said plat being filed in the United States land office aforesaid, and register of deeds aforesaid, August 30, 1890,—and the said plat was approved by the secretary of the interior. That from and after about the 20th day of May, 1889, all of Harrison avenue, and all of Third street, excepting the part in the possession of the plaintiff as herein stated, has been used as a public street and highway by the city of Guthrie. That lasting and valuable improvements, by way of frame and brick buildings, have been built upon Harrison avenue, on the north side, and opposite Third street, and the same have been ever since used for business and other purposes. It is hereby agreed that all instructions of the commissioner of the general land office and secretary of the interior relating to town sites on public land in Oklahoma are a part hereof, the same as if they were herein set out. Executed in triplicate. Harper S. Cunningham, Attorney for Pliffs. A. G. C. Blerer, Attorney for Defendant. J. L. Pancoast, City Attorney."

The town site of the city of Guthrie is located on a portion of the lands opened to settlement by the act of congress approved March 2, 1889, and were, prior to their settlement, embraced within the country known as the "Indian Territory." Section 13 of the act approved March 2, 1889, providing for the opening of the Oklahoma lands to settlement, contains the following provision in reference to town sites: "The secretary of the interior may after said proclamation and not before, permit entry of said lands for townsites under sections 2387, and 2388, of the Revised Statutes, but no such entry shall embrace more than one half section of land." At the time said lands were opened to settlement, on the 22d day of April, 1889, no provision

had been made by congress for any form of civil government within the territory opened to settlement at said time. There was no authority for organizing town or city governments, and there were no county organizations, or any law under which such municipalities could be organized. Hence there was no machinery by which the provisions of sections 2387 and 2388 of the Revised Statutes of the United States could be carried into operation. This condition of affairs continued to exist until the adoption of the act of congress approved May 2, 1890, providing for a territorial government for the territory of Oklahoma; but, before steps could be taken to enter said town sites by the authorities authorized by the act constituting the territorial government, congress passed the act authorizing the lands settled for town sites within the territory of Oklahoma to be entered and proved up by trustees appointed by the secretary of the interior. Section 1 of said act (26 Stat. 109) provides: "That so much of the public lands situate in the territory of Oklahoma now open to settlement as may be necessary to embrace all the legal subdivisions, covered by actual occupants for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as townsites for the several use and benefit of the occupants thereof by three trustees, to be appointed by the secretary of the interior for that purpose, such entry to be made under the provisions of section 2387 of the Revised Statutes as near as may be. And when such entry shall have been made, the secretary of the interior shall provide regulations for the proper execution of the trust by such trustees, including the survey of the land into streets, alleys, squares, blocks and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof, the assessments upon the lots of such sum as may be necessary to pay for the lands embraced in such townsite, costs of surveyor, conveyance of lots and other expenses, including compensation of trustees." Section 22 of the organic act of the territory of Oklahoma, approved May 2, 1890 (26 Stat. 81), provides: "That the provisions of title 32, chapter 8, of the Revised Statutes of the United States, relating to reservation and sale of townsites of the public lands shall apply to the lands open or to be opened to settlement in the territory of Oklahoma, except, those opened to settlement by the proclamation of the President on the 22nd day of April, 1889." This provision had the effect of repealing all the provisions of chapter 8 of the Revised Statutes of the United States (pages 436-438), so far as the provisions in said chapter relate to the town site in question. Hence we are compelled to look solely to the provisions of the act of May 14, 1890, to determine the rights of claimants to lots or parcels of land embraced within such town site. It is a part of the common history

of the country, of which courts take judicial notice, that on the opening of the Oklahoma country to settlement, at the hour of noon on the 22d day of April, 1889, several thousand people entered upon the lands now embraced within the town site of Guthrie for the purpose of acquiring property and rights as town-site settlers; that said lands had not been platted, and no provision had been made for surveying or laying the same off into blocks, lots, streets, or alleys, nor was there any provision of law or authority by which the same could have been legally done. It was the general opinion that a large city would at once be built up upon such site. For a number of days all was confusion and chaos. Each individual was seeking to obtain whatever of interest he might be able to acquire by reason of his personal occupancy, or such particular improvements as he was enabled to make; and, as shown by the stipulation in this case, every portion of the tract shown on the plat, from the government acre west for several blocks, and south a considerable distance, was occupied by persons claiming to be settlers, and no provision had been made, or any of said land left, for streets, highways, or alleys; and in this confused condition of affairs the people settled the town site, and attempted to acquire an interest in some specific portion or parcel of said tract. The question of law presented by this case for our determination is, did such persons, under this condition of affairs, acquire such vested rights or interests in any particular portion of land claimed by them as would prevent the same from afterwards being appropriated for the use of the streets which were necessary to the laying off of a town or city?

It is unquestionably the rule that one who settles upon and improves a lot in a town site upon the public lands acquires an interest that he may sell, convey, or incumber. *Hussey v. Smith*, 99 U. S. 22; *Stringfellow v. Cain*, Id. 610; *Cannon v. Pratt*, Id. 619. In *Lamb v. Davenport*, 18 Wall. 313, Mr. Justice Miller, in discussing this question, said: "It is sufficient here to say that, several years before any act of congress existed by which title to the land could be acquired, settlement of and cultivation of a large tract of land, which includes the lots in controversy, had been made, and a town laid off into lots, and lots sold, and that these are a part of the present city of Portland. Of course, no legal title vested in any one by these proceedings, for that remained in the United States, all of which was well known and undisputed. But it was equally well known that these possessory rights and improvements placed on the soil were, by the policy of the government, generally protected,—so far at least, as to give priority of the right to purchase whenever the land was sold, or offered for sale, and when no special reason existed to the contrary. And though these rights or claims rested on no statute, or any positive promise,

the general recognition of them in the end by the government, and its disposition to protect the meritorious actual settlers who were the pioneers of emigration in the new territories, gave a decided and well-understood value to these colonies. They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid. The right of the United States to dispose of her own property is undisputed, and to make rules by which the lands of the government may be sold or given away is acknowledged; but, subject to these well-known principles, parties in possession of the soil might make valid contracts, even concerning the title predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where congress had imposed restrictions on such contracts." While the above case announces the doctrine that the possessory rights of town-site settlers may be the subject of barter and sale, it also affirms the principle that such rights, thus acquired, are subject to the right of the United States to make such disposition of the title as congress may deem proper, and the power to make rules and regulations by which lands of the United States may be disposed of or given away is positively asserted. While it is true that the act of May 14, 1890, provides that the lands occupied for purposes of trade and business shall be entered by the trustees for the use of the occupants thereof, it also contemplates the entry of platted lands,—lands that have been or shall be by the trustees be platted into lots, blocks, streets, and alleys. While the act recognizes the rights of settlers and occupants, in so far as the same are consistent with the purposes of the act, it also authorizes the secretary of the interior to approve any survey that has already been made by the inhabitants of such town, or to provide by regulations for a survey of the land into lots, blocks, streets, and alleys, when necessary. The power of congress over the disposition of the public lands is supreme, and so long as the title is in the United States, and no entry of the land has been made under any law of the United States, or no rights of settlers or occupants have attached, congress may make such disposition as the lawmaking power may declare, although it may work injustice or hardship to claimants for such lands. The agreed statement of facts show that long prior to the adoption of the act of May 14, 1890, the town site of Guthrie had been platted into streets, alleys, squares, blocks, and lots, and the inhabitants had generally conformed themselves to such plat, and acquiesced in the same. Under the authority vested in him by congress, the honorable secretary of the interior approved and adopted this plat, and set apart all the portion of, or parcel of, land claimed by Beamer, for a public street. This was an appropriation of this portion of such tract for, and a dedication of the same for, a street, and was within the power of congress and the

authority of the secretary, unless the claims of Beamer were of such a character, at the date of the passage of the act of congress, as to have become a vested interest, which would not be disposed of by congress. Hence it becomes important to determine when the rights of an occupant or settler attach, or a vested interest becomes such.

It is contended by counsel for plaintiff in error that the interest acquired by a town-site occupant is analogous to that of a pre-emption claimant prior to payment of purchase money and entry, while counsel for defendant in error asserts that the right of a town-site occupant, acquired by settlement, is analogous to that of a homestead settler, and that he acquires a vested right, that even congress cannot divest. We deem it immaterial, under the facts in this case, which of these positions is correct. The only rights claimed by Beamer were such as he claims to have acquired by a settlement on the tract in dispute, and an effort to improve the same. It is conceded that at the time congress passed the act of May 14, 1890, no entry of any character had been made for the town-site lands, and that there was no provision of law under which the same could be entered. The only rights of occupants were such as could be acquired under the act of March 2, 1889, which provides: "The secretary of the interior may, after said proclamation, and not before, permit entry of said lands for townsites, under sections 2387 and 2388 of the Revised Statutes, but no such entry shall embrace more than one half section of land." But this provision was subsequently repealed by the force of the provisions of section 22 of the organic act. The rights acquired under these provisions were at all times subject to the paramount right of congress to dispose of the public lands of which the United States was the owner, and to provide the machinery for perfecting any rights that might be acquired or claimed. There is no difference in law as to the time when the rights of a claimant to public lands became such a vested right as that congress may not divest the same, or appropriate the land to other purposes. This question was under consideration by the supreme court of the United States in the case of *Railway Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566. In 1862 congress passed an act granting certain lands to the Kansas Pacific Railway Company (12 Stat. 489), which contained the following provision: "Every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limit of ten miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." Section 4 of an act of 1864, amending

tory to this act, provides as follows: "And any land granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land or other lawful claim." The railroad company sold the land in dispute to Dunmeyer, and conveyed to him by warranty deed. One Miller had a homestead entry on the land at the time the railroad company filed its map of definite location and claimed the land. Dunmeyer sued the railroad company on their warranty, and the question as to whether the entry of Miller brought the lands within the exceptions of the grant was in controversy. Counsel for the railroad company contended that congress had power to dispose of the land at any time prior to final proof, and issue of final certificate of entry. Mr. Justice Miller, speaking for the court, said: "In the case before us a claim was made and filed in the land office, and there recognized, before the line of the company's road was located. That claim was an existing one, of public record, in favor of Miller, when the map of plaintiff in error was filed. In the language of the act of congress, this homestead claim had attached to the land, and it therefore did not pass by the grant. Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of those conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the grant as much as if, in a deed, it had been excluded from the conveyance by metes and bounds." This case is conclusive of the question as to the time when the rights of a homestead or pre-emption claimant attach to the land, and the power of congress to deal with the land ceases. It is when the entry is made at the land office, and not before. Such right is not acquired by settlement, occupancy, or improvement. It is true, the laws of the United States provide that a homestead settler upon the public lands may have 90 days in which to make his entry at the land office, and when such entry is made his rights shall relate back to the initiation of his settlement; but this is in the nature of a privilege extended to settlers, and such rights do not become fixed until the entry is made, and, at any time prior to the making of the entry at the land office, congress may dispose of the land by grant, donation, or dedication, as has frequently been held by the supreme court of the United States in pre-emption claims. If the rights of a pre-emption or homestead claimant do not attach to

the land, as against the United States, until the entry of the land is made, then we know of no reason why the settlement or improvement of a town-site occupant will entitle him to any greater or superior rights. And applying the rule applicable to homestead and pre-emption claimants, as announced by Mr. Justice Miller, *supra*, which we think is applicable to the case at bar, congress had the right and authority to make such disposition of the lands embraced in the Guthrie town site, for streets, alleys, and public highways, as, in the wisdom of the lawmaking power, seemed proper; and the authority vested in the secretary of the interior to adopt a plat and survey already made carried with it, when such adoption was made, an express dedication of the lands shown on the plats as streets to the public uses, and divested all claims of private parties. A different rule would apply if the dedication had been attempted by the trustees or by congress after the land was entered for the benefit of the occupants. The dedication of the lands for streets by the act of congress, and the action of the secretary, relates to the time of the adoption of the statute, or, probably, to the date of the adoption of the plat by the inhabitants. And herein lies the distinction in, and misapplication of, the long list of cases cited by counsel for defendant in error. They are cases where the land had been actually entered for the use of the occupants, and after the entry the trustees or municipal authorities were attempting to change the status of parties as they existed at the time of the entry. It was not done by authority of congress in these cases, and it was properly held that the trustees could not divert the purposes of the trust.

A review of some of the most prominent of these cases will reveal the fact that they are not in point in this case. In the case of *Bingham v. City of Walla Walla*, 13 Pac. 411, decided by supreme court of Washington, a town had sprung up on the public domain, which had grown to be a city of considerable proportions. The town site was entered, and patent issued to the corporate authorities, under an act of congress approved March 2, 1867 (14 Stat. 541). This act makes no provision for the making and preservation of a plat of town sites entered under its provisions. In 1858 one Patton had entered upon and occupied a lot of land fronting on Monroe street, 23 feet by 120. He erected a building thereon 23x70 feet. The remainder of the lot was fenced. On November 22, 1862, Patton conveyed the lot to one Baker. In 1874 Baker conveyed the lot to Stevens, and Stevens conveyed to Bingham in 1883. In 1883 the building on the lot was destroyed by fire, and Bingham fenced the entire lot, and prepared to build on same. At this time the city of Walla Walla made claim that 11 feet of the lot was in First street, as shown by the plat adopted by the municipal authorities. The lot was occupied its entire width at the time

the land was entered for town-site purposes. Bingham brought suit to quiet his title to the 11 feet claimed by the city for street purposes. The court held that he was an occupant of that particular tract at the time the entry was made, and that the entry was made in trust for the actual occupants, and that the only powers of the trustees were to determine the extent of the occupancy of each occupant, and to convey the same as it might appear, and entered a decree quieting his title. In the act of congress under which the town site was entered appears the following provision: "The execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated." The court said: "This authority cannot relate to lands held by actual occupants, but evidently has relation to the lands included in the town site, not in possession of actual occupants, or to which the act contemplates a disposal by the city for purposes and under such regulations to be prescribed by the legislative authority." Certainly, no such narrow construction can be placed upon the provisions of the act of May 14, 1890, under which Guthrie was entered. This act gives, in specific terms, the right to adopt a survey and plat already made; or if, in his judgment, it should be found necessary, the secretary of the interior was authorized to cause a new survey to be made, and lay the town site off in blocks, lots, squares, streets, and alleys; and, unquestionably, this power extended to all the lands embraced in the town site, whether actually occupied or not. And hence the Walla Walla Case cannot be taken as authority in the case under consideration. That case followed the rule announced by the supreme court of the United States in *Ashby v. Hall*, 119 U. S. 526, 7 Sup. Ct. 308, wherein the court said: "The power vested in the legislature of the territory, in the execution of the trust upon which the entry was made, was confined to regulations for the disposal of the lots and the proceeds of the sales. These regulations might extend to provisions for the ascertainment of the nature and extent of the occupancy of different claimants of lots, and the execution and delivery to those found to be occupants in good faith of some recognition of title, in the nature of a conveyance. But they could not authorize any diminution of the rights of the occupants, when the extent of their occupancy was established. The entry was in trust for them, and nothing more was necessary than an official recognition of the extent of their occupancy." There is no question but this is the correct rule, applicable to all classes of cases where the lands are entered for the use and benefit of the actual occupants, and congress had established no rule for determining the extent and nature of the rights of the public in the lands entered for town-

site purposes. *City of Helena v. Albertose* (Mont.) 20 Pac. 817, is another of the class of cases relied upon by defendants in error, but it is clearly distinguishable from the case at bar. The city of Helena was built upon public land, and such land entered by the probate judge, under section 2387, Rev. St. U. S. The premises in controversy were at the time of the entry, and had for a long time prior thereto, been in the actual possession and occupancy of the defendants. After the entry of the town site a survey and plat were made, and the tract in dispute was included in Lawrence street, as shown on the plat. The city brought suit in ejectment. The court said: "When the patent was issued to the probate judge, he became a trustee of the lands included in the patent, holding the same in trust for the use and benefit of the occupants thereof, which trust must be executed by him in accordance with the laws of the United States creating such trusts, and with the regulations provided by the territorial laws not in conflict with the laws of the United States. These rules or regulations might guide the mode or manner of executing the trust, but they could not substitute one cestui que trust for another. In other words, neither the law of this territory, nor the act of the probate judge, could deprive any person of the land occupied by him at the time when the probate judge made entry for the town site, and give such land to one who was not an occupant thereof, and any attempt so to do would be null and void. Undoubtedly, the laws of this territory providing for a map, and the act of the probate judge in accordance therewith, were valid, and not in conflict with the laws of the United States, when such map designated and established as streets those portions of the town site which had theretofore been used by the public as streets; but, when the probate judge undertook to establish by that map a street over lands actually occupied by individuals as a residence when the entry was made by the probate judge, his act was in conflict with the proper execution of his trust, which was to convey the lands to occupants, when there were occupants, and not to others, and the public had no right, as against such an occupant. The act of the probate judge, therefore, was void, at least as far as it attempted to deprive occupants of their interests in lands occupied by them, and such act could give to the public no title to the premises, against the will of the true occupant." It will be observed that in the foregoing case there was an attempt by the city authorities to divest the interest of the claimants, after entry of the lands, by appropriating a portion of the land occupied by them for a street. In this the case is materially different from the case at bar. The case of *Winfield Town Co. v. Maris*, 11 Kan. 128, is cited in support of the contention of defendant in error. We find nothing in the case in conflict with our views in this case. The court there held that where the probate judge

entered a town site he must convey the lots and parcels of land to the actual occupants, and that a deed made by him to one who was not an actual occupant at the time of the entry was void, and also that the statute of Kansas, in so far as it attempted to make all persons occupants who selected and laid out a town site, was inoperative and void. We fully concur in this view of the law. In *Treadway v. Wilder*, 8 Nev. 92, the trustee of the town site gave a deed to one who was not an occupant of the town site at the time of the entry. This act was held to be void, and to convey no title. In *Rathbone v. Sterling*, 25 Kan. 444, the court held that the trustee must convey the lots to the persons who were occupants at time of entry of town-site, but in both the above cases the entry was made by the probate judge under the provisions of section 2387, Rev. St. U. S. In the case of *Clark v. Titus* (Ariz.) 11 Pac. 312, the court held that lands entered under section 2387 were held in trust for the use of the occupants, and that a deed conveying a large number of lots to a town company was invalid. In *Guffin v. Linney*, 26 Kan. 717, it was held that the probate judge had no authority to convey to one not an occupant of town site at date of entry.

We have examined all the authorities cited by counsel for defendant in error in support of the judgment in this case, but find nothing that conflicts with our views in this case. It is well settled that, as between adverse claimants to public lands, he who is first in time—the law having been otherwise compelled with—is first in right, but this rule has no application against the United States. The right of congress to dispose of the public lands is a power granted by the constitution, and every person who initiates a claim to any portion of the public domain takes such right subject to this power of congress; and such power of disposal continues until the United States has estopped herself to divest such right by accepting something of value from the claimant, and permitting an entry of the land at the proper land office. When the secretary of the interior, or the trustees appointed by him, under his instructions, adopted and approved the plat of the town site of Guthrie, which the inhabitants had made long prior to the entry of the land by the trustees, the lands designated as public streets on such plats were dedicated to the public use; and the act of congress, and the action of the secretary under the power vested in him by said act, had the effect to divest any individual interest that might have been asserted to such portion of said land, and Beamer has no rights or interest in the public streets which can be conveyed to him by the trustees. The district court erred in directing a conveyance to him of the parcel of ground in controversy.

There is another view of this case which we think defeats the defendant in error in his claim for title to this lot. It is a part of the

general history of the settlement of the city of Guthrie that prior to the opening of the country to settlement, on April 22, 1889, and prior to the settlement and occupancy of the lands embraced in the town site, no plats had been adopted, and no subdivisions of the lands into lots, blocks, and streets had been made, and no valid or legal survey, plat, or subdivision could have been made until after the lands were open to settlement. Thousands of people desiring to acquire lots in the projected city went upon the lands now constituting the city of Guthrie, and, each for himself, undertook to acquire by occupancy or improvement some particular portion of said tract for his own use. As a natural result, there was no order or regularity in such settlements, and everything was chaos and disorder. There was no municipal government, and no authority for any. There was no law in the territory at that time by which a municipal government could be formed, and no person had authority to act for the masses. It became necessary to bring order out of chaos, and to settle the many conflicting interests by some general rule or authority that the masses would recognize. "The very nature of land settled upon and occupied as a town site implies the existence of streets, alleys, lots, and blocks; and for the possession of the lots, and their convenient use and enjoyment, there must, of necessity, be appurtenant to them a right of way over adjacent streets and alleys. The entry of the land carried with it such a right of way. The streets and alleys were not afterwards at the disposal of the government, except as subject to such statement." *Ashby v. Hall*, 119 U. S. 526, 7 Sup. Ct. 308. Every person who attempted to settle upon said lands, in such chaotic state, established their settlement rights with full knowledge and notice of the fact that before the same could be entered as a town site, or any title acquired from the government, such lands must, of necessity, be platted and laid out into blocks, lots, streets, and alleys, and took whatever of interest he acquired subject to this right, and whatever would result from it. Prior to such platting and subdivision, no person could acquire any interest in any definitely described or particularly bounded portion of said tract. There was no way by which it could be determined what the quantity of land would be that would fall to the portion of any settler or occupant. The title acquired by a town-site settler, and the interest acquired by such settler by occupancy or improvement, are in and to a lot or lots. Such lot or lots must be determined by a plat, survey, and subdivision adopted in some manner, and generally acquiesced in. Recognizing this uncertain, chaotic, and disorderly condition of affairs, the experience and intelligence of the American people asserted itself; and they made a rule and law for themselves, and organized committees, by and with the consent of the settlers, and empowered them

to make surveys and plats, and to bring order out of confusion. The people generally acquiesced in this action, and adopted the result of their work, and conformed their settlements to the lines of the blocks, lots, streets, and alleys, as designated by such committees and the provisional government organized by the people for their own guidance and government. This step was necessary in order that the settlers might acquire some definite location, and become occupants of some definite portion of said tract; otherwise, a town site never could have been entered, or title acquired, as every portion of the tract was occupied and claimed by some person. When these surveys and plats were made, those who were so unfortunate as to have made their location in such portions of the tract as were required for streets were bound to give way, as they had taken their chances in the great lottery for a lot when they stuck their stake, and had drawn a blank. All could not be on lots, and this they all knew. Some were on lands that had to be used for streets in laying off a town, and this they all knew. Without streets and blocks and lots, there could be no town, and this they all knew. Hence, no specific interest could be acquired until there was a particular subdivision to which such right could be attached. The people were several days in bringing order out of confusion, and the provisional government, which had been organized with the consent of the governed, were charged with the duty of providing some means of communication between the various portions of the city. The stipulation shows that every portion of the lands embracing several blocks in the vicinity of the disputed portion was claimed by occupants, and that there was no reservation or provision for streets. All knew this when they settled in this confused state, with no uniformity of action; and each must have known, when he staked a lot and erected a temporary structure of any kind, that, so soon as streets were laid off, those who were in the way of the march of progress would have to surrender their settlements. The laws, as enacted by our legislators, never contemplated such a condition of affairs. The mind of man had not conceived, or history recorded, the building of a city of 20,000 people in less than a day. At the crack of a gun and the waving of a flag, 20,000 enthusiastic people assembled in mass, without a commander, or subject to any local law, and within less than a day, with wondrous energy, intelligence, and enterprise, had laid the foundation and established the boundaries of the future capital of the most remarkable territory that has ever existed. This vast, struggling mass of intelligence, each seeking to secure for himself a portion of the tract upon which all recognized that a great trade center was to be builded, left no spot unoccupied. No ground was too poor, and no stone was rejected. To this condition of

affairs no established rules were applicable. A new order of things was established, which called for additional legislation, or an application of old rules to the changed conditions, and none knew this better than the people who took part in the early settlement of this town site. Congress recognized this fact, and, to meet the requirements of these conditions, passed the act of May 14, 1890. When Beamer purchased the settlement right of Morrison, and attempted to acquire a right to a particular portion of the town site by occupancy or improvement, he made such purchase and effected such settlement with full knowledge of the conditions that existed, and that no streets had been laid out, or subdivisions established, which were necessary in order to build a city or town; and he knew, furthermore, that when a survey and plat were made he, or some other settler, would be required, by the exigencies of the occasion, to vacate their claims, and give way to the requirements of the public. Knowing these facts, he voluntarily took his chances with all other settlers, and happened to be unfortunate in his location. He was deceived or misled by no one. There was no compulsion on him to act, and he is in no position to complain. He has no claims for equitable relief, and his cause should be dismissed. The judgment of the district court is reversed, and cause remanded, with instructions to render judgment for the defendants in said cause for their costs.

McATEE and SCOTT, JJ., concur. DALE, C. J., trial judge below, and BIERER, J., having been of counsel, not sitting.

EDDY v. KINCAID, Secretary of State.
(Supreme Court of Oregon. Sept. 12, 1895.)

ELECTION OF RAILROAD COMMISSIONERS.

Act 1891, known as the "Australian Ballot Law," provides for the election by the people of only such state officers as are, by existing law, to be elected by them, and does not, therefore, repeal, nor is it inconsistent with, Hill's Ann. Laws, § 4003, providing for the election of railroad commissioners by the state legislature.

On motion for rehearing. Denied.

For former report, see 41 Pac. 156.

BEAN, C. J. In his petition for a rehearing, counsel for the defendant calls attention to the fact that he did not base his contention as to the effect of the act of 1891 entirely upon the first section, but contended at the hearing that sections 9 and 72, as well as section 1, and, in fact, the whole act, indicated an intention to cover the entire subject of elections, and, in effect, to provide for the election of all state officers by the people, and is therefore inconsistent with, and repeals by implication, that portion of the act creating a board of railroad commissioners which provides for the election of its members by the legislature. Repeals by im-

plication are not favored, and it is only when the provisions of the latter act are so repugnant to the former that both cannot stand, or when the latter is clearly intended as a substitute for the former, that such an interpretation is to prevail. *End. Interp. St. § 210.* Now, it cannot be claimed that the act of 1891 was intended as a substitute for the act creating the railroad commission; nor, in our opinion, is there any conflict between the two acts. The office of railroad commissioner is nowhere mentioned in the act of 1891, nor does it provide that such officers shall be elected by the people. It begins by declaring that a general election shall be held on the first Monday in June, 1892, and biennially thereafter, at which time there shall be chosen so many of the following officers "as are to be elected in such year [naming certain officers; the railroad commissioners, however, not being among the number], and all other state, district, county and precinct officers provided by law." It is thus, by its terms, confined to such officers as are by law to be elected by the people; and, as there is no law providing that the railroad commissioners shall be so elected, it manifestly has no application to them. The act of 1891 was intended, as its title plainly implies, to fix the time for and regulate the manner of conducting state, district, county, and precinct elections; to prescribe the manner of making nominations; the printing and delivery of ballots; and to prevent frauds and punish crimes affecting the right of suffrage. And the section declaring what officers shall be elected in the manner prescribed by the act is only a re-enactment of the law as it stood prior to the creation of the board of railroad commissioners. In our opinion, there is nothing, therefore, in the point that the act of 1891 repeals, or is inconsistent with, the law providing for the election of railroad commissioners by the legislature. Counsel also ably and learnedly reargues the question of the constitutionality of the act providing for the election of railroad commissioners by the legislature, but, inasmuch as the points raised were fully considered and determined in the former opinion, a rehearing would be unprofitable. The petition is therefore denied.

JOHNSTON et al. v. BARRILLS.

(Supreme Court of Oregon. July 20, 1895.)

LABORER'S WAGES—LIEN—ENFORCEMENT—PAYMENT BY NOTE.

1. Section 1 of the act approved February 20, 1891 (2 Hill's Code, p. 1902), provides that any person interested in property which is sought to be subjected to the preferred claim of a laborer or employé may contest the claim, or any part thereof, by filing exceptions thereto supported by affidavit, and thereupon the claimant shall be required to establish his claim by judgment. *Held*, that it was not necessary for such claimant to proceed to judgment on a claim opposed by affidavit that the claim was paid by the

claimant's acceptance of the debtor's promissory note, there being no allegation of an agreement that it was to be accepted in payment.

2. In the absence of an agreement to that effect, the acceptance of a debtor's promissory note is not a payment of a claim.

3. A firm engaged to thresh grain for an agreed price are not "laborers" or "employés," and their compensation is not "wages," within the meaning of Act Feb. 20, 1891 (2 Hill's Code, p. 1902), entitled "An act to protect employés and laborers in their claims for wages."

Appeal from circuit court, Wasco county; W. L. Bradshaw, Judge.

Action in attachment by T. H. Johnston and another against Joseph Barrills. James Brown and another intervened for the purpose of filing a laborers' claim. The claim was disallowed, and the claimants appeal. Affirmed.

William H. Wilson, for appellants. Dufur & Menefee, for respondents.

MOORE, J. This is a proceeding to establish and enforce a preferred claim to the proceeds arising from the sale of attached property. The facts are: That T. H. Johnston and G. W. Johnston, partners doing business under the firm name of Johnston Bros., having commenced an action against one Joseph Barrills, had a quantity of grain, the property of the defendant, attached to satisfy any judgment which they might obtain against him. That within 10 days thereafter the claimants, James Brown and J. D. Jones, partners doing business under the firm name of Brown & Jones, intervened for the purpose of establishing a laborers' claim against the attached property, and under the provisions of an act of the legislative assembly entitled "An act to protect employés and laborers in their claims for wages," approved February 20, 1891 (2 Hill's Code, p. 1902), filed a statement of their claim, under oath, with the sheriff who had attached said property, in which they claimed \$129.88 for threshing 1,820 bushels of wheat and 972 bushels of oats, and demanded the payment of \$100 thereon, as preferred creditors, for services performed for the debtor within 90 days next preceding the attachment. The said officer having reported the statement of said claim to the court, Johnston Bros., by their attorneys, filed exceptions thereto as follows: "(1) Said claim is not founded on a claim for wages. (2) Said claim is not the claim of an employé or laborer, but is, upon its face, and in fact, the claim of contractors. (3) That said claim is not such as is contemplated, provided for, or included in the 'Act to protect employés and laborers in their claims for wages,' approved February 20, 1891, and under which act said claimants, Brown & Jones, seek to establish their said claim as preferred. (4) That if said claim of Brown & Jones could, in the first instance, have been considered as a preferred claim upon the attached property, they, the said Brown & Jones, have waived their right, so far as the plaintiffs are con-

cerned, in that as to these plaintiffs, they, the said Brown & Jones, have received full payment of their said original debt and claim, by receiving and accepting a negotiable promissory note for the full amount from the debtor, Joseph Barrills. (5) That the taking and accepting said negotiable promissory note by said Brown & Jones from said Joseph Barrills, as appears by the affidavit hereto attached, supporting these exceptions, was, as to these plaintiffs, full payment of their claim under their said alleged contract." With these exceptions, Frank Menefee, one of Johnston Bros.' attorneys, filed his affidavit showing that his clients were interested in the attached property to the extent of their demand against Barrills, as alleged in their complaint, and that the claimants had exhibited to him a note which they had accepted from Barrills for the full amount of their threshing debt. The facts further show that, upon due consideration of said exceptions and affidavit, the court found that they were sufficient to require the claimants to establish their demand by judgment; but, neglecting to do so, the claim was rejected, and the proceedings dismissed, from which judgment they appeal. Two questions are presented by the record for our consideration: (1) The sufficiency of the exceptions to the statement filed by the claimants; and (2) whether they are entitled to be considered preferred creditors, under the provisions of the act.

The statute (section 1 of the act supra), in substance, provides that any person interested in the property which is sought to be subjected to the preferred claim of a laborer or employé may contest the claim, or any part thereof, by filing exceptions thereto, supported by affidavit, in the court having jurisdiction of the property, and thereupon the claimant shall be required to establish his claim by judgment in such court before any part thereof shall be paid. It will be observed that the first, second, and third exceptions are equivalent to a demurrer to the statement, except the allegation in the second that it "is upon its face, and in fact, a claim of contractors," but this allegation is not supported by affidavit, while the fourth and fifth exceptions present facts intended as a defense to the statement, and the affidavit refers to them only. It is not alleged in any of the exceptions that the note was accepted by the claimants under an agreement between them and Barrills that it should discharge the debt of the latter for which it was given. "Nothing," says Lord, C. J., in *Black v. Sippy*, 15 Or. 574, 16 Pac. 418, "is better settled than that accepting a note is not payment of an account, nor is accepting one note in renewal of another payment of the old note, unless there is an agreement that the note should be accepted in payment." From all that appears in these exceptions, the claimants may have taken the note as a mere evidence of the debt, and

with no agreement or intention to accept it in payment of their account. As we view the statute, the exceptions therein provided for are in the nature of an answer to a petition of intervention, and should put in issue the material allegations of the claimants' statement, or some of them, before they could be required to take any steps looking to the establishment of their claim by judgment. If the taking of a negotiable promissory note on account of a precedent debt is to be presumed to be in satisfaction of it, as held in some states (2 Daniel, Neg. Inst. § 1260), it would have been unnecessary to allege any agreement between the claimants and Barrills on the subject (*Bliss*, Code Pl. § 175). But this court, in *Black v. Sippy*, supra, having adopted the language of Lord Holt in *Clark v. Mundal*, 1 Salk. 124, that "a bill shall never go in discharge of precedent debt, except it be a part of the contract that it should be so," the discharge of the debt on account of the threshing cannot be presumed from the acceptance of Barrills' negotiable promissory note; and, not having alleged that the note was accepted under an agreement that it should be in payment of the account, it follows that such exceptions did not present any issue requiring further proceedings in support of the claim.

The act under consideration, so far as it applies to the case at bar, provides that, when the property of any person shall be seized upon any process of any court of this state, then the debts owing to laborers or employés, which have accrued by reason of their labor or employment, to an amount not exceeding \$100 to each employé, for work or labor performed within 90 days next preceding the seizure, shall be considered and treated as preferred, and such laborers or employés shall be preferred creditors, and shall first be paid; but, if there be not sufficient to pay them in full, the same shall be paid to them pro rata, after paying costs. Any laborer or employé desiring to enforce his claim for wages shall present a statement, under oath, showing the amount due after deducting all just credits and set-offs, the kind of work for which said wages are due, and when performed, to the officer or person charged with the execution of said process, within 10 days after the seizure of the property on any execution or writ of attachment. The claimants, desiring to avail themselves of the foregoing provisions, filed with the said sheriff their statement under oath, from which it, *inter alia*, appears "that said firm was employed by the said Joseph Barrills on or about the 3d day of October, 1894, to work for said Barrills in threshing the crop of grain raised by said Barrills during the season of 1894, at the rate of five cents per bushel for wheat and four cents per bushel for oats, and that under said contract said firm began to work on the 3d day of October, 1894; and between that day and the 8th day of October, 1894, said firm

performed work, services, and labor five days, and threshed 1,820 bushels of wheat, amounting to \$91, and 972 bushels of oats, amounting to \$38.88, and in the aggregate amounting to \$129.88." It will be observed, by an examination of the act, that its provisions are intended to secure to a laborer or employé the benefit of his wages when his employer's property has been levied upon by virtue of any judicial process. A proper definition of the terms "laborer," "employé," and "wages" becomes necessary, to correctly interpret the act. Under a statute of Pennsylvania quite similar to the one in question, the supreme court of that state held that laborers were those who perform with their own hands the contract they make with their employer. *Selders's Appeal*, 46 Pa. St. 57. And in a later case (*Wentroth's Appeal*, 82 Pa. St. 469) Mr. Justice Sharswood, in construing a similar statute, said: "The act meant to favor those who earned their money by the sweat of their own brows, not those who were mere contractors to have the work done, and whose compensation was the profit they would realize on the transaction." In *Campfield v. Lang*, 25 Fed. 128, it was held that one who performed service in sawing up lumber, which involved capital, machinery, and the labor of employés, was not a "laborer," and that a given compensation per 1,000 feet, to be paid for sawing the lumber, was not "wages," in the sense in which the terms were used in the statute. In *People v. Board of Police*, 75 N. Y. 39, Miller, J., in defining one of the terms, says: "Employés are usually considered as embracing laborers and servants, and those occupying inferior positions." From the whole scope and tenor of the act in question, it is apparent that the terms "laborer" and "employé," as there used, are synonymous, and relate to a class of persons who, by their own manual labor, earn a livelihood. *End. Interp. St. § 99.* The words "employer" and "employé" are doubtless the outgrowth of the old terms of "master" and "servant," and have been adopted by reason of, and in deference to, the exalted position labor has acquired by the education of the masses. The statute has wisely provided an easy and speedy remedy, by means of which the laborer or employé, in case the property of his employer has been levied upon under judicial process, may obtain a portion, at least, of the wages due him for his manual labor. The act, however, being in derogation of the common law, should be strictly construed; and no person should be entitled to its benefits unless he is a "laborer," and makes a *prima facie* showing that his claim comes within its provisions. There being no affirmative allegation in the statement that the grain was threshed by machinery, or that the work involved capital and labor, and the allegation in the exceptions that "said claim is not the claim of an employé or laborer, but is, upon its face, and in fact, a claim of contractors," not having been supported by affidavit, the question is present-

ed whether the trial court committed an error by invoking the presumption that the grain was threshed by a threshing machine, and dismissing the claim upon such presumption. Mr. Rice, in his work on Evidence (volume 1, § 30), in commenting upon a presumption of fact, says: "It is presumed that regular and ordinary means are adopted for a given end. So, where the means calculated to attain a certain end appear to have been adopted, and the end itself appears to have been attained, a particular completion will be presumed." In a state like this, containing vast fields of wheat, barley, oats, and rye, it cannot be presumed that any other mode of threshing grain exists than by machinery. If, in such states, which are noted for the quantity of grain annually raised, A. engage B. to thresh his crop of grain, and nothing is said about the means to be adopted to accomplish the result, can there be a doubt that the parties were contracting with reference to the implied fact that the grain was to be threshed by a threshing machine? Persons of ordinary intelligence would so understand and interpret the contract, and there is no just reason why courts should assume a greater degree of ignorance. It must therefore be presumed, from an inspection of the claimants' statement, showing the rapidity with which the work was done, that the grain was threshed by means of a threshing machine, the operation of which involved an outlay of capital and the employment of labor, and that the work was not done by their manual labor alone. The claimants not having been "laborers" or "employés," the compensation which they were to have received was not "wages," within the meaning of the act; and hence their claim was not entitled to preference, and the court committed no error in dismissing the proceedings. It follows that the judgment must be affirmed, and it is so ordered.

CLEMENS v. HANLEY et al.

(Supreme Court of Oregon. July 20, 1895.)

REVIEW ON APPEAL—BILL OF EXCEPTIONS—DISCRETION OF COURT.

1. Assignments of error—of surprise, insufficiency of the evidence to justify the verdict, errors of law occurring at the trial and duly excepted to—will not be reviewed on appeal, in the absence of a bill of exceptions.

2. The discretion of the court, exercised in permitting a reply to be amended during the trial, will not be reviewed, except for abuse.

Appeal from circuit court, Harney county; James A. Fee, Judge.

Action by Peter Clemens against W. D. Hanley and another. Plaintiff had judgment, and defendants appeal. **Affirmed.**

J. J. Balleray, for appellants. J. L. Rand, for respondent.

BEAN, C. J. This is an appeal from a judgment of the court below in favor of the

plaintiff for the sum of \$750, rendered in an action at law. The assignments of error in the notice of appeal are as follows: (1) Irregularity in the proceedings and in the orders of the court, and abuse of discretion, by which defendants were prevented from having a fair trial. (2) Surprise, which ordinary prudence could not have guarded against. (3) Insufficiency of the evidence to justify the verdict or judgment. (4) Error in law occurring at the trial, and duly excepted to by defendants.

There is no bill of exceptions in the record, and hence the last three assignments of error, even if otherwise sufficient, go for naught, as there is no foundation upon which they can rest.

The first assignment is also indefinite and uncertain, but it is claimed that it is sufficient to raise the question as to whether the court abused its discretion, in allowing an amended reply to be filed during the progress of the trial. The statute provides for the amendment of a pleading at any time before the cause is submitted, by conforming the pleading to the facts proved, when such amendment does not substantially change the cause of action or defense. Code, § 101. But leave to so amend is granted or refused in the sound discretion of the trial court, and its action will not be reviewed here, except for an abuse of such discretion, which does not appear in this case. We have nothing before us but the original and amended replies, and from them it does not appear that the allowance of the amendment was an abuse of discretion by the trial court, and it follows that the judgment must be affirmed.

(27 Or. 249)

CAMPBELL v. SNYDER.

(Supreme Court of Oregon. July 20, 1895.)

BILL OF REVIEW—CONTRACT OF MARRIED WOMAN.

1. A bill of review will lie for error of law apparent upon the face of a decree.

2. The covenant of a married woman, in a mortgage of her property to secure the note of her husband, to pay the mortgage debt, does not create a personal liability against her, though she is not a party to the contract whereby the indebtedness was created.

Appeal from circuit court, Umatilla county; James A. Fee, Judge.

Action by Harriet Campbell against Edward Snyder to cancel a judgment theretofore rendered against her by default. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

J. J. Balleray, for appellant.

PER CURIAM. There are two very important questions suggested by this appeal: First, whether, under our statute, a bill of review will lie for error of law apparent upon the face of the decree sought to be reviewed; and, second, whether the covenant of a married woman, in a mortgage of her

property to secure a note of her husband, to pay the mortgage debt, creates a personal liability against her, she not being a party to the contract whereby the indebtedness was created. From *Heatherly v. Hadley*, 4 Or. 7, *Crews v. Richards*, 14 Or. 442, 13 Pac. 67, and *Knoll v. Kiessling*, 23 Or. 8, 35 Pac. 248, it seems that the first of these questions should be answered in the affirmative, and the second in the negative; but not having the benefit of a brief or argument for respondent in this case, and believing the conclusion reached not entirely free from doubt, either or both questions must be considered as open for re-examination in the future, should they become important. The decree of the court below is reversed, and a decree will be entered here as prayed for in the complaint.

(27 Or. 215)

LA GRANDE NAT. BANK v. BLUM et al. (Supreme Court of Oregon. July 20, 1895.)

RATIFICATION OF AGENT'S ACTS—NOTICE TO TAKE DEPOSITION—PROOF OF SERVICE—INSTRUCTIONS.

1. A bank, by suing on a note taken by its cashier under a contract made by him, ratifies the contract in toto, though he was unauthorized to make it.

2. Proof of service by a marshal of notice of application for commission to take deposition is properly made by his certificate. *Hill's Code*, §§ 61, 527.

3. The refusal of instructions is not error where the substance thereof has been given in the general charge.

Appeal from circuit court, Union county; Morton D. Clifford, Judge.

Action by the La Grande National Bank against N. Blum and another. Judgment for defendants. Plaintiff appeals. Affirmed.

O. H. Finn, for appellant. M. Baker, for respondents.

BEAN, C. J. This is an action on a promissory note executed and delivered by the defendants to plaintiff on February 12, 1892, payable three months after date. The complaint is in the usual form. The answer admits the execution and delivery of the note, but as a defense avers, in substance, that at the time of such execution the plaintiff was the owner and in possession of two certain promissory notes, for \$600 each, on one O. M. Ramsey, which it delivered to defendant Blum for collection, under an agreement that he would pay over the proceeds to plaintiff, if collected, or, if unable to collect the notes or any part thereof, he would return them; that the note in question was given to secure the performance of such agreement on Blum's part; and that he fully complied therewith. The reply puts in issue the allegations of the answer, and affirmatively avers that the Ramsey notes mentioned therein were originally made, executed, and delivered to the defendant Blum and one Summers, as partners under the firm name of Summers & Blum, and were by plaintiff discounted in the usual course of business, the payment thereof

being guarantied by an indorsement of the payees; that when the notes matured demand was duly made of the maker, and, he being insolvent and neglecting to pay the same, payment was demanded of Summers & Blum, whereupon the note in suit was made, executed, and delivered in discharge of the obligation of Summers & Blum as indorsers of the Ramsey notes. Upon the trial the jury, finding the allegations of the answer to be true, rendered a verdict in favor of defendants, upon which judgment was subsequently entered, and plaintiff appeals.

It is contended that the court erred in refusing to direct a verdict in favor of plaintiff, at the close of the testimony, on the ground that the evidence for the defendants showed that the agreement set up in the answer was made with the cashier of plaintiff without its authority. It is unnecessary for us to enter into an examination of the power, duty, and authority of the cashier of a bank, to ascertain whether the alleged agreement or contract set up in the answer was within the scope of his agency; for the plaintiff, by bringing this action on the note received by the cashier under such contract, has, so far as this proceeding is concerned, ratified the entire contract. No rule of law is more fundamental than if the principal elects to ratify any part of the unauthorized act of an agent he must ratify the whole. He cannot accept that part which is favorable to himself, and repudiate the remainder. As said by Mr. Justice Story: "The principal cannot, of his own mere authority, ratify a transaction in part, and repudiate it as to the rest. He must either adopt the whole or none." Story, Ag. § 250. And "from this maxim," says Chief Justice Smith, "results a rule of universal application that, where a contract has been entered into by one man as agent of another, the person on whose behalf it has been made 'cannot take the benefit of it without bearing its burdens. The contract must be performed in its integrity.'" *Rudasill v. Falls*, 92 N. C. 222. Indeed, reason, as well as authority, is all one way on this question. Mech. Ag. § 130; *Coleman v. Stark*, 1 Or. 116; *Eberts v. Selover*, 44 Mich. 519; *McClure v. Briggs*, 58 Vt. 82, 2 Atl. 583. Now, in this case, if the cashier of the bank exceeded his authority in making the contract with the defendants set up in the answer, and in accepting the note in suit, the plaintiff was not bound thereby; but it was bound to take the contract in its entirety or not to recognize it at all. It cannot affirm that part of his act which is of advantage to it, and repudiate the rest.

It was also claimed that the alleged agreement was an attempt to vary by parol the terms of a written contract. But that question was presented and decided on the former appeal in this case (37 Pac. 48), and requires no further notice at this time.

It is next contended that the court erred in overruling plaintiff's motion to suppress

Blum's deposition, and in allowing the same to be read in evidence on the trial. The ground of the objection is that there is no sufficient proof of service of notice of the application for a commission to take such testimony. The notice was served by the marshal of La Grande, and the proof of service is made by his certificate, while the claim for plaintiff is that it should have been made by his affidavit. Now, by section 527 of the Code, the marshal was authorized to serve the notice and make the proof of service in the same manner as he is empowered by law to do in case of the service of a summons; and section 61 provides that the proof of service of a summons by a marshal shall be by his certificate; and therefore the service in question is sufficient.

Error is also assigned on the refusal of the trial court to give a series of some nine instructions embodying abstract propositions of law concerning the legal liability of an indorser of a promissory note. These instructions could only become material in this case on the theory of the plaintiff that the note in suit was given by the defendants in discharge of the liability of Summers & Blum as indorsers of the Ramsey notes, and was, therefore, supported by a sufficient consideration; but the court, in its general charge, concisely presented the same idea by instructing the jury "that, if the note was given for the purpose of taking up the Ramsey notes, that would be a sufficient consideration, and your verdict should be for plaintiff." This was all plaintiff sought to accomplish by the abstract propositions of law submitted in the form of instructions, and was certainly simpler and more easily comprehended by the jury.

There are some other assignments of error in the notice of appeal, but they are without merit, and the judgment must be affirmed.

DRAY et al. v. BLOCH.

(Supreme Court of Oregon. July 20, 1895.)

ADMINISTRATOR DE BONIS NON—ACCOUNTING.

An administrator having sold land and received part of the pay therefor, which he misappropriated, and the sale having been confirmed, the administrator de bonis non can be held liable only for the balance of the price which he received.

Appeal from circuit court, Union county; James A. Fee, Judge.

Henry Dray and another made objections to the final account of M. S. Bloch, administrator de bonis non of A. Dray, deceased, and from an order approving the account appealed to the circuit court, which affirmed the order, and they again appeal. Affirmed.

C. H. Finn, for appellants. J. Baker, for respondent.

PER CURIAM. This controversy has arisen in the course of the settlement of the estate of A. Dray, deceased. The facts are

that the defendant, having been by the county court of Union county appointed administrator de bonis non of the said estate, filed his final account, to which the plaintiffs, Henry Dray, an heir of the deceased, and D. Marx, a creditor of the estate, made objections, and the issue thus joined was referred to J. W. Knowles, Esq., to take the evidence and report his findings of fact and law therefrom; and, having found for the defendant, he so reported to the county court, which affirmed the report and made an order approving the account of the administrator, from which order the plaintiffs appealed to the circuit court, which rendered a decree affirming the order of the county court, from which decree the plaintiffs appeal to this court.

The principal objection to the defendant's account grows out of the sale of land belonging to the estate of J. W. Dray, the former administrator, to one C. M. Cartwright, for \$6,000, upon which the purchaser paid \$696.35 to said J. W. Dray; but the latter having been removed, and the defendant appointed in his stead, the county court made an order that the sale should be confirmed upon the payment to the defendant of \$6,000 within 30 days, and to be set aside if not so paid. The other objections relate to the payment of various amounts by the defendant and expenses incurred in the administration, the defendant's failure to collect certain accounts due the estate, and to the sale of certain personal property for an insufficient price. The referee, in substance, found that the amounts paid out by the defendant and expenses incurred by him were bona fide and just claims against the estate, the greater portion of which had not been allowed until he had consulted with and been advised by the plaintiff Henry Dray to pay; that the claims of the estate against certain debtors were barred by the statute of limitations, while others were without merit, and could not be enforced; that in the sale of the personal property the defendant had secured the best prices obtainable; and that he had acted in good faith, and exercised such prudence and diligence as men ordinarily bestow upon their own affairs. The circuit court adopted these findings, which it says were supported by the weight of the testimony submitted to the referee, and also, in substance, found that the county court exercised its functions in the manner provided by law, without injury to any of the substantial rights of the plaintiffs; that the plaintiff Henry Dray and J. W. Dray were heirs and joint administrators of the estate of the said A. Dray, deceased, prior to the appointment of the defendant as administrator herein; and that said J. W. Dray, as such administrator, collected \$696.35 on account of the said sale of land to C. M. Cartwright, and the remainder of the purchase price, to wit, the sum of \$5,303.65, was paid to the defendant, who duly accounted therefor. A review of the record before us shows

that the referee and trial court carefully examined the evidence, including the long accounts of the administrators, and convinces us that the findings and conclusions reached by them are correct. The said real property of the estate having been sold by J. W. Dray while exercising his trust as administrator, the purchaser, having paid him \$696.35 on account thereof, was, on confirmation of the sale, entitled to a deed upon the payment of \$5,303.65. Because J. W. Dray misappropriated the \$696.35, the purchaser could not be required to repay it when the sale was confirmed, nor could the defendant be held liable therefor, because he did not collect it. The record shows that the county court, on the settlement of J. W. Dray's account, found him in default to the estate in the sum of \$1,206.56, of which this \$696.35 forms a part. And the plaintiffs insist that the defendant is liable—First, because he did not collect from C. M. Cartwright the amount paid to J. W. Dray; and, second, because he had not collected the \$1,206.56 which J. W. Dray owed the estate,—thus seeking to charge him twice for the same amount. The defendant, having accounted for the property and money received, was entitled to be discharged as administrator, and hence the decree is affirmed.

MAXWELL v. BOLLES.

(Supreme Court of Oregon. July 20, 1895.)

ADMISSION OF EVIDENCE—ERROR CURED BY SUBSEQUENT EVIDENCE—CROSS-EXAMINATION—ATTACHMENT AND MORTGAGE—PRIORITY.

1. Error in admitting testimony of a party as to the existence and contents of a note without proof of its loss or destruction is cured by the fact being thereafter elicited, on his cross-examination, that he had not possession of it, but that it had been stolen from him before the trial.

2. Where plaintiff testifies that a note and mortgage executed by S. were given him for work performed for S., defendant, who contends that they were without consideration, should be allowed to ask him, on cross-examination, when he commenced work, when he quit, what time he worked between those dates, what wages he was to receive, and how much he had been paid above the amount covered by the note.

3. An attachment of chattels so situated as to require separate and distinct seizures takes precedence of a mortgage thereon, filed on the same day as the seizure, as to such of the chattels only as are actually taken into the hands of the officer before the filing.

Appeal from circuit court, Union county; Morton D. Clifford, Judge.

Action by Isaac T. Maxwell against J. T. Bolles. Judgment for plaintiff. Defendant appeals. Reversed.

T. H. Crawford, for appellant. J. L. Rand and J. M. Carroll, for respondent.

BEAN, C. J. This is an action to recover possession of personal property. The complaint, in substance, alleges, that on February 12, 1894, one J. Q. Shirley made, ex-

ecuted, and delivered to the plaintiff his promissory note for the sum of \$1,000, due one year after date, and as security for the payment of the same gave him a chattel mortgage on 31 head of horses, of the value of \$900, which mortgage is conditioned that, should the mortgaged property, or any part thereof, be "taken on attachment or execution, the whole of the principal and interest shall become due and collectible, at the option of the mortgagee or his assigns, and it shall be lawful for such person, his agents or assigns, to take immediate possession of said property, and to sell the same at public sale"; that said mortgage was duly and regularly filed in the office of the county clerk of Union county at 9 o'clock a. m. of the 12th day of February, 1894, and has ever since been and is still on file in said office; that thereafter, and on the 13th day of February, the defendant, as sheriff, attached a portion of said mortgaged property under a writ of attachment issued in an action brought by Wright & Davis Bros. against Shirley, and ever since and now wrongfully and unlawfully withholds the possession thereof from the plaintiff; that, by reason of said attachment, plaintiff became and is entitled to the immediate possession of said property under the terms of his mortgage. The answer specifically denies, on information and belief, the material allegations of the complaint, and affirmatively avers that on February 11, 1894, there was placed in his hands for service two certain writs of attachment issued out of the circuit court for Union county, in actions pending in which Wright & Davis Bros. were plaintiffs and Shirley defendant, commanding and directing him to attach and take into his possession sufficient of the property of Shirley to satisfy the amount named in said writs; that afterwards, and on the 12th day of February, 1894, and before the hour of 9 o'clock a. m. of said day, under and by virtue of said writs, the defendant attached and took into his possession the personal property in controversy in this action, the same being at the time the property of Shirley and in his possession. And for a further defense he avers, on information and belief, that the promissory note and mortgage set out in the complaint were both voluntarily executed and delivered by Shirley to plaintiff without any consideration, and for the purpose of hindering, delaying, and defrauding the creditors of Shirley, and especially Wright & Davis Bros., whose action was then pending, and that such note and mortgage were so received and accepted by plaintiff. The reply having put in issue the allegations of the answer, a trial was had, resulting in a verdict and judgment in favor of the plaintiff; and defendant appeals, assigning error in the ruling of the trial court in the admission of evidence and in its instructions to the jury.

It is claimed that the court erred in allowing the plaintiff to testify as to the existence

and contents of the alleged promissory note given him by Shirley without first proving its loss or destruction. It is a rule of universal application that the existence and contents of a written instrument, when material and in issue, cannot be proved by parol without first showing that it is not within the power of the party offering such evidence to produce the writing itself. The instrument sought to be proved is regarded, necessarily, as the primary or best evidence of its own existence and contents, and if possible must be produced. This is but an application of the rule that the best evidence of a disputed fact must be produced of which the nature of the case is susceptible. 1 Greenl. Ev. §§ 82, 84; Rice, Ev. § 146. But in this case the bill of exceptions shows that the fact was elicited, upon his cross-examination, that the note in question was not in possession of the plaintiff, but had been stolen from him two or three weeks before court convened. So that the error, if any, in admitting evidence of the contents of the writing without first proving its loss, was cured by the subsequent testimony of the defendant. And, besides, it may well be doubted whether the existence or contents of the note was really in issue in the case at all. True, the defendant denied its execution or delivery, upon information and belief, but in his answer he affirmatively admits the execution of both the note and mortgage, but alleges that they were made and received without consideration, and for the purpose of hindering, delaying, and defrauding the creditors of Shirley; and this admission probably rendered proof of their execution and delivery unnecessary. *Veasy v. Humphrey* (just decided) 41 Pac. 8.

From the pleadings it will be observed that the plaintiff claims title and right to the possession of the horses described in the complaint by virtue of a chattel mortgage thereon executed by Shirley on the 12th day of February, 1894, which was filed for record at 9 o'clock in the morning of said day, while the defendant claims that the writ of attachment under which he justifies was served by taking the property in question into his custody before the mortgage was filed, and that the note and mortgage were given and received for the purpose of hindering, delaying, and defrauding creditors, and especially the said Wright & Davis Bros. So that the real questions presented were—First, was the chattel mortgage filed before the attachment? and, second, if so, were the note and mortgage to plaintiff given and received in good faith to secure a bona fide debt?

The next error assigned relates to the refusal of the court to compel the plaintiff to answer certain questions on cross-examination. The bill of exceptions discloses that plaintiff testified, on his direct examination, that the note and mortgage were given for and to secure an indebtedness to him from Shirley for work and labor performed on

Shirley's farms prior to February 12, 1894. On cross-examination he was asked by defendant's counsel the following, among other, questions: "Was it for work you done for him just before the note was given?" "For what particular length of time did you work for Mr. Shirley, and what dates and between what dates did you work for him, for which the thousand-dollar note was given?" "What time in 1889 did you commence to work for him?" "What were you to receive a month for your work?" "How much did he pay you on your work between these dates, over and above the thousand-dollar promissory note?" To each and all of these questions plaintiff by his counsel objected, whereupon the court sustained the objection, and excused the witness from answering. One of the most important, if not the principal, contested question in the case, was whether there was any consideration for the note and mortgage under which plaintiff claims possession of the property; and, the plaintiff having testified in chief that it was for work and labor performed by him for Shirley, it was clearly competent for the defendant, on cross-examination, to ask him when he commenced work, when he quit, what time he worked between those dates, what wages he was to receive, and how much he had been paid for his work over and above the amount covered by the note. These were all matters of legitimate cross-examination, and went to impeach the consideration of the very instrument under which plaintiff was claiming the right to the possession of the property in question. If the mortgage was without consideration, it was void as to the defendant, and plaintiff could not recover in the action. It was, therefore, of the utmost importance to the defendant that the right to cross-examine the plaintiff upon this matter should not be denied him. The cross-examination of a witness should always be allowed a free range, and it should not be limited to the exact facts stated in the direct examination, but may extend to any other matters connected therewith which tend to limit, explain, qualify, or rebut any inference resulting from the direct examination. *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093; *Sayres v. Allen*, 25 Or. 215, 35 Pac. 254. The range and extent of the cross-examination of witnesses is left to the discretion of the trial court, and will be reviewed by an appellate court only in case of an abuse of such discretion; but the bill of exceptions here discloses that defendant was not allowed to cross-examine the plaintiff at all upon the consideration of the note and mortgage, the objection to the questions being that such evidence was immaterial and irrelevant, and the court so ruled. The right to cross-examine the witness was a valuable legal right, of which the defendant could not be justly deprived, and the denial of such right was clearly error.

The next question is as to when the attach-

ment under which defendant justifies took effect. The evidence in his behalf tended to show that on Saturday, the 10th day of February, he received the writs of attachment, together with a list of the property to be attached, but too late for service on that day. On the following Monday morning, about 7 o'clock, his deputy, accompanied by the agent of Shirley, who had possession of the property, left Union to go to the Stanton and Jones ranches, some four or five miles distant, where the horses were, for the purpose of attaching them. While on the way, and before reaching the Stanton ranch, they met parties driving some of the horses to town, which they proceeded to attach and list. They then went to the Stanton ranch and attached and listed some more of the horses, and then went to the Jones ranch and completed the attachment, getting through about noon, and returning to Union about 2 o'clock in the afternoon. The evidence tended to show that a portion of the horses were attached prior to 9 o'clock, the date at which the mortgage was filed, and it was admitted that some of them were not attached until after that time. The contention for the defendant is that, in contemplation of law, the attachment dated from the time the officer commenced to take the horses into his custody, and, if that was prior to the filing of the mortgage, the attachment took precedence over it, although a part of the horses were not actually seized until after it was filed. But, as we understand the law, a writ of attachment creates no lien on personal property until it is actually taken into the custody of the officer, if it is capable of manual delivery and not in the possession of some third person; and, when the property is so situated as to require separate and distinct seizures, the lien as to each only attaches at the time of its actual seizure and taking into custody by the officer. *Kuhn v. Graves*, 9 Iowa, 303; *Lott v. Roosevelt*, 9 Cow. 526; *Burhans v. Tibbits*, 7 How. Prac. 77. It is true it is sometimes said that in legal contemplation the law knows no fraction of a day, but common sense, and common justice as well, require that the exact time may be shown when it will promote substantial justice; and hence, when the statute says that from the date of the attachment the attaching creditor shall be deemed a purchaser in good faith, it simply means from the actual time that the property is attached, and not from the date of the writ or of the day on which the attachment is made. The mortgage of the plaintiff, if otherwise valid, was, therefore, a prior lien upon all the property therein described which had not been actually seized or attached by the sheriff at the time it was filed, and the defendant is entitled to the possession of such of the horses, if any, as he may have actually attached prior to such filing.

The judgment of the court below is reversed, and a new trial ordered.

KINE v. TURNER et al.

(Supreme Court of Oregon. July 20, 1895.)

SPECIFIC PERFORMANCE — CONTRACTS AGAINST PUBLIC POLICY.

Defendant, before buying land which was sold at auction under Act Cong. March 3, 1885,—providing that land, including that bought by him, should be thus sold, and the proceeds given to Indians, and that none of it should be sold except to one making oath that he was buying it for his own use and occupation, and not for or on account of another,—contracted to convey part of it to plaintiff at the same price per acre he had to give for it, if plaintiff would refrain from bidding at the auction. *Held*, that though plaintiff had gone into possession, and improved the land, the contract would not be enforced, as it was against public policy; being intended to prevent competition, and requiring defendant to perjure himself.

Appeal from circuit court, Umatilla county; James A. Fee, Judge.

Suit by Pat Kine against Ida Turner and her husband. Decree for defendants. Plaintiff appeals. Affirmed.

J. J. Balleray, for appellant. Wirt Minor, for respondents.

BEAN, C. J. This is a suit to enforce the specific performance of a parol contract for the conveyance of a small tract of land in what was formerly the Umatilla Indian reservation. The quarter section of which it forms a part was purchased for the defendant in April, 1891, by her father, Jehu Switzler, at public sale by the government of the United States under the act of congress of March 3, 1885, providing for the allotment of a portion of the reservation lands to the Indians, and the sale of the surplus at public auction. The contract which plaintiff seeks to enforce was made between him and Switzler, as the agent of defendant, before the sale, and was to the effect that if plaintiff would refrain from bidding for the land as he contemplated doing, and allow Switzler to purchase it at its appraised value, the defendant would, as soon as she got a patent therefor, convey to him the particular tract in controversy at the same price per acre that she should be compelled to pay for the entire 160 acres. In pursuance of this agreement, plaintiff, although present at the sale, did refrain from bidding on the land, and it was purchased by Switzler for his daughter, without competition, and at the lowest price for which it could be sold under the law. Within two or three days thereafter, plaintiff went into possession of the land Switzler had agreed defendant would convey to him, and he has ever since resided thereon with his family, making valuable and permanent improvements, with the knowledge of, and without objection from, the defendant, until after she received her patent, when she repudiated and denied the contract, and refused to convey the land to plaintiff; and hence this suit. Briefly, these are the facts, as claimed by plaintiff,

and upon which he relies for a decree. From this statement it will be perceived that he is confronted at the outset with the objection that a contract concerning the purchase and conveyance of land belonging to the United States, which is about to be offered for sale at public auction to the highest and best bidder, and having for its sole consideration the forbearance of one of the parties to bid at such sale, is illegal and void, and one which a court of equity will not enforce. The agreement between the plaintiff and Switzler, whether it was for the conveyance of the land in dispute, as claimed by plaintiff, or for a 20-year lease, as claimed by Switzler, was probably entered into at the time by both parties in good faith, for their supposed mutual benefit, and with no intention on the part of either to defraud the other. But this is not enough. The real question is whether the contract is not illegal because it contemplated a fraud upon the government of the United States, by stifling competition, thereby enabling Switzler to purchase at a price less than the land would otherwise have sold for. If so, it was void as against public policy, and plaintiff cannot recover in this suit, whatever may have been the motives of the parties, and however upright their intentions may have been, as between themselves. The aid of a court of equity cannot be invoked to enforce the performance of a contract for the conveyance of land, if it is contrary to the spirit and policy of the law, or against public policy or good morals. *Pom. Spec. Perf. Cont.* 280; *Brake v. Ballou*, 19 Kan. 397. In such case the court will leave the parties where it found them, and refuse to encourage the making of such contracts by lending its aid to enforce them. The courts have repeatedly refused to enforce the specific performance of the contract of a homesteader to convey a portion of his claim when he shall acquire title from the United States, although there is no prohibition against alienation in the homestead law, and no express forfeiture in case of alienation. Contracts of this character are deemed to be in violation of the spirit and policy of the homestead law, void as against public policy, and cannot be made valid by part performance. *Oaks v. Heaton*, 44 Iowa, 116; *Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905; *McCrillis v. Copp* (Fla.) 12 South. 643; *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97.

The same principle, it seems to us, must be applied in this case. The act of March 3, 1885, under which the land was sold, provides that the surplus reservation lands shall be sold at public auction,—the evident policy of the government being to obtain the highest and best price therefor at an open, public sale, fairly conducted; and any contract or agreement between intending purchasers, tending to prevent competition at such sale, is necessarily in violation of the spirit of the law under which it was made, and in fraud

thereof. It is important that sales at public auction should be conducted in good faith, without prejudice to the rights of any party; and for that purpose the law encourages bidding, and will not recognize as valid any contract or combination to prevent competition at such sales. *Pom. Spec. Perf. Cont. § 283; Jones v. Caswell, 3 Johns. Cas. 29; Wilbur v. How, 8 Johns. 346.* "A sale at auction is a sale to the best bidder," says Henderson, C. J.; "its object, a fair price; its means, competition. Any agreement, therefore, to stifle competition, is a fraud upon the principles on which the sale is founded. It not only vitiates the contract between the parties, so that they can claim nothing from each other, but also any purchase made under it, their claims against the vendor being weaker than those against each other; policy alone forbidding that the last mentioned should be enforced, but both policy and justice uniting to condemn the former. If this be the rule with regard to auctions instituted by private individuals, a fortiori should it be as to those public auctions instituted by law for great public purposes." *Smith v. Greenlee, 2 Dev. 126.* That the contract between plaintiff and Switzer comes within this principle seems to us clear. It was made for the express and avowed purpose of preventing competition, and the only consideration for defendant's promise was a forbearance on the part of plaintiff to bid against her at the sale. The contract was thus plainly in fraud of the rights of the government of the United States and the Indians to whom the proceeds of the sale belonged, and in violation of the spirit and policy of the law under which the sale was made, and consequently void as against public policy. Nor does the fact that plaintiff entered into possession and made valuable improvements on the land make valid a contract which was before illegal, or give him a right to any relief in this suit. His present condition is the result of a voluntary agreement on his part, the tendency of which was to defraud the government; and although the defendant may have obtained an advantage, unconscionable as it may be, a court of equity will keep its hands off, and leave the parties where it finds them. The original agreement being void as against public policy, and both parties being alike guilty, no subsequent act of part performance can give it validity; and the courts will refuse to enforce it, or any rights acquired thereunder, —not, however, from any regard for the defendant, but from motives of public policy alone.

And again, it seems to us, the contract is in violation of the manifest theory of the act of 1885, which is that the land should be sold only to bidders desiring it for their own exclusive use and occupation. It requires each purchaser to make oath or affirmation, at the time of making his purchase, that he is purchasing the land for "his own use and occupation and not for or on account of or at

the solicitation of another, and that he has made no contract whereby the title shall directly inure to the benefit of another"; and, before patent shall issue, he is required to make "satisfactory proof that he has resided upon the lands purchased at least one year and has reduced at least twenty-five acres to cultivation." These provisions clearly indicate the policy of the government to dispose of the lands for the actual use and occupation of the purchaser, and not for speculative purposes; and, while it may be true that the act contains no express prohibition against a contract of alienation made before the purchase, yet it cannot be consummated in such case without perjury; and the courts have uniformly, and with one voice, declared that a court of equity will have nothing to do with the enforcement of a contract which can only be carried out by perjury, and which was entered into in defiance of the clearly-expressed will of the government. Whether a contract for a sale of the lands, made after a purchase, and before patent issues, would be valid, is not material here, although the question was ably and exhaustively argued at the hearing, because it is admitted that the contract which plaintiff seeks to enforce was made before the sale; and whether it is absolutely void, or not, it is so manifestly against the spirit of the act of 1885, and so necessarily resting upon perjury, that the aid of a court of equity cannot be invoked for its enforcement. It follows that the decree of the court below must be affirmed, and it is so ordered.

LEASEURE et al. v. FORQUER et al.
(Supreme Court of Oregon. July 20, 1895.)
FRAUDULENT CONVEYANCE — ACTION TO SET ASIDE — COMPLAINT.

A complaint in an action to set aside a conveyance as fraudulent is bad on general demurrer, where it merely alleges a conveyance of lands without consideration to defendant, recorded four months before date of execution by the grantor to plaintiff of a note and a mortgage on the land (which will be presumed to be the date on which the debt accrued), and that the conveyance was made for the purpose of defrauding plaintiff, as was well known to defendant; the allegations of fraud being merely conclusions, and insufficient, and the grantor having a right to convey without consideration, when he had no creditors, unless it was on a secret trust for himself, with a view of contracting debts with plaintiff, and defrauding him thereof.

Appeal from circuit court, Umatilla county; Morton D. Clifford, Judge.

Suit by J. C. Leaseure and another, partners as Leaseure & Stillman, against William Forquer and another. Decree for plaintiffs. Defendants appeal. Reversed.

William Parsons and J. J. Balleray, for appellants. Charles H. Carter, for respondents.

PER CURIAM. This is a suit to foreclose a mortgage, and to have the land therein described sold to satisfy the same. The alle-

gations of the complaint are, in substance, that on or about the 5th day of June, 1893, the defendant William Forquer, for value, made, executed, and delivered to plaintiffs his promissory note for the sum of \$500, payable five months after date in United States gold coin, with interest from date at the rate of 10 per cent. per annum, and providing for the payment of reasonable attorney's fee in case suit or action was instituted to collect the same; that, for the purpose of securing the payment of the same, Forquer, on the 12th day of June, 1893, made, executed, duly acknowledged, and delivered to plaintiffs, a mortgage upon certain premises therein described, containing 156.70 acres, a copy of which is made a part of the complaint. It appears from the copy that Forquer covenanted therein that he was the owner in fee simple of the premises, and that they were free from all incumbrances, except a mortgage in favor of J. H. Raley for the sum of \$500. It is further alleged that the defendant Forquer is insolvent, and the complaint continues: "That heretofore, to wit, on or about the 18th day of January, 1893, the said William Forquer sold and transferred the said real property, by deed of conveyance dated on that day, to defendant Squire Bosworth, for the alleged consideration of \$800, which deed of conveyance was recorded on the 7th day of February, 1893, at page 356 of Book 9 of Deeds, in the office of the county clerk of Umatilla county, Oregon, but in truth and in fact said deed of conveyance was made without any consideration whatever, and was made for the purpose of defrauding, hindering, and delaying the creditors of the said William Forquer, and these plaintiffs in particular, all of which was well and is well known to the defendant Squire Bosworth, and the said deed of conveyance was and is fraudulent and void as to all the creditors of said William Forquer, and these plaintiffs in particular; that the interest, right, estate, title, and lien, if any there be, which said Squire Bosworth has, or claims to have, in the said lands, are inferior and subordinate in right to the lien and right of these plaintiffs therein by virtue of their said mortgage thereon, and is null and void and fraudulent as to these plaintiffs, and so far as they, and their said lien and right upon said lands, are concerned." There are some other allegations, relating to the attorney's fee and a supposed mistake in the mortgage, not necessary to recite. Bosworth interposed a general demurrer,—that the complaint does not state sufficient facts to constitute a cause of suit,—which was overruled by the court. In this it is claimed there was error, and, owing to the imperfect state of the record, it is the only question we can consider.

It will be seen from the complaint that the said note was executed by Forquer June 5, 1893, and it will be presumed, for the purposes of the demurrer, that the debt accrued upon that date, and not prior thereto. The

deed of which plaintiffs complain was executed long prior thereto,—about January 18, 1893,—and was placed of record the same day, which gave them at least constructive notice thereof; so that, at the time of the execution of the deed, plaintiffs were not creditors of Forquer. Hence, it could not be true that the deed was made for the purpose of hindering, delaying, or defrauding the plaintiffs. There is no allegation of an evil design on the part of Forquer to secretly dispose of his property with a view of contracting a debt with plaintiffs for the purpose of defrauding them. So far as the allegations of fraud are concerned, they are mere conclusions, and not a statement of facts out of which it is supposed to arise. Such averments alone will not support a judgment. *Flewellen v. Crane*, 58 Ala. 627; *Rowland v. Coleman*, 45 Ga. 204; *Wood v. Amory*, 105 N. Y. 282, 11 N. E. 636; *Van Weel v. Winston*, 115 U. S. 237, 238, 6 Sup. Ct. 22. The allegation, however, that the "deed of conveyance was made without any consideration whatever," is an averment of a fact; but this cannot avail the plaintiffs, in the absence of some showing that Forquer had an interest in the premises, or that Bosworth was holding them in secret trust for his use and benefit. The only intimation we have from the complaint that Forquer had any interest whatever at the time of the execution of the mortgage is his covenant, and perhaps a colorable presumption of some sort of title, arising from the fact of his giving it to plaintiffs; but this is not competent evidence to impeach Bosworth's title, in the absence of a showing of conspiracy to which both Forquer and Bosworth were parties. If Forquer had no creditors to subserve, he had a right to convey his property to whomsoever he pleased, without a consideration; and, unless it was conveyed in trust for himself, it would be out of reach of his subsequent creditors. *Hill, Ann. Laws, § 3053*. No such secret trust relations are set up, nor are they relied upon for relief. We cannot concur with counsel for the plaintiffs that the defect in the complaint is one of statement, merely. It states a defective title, and is insufficient to support the decree based upon it. It follows that the decree is reversed, the demurrer sustained, and the cause remanded for such other proceeding as may seem appropriate, not inconsistent with this opinion.

MOSS et al. v. ROSE.

(Supreme Court of Oregon. July 20, 1895.)

WATER RIGHTS — ABANDONMENT — ADVERSE POSSESSION.

1. Plaintiffs and defendant agreed that, in consideration of their labor in constructing a ditch over defendant's land, plaintiffs should have the right to appropriate one-half the water therein. Defendant did not appropriate water until seven years afterwards. *Held* that, as plaintiffs and defendant were tenants in common of the ditch, plaintiffs' use of the water was presumed to be in maintenance of, and not in oppo-

sition to, defendant's rights, and therefore defendant had not abandoned his interest therein.

2. If plaintiffs' possession was adverse, it did not continue for a sufficient time to entitle them to any rights against defendant by prescription.

3. On an issue as to whether defendant manifested an intention to abandon a water appropriation, the evidence showed that defendant faithfully prosecuted improvements on his land, adding each year to the area in cultivation, and provided for the irrigation thereof from other and more convenient sources, but that he did not put the water in controversy to use until seven years after it was first appropriated. *Held*, that defendant's intention to abandon had not been established.

4. Where plaintiffs and defendant were tenants in common of a ditch, and plaintiffs neglected to repair the same, thereby causing an overflow on defendant's land, defendant had no right to stop up the ditch, as he was equally bound to repair.

Appeal from circuit court, Malheur county; Morton D. Clifford, Judge.

Action by Arthur J. Moss and another against William A. Rose to enjoin defendant from obstructing the flow of water in a ditch. Plaintiffs had judgment, and defendant appeals. Modified.

M. L. Olmstead, for appellant. Will R. King, for respondents.

MOORE, J. This is a suit to enjoin the defendant from obstructing the flow of water in a ditch constructed across his lands. The facts show: That in November, 1881, the defendant settled upon an arid tract of public land, and that prior thereto the plaintiffs had settled upon adjoining tracts. That said lands were thereafter surveyed, and patents duly issued therefor, as follows: To the plaintiff Alvin S. Moss for the N. E. $\frac{1}{4}$ of section 29; to the plaintiff Arthur J. Moss for the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of said section, and the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 28; and to the defendant for the N. W. $\frac{1}{4}$ of section 33,—all in township 25 S., of range 46 E., in Malheur county, Or. That the waters of Carter creek flow in a northerly direction, in a well-defined channel, through the western portion of the defendant's land, and those of Sucker creek, entering the defendant's land at the eastern border, flow in a northwesterly direction, uniting on the land of Arthur J. Moss, near its southern boundary. That in the spring of 1883 the parties above named and one Thomas Waite commenced a ditch at the west side of Carter creek, near the south boundary of defendant's land, and jointly constructed it for a distance of about one-fourth of a mile. That the plaintiffs continued its construction to their lands, and conducted water therein, which they have continuously used in irrigating their said lands, except when prevented from doing so by the defendant. That in October, 1892, the defendant forbade the plaintiffs from entering upon his premises, or appropriating the water of said creek, and thereafter removed the headgate,

filled the ditch, and obstructed the flow of water to the plaintiffs' premises, to prevent the continuance of which they bring this suit, and allege that the ditch was constructed and owned by the parties as tenants in common, but that the defendant had abandoned his interest, and pray that he may be restrained from intermeddling with said ditch, or obstructing the flow of the water therein. The defendant, after denying the material allegations of the complaint, alleges that he was the prior appropriator of the waters of Carter creek, at a point about one mile above his land; that the plaintiffs' diversion and appropriation had at all times been by his permission, which he had revoked, and filled the ditch, because of the plaintiffs' failure to keep it in repair. A reply having put in issue the allegations of new matter contained in the answer, the cause was referred to John Wheeler, who took the evidence, from which the court found that the ditch had been constructed by the parties as tenants in common, but that, by reason of the defendant's failure to appropriate the water within a reasonable time, he had abandoned his right to its use; that by such abandonment the plaintiffs became entitled to the exclusive use thereof,—and rendered a decree as prayed for in the complaint, with \$50 damages, and the costs and disbursements of the suit, from which decree the defendant appeals.

A careful examination of the evidence leads us to the conclusion that the court very properly found that there was an agreement, by the terms of which the plaintiffs, in consideration of their labor and expense in constructing the ditch, should have the right to appropriate one-half the water conducted therein, for the purpose of irrigating their lands; and hence the principal question to be considered is whether the defendant, by not appropriating the water till 1890, had abandoned all his interests therein. The ditch having been constructed under an agreement between the parties that each should be entitled to appropriate his share of the waters of Carter creek, rendered the parties tenants in common of the ditch and right of appropriation, and the defendant's property rights must be governed by the rules of law regulating such. Black's *Pom. Water Rights*, 63; *Freem. Coten*, § 88. Had the plaintiffs abandoned that ditch, and made a subsequent appropriation through another, there might have been just reason for considering the effect of the defendant's delay in applying the water so diverted to some beneficial purpose; but the continued use of the water by the plaintiffs is presumed to be in maintenance of the rights of the defendant, for whom they hold it as tenants in common. *Gunter v. Laffan*, 7 Cal. 588. And, even if their possession were adverse, it has not continued a sufficient length of time to entitle them to any rights by prescription.

Examining the evidence from which an inference of the defendant's intention to abandon the appropriation is to be deduced, we find that in the spring of 1882 he dug a short ditch about one mile above his land, and built a dam in Carter creek, by means of which he turned a portion of the waters of that stream into a slough, from which he constructed a ditch, and recaptured the water thus diverted. With this, and water diverted from Sucker creek, which he tapped by another ditch, he was enabled to irrigate that portion of his land lying east of Carter creek, and, after having reduced the same to cultivation, he, in 1890, commenced to improve the tract on the west side of said creek. It is manifest that from the time the defendant appropriated the water, until 1890, he had exercised due and reasonable diligence in reducing his land lying east of Carter creek to cultivation. He had in that time changed an arid sagebrush plain of about 100 acres into a productive farm, and, having succeeded in providing sufficient water for the irrigation of his land lying east of the creek, he immediately turned his attention to the improvement of that on the west. Having in 1883 made a diversion of the waters of Carter creek by the ditch in question, the defendant was required to use due and reasonable diligence in appropriating the waters so diverted to some beneficial use. But having made two diversions,—one from Sucker, and the other from Carter creek,—it could not be expected that he must needs abandon the former in order to protect his interests in the latter, nor that he should alternately appropriate the waters of each stream, and make his improvements on both sides of Carter creek, in order to maintain his original rights. Reasonable diligence only was required, and the evidence shows that the defendant faithfully prosecuted the improvement of his lands adding each year to the area in cultivation. Upon these facts, we cannot say his intention to abandon the use of the waters of Carter creek has been established by that degree of proof required in such cases. *Black's Pom. Water Rights*, 97. And, as matter of law, we conclude that the plaintiffs, as tenants in common, held the possession for, and maintained the rights of, the defendant. *Mining Co. v. Taylor*, 100 U. S. 37; *Clymer v. Dawkins*, 3 How. 674.

The evidence also shows that the plaintiffs neglected to repair the ditch, in consequence of which it became obstructed; causing an overflow of water on the defendant's land, which washed out quite a gully therein. This no doubt precipitated the difficulty, and caused the defendant to take out the headgate and fill the ditch, thereby preventing the water from flowing to the plaintiff's lands for which injury the court rendered a judgment against the defendant for \$50, as damages. In our view of the case, the defendant was equally liable with the plaintiffs for the expense of keeping the ditch in repair,

and the failure of the latter to keep up repairs upon it at their own expense did not authorize the defendant to fill it, for which reason the judgment for damages rendered against him will be allowed to remain.

The plaintiffs will be allowed to appropriate one-half of the waters diverted, and required to bear one-half of the expense of maintaining the ditch across the defendant's lands; and, for the purpose of performing their part of the work, they must have the right of entry upon the said lands of defendant, along the banks of the ditch. And in case of default of either party the other may complete the necessary repairs, and thereupon the party in default shall be liable for one-half of the expense thereof. The decree of the court below will be modified, and one here entered in accordance with this opinion.

DOROTHY et al. v. PIERCE, County Clerk, et al.

(Supreme Court of Oregon. July 20, 1895.)

COUNTIES—LIMIT OF INDEBTEDNESS—OWNERSHIP OF COUNTY WARRANTS—PLEADING.

1. The allegation of a complaint to enjoin the payment of county warrants, as illegal, that a county has a debt of \$40,000 over and above all obligations created by operation of law "for the current fiscal year," in connection with the further allegation that all of said debt has been created voluntarily by the county, sufficiently shows that none of the debt was thrust on the county by operation of law.

2. An allegation that county warrants were issued and delivered to a certain person is sufficient to show that he is the present owner thereof.

Appeal from circuit court, Umatilla county; Morton D. Clifford, Judge.

Action by R. M. Dorothy and others against W. M. Pierce, county clerk of Umatilla county, and others. A demurrer to the complaint was sustained, and plaintiffs appeal. Reversed.

William Parsons, for appellants. J. J. Balleray, for respondents.

WOLVERTON, J. This is a suit to enjoin Rourke from collecting, Folsom (county treasurer) from paying, and Furnish (sheriff and tax collector) from receiving, in payment of taxes, certain county warrants, numbered from 838 to 890, inclusive, aggregating \$3,500, alleged to have been unlawfully issued by W. M. Pierce, county clerk of said county. The warrants were issued by order of the county court of Umatilla county, Or., in payment of the purchase price of Rourke's undivided half of what is known as the "Lee Street Bridge," crossing the Umatilla river, in said county, purchased by the county. It is claimed that the indebtedness was incurred in violation of the constitution, and therefore void, as the voluntary indebtedness of the county at the time—September 9, 1893—exceeded \$5,000. A demurrer to the complaint

having been sustained, and the suit dismissed, plaintiffs appeal.

The only question presented by the record is whether the complaint states facts sufficient to constitute a cause of suit. The allegations of the complaint necessary to an understanding of the main point relied upon by defendants to defeat it are as follows: "First. That all of the indebtedness of the county of Umatilla, hereinafter stated, when the said action or order of the county court to purchase the interest of the said defendant Rourke in said bridge, and to issue the said described warrants, to wit, on the 9th day of September, 1893, exceeded the sum of forty thousand dollars (\$40,000), and had been for more than two years prior to said date, and is now, in force as a debt against said county, to an amount exceeding the sum of forty thousand dollars (\$40,000) over and above all indebtedness incurred or required in the administration of the business affairs of said county, in the payment of the salaries of officers, expenses in holding its courts, or any other debts or liabilities created by operation of law, for the current fiscal year, of said county, and that no part of said indebtedness of forty thousand dollars (\$40,000) had been created or was in force at the date of the adoption of the constitution of the state of Oregon, and that no part of said indebtedness of forty thousand dollars (\$40,000) has been created to suppress insurrection or to repel invasion, and that all of said indebtedness of forty thousand dollars (\$40,000) has been created voluntarily by said county, and was and is a voluntary indebtedness thereof exceeding the sum of five thousand dollars (\$5,000)."

It is stoutly contended by counsel for defendants that the allegation that there is now in force, as a debt against said county, an amount exceeding \$40,000, "over and above all indebtedness incurred or required in the administration of the business affairs of the said county, in the payment of salaries, expenses in holding its courts, or any other debts or liabilities created by operation of law, for the current fiscal year, of said county," contains, by force of the phrase "for the current fiscal year," a negative pregnant, and that, while the allegation may be true, it may also be true that the \$40,000 county indebtedness may yet consist wholly of obligations thrust upon the county by operation of law at some time prior to the current fiscal year named. In *Burnett v. Markley*, 23 Or. 440, 31 Pac. 1050, Beau, J., says: "Before it can be said that a county has exceeded the constitutional limit of indebtedness, it must appear that the debts have been voluntarily created by the county, in its corporate capacity, since the constitution took effect, and such debts were not created for the purpose of suppressing an insurrection or repelling an invasion." And by the same opinion *Grant Co. v. Lake Co.*, 17 Or. 453, 21 Pac. 447, and *Wormington v. Pierce*, 22 Or. 606, 30 Pac. 450, are approved, wherein it is held that debts and liabilities

imposed upon a county by law, such as salaries of officers, expenses of holding courts, and other like outlays and charges, which it is powerless to prevent, are not within the inhibition of section 10, art. 11, of the constitution, providing that: "No county shall create any debts or liabilities which shall singly, or in the aggregate, exceed the sum of five thousand dollars, except to suppress insurrection, or repel invasion; but the debts of any county, at the time this constitution takes effect, shall be disregarded in estimating the sum for which such county is limited." It is apparent that the portion of the complaint referred to by defendants does not negative the exceptions of this section of the constitution, both express and implied, and would undoubtedly be insufficient, were it not followed by the allegation that "all of said indebtedness of forty thousand dollars has been created voluntarily by the county." Coupling this with the allegation so referred to, the complaint meets the requirements of *Burnett v. Markley*, is relieved of the apparent ambiguity pointed out by counsel, and we think it quite sufficient.

It is also urged against the complaint that it does not allege that the defendant Rourke is the present owner and holder of the warrants issued. This objection is not well taken. The complaint alleges that the warrants were issued and delivered to Rourke, which is sufficient to show that Rourke is the owner thereof, within the doctrine of *Moss v. Cully*, 1 Or. 148. It follows from the foregoing that it was error to sustain the demurrer, and the decree of the court below is therefore reversed, and the cause remanded, with directions to overrule it.

McGUIRE v. CITY OF BAKER CITY.

(Supreme Court of Oregon. July 20, 1895.)

CHIEF OF POLICE — FEES FOR COLLECTING TAXES.

A city charter (section 81) enumerates the duties of the chief of police, and includes among them the collection of all delinquent taxes. Section 82 provides that his salary shall not exceed \$100 per month, and that he shall receive "no other fees or compensation whatever." Section 85 provides that when acting as a constable he shall receive and collect the fees allowed a constable, but shall pay the same to the city treasurer. Section 87 requires him to give a bond conditioned that he will faithfully perform his duties as chief of police and tax collector, and account for and pay over all moneys coming into his hands as tax collector. It also provides that he shall receive such fees for the collection of taxes as the council may provide, not exceeding those of sheriff, which must be paid by him into the city treasury, and may receive such other compensation as tax collector as the council may provide. Section 101 provides that all costs and charges for collecting delinquent taxes must be collected as part of the taxes, and that the council may prescribe by ordinance the fees and compensations for collecting delinquent taxes, but the same shall in nowise be paid out of the treasury. *Held*, that he was limited to the prescribed salary, and was not entitled, in addition, to fees for collecting taxes,

but that such fees were collected by him as agent, and for the benefit of the city.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Action by Thomas McGuire against the city of Baker City. Judgment for defendant. Plaintiff appeals. Affirmed.

J. L. Rand, for appellant. Will R. King, for respondent.

BEAN, C. J. This is an action against Baker City to recover the sum of \$651.20, alleged to be due the plaintiff as fees for the collection of delinquent city taxes under an ordinance providing that the chief of police shall receive such fees for the collection of delinquent taxes as are allowed the sheriff of Baker county by general law for similar services. A demurrer to the complaint having been sustained, on the ground that under the charter of the city the ordinance in question is void so far as it allows the chief of police to receive and appropriate to his own use the fees received by him for the collection of delinquent taxes, plaintiff appeals.

Section 81 of the charter defines the duties of the chief of police as follows: "The chief of police is a peace officer, and must execute all processes issued by the police judge or directed to him by any magistrate in criminal matters. He may make arrests for a breach of the peace or commission of a crime within the limits of the city, with or without a warrant, as a peace officer may do under the laws of the state. He must exercise a vigilant control over the peace and quiet of the city. He is a keeper of the city prison or house of correction. He must collect all delinquent taxes and assessments when required by warrant, and pay the same to the city treasurer monthly. He must attend regularly the sittings of the police court and the meetings of the common council. He shall exercise such additional powers as may be conferred by the ordinances of said city to enable him to carry out the object and purposes of this act, and for the prevention of fires." Section 82 provides that the salary of the chief of police shall not exceed \$100 per month, and that he shall receive no other fees or compensation whatever; and the salary of policemen shall not exceed \$70 per month each. Section 85, in effect, provides that the chief of police, when acting as a constable, shall be entitled to receive and collect the same fees as allowed by law to that officer, but he shall pay the same over to the city treasurer. By section 87 he is required to file a bond conditioned that he will faithfully perform his duties as chief of police and tax collector during his continuance in office, and will account for and pay over all moneys that may come into his hands as tax collector. This section further provides that "he shall receive such fees for the collection of taxes as the council may provide, not exceeding those of sheriff, which must be paid by him

into the city treasury, and may receive such other compensation as tax collector as the council may provide or designate." Section 91 directs the council to order the auditor to deliver the tax roll to the chief of police, and issue and annex thereto a warrant commanding him to proceed forthwith to collect the delinquent taxes upon such roll, and pay the same, together with the costs of the collection, to the treasurer, and return the warrant to the auditor with his doings indorsed thereon and the receipt of the treasurer for all moneys collected thereby and paid to him. Section 101 provides that all costs and charges for collecting delinquent taxes must be paid on the warrant and collected as part of the taxes, and that the council may prescribe by ordinance the fees and compensation for collecting delinquent taxes, but the same shall in nowise be paid out of the treasury. These are all the provisions of the charter material to the question presented by this appeal, except that the incumbents of all lucrative offices of the city are paid by salary.

The contention for the plaintiff, in effect, is that the duties of the chief of police as a peace officer and as tax collector are separate and distinct, and that the salary provided by section 82 is designed to compensate him in the former capacity, while by sections 87 and 101 the council is authorized to provide for his compensation as tax collector, to be collected from the delinquent taxpayers. On the other hand, the contention for defendant is that it is made a part of the duties of the chief of police by the charter to collect all delinquent taxes, and that the salary provided by section 82 is intended as a full compensation for all the duties which he is required to perform; that all fees received by him belong to the city, and must be paid to the treasurer; and that the provisions of the charter authorizing the council to prescribe the fees and compensation for collecting delinquent taxes, to be paid on the warrant and collected as a part of the taxes, were designed to enable the council to impose a penalty upon the delinquent taxpayers, and to provide compensation to the city for the expense incident to the collection of delinquent taxes. It must be admitted that the several provisions of the charter are in apparent conflict, but we are bound to construe them, if possible, so as to give effect to all and carry out the legislative intent. From an examination of the charter it is obvious that it was intended to put the city officers on a salary, and do away with the unsatisfactory system of compensating public officers by fees; and it seems to us no plainer language indicating such intent, so far as the chief of police is concerned, could have been used than sections 81 and 82, the former of which, in effect, provides that his duties shall be those of a peace officer and collector of taxes, and the latter that he shall receive a salary, as compensation for the services performed by him, not to exceed \$100 per month, and no other

fees or compensation whatever. By these two sections his duties are carefully defined and his compensation fixed. If it had been the intention to allow him a compensation as tax collector, in addition to his salary, it would naturally have been so indicated in section 82, which deals solely with the salary of police officers. It seems to us that the intention to limit the compensation of this officer to a salary not to exceed \$100 per month is clear, and, therefore, the subsequent language of the charter, which is in apparent conflict with section 82, must be so construed as to make the chief of police the agent of the city in receiving and collecting the fees which delinquents may be required to pay. In no other way can we give effect to all the provisions of the charter above quoted, and by such a construction alone can the manifest intent of the legislature to limit the compensation of the chief of police to a certain fixed sum for the performance of official duty be accomplished. The declaration of the charter that he shall receive no fees or compensation whatever, except a salary, is plain and unambiguous, and ought to be given force and effect; and for that purpose the other provisions of the charter, authorizing or permitting him to receive and collect fees or compensation, must be understood as intending such fees or compensation for the benefit of the city. It follows, therefore, that the city ordinance allowing the plaintiff to receive and appropriate to his own use the fees collected by him from delinquent taxpayers is void, as unauthorized by the charter, and the judgment of the court below must be affirmed.

LAWRENCE et al. v. PHY et al.

(Supreme Court of Oregon. July 20, 1895.)

FARM LEASES—INTEREST OF LESSEE IN CROP—PROVISIONS FOR LIENS.

1. A lessee of a farm has an interest in the crop which, as against a creditor, he can mortgage, notwithstanding a provision of the lease that the crop should remain the property of the lessor till payment of all expenses necessary to care for the crop, and put the third thereof, reserved as rent, in sacks, and to cover any liens of hands or otherwise incurred in caring for, harvesting, or threshing thereof, together with the payment of the said one-third rental.

2. Such provision in a lease does not create a lien on the crop in favor of one not a party to the lease for work which he does in caring for, harvesting, or threshing the crop.

Appeal from circuit court, Union county; M. D. Clifford, Judge.

Action by John Lawrence and others against J. F. Phy and J. W. Couper. Judgment for plaintiffs. Defendants appeal. Reversed.

The plaintiffs sue for the wrongful taking and conversion by defendants of certain grain, and ask for damages in the sum of \$2,000. The complaint alleges, in substance, a copartnership between Ed and John Tinkham, under the firm name of Tinkham Bros.;

that they leased from E. J. Couper, receiver, for the cropping season of 1894, certain premises known as the "Jones Ranch" and "Stanton Ranch," agreeing to pay as rental one-third of the grain grown thereon, to be delivered at the machine when threshed; that by the terms of the lease their two-thirds interest in the crop was expressly charged with the payment of persons employed by them in and about the seeding, caring for, harvesting, and threshing the entire crop; that, becoming largely indebted to plaintiffs on account of work and labor done and performed in and about putting in the crops, harvesting and caring for the same, in order to secure the payment of such indebtedness, and the further liabilities to accrue for work and labor thereafter to be performed in threshing and caring for said crop, then cut and stacked upon the premises, the said Tinkham Bros. on the 18th day of October, 1894, turned over to and put plaintiffs in possession of the whole of said crop, and then and there authorized plaintiffs to thresh the same, and deliver to E. J. Couper, receiver, his one-third thereof at the machine, and to sell the remaining two-thirds, and out of the proceeds to pay themselves whatsoever was due them on account of such work and labor; that the said two-thirds interest amounted to about 5,000 bushels of wheat and 3,000 bushels of barley, of the value of \$2,000; that on the 9th of November, 1894, defendants wrongfully took said grain from plaintiffs, and converted the same to their own use; and that at said date Tinkham Bros. were indebted to plaintiffs in the aggregate sum of \$2,013.57. The answer puts in issue every material allegation of the complaint, except the fact of the Tinkham Bros. copartnership and the leasing, but the denials as to the quantity of grain are qualified. For a further and separate defense defendants allege, in substance, that in March and April of 1894, and thereafter, Tinkham Bros. desiring money with which to buy seed grain, and to enable them to put in said crop, the defendant J. W. Couper, with the express agreement that he should have the crop as security therefor, advanced and loaned to Tinkham Bros., at divers times and in sundry amounts, the sum of \$2,000, and on May 26, 1894, took their note for that amount, payable October 1, 1894, and to secure the payment thereof they executed and delivered to him at the same time a chattel mortgage upon their undivided two-thirds interest in the growing crop upon that part of the premises known as the "Stanton Ranch," consisting of 700 acres, which mortgage was duly filed with the county clerk on the same day; that on November 9, 1894, the conditions of the mortgage having been broken, J. W. Couper and the defendant Phy, who was sheriff of Union county, Or., and acting under his (Couper's) directions, took said grain into their possession, under and by virtue of the authority conferred by such mortgage, and proceeded to complete the harvesting and

threshing thereof. The reply puts in issue the material allegations of the answer, and sets forth affirmatively other matter not relevant here. The lease referred to contains, among others, the following provisions: "It is further provided by this lease that the said Tinkham Bros. shall not sublet any of said ground without the written consent of the said E. J. Couper or his successor in interest. And it is also provided that the crop so raised shall be and remain the crop of the said E. J. Couper, receiver, or his successor in interest, until the payment of all expenses necessary to care for said crop and put the said one-third rental in sacks, as herein provided for, and to cover any liens of hands or otherwise incurred in caring for, harvesting, or threshing thereof, together with the payment of the said one-third rental as herein provided." A trial was had, and, the verdict and judgment being for plaintiffs, defendants appeal.

T. C. Crawford, for appellants. T. G. Hall-ey, for respondents.

WOLVERTON, J. (after stating the facts). There are numerous assignments of error, but from the view we take of the case it is only necessary for us to consider two questions, which arise upon the court's instructions to the jury. Respondents' contentions are—First, that the provision in the lease "that the crop so raised shall be and remain the crop of the said E. J. Couper, receiver, or his successor in interest, until the payment of all expenses necessary to care for said crop and put the said one-third rental in sacks, as herein provided for, and to cover any liens of hands or otherwise incurred in caring for, harvesting, or threshing thereof, together with the payment of said one-third rental," constituted E. J. Couper the sole owner of the crop, and until it was raised and harvested, and the expenses paid by the Tinkham Bros., they had no interest therein subject to mortgage or sale; and, second, that such provisions of the lease created an equitable lien upon Tinkham Bros.' interest in the crop in favor of the laborers to the extent of their wages remaining due and unpaid, and which had accrued on account of the production and harvesting thereof. Both these propositions are controverted by defendants.

The law is settled in this state that the lessor may retain within himself the ownership of the crop to be grown upon premises leased by him until the rent is paid. See Fox, Baum & Co. v. McKinney, 9 Or. 493. But what the nature and extent of the lessee's interest is, and to what extent may he deal with it, are the questions here. The lease expressly prohibits Tinkham Bros. from subletting any portion of the premises, but it contains no provision against the assignment of the lease or disposition of their interest in the crop. It has been said (Jones, Chat. Mortg. § 114) that "if there be an agree-

ment that the crops shall belong to the owner of the land, and that the tenant, after paying him for certain advances, should have a certain undivided portion of the crop, the tenant has no interest which he can sell or mortgage,"—citing Ponder v. Rhea, 32 Ark. 435, and Leland v. Sprague, 28 Vt. 746. The former of these cases went upon the ground that the party claiming as tenant was only a cropper, had no interest in the land, and was to receive his share of the crop as the price of his labor; and the latter simply holds that the landlord may maintain trover against an attaching creditor of the tenant, or one who purchases from him with notice of the landlord's right. The same thing may be said of other cases cited in respondents' brief. In Lewis v. Lyman, 22 Pick. 437, it is held that the tenant's remuneration was in the nature of wages, and ownership of the crop remained with the lessor; and this was independent of any stipulation that the ownership should remain in the landlord. So, in Wentworth v. Miller, 53 Cal. 10, it was held that purchasers holding from lessees under such an agreement for leasing could assert no right of possession as against the lessors. So, also, in Howell v. Foster 65 Cal. 169. It appears that the lease provided that all grain should be and remain the property of the lessor until certain advances made by him were fully paid, and then that he should deliver to the lessee his three-fourths interest of the grain raised; and it was further stipulated that, prior to the payment of the advances, the lessee "shall have no right to dispose of any portion thereof." Held, that under this agreement the crop was in no way subject to the disposal of the lessee. These cases do not support the text of Jones, Chat. Mortg., supra, nor the contention of respondents, but Andrew v. Newcomb, 32 N. Y. 419, and Smith v. Atkins, 18 Vt. 461, do, apparently. The former of these two cases was an action in the nature of replevin, by a purchaser of the crop from the lessor, against one who had bought under an attachment and sale on execution against the lessee, and it was held that the action would lie; the court saying, among other things, that the crop "could not be taken under a process of fieri facias, which only authorizes the levying the debt on the goods and chattels of the debtor." The latter case was an action in trespass, for taking a quantity of hay under a purchase of the lessor's interest in the lease, against a party who had purchased the lessee's interest in the property at a sheriff's sale. It was considered that the action would lie, but the court said, in the course of the opinion, that the lessee "at the time of the levy and sale had no attachable property in the hay." But the remarks here quoted were not necessary in either case to the decision. Upon the other hand, in Dworak v. Graves, 16 Neb. 706, 21 N. W. 440, Cobb, C. J., speaking for the court, said:

"I have come to the conclusion that the law is quite clear that, while the landlord has the right to bind the tenant or cropper not to sell or sublet his lease, or the crops while growing or standing on the premises, without the consent of the lessor, that, without such terms or stipulation in the lease or contract, the tenant would have the right to sublet the land or sell his interest in the crops at any time." *Yates v. Kinney*, 19 Neb. 275, 27 N. W. 132, is much in point. This was a suit in equity to restrain Kinney, a tenant of plaintiff, and Carey, a mortgagee of the crop, from committing waste and appropriating to their own use the crops grown on the land by Kinney. The lease under which Kinney went into possession contained a provision as follows: "The crop is considered the property of the first party until it is divided." The court, after stating the holding in *Dworak v. Graves*, supra, said: "It would logically follow that the same rights or interests might be mortgaged. But it is insisted that as, by the terms of the lease, the crop is considered the property of the plaintiff until it is divided, a different rule would have to be applied, and that no such transfer or mortgage could be made which would not violate the property rights of plaintiff. It is evident that Kinney had some interest in the crops. The fact that the extent of that interest depended upon his compliance with the terms of his lease could not deprive him of the right to sell or mortgage it." In *Farnum v. Hefner* (Cal.) 21 Pac. 955, the leasehold interest of the lessee, with like condition, was levied upon and sold. It was held that it carried his interest to the purchaser, who could go forward with the performance of the conditions of the lease, and thereby become entitled to the lessee's interest in the crop. *Poland, C. J.*, in *Bellows v. Wells*, 36 Vt. 599, says: "The reasoning upon which our decisions go is that the owner of the land, being also the owner of the fruits or products of it, in parting with the use of it to another may make such conditions and reservations in relation to the land itself, or the products grown from it, as he chooses, instead of parting with the full right. The principle is the same as that upon which conditional sales of personal property are upheld." The buyer under a conditional sale of personal property immediately acquires an interest therein. Defeasible though it may be, it is such an interest that until breach of the condition he may sell, convey, or mortgage. *Benj. Sales* (6th Ed.) 283; *Vincent v. Cornell*, 13 Pick. 294; *Chase v. Ingalls*, 122 Mass. 381; *Currier v. Knapp*, 117 Mass. 324; *Day v. Bassett*, 102 Mass. 445. It would seem that under these authorities Tinkham Bros. had such an interest in the crop that they could sell or mortgage prior to condition broken, especially as there are no conditions in the lease in contravention of an assignment thereof, or of the sale of their

interest in the crop; and we think this is the better doctrine as applied to cases of like nature. After condition broken, Tinkham Bros., and a fortiori the persons holding under them, had no right to possession as against E. J. Couper. Most, if not all, the authorities cited by respondents in support of their contention are actions either by the lessor or his successor in interest. But this is an action by third parties also claiming under Tinkham Bros., and unless they have a right superior in law to that of the mortgagee they cannot prevail.

We come now to the second proposition. Testimony was produced at the trial tending to show that on the 18th day of October, 1894, Tinkham Bros. turned over to plaintiffs the possession of the crop, which was then cut and in the stack, with authority to thresh and deliver to E. J. Couper his one-third interest, and to sell the balance, and out of the proceeds retain the wages due for labor in producing and harvesting the crop; they to account to Tinkham Bros. for any balance that might remain. Now, it is claimed that under the terms of the lease Tinkham Bros.' two-thirds interest in the crop was expressly charged with the payment of the laborers' wages. The lease provides that the crop shall remain the property of E. J. Couper until the payment of all expenses necessary to care for the crop and to put the one-third rental into sacks, and to cover any lien of hands or otherwise incurred, together with the payment of the one-third rental. The evident central object of this provision was to secure the payment of the one-third rental to Couper, and, as a means to that end, Tinkham Bros. were required to pay all expenses and liens of hands before they should become entitled absolutely to their two-thirds interest. The laborers were not parties to the lease or agreement, nor was the crop constituted a fund in the hands of Couper for their payment. Couper is not charged with the duty or obligation of paying them out of the crop, or of holding it for their security. If he had received his rent and relinquished to Tinkham Bros. their proportion prior to the plaintiffs' obtaining possession, undoubtedly they could not have had any recourse against him to obtain the amount due for wages from Tinkham Bros., nor could they have followed the grain into the hands of third parties who had purchased even with full knowledge of the terms of the lease. Under these conditions, we think that no lien, either equitable or otherwise, was created by the terms of the lease in favor of Tinkham Bros.' employés. See *Dillon v. Barnard*, 21 Wall. 430. The test as to whether the employés of Tinkham Bros. had acquired an equitable lien upon the crop or upon Tinkham Bros.' interest therein is, could they have proceeded against such crop or interest, prior to their having obtained possession, in an equitable proceeding, and subjected it to the payment of their wages? *Pom. Eq. § 1233*. It is apparent that they

could not. Whatever lien, therefore, plaintiffs acquired upon the crop or grain, was by virtue of the possession they obtained from Tinkham Bros. under their alleged agreement with them to thresh it and pay themselves from the proceeds thereof. But such lien was acquired long subsequent to the execution of Couper's mortgage, and is inferior thereto. As between the mortgagee and the plaintiffs, if the conditions of the mortgage have been broken, he has the right to possession. The instructions of the court proceeded upon the theory contended for by counsel for respondents, and hence were erroneous in these particulars. We think the assignment of error contained in the notice of appeal sufficiently specific, under *Nickum v. Gaston*, 24 Or. 388, 33 Pac. 671, and 35 Pac. 31.

The judgment of the court below will be reversed, and the cause remanded for such action as may seem proper, not inconsistent with this opinion.

(1 Kan. A. 14)

MALOTT et al. v. JEWETT.

(Court of Appeals of Kansas, Northern Department, C. D. Sept. 18, 1895.)

ACTION ON NOTE—PLEADING—COMPLAINT.

Where a petition alleges that a certain promissory note was made by B., payable to the order of M. & Co., and by M. & Co. indorsed to J., and contains no allegation of demand of payment, or notice of nonpayment and protest, and no reason or excuse why payment was not demanded and protest made, such petition does not state facts sufficient to constitute a cause of action in favor of plaintiff, J., and against the defendants, M. & Co., or either of them.

(Syllabus by the Court.)

Error from district court, Dickinson county; James Humphrey, Judge.

Action by Americus V. Jewett against Thomas H. Malott and others. Judgment for plaintiff, and defendants bring error. Reversed.

Stambaugh & Hurd, for plaintiffs in error. John H. Mahan, for defendant in error.

GILKESON, P. J. This was an action brought by the defendant in error (plaintiff below) to recover from the plaintiffs in error (defendants below) upon a certain promissory note indorsed by the said plaintiffs in error to the defendant in error. The facts, in brief, are as follows: That some time in 1882 or 1883 one John F. Baxter (who was also a party to this action in the court below) as principal, and John Johntz (one of the defendants in error), as indorser, were indebted to the defendant in error upon a certain promissory note, which was also secured by a chattel mortgage on the personal property of the said Baxter. Malott & Co. held a second mortgage upon said personal property. This note was not paid at its maturity. The indorser, Johntz, refusing payment on the ground that it had not been presented for payment, nor protested for non-

payment, he was released from any liability thereon. Some time afterwards it was proposed that, if Jewett would give further time, Baxter would give him three other notes for the amount then due upon the original note, and that Malott & Co. would indorse them. This proposition was accepted, and thereupon Baxter drew his three notes, due, respectively, in four, eight, and twelve months, payable to Malott & Co., and Malott & Co. indorsed the same, and delivered them to Jewett. He accepted them, and assigned and delivered to Malott & Co. the original note of Baxter and Johntz. Two of the last-mentioned notes were paid, either before or at maturity. Payment on the third was refused by Malott & Co. Upon this note, suit was brought, a trial had before the court (a jury being waived), and judgment rendered against Malott & Co. for the sum of \$1,044.65, with interest at 12 per cent. per annum, and costs of suit; no judgment being rendered against Baxter.

The pleadings in this case consist of petition, answer, and reply. Upon the trial of the cause, Malott & Co. objected to the introduction of any testimony, under the petition, as to the defendants Malott & Co., for the reason that the petition did not state facts sufficient to constitute a cause of action against Malott & Co., or any of them, and in favor of Jewett. The petition in this case is simply one on a promissory note against Baxter, as principal, and Malott & Co., as the indorsers, but fails to state that said note was presented for payment, or protested, when due, or to state any reason or excuse why it was not, or that it was waived. The answer alleges, among other things, "that at the time the said promissory note, attached to said plaintiff's petition, became due and payable, it was not presented for payment on the day it was due, nor protested for nonpayment, and said defendants were thereby released from further liability." Nor does the reply in any way aid the petition, it being as follows: "Comes now the plaintiff, Americus V. Jewett, and, for reply to the answer of Malott & Co. filed herein, says that he denies each and every allegation contained in said answer, which is contradictory to, or inconsistent with, his petition filed herein." Now, this does not deny the allegation of the answer that the note was not protested. It merely denies such allegations as are contradictory to, or inconsistent with, the allegations of the petition. The allegation of nonprotest in the answer is not contradictory to, or inconsistent with, the allegations of the petition. We think the objection of the defendants, Malott & Co., to the introduction of testimony, should have been sustained; in other words, that the petition filed in this cause does not state facts sufficient to constitute a cause of action. There are numerous immaterial and surplus allegations in the petition and in the answer. With these stricken out, there is but one question in this case, viz. is there any

liability upon the part of the defendants, under the allegations of the petition? The law is well established in this state that, "before an indorser can be held upon a note, it must appear that sufficient notice of protest was duly served upon him." *Couch v. Sherrill*, 17 Kan. 622; *Bradford v. Pauly*, 18 Kan. 216; *Braley v. Buchanan*, 21 Kan. 274; *Shelby v. Judd*, 24 Kan. 161; *Selover v. Snively*, Id. 672; *Swartz v. Redfield*, 13 Kan. 550; *Doolittle v. Ferry*, 20 Kan. 230. This being necessary, it becomes material, and should be alleged in the petition, or some reason or excuse given therein why it was not so done, or that it had been waived. If raised in the first instance by the allegations of the answer, it should be controverted by the reply. We think, therefore, the objection to the introduction of testimony under the petition should have been sustained. The judgment will be reversed, and the case remanded for further proceedings in accordance with this opinion. All the judges concurring.

(1 Kan. A. 1)

WESTERMAN et al. v. EVANS.

(Court of Appeals of Kansas, Northern Department, C. D. Sept. 18, 1895.)

REVIEW ON APPEAL—FINDINGS BY COURT—PRINCIPAL AND AGENT.

1. Where an action has been tried by a court without the intervention of a jury, and the court makes special findings, and such findings are supported by a preponderance of the testimony, a reviewing court will not order that the findings be set aside, nor that a new trial be granted.

2. Whatever the agent knows concerning a matter connected with his agency, his principal is bound to know. And knowledge of an agent, acquired previous to the agency, but actually present while acting for his principal in a particular matter or transaction, will be deemed notice to the principal.

(Syllabus by the Court.)

Error from district court, Ellsworth county; W. G. Eastland, Judge.

Action by Sharon Evans against L. H. Westerman and Frances A. Westerman. Judgment for plaintiff, and defendants bring error. Affirmed.

C. J. Evans, for plaintiffs in error. J. W. Brooks, for defendant in error.

GILKESON, P. J. This was an action brought in the district court of Ellsworth county by Sharon Evans, a minor, by S. D. Evans, his next friend, against L. H. Westerman and Frances Westerman, in which said Evans sought to disaffirm a certain contract for the purchase of real estate, on the ground of minority, and to recover from the vendors the amount which had been paid to them on account of said contract. Case tried before court without a jury. Court made special findings of fact and conclusions of law, and rendered judgment thereon for the plaintiff, Evans, for the sum of \$333.86. Defendants moved for judgment upon special findings,

and, motion being overruled, the defendants thereupon filed a motion for new trial, for various reasons; and their petition in error contains numerous assignments of error, all of which they have abandoned, and only urge in this court the sole error "that the judgment of the court is not sustained by sufficient evidence." The facts in the case, in brief, are that Westerman was the owner of certain real estate in the city of Ellsworth, Ellsworth county, Kan., that he "listed," (as they call it,) or placed in the hands of Cathcart & Hutchins, as his agents, this land, for sale; and that these agents made the contract which is complained of in this action, which was that Westerman and his wife should, upon the payment of a certain sum of money, viz. \$350, deed to Evans this land, and in pursuance of that contract executed their bond. Evans paid, upon the execution of said bond, in cash, \$116, and executed his two notes for \$116 each. He afterwards paid the first note and interest in full, and \$95 on the second note, making in all \$333.96.

It is undisputed that at the time of the execution of this contract the plaintiff, Evans, was a minor, of the age of 18 years, and that he disaffirmed the contract before he reached the age of majority. The defendant Westerman contends that on account of the representations made by the minor as to his minority, and from his having been engaged in business as an adult, he had good reason to believe that the said Evans was capable of contracting. The court made findings of fact upon every issue in the case, and they are very full and complete, and these findings are supported by a preponderance of the testimony. Under the rule so well established by the decisions of the supreme court of this state "when an action has been tried by a court without the intervention of a jury, and the court makes special findings, and such findings seem to be sustained by a preponderance, though not by all the evidence, a reviewing court will not order that the findings be set aside, nor that a new trial be granted." *Carson v. Kerr*, 7 Kan. 269; *Brewster v. Hall*, 12 Kan. 161.

This might dispose of this case, but as the plaintiff in error has argued at some length, in his brief, the sufficiency of certain evidence, viz. whether the knowledge of Cathcart, one of the members of the firm, who were the agents of Westerman, as to the minority of Evans, was sufficient to constitute notice to and bind the principal, this we will have to answer in the affirmative. It is conclusively proven in this action: That the whole transaction between Evans and Westerman was, on the part of Westerman, carried on and consummated by Cathcart & Hutchins, partners, as his agents. That Cathcart knew, during all the time it was pending, that Evans was a minor; had known it for a long time previous to any of these negotiations; had known Evans two or three years previous; knew he was going

to school with his children. That Evans' minority was thought of by them at the time bond was drawn. And he assigns as a reason for taking the bond at the time the fact that it would not be due for a year or two, and Evans would be of age by the time, if not before, it matured. Hutchins, the other partner, testified that, when he went to Evans for the purpose of closing the contract, Evans told him that he wished to consult with his mother; that he took him to his mother's house for the purpose of consultation; that he had known Evans a year or two before the contract was drawn. He was not positive whether there was anything said, during the pendency of this transaction, as to his age. He knew he was not doing business for himself, and believed him to be a minor at the time. "When a transaction is carried on and consummated by one person acting as the agent for another person, whatever comes to the knowledge of the agent pending the transaction must be presumed to come to the knowledge of the principal." *Ayers v. Probasco*, 14 Kan. 175. "And knowledge of an agent, acquired previous to the agency, but actually present while acting for his principal in a particular transaction or matter, will be deemed notice to the principal." *Bank v. Hallenbeck* (Minn.) 13 N. W. 145. "Whatever the agent knows concerning a matter connected with his agency, his principal is bound to know." *Jarvis v. Campbell*, 23 Kan. 370. The case of *Nickliss v. Holman*, 17 Kan. 22, was an action to set aside a certain sale and conveyance of real estate made by Mrs. Holman, through her agents, C. Holman and J. R. Hibbard, to Nickliss. It was claimed that false statements were made in reference to the sale,—not, however, made directly to Mrs. Holman, but made to her agent,—and that such statements were not communicated to her. The court said: "The alleged false and fraudulent statements were, however, not made directly to Mrs. Holman, but were made to her agents, and it is not claimed that such statements were never communicated to her. Whether this is true, or not, as a fact, it is not true in law. In law, whatever comes to the knowledge of an agent comes to the knowledge of the principal, and whatever is done by an agent, within the scope of his agency, is done by the principal. The agent, with reference to third parties, and within the scope of his agency, is, to all intents and purposes, the principal." And it is further proven in this action that Westerman accepted the cash and notes paid and given by Evans, paid Cathcart & Hutchins their commissions for making the sale, and thereby ratified their action. And when one voluntarily accepts the proceeds of an act done by one assuming (though without authority) to be his agent, he ratifies the act, and takes it as his own, with all the burdens as well as its benefits. *Waterson v. Rodgers*, 21 Kan. 529. We

think the evidence is sufficient to charge Westerman with notice. But, as we have said, the trial court made special findings upon the facts in this case, and these findings are supported by a preponderance of the testimony; and, were the testimony weaker than it is, we would not feel authorized to reverse the judgment, or grant a new trial. The judgment in this case will be affirmed. All the judges concurring.

(1 Kan.A. 32)

DAVIS et al. v. RINGER.

(Court of Appeals of Kansas, Northern Department, C. D. Sept. 18, 1895.)

APPEAL—RECORD—REVIEW OF ORDER—CASE MADE.

1. In order to be available on review in error, a case made must be complete and perfect when settled, signed, and attested. It cannot be supplemented and perfected afterwards. And where the case made does not affirmatively show that it is complete, this court will not consider alleged errors.

2. The object of a case made is to present to an appellate court, complete in itself, a statement of so much of the proceedings and evidence or other matter in the action as may be necessary to bring to the notice of the appellate court the errors complained of. It must embrace and include all that is necessary for a full understanding of the questions submitted for decision.

(Syllabus by the Court.)

Error from district court, Mitchell county; Cyrus Heren, Judge.

Action by Abraham Ringer against Henry Davis and T. J. Crawford. Judgment for plaintiff, and defendants bring error. Affirmed.

L. J. Craus, for plaintiffs in error. A. H. Ellis, E. S. Ellis, and F. T. Burnham, for defendant in error.

GILKESON, P. J. An attempt was made in this proceeding to bring here for review certain alleged errors committed by the district court of Mitchell county in overruling defendants' demurrer, receiving and rejecting certain evidence, in refusing to give defendants' instructions, in giving certain instructions, in overruling defendants' motion for a new trial, and in rendering judgment for plaintiff. A jury was impaneled in this case and general verdict rendered, and no special findings of fact were returned by the court or jury. Some of the evidence, instructions of the court, and pleadings are incorporated therein, and to it are attached certain papers, not certified or referred to, nor bearing any marks by which they can be identified as relating to, or a part of, the case made. And its sufficiency is challenged in this court. It shows upon its face that it is not complete, not even in the condition it now is, when served upon counsel, or presented to the judge, and by him signed and settled. If we were called upon to decide what the papers attached really are, we could not determine. They might or might not be copies

of record evidence which had been omitted. Nor could we say when they were supplemented. And upon examination of the whole case made, we are unable to say that it contains so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of to this court. We cannot go outside of the case made and search for these matters, nor can we consider anything dehors the case settled and signed. It should be complete, without the necessity of support aliunde. It should be complete when it is settled and signed. *Transportation Co. v. Palmer*, 19 Kan. 471. It might be said that the plaintiffs in error have attempted to combine a case made with a transcript of the record; but this is a practice unauthorized by the Code. It must be one or the other; and, in their attempt to combine them, they have failed to obtain any benefit from either, and have fallen between the two. The plaintiffs in error have not sufficiently presented their case made to this court to obtain a review. The case made must contain a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present errors complained of to this court. *Transportation Co. v. Palmer*, 19 Kan. 471. The rule is well established in this state "that, where the case made itself does not affirmatively show that it is complete, an appellate court will not consider alleged errors." No error appearing in the record, the judgment of the court below will be affirmed. All the judges concurring.

(1 Kan. A. 100)

CITY OF SALINA v. WAIT.

(Court of Appeals of Kansas, Northern Department, C. D. Sept. 9, 1895.)

COURT OF APPEALS—JURISDICTION.

The court of appeals has no jurisdiction to review a judgment of the district court, in favor of the defendant, on quashing a complaint charging a violation of a city ordinance.

(Syllabus by the Court.)

Appeal from district court, Saline county; R. F. Thompson, Judge.

A. O. Wait having been found guilty in a police court of violating an ordinance, the district court, on appeal, quashed the complaint, and plaintiff, the city of Salina, appeals. Certified to supreme court.

J. B. Hutchinson, for appellant. Bishop & Burch, for appellee.

CLARK, J. The defendant, A. O. Wait, was charged in the police court in the city of Salina with the violation of Ordinance No. 855 of said city, entitled, "An ordinance to regulate the use of hacks and other vehicles and to prescribe a punishment for the violation of the same." He was found guilty, and adjudged to pay a fine and the costs of prosecution. He appealed to the district court of Saline county, and at the September, 1894, term thereof, on his motion,

the said complaint was quashed, and the plaintiff was adjudged to pay the costs. To this ruling, decision, and judgment, the city of Salina duly excepted, and prosecuted its appeal to the supreme court. All of said proceedings were had prior to the enactment of chapter 90 of the Laws of 1895, entitled, "An act creating appellate courts, defining their jurisdiction and the proceedings therein." Subsequent thereto, said cause not having been submitted to the supreme court, the record thereof was certified to this court for review.

Under section 1 of the act above referred to, the jurisdiction of the supreme court, and the procedure therein, except as otherwise declared in said act, remain the same as they were prior to said enactment. By section 2, two additional courts of record were created, to be known and styled as the courts of appeals of the Northern and Southern departments, respectively; and the jurisdiction of said courts of appeals is defined and declared by section 9, from an examination of which it will be observed that the appellate jurisdiction of said courts is limited to all cases of appeal from convictions for misdemeanor in the district and other courts of record; also, in all proceedings in error, as allowed by law, taken from orders and decisions of the district and other courts of record, or the judge thereof, except probate courts, in civil actions before final judgment, and from all final orders and judgments of such courts, within their respective divisions, where the amount or value does not exceed \$2,000, exclusive of interest and costs. Before this court will review a judgment of an inferior court, it must first appear that it has jurisdiction of the subject-matter thereof, otherwise, its judgments would be of no validity or binding force. That this prosecution in the court below was in the nature of a criminal action, there appears to be no question, under the decisions of our supreme court. Hence, the judgment therein can be reviewed only upon appeal, and not upon petition in error. The courts of appeals are given appellate jurisdiction in appeals from convictions for misdemeanors in the district and other courts of record, but jurisdiction to hear and determine an appeal from a judgment in favor of the defendant on quashing a complaint or information is not conferred upon said courts. Hence, the record is not properly here, and the same will be, by the clerk, returned to the supreme court, with a copy of this opinion. All the judges concurring.

(1 Kan. A. 85)

CITY OF JUNCTION CITY v. BLADES.

(Court of Appeals of Kansas, Northern Department, C. D. Sept. 18, 1895.)

DEFECTIVE STREETS—EVIDENCE—INSTRUCTIONS—VIEW BY JURY.

1. It is error to permit witnesses to give their opinions, over the objection of defendant,

whether street crossings are dangerous or safe, who are not shown to be experts, or possessed of any particular skill or knowledge with reference to street crossings, but who have merely seen the street crossing at which the accident in the present case occurred.

2. It is inadmissible for the plaintiff, for the purpose of showing her injuries, their character or extent, or in order to enhance her damages, or for any other purpose, to introduce evidence to prove her financial condition.

3. It is not necessary, in order to charge a city with negligence or carelessness for defective street crossings, that notice of the defect should be brought to it by actual complaint. If the city carelessly and negligently permits defects to exist in its street crossings, no matter how caused, for so long a time that notice is presumable, then it becomes liable if a person is injured thereby without fault or negligence on the part of the party injured.

4. An instruction which clearly indicates to the jury that a material fact in dispute does or does not exist is erroneous.

5. A trial court, in all cases, should give such instructions as are applicable to the facts proven and the issues raised in the case, and should embody therein the legal definition or definitions of the important technical words and phrases which are used, and are necessary to be understood by the jury for a proper determination of the case. And, when the instruction given fails so to do, it is error for the court to refuse an instruction asked which so defines such words.

6. Testimony of general habits of carefulness is too remote to raise a presumption that they have been exercised in any given case.

7. The inspection of a place by the jury is not evidence, but merely comes in aid thereof, and the information which the jury may acquire from making the view is not to be elevated to the character of exclusive or predominating evidence.

(Syllabus by the Court.)

Error from district court, Geary county; James Humphrey, Judge.

Action by Harriet Blades against the city of Junction City. Judgment for plaintiff. Defendant brings error. Reversed.

John O. Marshall and Thos. Dever, for plaintiff in error. Humphrey & Laundry, for defendant in error.

GILKESON, P. J. This was an action brought by Harriet Blades against the city of Junction City for injuries resulting from a fall caused by an alleged defect in the construction of a culvert and street crossing. The answer was a general denial, and the further defense of contributory negligence. Trial had before court and jury, which resulted in a general verdict and special findings in favor of the plaintiff and against the defendant for the sum of \$1,870. Motion was made by the defendant for new trial, upon several grounds, but was overruled, and new trial refused, and judgment rendered in favor of the plaintiff against said defendant for the sum of \$1,870, and the defendant then brought the case to this court for review.

The facts in this case appear to be substantially as follows: The plaintiff below, while crossing Eighth street, which runs east and west on the west side of Adams street (running north and south), about 8 o'clock on the

evening of June 8, 1894 (said evening being very dark, on account of an approaching storm), stepped from a crossing (or, rather, the covering of a culvert, which was generally used as a street crossing) into the culvert, 26½ inches in depth, falling violently upon some broken stone (or, rather, hard substance) in the bottom thereof, thereby sustaining injuries, viz. fracture of the lower end of the outward bone of the leg, with a dislocation at the ankle joint, and receiving numerous bruises on her body, and particularly about the chest. That this culvert or ditch is at the outside of the sidewalk line, and extends a considerable distance both north and south of the covering. The south end of the covering, on Adams street, extends as far south as the sidewalk on the south side of Eighth street, but on the north it does not extend as far north as the sidewalk on the north side of Eighth street. There are no sidewalks on the west side of Adams street, at or near where it crosses Eighth street,—merely a footpath. Nor is there any street crossing, properly speaking, over Eighth street, on the west side of Adams; and the top of this culvert or ditch, being planked, has been for a number of years used by the people generally as a street crossing. The ditch and covering were constructed some 8 or 10 years previous to the accident, and had been in the same condition that they were on the night of the 8th of June ever since.

1. The first error complained of is in permitting H. G. Sawtelle to answer certain questions in reference to the other accidents happening on this sidewalk. We believe that such testimony was admissible, as tending to establish the condition of the sidewalk. One of the facts it was necessary to establish in this action was the condition of this sidewalk. Of course, this could be proven in different ways, and by other evidence than that of other accidents. This is not the most practical and positive evidence of which the case is susceptible, but the simple fact there were other accidents on this culvert or crossing would tend to show it was unsafe. When the question of the proper condition or safety of anything constructed is to be determined, evidence tending to show that it served the purpose for which it was designed is always competent, and often most satisfactory and conclusive in its character. On the other hand, evidence to show that frequent and repeated accidents result from its use would be testimony to show that it was not properly constructed. This crossing had been tested by actual use, and this evidence tended to show it was dangerous and unsafe. *City of Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933. In permitting said witness to answer question No. 178, and give his opinion as to whether or not the culvert was safe, we think the court erred. *City of Parsons v. Lindsay*, 26 Kan. 426; *City of Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933.

2. The next error assigned is in permitting the plaintiff to testify as to her financial con-

dition. We cannot agree with counsel for defendant in error that this was designed to show the amount of damages. The answer speaks for itself, and is a statement of the plaintiff's financial condition. This is never competent. To permit the introduction of this kind of testimony is virtually to impose upon the city the burden of supporting the plaintiff. This the law does not require. The law treats all persons alike, whether rich or poor; and the plaintiff cannot show that he is either rich or poor, for the purpose of enhancing his damages. *City of Parsons v. Lindsay*, 26 Kan. 426. The plaintiff has a right to show the nature or extent of her injuries; her suffering; the length of time she was disabled; the value of her time; her expense in being cured; her condition with respect to the injuries at the time of the trial; the effect the injuries will have upon her in the future. And the latter (the effect of the injuries) may be proven by professional opinion of the physician or surgeon who has made a sufficient examination of the injuries. But it is certainly incompetent, for the purpose of showing the nature or character or extent of her injuries, for the purpose of enhancing the damages which she expects to recover of the plaintiff in error, to prove her pecuniary condition, whether she was rich or whether she was poor. She might with as much propriety be allowed to testify as to her social condition, or her religious affiliations. Neither of these would throw any light upon the character or extent of her injuries, nor could they tend in any way to show how much she was damaged, nor in any way enhance or diminish the amount for which the plaintiff could recover. *Kansas Pac. Ry. Co. v. Pointer*, 9 Kan. 620.

3. Plaintiff in error complains of the overruling of its demurrer to evidence. "A demurrer to the evidence should not be sustained where there is some proper evidence to establish every material allegation of the petition." *Steel-smith v. Union Pac. R. Co.* (Kan. App. N. D.; just decided) 40 Pac. 992.

4. Again, the plaintiff in error complains that the court erred in not allowing plaintiff in error to show that no complaint had ever been made to the city, or its officers, that the place where the accident occurred was unsafe. We do not think that the plaintiff in error was prejudiced by this refusal. "Complaint to the city authorities is not necessary, to charge the city with negligence or carelessness, if it permits defects to exist for so long a time that notice is presumable." *City of Atchison v. King*, 9 Kan. 550; *City of Kansas City v. Bradbury*, 45 Kan. 381, 25 Pac. 889; *Jansen v. City of Atchison*, 16 Kan. 358. In this case the petition charges that the city made this culvert, or dug these ditches, thereby rendering it difficult and unsafe for persons to cross the street; that the city constructed with boards what was designed to, has ever since, and does now, serve the purpose both of a covering of the culvert running underneath the same, and a crossing over which persons on

foot, passing along the west side of said street, should pass; and that they have continued for several years to allow this place to be in this condition. We perceive no error in the ruling of the court in this respect.

5. Again, the plaintiff in error complains that the court erred in sending the jury, over the objection of the plaintiff in error, a second time, to view the place where the accident occurred. Section 277 of the Code provides: "Whenever in the opinion of the court it is proper for the jury to have a view * * * of the place in which a material fact occurred, it may order them to be conducted in a body," etc. This unquestionably leaves the matter of viewing the place to the discretion of the court, and has been repeatedly so held by the supreme court of this state. There is no limit as to the number of views that may be ordered. In fact, the language of the statute, "whenever in the opinion of the court," negatives such a conclusion. And we see no reason why this should not be so. In fact, we can see many circumstances that might arise, in the trial of an action, that would render a second, or even a third, view of the place very important. We fully agree with counsel for plaintiff in error that such a view is not testimony, but comes in aid of testimony, but we cannot say that by sending them a second time any such inference as is contended for by plaintiff in error can be drawn. As was said by Simpson, C., in *Coughlen v. Railway Co.*, 36 Kan. 422, 13 Pac. 813: "We will not undertake to discuss the varying impressions that might be conveyed to the mind of the jury by a [second] view of the premises. We are bound to presume that the purpose of the legislature in allowing them to be taken to the locality is a wise one, and, in the absence of a proper showing, there are no means of determining whether the view is favorable or unfavorable to the plaintiff in error."

6. The next assignment of error is upon the giving of paragraph 4 of the instructions, viz.: "The evidence tends to show that the plaintiff had crossed the bridge frequently before in the daytime, and on the night in question was proceeding cautiously over it, but miscalculated the distance she had gone over it, and, without fault on her part, fell over the end of the bridge into the ditch, and received the injuries now complained of. * * *" The language used in these instructions is not the most appropriate, and they could have been couched in much more fitting terms. Counsel for defendant in error complains that the criticism upon the instruction arises from the fact that counsel for plaintiff in error does not understand the meaning of the word "tends." If this is such a term as would confuse counsel, how are we to say what the jury thought it meant? Trial courts ought to be very careful not to impose an opinion as to facts in dispute, for it is well recognized that juries have a great respect for opinions of the trial court, and are always on the alert for some intimation as to what the trial court thinks of the

case. Taking this paragraph as a whole, and considering it altogether, we think it erroneous.

7. The next error assigned is the giving of paragraph No. 6 of the court's instructions, and refusing to give paragraph No. 4 asked by the plaintiff in error. It would have been well for the court to have given in the general charge a definition of "ordinary care,"—what ordinary care would be under certain circumstances. He should have said to the jury that if the plaintiff knew the crossing, and that it was dangerous, and the night dark, then it required greater diligence and care than it would under other circumstances, and at other times. *Corlett v. City of Leavenworth*, 27 Kan. 673; *Osage City v. Brown*, Id. 74. But this care, whatever it would be, still would be ordinary care; and ordinary care and caution are all that is required at any time to avoid the class of injuries complained of in this action, and what constitutes them must be determined by the facts in each case. The expression "ordinary care" is generally defined, "Such care as is usually exercised under like circumstances by persons of average prudence." "The term, like many other things in law, is incapable of exact definition. It is a relative term, and, in order to be ordinary care, it must accommodate itself to the exigencies of the case in which it is exercised." *Quirk v. Elevator Co. (Mo.)* 28 S.W.1080. Under the circumstances of this case, owing to the omission from the general charge of any definition or explanation of the term "ordinary care," as above stated, we think it was proper; and the court erred in refusing to give the second subdivision of paragraph 4, which contains such definition or explanation, as requested by the plaintiff in error, and in giving paragraph 6. It is also contended that the court erred in giving the following instruction: "You have seen the plaintiff, and heard the testimony, and also the testimony respecting her habits of carefulness. You can judge, therefore, whether she is a heedless or careful and prudent person, and also with what degree of care and prudence she was proceeding, in crossing the bridge on the night in question; and, if she used due precaution to avoid injury, she cannot be chargeable with contributory negligence." While this instruction is applicable to testimony admitted in this case without objection, we cannot say that it is correct. It gives the jury to understand that, if the plaintiff was usually careful, she was so on the night in question. Ordinary habits of carefulness raise no presumption that they are always indulged in. It is well known that very prudent people sometimes act very imprudently. Testimony of general habits of carefulness is too remote to raise the presumption that they are exercised upon any particular occasion. In giving this instruction, therefore, we think the court erred.

8. The next error complained of is in the giving of the following instruction: "You have also seen the place where the injury to the

plaintiff is said to have occurred. You are entitled to form your own judgment as to whether the bridge was a reasonably safe crossing of Eighth street on a dark night, and unlighted street. You are not bound by the testimony of those who have given their opinion on the subject. You should consider them in the light of your knowledge and judgment, gathered from the view of the locality." Two or three lines of this instruction are open to criticism. The language used by the court in the last subdivision above is perhaps stronger than it should be, and would warrant the jury in rendering a verdict on a material fact in this case, viz. the safeness or unsafeness of the crossing in question, upon their own judgment, from what they saw, regardless of any of the sworn testimony in the case. This is erroneous. The inspection of the place in question is not evidence, but merely comes in aid thereof. We understand that the object of a view is to acquaint the jury with the physical situation, condition, and surroundings of the thing viewed. As said by Judge Thompson in his work on Trials: "But the evidence which the jury may acquire from making the view is not to be elevated to the character of exclusive or predominating evidence. They are not to disregard other evidence in regard to the character and value of the property, and an instruction which conveys to them the impression that they may do so is erroneous." And this view has been adopted by the supreme court of this state. *City of Topeka v. Martineau*, 42 Kan. 387, 22 Pac. 419; *Railroad Co. v. Mouriquand*, 45 Kan. 170, 25 Pac. 567. As to the special questions and answers of the jury, we shall only say that they are unsatisfactory, but cannot say that the defendant was prejudiced thereby. For the reasons herein set forth the judgment in this case will be reversed, and cause remanded for new trial in accordance with the views herein expressed. All the judges concurring.

(1 Kan.A. 389)

BANK OF LE ROY v. HARDING.¹

(Court of Appeals of Kansas, Southern Department, E. D. July 16, 1895.)

ACTION TO RECOVER SPECIAL DEPOSIT—SUFFICIENCY OF PETITION—GARNISHMENT—EFFECT OF ORDER TO PAY MONEY INTO COURT.

1. It is held that the petition in this case states a cause of action, in ordinary and concise language, and without repetition, and the evidence introduced by plaintiff in the court below tended to prove all the allegations thereof. Therefore, all the motions attacking the petition, and the demurrer to the evidence, were properly overruled.

2. A special deposit, made by H., to be paid to D. & W. upon their joint check, and not otherwise, upon which the conditions have not been complied with for 16 months, should, upon demand, be paid to said H.

3. An order of a justice of the peace, to the garnishee, to pay money into court, is not a judgment. It simply gives the creditor the

¹ Rehearing denied Oct. 1, 1895.

same right to enforce the payment of the money that the debtor previously had. 13 Kan. 22.

(Syllabus by the Court.)

Error from district court, Coffey county; Charles B. Graves, Judge.

Action by H. B. Harding against the Bank of Le Roy. Plaintiff had judgment, and defendant brings error. Affirmed.

This is an action brought in the district court of Coffey county, Kan., by this defendant in error, H. B. Harding, as plaintiff, against this plaintiff in error, the Bank of Le Roy, as defendant, to recover the sum of \$829.94. Judgment was rendered in the court below in favor of said plaintiff, Harding, and said defendant, the Bank of Le Roy, brings the case to this court for review, and alleges nine assignments of error, as follows: "First. The said district court erred in overruling the motion of the plaintiff in error to require the said defendant in error to make his petition more definite and certain in certain particulars. Second. Said district court erred in overruling the fourth ground of motion of said plaintiff in error requiring said defendant in error to make his reply more definite and certain. Third. Said district court erred in overruling the demurrer of plaintiff in error to the third cause of the amended reply of the said defendant in error. Fourth. Said district court erred in overruling the motion of the plaintiff in error to strike from the second and third counts of said reply of said defendant in error certain parts thereof in said motion specified. Fifth. Said district court erred in overruling the objection of plaintiff in error to the introduction of any evidence in said action. Sixth. Said district court erred in overruling the demurrer of the plaintiff in error to the evidence introduced by the defendant in error. Seventh. Said district court erred in overruling the objection of the plaintiff in error to the introduction in evidence by the said defendant in error of the affidavit of J. R. Ahlefeld. Eighth. Said district court erred in overruling the motion of the plaintiff in error for a new trial. Ninth. Said district court erred in giving judgment for said defendant in error."

The petition in the case is as follows (omitting title): "The said plaintiff, H. B. Harding, for his petition and cause of action against the said defendant, the Bank of Le Roy, alleges: That it (the Bank of Le Roy) is a corporation duly organized under the laws of the state of Kansas. That in the month of December, 1887, the said plaintiff deposited with the said defendant the sum of two thousand eight hundred dollars, and directed the said defendant to pay said moneys to divers persons, whose names, and the amount to be paid to each, was furnished to the said defendant by the said plaintiff at the time. Among others, the plaintiff directed the defendant to pay to I. S. De Ford and John Wackman eight hundred and twenty-

nine dollars and ninety-four cents, which said payment was to be made upon the joint check of the said De Ford & Wackman, and not otherwise. That the said De Ford & Wackman refused to draw said money so deposited as aforesaid, and refused to accept the same, but, upon the contrary, brought suit against the plaintiff, and obtained judgment against him for all of the moneys due from the plaintiff to said parties, which judgment the plaintiff paid in full. That before the bringing of this suit the plaintiff demanded of the defendant said sum of money, and the defendant refused to pay the same to the plaintiff, or any part thereof. Wherefore, an action hath accrued to the plaintiff. He therefore brings suit, and prays for a judgment against said defendant for said sum of money to wit, eight hundred and twenty-nine dollars, with the interest thereon, at seven per cent. per annum, from the 1st day of January, 1887, and the costs of this suit. S. S. Kirkpatrick, Attorney for Plaintiff."

The said petition was attacked by the following motion (omitting title): "Comes now the said defendant, by Redmond & Junkins, its attorneys, and moves the court to require said plaintiff to make his petition herein definite and certain, in the following particulars, to wit: First. That plaintiff state whether, at the time of making said alleged deposit with the defendant, he (the plaintiff) received from defendant any certificate or other written evidence of such deposit; and, if so, that the plaintiff set out in his petition a copy of the same. Second. That plaintiff state whether he directed the said defendant to pay said money to divers persons, as alleged in his petition, orally or in writing; and, if in writing, that he attach to or set out in his petition a copy of such written direction; and, if orally, then that the plaintiff set out the particulars fully, as to amounts, and names of persons to whom said moneys, by plaintiff's said direction, were to be paid. Third. That plaintiff state in what court said De Ford and Wackman brought suit against said plaintiff, and who were parties plaintiff and defendants therein, and what judgment was rendered therein, together with the date of such judgment, and that plaintiff state when, and to whom, he paid such judgment. Redmond & Junkins, Attys. for Defendant,"—which said motion was overruled.

After which the defendant filed the following answer (omitting title): "Comes now said defendant, and, for answer to plaintiff's petition, says First. This defendant denies each and every allegation, averment, matter, and thing in plaintiff's petition contained. Second. And said defendant, for a second and further answer herein, says: That on the 27th day of December, 1886, one John Wackman deposited with this defendant the sum of \$2,828.96, and at the same time said John Wackman deposited with this defendant his

directions, in writing signed by him, said John Wackman, and therein and thereby directed said defendant to pay said moneys to divers persons, whose names, and the amount to be paid to each, was furnished to said defendant in said direction in writing; a copy of which said direction in writing is hereto attached, marked 'Exhibit A,' and, by incorporation, made a part of this answer. That thereafter, and in pursuance of said direction, this defendant paid out said moneys to the several persons in the several sums as therein directed, all save and except the said sum of \$829.94, so as aforesaid directed to be paid out upon the order of I. S. De Ford and John Wackman. That no order of I. S. De Ford and John Wackman, or either of them, for said last-mentioned sum of money, or any part thereof, has ever been presented to this defendant, nor have said I. S. De Ford and John Wackman ever demanded of this defendant said money, or any part thereof. That after said moneys were deposited with this defendant as aforesaid, and while there still remained with this defendant said \$829.94 thereof, on the 15th day of January, A. D. 1887, one J. R. Ahlefeld commenced before G. Wilkinson, a justice of the peace of Le Roy township, in said county, an action against said John Wackman upon account, and in said action a garnishee summons was duly served upon this defendant January 15, 1887, and before any order of said I. S. De Ford and John Wackman, or either of them, had been presented for said moneys, and before any demand by said De Ford & Wackman, or either of them. And thereafter this defendant appeared, on January 18, 1887, before said justice, and answered upon oath, as garnishee, in regard to said moneys of said John Wackman in hands of this defendant as aforesaid; and upon such answer, and on conclusion of the hearing of said case, on the 18th day of January, 1887, it was duly adjudged by said justice that said J. R. Ahlefeld have and recover of said John Wackman the sum of \$300 and costs, \$5.40, and it was then and there duly ordered by said justice that this defendant, the Bank of Le Roy, pay into court the sum of \$305.40. And thereupon, in pursuance of said order and judgment of the court, this defendant did pay into court, of said moneys, the sum of \$305.40. All and every of which proceedings will more fully appear by reference to the records and files of said justice court. That after said moneys were so deposited with this defendant as aforesaid, and while there still remained with this defendant said \$829.94 thereof, on the 15th day of January, 1887, one John Fallakey commenced before G. Wilkinson, a justice of the peace of Le Roy township, in said county, an action against said John Wackman upon account; and in said action a garnishee summons was duly served on this defendant on January 15, 1887, and before any order of said I. S. De Ford and John Wackman, or either of them, had been pre-

sented for said moneys, and before any demand thereof by said De Ford & Wackman, or either of them. And thereafter this defendant appeared, on January 18, 1887, before said justice, and answered upon oath, as garnishee, in regard to said moneys of said John Wackman in hands of this defendant as aforesaid; and upon such answer, and on conclusion of the hearing of said case, on the 18th of January, 1887, it was duly adjudged by said justice that said John Fallakey have and receive of said John Wackman the sum of \$300 and costs, \$5.40, and it was then and there duly ordered by said justice that this defendant, the Bank of Le Roy, pay into court the sum of \$305.40. And thereupon, in pursuance of said order and judgment of the court, this defendant did pay into court, of said moneys, the sum of \$305.40. All and every of which proceedings will more fully appear by reference to the records and files of said justice court. That after said moneys were so deposited with this defendant as aforesaid, and while there still remained with this defendant said \$829.94 thereof, on the 15th day of January, 1887, one Chas. W. Becker commenced before G. Wilkinson, a justice of the peace of Le Roy township, in said county, an action against said John Wackman upon account, and in said action a garnishee summons was duly served on this defendant on January 15, 1887, and before an order of said De Ford & John Wackman, or either of them, had been presented for said moneys, and before any demand thereof by said De Ford & Wackman, or either of them. And thereafter this defendant appeared, on January 18, 1887, before said justice, and answered upon oath, as garnishee, in regard to said moneys of said John Wackman in hands of this defendant as aforesaid; and upon such answer and the conclusion of the hearing of said case, on the 18th day of January, 1887, it was duly adjudged by said justice that said Chas W. Becker have and recover of said John Wackman the sum of \$224 and costs, \$5.40, and it was then and there duly ordered by said justice that this defendant, the Bank of Le Roy, pay into court the sum of \$219.14, and thereupon, in pursuance of said order and judgment of the court, this defendant did pay into court, of said moneys, the said sum of \$219.14. All and every of which proceedings will more fully appear by reference to the records and files of said justice court. That said several sums of money so paid into said justice court in said three several actions against said John Wackman, amounting to the sum of \$829.94, are the same moneys and funds so as aforesaid originally deposited with this defendant as aforesaid, and are the same funds which said plaintiff now claims in this action. That before the said several actions were commenced against said John Wackman the said plaintiff was informed and had due notice that said several actions were about to be commenced against said John Wackman,

and that said funds in the hands of this defendant would be garnished and appropriated in said action, as the property of said John Wackman, and said plaintiff was inquired of as to whether he, the said H. B. Harding, had or claimed any interest in said funds, and upon said information, notice, and inquiry, said H. B. Harding, then and there disclaimed any right, title, or interest in said funds, of all which information, notice, and inquiry, and of the said disclaimer of said H. B. Harding thereto, this defendant was fully informed and had due notice before said moneys were paid over as garnishee as aforesaid. That before the said several actions were commenced against said John Wackman the said I. S. De Ford was informed and had due notice that said several actions were about to be commenced against said John Wackman, and that said funds in hands of this defendant would be garnished and appropriated in said actions as the property of said John Wackman, and said I. S. De Ford was inquired of as to whether he, the said I. S. De Ford, had or claimed any interest in said funds; and upon such information, notice, and inquiry, said De Ford then and there disclaimed any right, title, or interest in said funds. Of all which information, notice, and inquiry, and of the disclaimer of said I. S. De Ford, thereto, this defendant was fully informed and had due notice before said moneys were paid over as garnishee as aforesaid. Wherefore, this defendant prays judgment against said plaintiff for its costs. Redmond & Junkins, Attorneys for Defendant."

"Exhibit A. Le Roy, Kansas, Dec. 27th, 1886. Memorandum. Whereas, I have this day made settlement with H. B. Harding and Co. for all claims against them on account of the firms of De Ford and Wackman and I. S. De Ford and Co., as a partner in both firms; and whereas, there is a disagreement as to accounts between I. S. De Ford and myself, as partners in the aforementioned firms of De Ford and Wackman and I. S. De Ford and Co.: Now, therefore, this is to witness that I have agreed to and do place in the hands of the cashier of the Bank of Le Roy, Kas., the full sum of \$2,828.96, being the full balance due from said Harding and Co. to the aforesaid mentioned firms, to be held by said cashier for disbursement as follows, to wit: \$2,001.92 to be paid to the creditors of said I. S. De Ford and Co., viz.:

Goddard Peck and Co.....	\$ 82 14
Gauss and Co.....	408 50
Gauss, Shelton & Co.....	39 25
Croc, Hagardine & Co.....	538 58
Chambers	82 78
Wade	116 67

\$2,001 92

—"Upon their drafts for the same, or upon receipts properly signed by them, the said creditors, and the balance of \$827.04 to be paid out by said cashier only upon orders signed jointly by myself and I. S. De Ford. [Signed] John Wackman."

The plaintiff in said action made the following reply (omitting title): "Comes now the plaintiff, and, for his reply to the answer of the defendant filed herein, says: He denies each, all and singular, the allegations in said answer contained, save and except what is herein specifically admitted. The plaintiff admits the execution of the paper, a copy of which is attached to said answer, and marked 'Exhibit A,' but alleges the fact to be that the said moneys mentioned and described in said paper was not deposited by the said John Wackman, but was deposited in said bank by this plaintiff, who had made settlement with the said John Wackman, and was deposited by said plaintiff for the specific purposes mentioned in said exhibit, all of which said bank had due and legal notice. The plaintiff, further replying to said answer, says: That before the making of said deposit, and on, to wit, the 11th day of November, 1886, the said John Wackman sold and transferred to the said I. S. De Ford all of his rights and interest in and to the then existing partnerships of De Ford & Wackman and De Ford & Co., for a valuable consideration. And, at the time said pretended settlement set forth and stated in the answer of said defendant, the said Wackman had no interest whatever in the several sums of money due from the said H. B. Harding to the said firms of De Ford & Wackman and I. S. De Ford & Co. That subsequent thereto, and subsequent to the deposit of the money with the defendant bank, and some time in the month of December, 1886, the said I. S. De Ford, by virtue of the sale and assignment to him as aforesaid, commenced an action in the district court of Wilson county, Kansas, against the said H. B. Harding, to recover the moneys due the late partnerships of De Ford & Wackman and I. S. De Ford & Co., less the amount paid to the creditors of said firms mentioned in Exhibit A, attached to defendant's answer. That, subsequent thereto, judgment was rendered in said action in favor of said De Ford for the sum of \$1,000, which the said plaintiff was compelled to pay, and did pay, to the said I. S. De Ford, all of which the defendant bank had notice. The plaintiff, further replying to said answer, says: That the said several suits mentioned and set forth in said answer, commenced before G. Wilkinson, a justice of the peace of Le Roy township, in said county, against John Wackman, and the several garnishee summonses issued in said suits, were brought by the respective plaintiffs, and against the said defendant, by collusion, with full knowledge upon the part of the respective parties that the said John Wackman was not indebted to said parties in any sum whatsoever, it being the objective purpose and intention of the several plaintiffs and the said defendant to defraud the plaintiff herein. That the said bank gave the said plaintiff no notice of service of garnishes proceedings upon it, nor

did it give the said I. S. De Ford any notice of service of garnishee summons, although the bank, at the time each of the garnishee summonses was served upon it, had actual knowledge that the said De Ford had commenced a suit against the said H. B. Harding, claiming that the said Wackman had assigned to the said De Ford, for a valuable consideration, his (the said Wackman's) entire interest in the said partnerships of I. S. De Ford & Co. and De Ford & Wackman, and that said suit was still pending at the time the defendant claims it paid the money out on the orders of the justice of the peace, as stated in said answer. S. S. Kirkpatrick, Attorney for Plaintiff."

To which said reply the said defendant filed the following motion (omitting title): "Comes now said defendant, and moves the court to require said plaintiff to make his reply more definite and certain in the following particulars, to wit: First. That said plaintiff separately state and number his several replies and pretended defenses to the answer of the defendant (1) by separating and numbering that part of his said reply from the beginning thereof to and including the words 'Exhibit A,' in the sixth line of the body of said reply; (2) by separately stating and numbering that portion of his said reply following the words 'Exhibit A,' in said sixth line, to and including the word 'notice,' in the eleventh line, of the body thereof; (3) by separately stating and numbering that part of said reply beginning with the last two words of said eleventh line, to and including the word 'De Ford,' in the twenty-first line, of the body of said reply; (4) by separately stating and numbering that part of the reply following said word 'De Ford,' in the twenty-first line thereof, to and including the word 'notice,' in the eighth line of second page of said reply; (5) by separately stating and numbering that part of said reply following the said word 'notice,' in the eighth line of second page thereof, to and including the word 'herein,' in the eighteenth line of second page thereof; and (6) by separately stating and numbering the remaining part of said reply, from the said word 'herein,' in the eighteenth line of second page, to the end of said reply. Second. That defendant asks the court to require said plaintiff to make his reply more definite and certain by stating therein who is meant by the words 'said defendant,' at the beginning of the fourteenth line of the second page of said reply. Third. The defendant asks the court to require said plaintiff to make his reply more definite and certain by stating who is meant by the words 'said defendant,' at the end of the seventeenth line, and beginning of eighteenth line, of second page of said reply. Fourth. That the plaintiff make his reply more definite and certain by stating therein who and what persons participated in the collusion alleged and referred to in said reply; and by stating the

facts constituting, and the acts done constituting, such collusion, and that plaintiff state what acts were done, and by whom, to defraud said plaintiff. Redmond & Junkins, Attorneys for Defendant."

Upon the hearing of this motion the court sustained said motion, as to the first, second, and third grounds thereof, and overruled the fourth ground of said motion. Amendment was thereupon made instanter, and the defendant therein filed the following demurrer (omitting title): "Comes now said defendant, and demurs to the third count in the amended reply of said plaintiff, upon the following ground, to wit: First. That said third count does not state facts sufficient for a reply to the answer of said defendant herein,"—and also filed the following motion (omitting title): "Comes now the said defendant, and moves the court to strike from the first count of the amended reply of said plaintiff all that part thereof following the words 'Exhibit A,' in the sixth line thereof, for the reason and on the ground that the same is redundant and irrelevant. Second. And said defendant further moves the court to strike from the files in this case the second count in the amended reply of said plaintiff, for the reason and on the ground that the same is inconsistent with, and a departure from, the petition of said plaintiff herein. Redmond & Junkins, Attorneys for Defendant."

Upon the hearing of said demurrer and motion the court overruled the said demurrer, and also overruled said motion.

At the trial of said cause the defendant objected to the introduction of any evidence under the petition, for the reason that it did not state facts sufficient to constitute a cause of action. The objection was overruled, to which the defendant excepted. And after the plaintiff had introduced his evidence, and rested, the defendant demurred to the evidence that had been introduced on the part of the plaintiff, on the ground that the evidence did not prove a cause of action against the defendant and in favor of the plaintiff. The demurrer was overruled, and the defendant excepted thereto, and then introduced his evidence.

Jas. Redmond, for plaintiff in error. S. S. Kirkpatrick, for defendant in error.

DENNISON, J. (after stating the facts). We will consider the errors alleged in this case in the order in which they appear in the petition in error.

The first assignment of error is to the overruling of the motion to make the petition more definite and certain in certain particulars. The statutes of Kansas require the petition to contain "a statement of the facts constituting the cause of action, in ordinary and concise language and without repetition," and also, "when the allegations of a pleading are so indefinite and uncertain that the precise

nature of the charge or defense is not apparent, the court may require the pleading to be made more definite and certain by amendment." The petition in this case alleges that in December, 1887, Harding deposited with the bank a certain sum of money, and directed the bank to pay out the same to divers persons (giving their names, and the amount to be paid to each), and that, among others, he directed said bank to pay to I. S. De Ford and John Wackman \$829.94, upon their joint check, and not otherwise; that the said De Ford & Wackman refused to draw the money, and refused to accept the same; and that the said Harding, before the bringing of this suit, demanded of said bank the said sum of money, and the said bank refused to pay the same or any part thereof, to said Harding. "The function of a petition is not the narration of the evidence, but a statement of the substantive facts upon which the claim for relief is founded, and a motion to make more definite and certain the allegations of the petition can be sustained only when the precise nature of the charge is not apparent." *Railway Co. v. McCormick*, 20 Kan. 107. The petition in this case is definite and certain, and apprised the defendant of the precise nature of the claim of the plaintiff against him. There was no error in overruling this motion.

The second assignment of error is to the overruling of the fourth ground of the motion of said plaintiff in error, requiring said defendant in error to make his reply more definite and certain by stating therein who and what persons participated in the collusion alleged and referred to in said reply, and by stating the facts constituting, and the acts done constituting, such collusion, and that plaintiff state what acts were done, and by whom, to defraud said plaintiff. The amended reply contains the following: "The plaintiff, for his third and further reply to said answer, says: That the said several suits mentioned and set forth in said answer, commenced before G. Wilkinson, a justice of the peace of Le Roy township, in said county, against John Wackman, and the several garnishee summonses issued in said suits, were brought by the respective plaintiffs in said suits, and against the said defendant John Wackman, by collusion, with full knowledge upon the part of the respective parties bringing said suits, and the said Wackman, that the said John Wackman was not indebted to said parties in any sum whatever, it being the objective purpose and intention of the several plaintiffs in the said garnishee suits, and the said defendant John Wackman, to defraud the plaintiff herein. That the said bank gave the said plaintiff no notice of service of garnishee proceedings, nor did it give the said I. S. De Ford any notice of service of garnishee summons, although the bank, at the time each garnishee summons was served upon it, had actual knowledge that the said I. S. De Ford had commenced a suit against the said H. B. Harding, claiming that the said

Wackman had assigned to the said De Ford, for a valuable consideration, his (the said Wackman's) entire interest in the said partnerships of I. S. De Ford & Co. and De Ford & Wackman, and that said suit was still pending at the time the defendant claims he paid the money out on the orders of the justice of the peace as stated in said answer." This language states as clearly as language can who participated in the collusion alleged, what the facts were and acts done constituting such collusion, and by whom said acts were done. The court properly overruled the fourth ground of said motion.

The third assignment of error was upon the overruling of the demurrer of plaintiff in error to the third cause of the amended reply of said defendant in error. The language complained of in the amended reply may have been redundant, and, upon a proper motion, might have been stricken out, but a demurrer was not the proper remedy. The proper proceeding would have been by motion.

The fourth assignment of error is upon the overruling of the motion of plaintiff in error to strike from the second and third counts of said reply of said defendant certain parts thereof in said motion specified. An examination of the record shows that the motion was not to strike from the second and third counts, but from the first and second counts. The first part of the motion reads as follows: "Comes now the said defendant, and moves the court to strike from the first count of amended reply of said plaintiff all that part thereof following the words 'Exhibit A,' in the sixth line thereof, for the reason and on the ground that the same is redundant and irrelevant." This part of the motion was properly overruled. Plaintiff, in his petition, alleges that he deposited money in said bank for certain specified purposes. The defendant answers that the money was not deposited by the plaintiff, but by John Wackman, and exhibits a paper with John Wackman's named signed to it, in support of that allegation. That part of the reply which the defendant moves to strike out reiterates the fact that the money was deposited by the said plaintiff, and is explanatory of the exhibit mentioned, and the part that John Wackman took in the transaction, and is a reply to said answer, and is not redundant or irrelevant. The second ground of said motion reads as follows: "And said defendant further moves the court to strike from the files in this case the second count in the amended reply of said plaintiff, for the reason and on the ground that the same is inconsistent with, and a departure from, the petition of said plaintiff herein." This part of the motion was also properly overruled. Plaintiff, in his petition, alleges that "the said De Ford & Wackman refused to draw said money so deposited as aforesaid, and refused to accept the same, but, on the contrary,

brought suit against the plaintiff, and obtained judgment against him for all the moneys due from the plaintiff to said parties, which judgment the plaintiff paid in full." The latter part of this statement in the petition may have been surplusage, and, upon a proper motion, might have been stricken out, but it was not done. That part of the reply complained of in the second ground of said motion may have been redundant, irrelevant, and surplusage, and, upon a proper motion, might have been stricken out for that reason; but this motion is to strike it out "for the reason and on the ground that the same is inconsistent with, and a departure from, the petition of said plaintiff herein." It certainly is not inconsistent with, or any departure from, the language of the petition, but relates to the refusal of De Ford & Wackman to draw said money, and to accept the same, and to their bringing suit against the plaintiff, and obtaining judgment against him, and his payment thereof. The only variation in the reply was the sale and transfer by John Wackman to I. S. De Ford of all his rights and interests in the partnership of De Ford & Wackman and of De Ford & Co., and the suit upon the company accounts so assigned by I. S. De Ford, instead of I. S. De Ford and John Wackman. This variation was an immaterial one, and certainly no ground for reversing this case.

The fifth assignment of error is in overruling the objection of plaintiff in error to the introduction of any evidence in said action. As already stated in this opinion, in considering the first assignment of error, the petition alleges that Harding deposited with the bank a certain sum of money, directed it to be paid to divers persons (giving their names, and the amounts to be paid to each, among others being I. S. De Ford and John Wackman, \$829.94), upon their joint check, and not otherwise. That said De Ford & Wackman refused to draw the money, or to accept the same; that the said Harding, before bringing the suit, demanded the return of the money, which was refused by the bank. The answer of the defendant alleges that the money was not deposited by said Harding, but by John Wackman, and sets out, as Exhibit A in the answer, a paper, signed by John Wackman, directing the payment of the money. The reply of the said plaintiff admits the execution of the paper, marked "Exhibit A," and alleges that the money was not deposited by John Wackman, but was deposited by said Harding for the purposes therein specified, of which said bank had due and legal notice. This states a legal cause of action, and the plaintiff was properly permitted to introduce evidence to sustain the same, and overruling the objection to the introduction of evidence was not error.

The sixth assignment of error was in overruling the demurrer of the plaintiff in error

to the evidence introduced by the defendant in error. The plaintiff in error contends that the money was deposited under the paper marked "Exhibit A," for the specific purpose named therein, and says that that paper shows conclusively that the money was placed in the hands of the cashier of the Bank of Le Roy, plaintiff in error, by John Wackman, and not by H. B. Harding, and that said money was to be paid out only upon orders signed jointly by John Wackman and I. S. De Ford, and there being no averment in the petition, or any evidence, that there was a check signed jointly by I. S. De Ford and John Wackman, that the plaintiff could not maintain his action. This contention is not sound. When Harding deposited the money in the bank for a specified purpose, and that purpose failed, as it did in this case, by De Ford & Wackman refusing to accept the money upon the conditions named, then the money belonged absolutely to Harding, and it was the duty of the bank to pay it to him upon his demand therefor. There having been some evidence introduced to sustain all the material allegations in the pleadings of the plaintiff, there was no error in overruling said demurrer. *Simpson v. Kimberlin*, 12 Kan. 579; *Railway Co. v. Couse*, 17 Kan. 571; *Railroad Co. v. Doyle*, 18 Kan. 58.

The seventh assignment of error is in overruling the objection of the plaintiff in error to the introduction in evidence by the defendant in error of the affidavit of J. R. Ahlefeld. Said Ahlefeld, in his evidence, stated: That he saw Mr. Harding about the 1st of January, and told him that he wanted to draw that money out, if it was possible. Mr. Harding told him he had no interest in it, and nothing to do with it, and would not have anything to do with it, in any shape or form; that it was not his money. That said conversation occurred two or three days before the garnishment proceedings which were introduced in evidence on behalf of the defendant in this case. And he stated that Harding told him, in this same conversation, that he believed the money belonged to Wackman. He stated further that he told Harding that he would garnish the bank, but that he did not want to do it if it would interfere with him in any particular. He says, further, that Harding told him to go ahead and get the money, if he could, and that Mr. Harding had full notice of the garnishee proceedings. The affidavit of Mr. Ahlefeld was shown to him upon the witness stand; was identified by him as having been made by him, and that it was his signature. The affidavit tended very strongly to impeach the evidence of said Ahlefeld given at the trial. The said Ahlefeld states in his affidavit that he was acquainted with the said Harding, De Ford, and Wackman, and that about the 1st of January, 1887, he learned that said Harding had made a settlement with said De Ford & Wackman, and that by the terms of said

settlement so made as aforesaid said Harding deposited the amount due them after the payment of their liabilities, to the credit and for the use of said De Ford & Wackman, in the Bank of Le Roy, at Le Roy, Coffey county, Kan. And he further states in said affidavit "that said Harding, or any one in his behalf, did not consent to the withdrawal of said money for payment and satisfaction of said judgment, nor did deponent advise said Harding that any proceedings were or had been instituted, for and on behalf of any person or persons whomsoever, for the purpose of withdrawing or appropriating any of said money so deposited by said Harding in said Bank of Le Roy, to the credit and for the use of said De Ford & Wackman, as aforesaid." The attorneys for this plaintiff in error state in their brief that "no foundation was laid for its introduction in evidence, and that it does not modify, change, or contradict any statement of said Ahlefeld given on the trial; that it cumbers the record, and ought to have been rejected." The foundation was laid for its introduction, and it did contradict and impeach the testimony of said Ahlefeld, and was properly introduced at the trial.

The eighth assignment of error was in overruling the motion of the plaintiff in error for a new trial. The first ground of the motion is, "said findings are not sustained by sufficient evidence, and are contrary to law." The evidence in this case discloses the fact that Harding owed De Ford & Wackman the sum of \$2,828.96. Harding believed himself liable for some of the debts owing by said De Ford & Wackman to persons from whom they had purchased goods. De Ford and Wackman disagreed upon a settlement between themselves of their partnership matters. Each had notified Harding to pay no money to the other. Harding attempted to settle the account between himself and the firm of De Ford & Wackman with Wackman. In pursuance of the attempted settlement, and to fully protect himself, Harding agreed with Wackman to deposit with the Bank of Le Roy a draft upon Simmons & Sidell for the amount found due from Harding to said firm of De Ford & Wackman, for said sum of \$2,828.96, provided the said Wackman would give a partnership receipt to the said Harding, to be sent with the draft to said Simmons & Sidell, and would agree to certain other conditions. Wackman so agreed, and set out the conditions in writing, which is Exhibit A, and deposited the writing, signed by him individually, with the draft, in said bank. The bank received the money on Harding's draft, and proceeded to and did pay out \$2,001.92, according to the terms of said writing. The conditions as to the balance were never complied with. De Ford refused to sign a joint receipt with Wackman, and the money was not paid out as per stipulation. After a period of one year and some four months, Harding drew a draft, through

the Willson County Bank, upon the said Bank of Le Roy, for the amount of \$829.94, and the said Bank of Le Roy refused to pay the same. This is sufficient evidence to sustain the said findings. To relieve themselves from the payment of said \$829.94, the Bank of Le Roy alleged that they had paid out the money upon the order of a justice of the peace in several proceedings in garnishment, in which John Wackman was the defendant, and they give in evidence full copies of the garnishee proceedings had before the justice of the peace. Upon examination of A. C. Thompson, cashier of the Bank of Le Roy, as said garnishee, he makes, in each of the cases, the following answers to the following questions: "Ques. 1. At the time you were served with the order of garnishment in the above-entitled action, had you then, or have you had since then, or have you now, in your possession or under your control, any property, moneys, or credit of the above-named defendant? A. We have nothing in the name of John Wackman. Ques. 2. At the time you were served with the garnishment notice in this case, had you, or have you since had, any money or other property, in your hands or under your control, belonging to the firm of De Ford & Wackman, or in the name of I. S. De Ford & Co.? If so, how much? Ans. 2. There is nothing in the name of De Ford & Wackman. Mr. Barrett, who represents H. B. Harding & Co., deposited some money with the cashier, in trust, to be drawn by orders signed jointly by John Wackman and I. S. De Ford. The amount deposited was, I think and know, was \$2,828.96, out of which was to be paid the sum of \$1,999.02,—is the exact amount to come out of the sum deposited, for the payment of the St. Louis indebtedness. The balance belongs and was to be drawn jointly by John Wackman and I. S. De Ford, which would be \$829.94." And the said bank alleges and proves that they paid out the money upon the order of the said justice of the peace, in pursuance of said garnishee proceedings. Mr. Foster, cashier of the bank, was asked: "Ques. You knew that there was a dispute between De Ford and Wackman as to the amount due each? Ans. Yes; as stated through that (meaning the stipulation). Ques. You observe in this stipulation that this \$827 was to be paid out only on their joint order? Ans. Yes. Ques. You understood from that that you had no authority to pay to either of them on either name individually? Ans. Yes, sir. Ques. If Wackman had presented a check or draft or receipt, you would not have paid it? Ans. No, sir. Ques. If De Ford had presented a check or draft or receipt, you would not have paid it? Ans. No, sir. Ques. As you understood this agreement between the parties, it was only to be paid on their joint order or receipt? Ans. Yes, sir. Ques. For the purpose of protecting Mr. Harding? Ans. No; I didn't understand that it was for the purpose of protect-

ing Mr. Harding. I understood Mr. Harding wanted to get relieved from these bills or debts which he might be liable for."

In the case *Board v. Scoville*, 13 Kan. 32, the supreme court says: "First, is an order of a judge pro tem. in the district court, in a proceedings in aid of execution, under section 490 of the Civil Code, that the garnishee shall pay over to the judgment creditors of certain moneys which the garnishee owes to the judgment debtor, a final determination of the liability of said garnishee to pay said money to said judgment creditor? Second, is the order of a justice of the peace, in an attachment proceeding pending before him under section 42 of the justice act, that the garnishee shall pay into court certain money which the garnishee owes to the defendant in the action, a final determination of the right of the plaintiff in the action to said money? We must answer both of these questions in the negative. Neither of said orders is a judgment. The making of them is not an adjudication between the parties. It does not determine their ultimate rights. It simply gives to the creditor the same right to enforce the payment of the money from the garnishee that the debtor previously had. It is in fact only an assignment of the claim from the debtor to the creditor. The creditor gains no more or greater rights than the debtor had, and the garnishee loses no rights, and the payment of the money can be enforced from the garnishee to the creditor only by an ordinary action. See, also, *Phelps v. Railroad Co.*, 28 Kan. 169." The evidence in this case further shows that when the conditions contained in the stipulation are complied with, to wit, giving the joint check of De Ford & Wackman, the money would then pass from Harding, and become the property of the firm of De Ford & Wackman, and therefore it was not subject to garnishment for the debts of Wackman. *Trickett v. Moore*, 34 Kan. 755, 10 Pac. 147. The attorneys for plaintiff in error contend that "there is no testimony tending to show that either I. S. De Ford or John Wackman ever assigned to H. B. Harding their interest in said moneys, or that said Harding ever acquired an interest of De Ford & Wackman, or either of them, in said moneys, or any part thereof. No order signed jointly by I. S. De Ford and John Wackman was ever presented to said Bank of Le Roy, directing the payment of said money." The evidence in this case clearly shows that the money never became the money of I. S. De Ford and John Wackman, or either of them, for the reason that they never complied with the conditions set forth in the stipulation filed with the Bank of Le Roy, to wit, they never jointly signed an order or check for the money. This money was clearly a special deposit, deposited by said Harding for a specified purpose, and the said De Ford & Wackman had a right, within a reasonable time, to present a check signed jointly by them, and obtain the money. Not having done so,

and 16 months having elapsed after the same was deposited, said Harding and the said bank had a right to assume that they never would present the said check; and the said Harding, having been compelled to pay the same upon the suit of I. S. De Ford, certainly had a right to demand and receive the money from said bank.

The plaintiff in error, in their brief, call our attention to the second ground of their motion for a new trial, to wit, error of law occurring at the trial, etc., and call our attention to the suggestions made under the fifth, sixth, and seventh assignments of error. Having already decided these assignments of error, it is not necessary to again do so. They also call our attention to the third ground of their motion for a new trial, which is newly-discovered evidence, material to defendant, which it could not, with reasonable diligence, have discovered and produced at the trial. This plaintiff, in support of his motion for a new trial, upon the third ground of said motion, introduced the affidavit of G. Wilkinson, the justice of the peace before whom the garnishee proceedings were had, that the said H. B. Harding was present during the examination of H. C. Thompson, the then acting cashier of said bank, and the said justice inquired if he had any interest in the funds then in the bank, to which Harding made answer that he had none, and, further than that, he wanted those St. Louis debts paid out of the money put in the bank, and also the affidavit of Frank Quiggle, who says that he heard the conversation between the justice and said Harding. The court properly overruled the motion for a new trial upon this ground. If the said Harding had been present at such garnishment proceedings, and made the statements to the justice of the peace which he claims were made, it would not have given the bank any right or authority to pay out the money upon the garnishee proceedings, because said money did not belong to John Wackman, the defendant in the garnishee proceedings.

The ninth assignment of error is in giving judgment for said defendant in error. For the reasons already stated in this opinion, this was not error, as it was the duty of the court to render judgment in favor of this defendant in error. The judgment of the court below is affirmed.

COLE, J., concurring. JOHNSON, P. J., not sitting in the case.

(1 Kan. A. 51)

STATE v. LINDGROVE.

(Court of Appeals of Kansas, Northern Department, C. D. Sept. 18, 1895.)

INTOXICATING LIQUORS—SEIZURE—INFORMATION—BILL OF PARTICULARS—INSTRUCTIONS—CONSTITUTIONAL LAW.

1. Where an information filed charges an offense against any of the provisions of the prohibitory law of the state, and the warrant issued

in pursuance thereof commands the officer to whom it is directed to seize and take into his custody the property mentioned in the statutes, such warrant, and the seizure made thereunder, are valid.

2. The granting or overruling of a motion to require the state to make and file a bill of particulars with an information rests within the sound discretion of the trial court, and, unless there is an abuse of such discretion shown, an appellate court will not disturb its rulings.

3. Where the court refuses to give instructions which are not applicable to the facts that are in evidence, notwithstanding they contain correct statements of the law in the abstract, held not error.

4. Paragraphs 2522, 2533, Gen. St. 1889, are constitutional, and not in conflict with the fourteenth amendment to the constitution of the United States.

(Syllabus by the Court.)

Appeal from district court, Jewell county; Cyrus Heren, Judge.

Nels Lindgrove was convicted of keeping a common nuisance, and appeals. Reversed.

T. S. Kirkpatrick and Ira F. Hodgson, for appellant. F. B. Dawes, Atty. Gen., and M. R. Sutherland, for the State.

GILKESON, P. J. This was a criminal prosecution brought by the state against Nels Lindgrove, under the provisions of the prohibitory law, charging the defendant with keeping and maintaining a common nuisance. The information as originally filed, and upon which the first trial was had, contained two counts, and two verdicts were rendered therein, viz.: "Not guilty as to the first count, and guilty as to the second count." The warrant issued in this action contained what is commonly called the "search and seizure clause," and certain articles were by the sheriff taken into his possession, and held subject to the order of the court. The verdict of guilty was set aside, and a new trial awarded, upon the second count in said information. The case was again tried by the court and jury November 13, 1894, and the defendant was found guilty, and adjudged to pay a fine of \$150 and costs of suit, and was ordered to stand committed to the county jail until such fine and costs were paid. The defendant insists that in the proceedings in the trial there were errors as follows: (1) That the seizure made in this action is not authorized by the section of the statutes under which he was convicted. (2) That the court erred in overruling the defendant's motion for a return of the barrels and bottles seized. (3) That the court erred in overruling the defendant's motion to require the state to make and file a bill of particulars with its information. (4) That the court erred in permitting the introduction, as evidence, of the contents of the bottles seized, and permitting the jury to taste or smell thereof. (5) That the court erred in refusing certain instructions. (6) That the court erred in overruling defendant's motion in arrest of judgment. We will consider the assignments of error in the order presented.

1. The defendant contends that the seizure

in this case is not authorized by paragraph 2533, Gen. St. 1889, but admits that paragraph 2543 authorizes such seizure. The distinction sought to be made is that, this defendant having been charged with maintaining a nuisance, as he claims, under said paragraph 2533,—that being the only section of the law relating thereto,—a search and seizure can only be made in compliance with that section, which, he contends, is after judgment by a court of competent jurisdiction, finding such a place to be a nuisance. This contention arises, we think, from a misconception of the statutes. The information in this case charges an offense against the provisions of the prohibitory law, and the records show that paragraph 2543 has been fully complied with, which provides: "If the testimony so taken discloses the fact that an offense has been committed against any of the provisions of this act—thereupon a warrant shall issue for the arrest of the person named in such information as in other criminal cases. But in addition thereto shall command the officer to whom it may be directed to seize and take into his custody any and all intoxicating liquors, vessels and bottles, containing the same subject to the order of the court." And, further, provides: "And if upon the trial of such person he shall be convicted of violating any of the provisions of this act, the court shall order as a part of the judgment in addition to the penalty therein provided, that the officer having the custody thereof, shall publicly destroy all such property," etc. The search and seizure had in this case is fully authorized by law.

2. The defendant contends that the court erred in overruling the defendant's motion for the return of the property seized. This contention is wholly untenable, and we do not think that the defendant presses it with any seriousness. The seizure in this case being valid, and the warrant directing the sheriff to hold the property seized until the further order of the court, we can see no reason, nor is there any urged by counsel, why the property should be returned until after a trial had been had, and the court, by order, makes disposition of it. The defendant, having been granted a new trial, was in the same position, when this motion was made, as when first arrested, and he cannot be heard to complain of the retention of the property, at least, until some action has been had in the proceedings under which it was seized. The granting of this motion at this time might have the effect of defeating the very end for which the seizure was made, and might deprive the state of material assistance in securing a conviction, by depriving it of the only evidence within its control to show that the place charged was a place where intoxicating liquors were kept and stored.

3. That the court erred in overruling the defendant's motion to require the state to make and file a bill of particulars with its information. We think that some of the reasons

urged by counsel bring this case within that class of cases in which the court might, in its discretion, require the prosecution to file a bill of particulars.

4. That the court erred in permitting the jury to taste or smell the contents of the bottles seized in this action. In this we think the court erred. It is well settled that a juror cannot give a verdict founded on his own private knowledge, and this rule is founded in reason and justice; for it could not be known whether the verdict was according to or against the evidence, as it is very possible that the private grounds of belief might not amount to legal evidence. If such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath. The juror cannot be subjected to cross-examination; and if, therefore, a juror knew any facts material to the issue, he ought to be sworn as a witness. 1 Starkie, Ev. 471-478. "The verdict of a jury must be rendered solely upon the legal and open testimony in the cause." *Pleasant v. State*, 13 Ark. 360. One of the material facts to be proven in this case, and so claimed by the state, is that the defendant kept a place where persons resorted for the purpose of drinking, as a beverage, intoxicating liquors. It was incumbent, therefore, upon the state, to prove by legal testimony whether the liquor so kept by the defendant was intoxicating, or, as the state insists, "beer"; and this should have been proven by evidence, oral or written. "It is true that the jury have the advantage of instruction. They may, in the discretion of the court, if convenient, and under proper custody (if by so doing they can better understand the testimony), be allowed to view the place of the alleged homicide. They may be allowed to inspect the instrument of homicide. The appearance of the different witnesses is matter for their observation. But in all such cases the inspection or observation is not testimony, but comes in aid of the testimony. So, proof of venue is a material fact, and the omission of it is fatal, though every juror may know the offense was committed in the county in which trial is being held. It would not be contended for a moment that the jury could say from their own private knowledge that the venue was proven, without some testimony showing it. Nor could one, two, or more of the jurors be permitted to communicate to the rest their knowledge as to the venue." *Pleasant v. State*, supra. And when the court in this case permitted the jury to taste and smell the contents of the bottles, they, for the purposes of this case, ceased to be jurors, and should have been sworn as witnesses. The testimony in this case discloses that some, only, of the jury tasted or smelled of the contents of the bottles, and those who did must have communicated the result of their research to those who did not, in order that the others might know what they did; or, if they did not, then some of the jurors must have rendered their verdict

upon their own personal private knowledge, and some without knowing anything about it. In neither event can it be said that the verdict was rendered solely upon the evidence adduced in court, and the rule that "the jury must be satisfied from the testimony, apart from their individual knowledge and belief, of the facts," absolutely fails. Had the jurors who tasted, when examined upon voir dire, testified that they had drunk of the liquor kept by the defendant in his place of business, and knew its character, they would have been disqualified to sit, and the court would very properly have sustained a challenge for cause, and, in all probability, they would have appeared as witnesses in this case. Yet, by this very act, they were permitted, after they had been sworn, and entered upon (and nearly concluded) the trial of this cause, to disqualify themselves. It would have been just as competent to have permitted the introduction of evidence in this case in the absence of part of the jury, and allow those who were present to communicate to those who were not what the testimony had been during their absence, as to permit an act of this kind. If it is proper for the jury to receive evidence by tasting and smelling the liquor, all of the jurors should have been compelled so to do, so that each juror should receive the same kind of evidence and in the same manner; and the court should have ascertained in the first instance whether or not they were all equally expert in taste and smell, so that this evidence could operate alike on the same sense of each juror. One juror might be familiar with the use of intoxicating liquor, and know the taste and smell of any kind, and the other 11 might be wholly ignorant of the taste or smell of any kind. In that event, the 11 jurors would receive their evidence of the contents of the bottle from the one wiser juror; and this in the privacy of the jury room, in the absence of the accused and his counsel, and contrary to the constitutional guaranty that "the accused should be brought face to face with the witnesses who testify against him."

5. The court erred in refusing certain instructions. The first instruction refused is: "'Hop tea' does not come within the category of intoxicating liquors without proof of its intoxicating qualities, and the burden of the proof is on the plaintiff to show, by a preponderance of evidence, beyond all reasonable doubt, that said liquor is intoxicating." Under paragraph 2521, Gen. St., being section 1 of the prohibitory law, the sale of any spirituous, malt, vinous, fermented, or other intoxicating liquors is illegal. The charge in this case is for keeping a place where intoxicating liquors were kept for the purpose of being sold as a beverage, etc. The evidence discloses the fact that "hop tea" is a malt liquor. Paragraph 2530 provides that "all liquors mentioned in paragraph 2521 shall be considered and held to be intoxicating liquors within the meaning of this act."

It is, therefore, within the prohibition of the statutes, and, if the defendant denies that it is intoxicating, it devolves upon him to remove the presumption of the law by evidence. *State v. Schaefer*, 44 Kan. 90, 24 Pac. 92. The other instruction refused is: "The jury are instructed that, under the laws of the state of Kansas, the defendant has a right to keep intoxicating liquors, lawfully acquired, for his own use; and he may lawfully drink the same, or give it away, as he may see fit; provided, a place is not thereby kept where persons are permitted to resort for the purpose of drinking intoxicating liquors." While this may be a correct statement of the law, there was no claim made on the part of the defendant, nor was there any evidence offered to show, that any of the liquors so kept by him was for private use; and the instruction asked for is unnecessary, and certainly the refusal of it did not prejudice his rights in the least. An instruction ought not to be given, although it is a correct statement of law in the abstract, which is not applicable to the facts that are in evidence. *State v. Whitaker*, 35 Kan. 731, 12 Pac. 106; *City of Kinsley v. Morse*, 40 Kan. 578, 20 Pac. 217; *Markland v. McDaniel*, 51 Kan. 350, 32 Pac. 1114; *Lorie v. Adams*, 51 Kan. 692, 33 Pac. 599.

6. The court erred in overruling defendant's motion in arrest of judgment; that paragraph 2522 of the prohibitory law is unconstitutional, and in contravention of section 1, art. 14, of the constitution of the United States, or what is usually termed the "Fourteenth Amendment of the Constitution"; that it not only creates a monopoly in the sale of intoxicating liquors, by placing it in the hands of a class, to wit, druggists, but a subdivision of a class, by placing a property qualification upon the class. This argument implies that the sale of intoxicating liquors is an immunity or privilege of a citizen of the United States. The weight of authorities is overwhelming that no such immunity has heretofore existed as would prevent state legislatures from regulating, and even prohibiting, the traffic in intoxicating drinks; and no court has held that such a law was void, as violating the privileges or immunities of citizens of the state, or the United States. And as was said by Mr. Justice Brewer in the case of *State v. Bradley*, 28 Fed. 289: "If, however, such a proposition is seriously urged, we think the right to sell intoxicating liquors, so far as such right exists, is not one of those rights growing out of citizenship of the United States." "A state may absolutely prohibit the manufacture or sale of intoxicating liquors. No supreme court has ever denied the power, and the supreme court of the United States, both before and after the adoption of the fourteenth amendment, has often and expressly affirmed it." *License Case*, 5 How. 504; *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Foster v. Kansas*,

112 U. S. 201, 5 Sup. St. 8. That a state has the unquestioned right to prohibit the sale of intoxicating liquors cannot be denied. It certainly, then, can place upon it such restrictions as the legislature, in its discretion, may deem proper. Mr. Justice Brewer, in speaking for the court, in *Intoxicating-Liquor Cases*, 25 Kan. 761, says: "It will not be doubted that the police power of the state is broad enough and strong enough to uphold any reasonable restriction or limitation on the keeping, use, or sale of any substance whose keeping, use, or sale involves danger to the general public. The storage of powder or explosives and highly inflammable oils may be forbidden within the city limits. The legislature may require railroads to fence their tracks, dangerous machinery to be everywhere inclosed, poisons to be labeled when sold. By virtue of the same power, we may commit the sale of liquor to any particular class of persons who, by reason of its special training and habits, it may deem peculiarly fit for such duty." And it is not unreasonable, therefore, to say that the placing of the sale of intoxicating liquors in the hands of registered pharmacists who are the owners of a certain amount of stock is a restriction within the power of the legislature to place thereon. It is certainly a safeguard to the public, and evidence of the party being in good faith engaged in the drug business, and not merely the proprietor of a medical, mechanical, or scientific joint. And what could be more natural than to suppose that a druggist who has \$1,000 invested in his business as a stock, which may become liable for fine and costs if he violates the law, will be more discreet in exercising such a business than one who has little or no property to risk or lose, and is, therefore, peculiarly fitted for such duty? The second proposition—that paragraph 2533 is unconstitutional because it provides for the destruction of property, irrespective of ownership, and without notice to the owner, or an opportunity to appear and defend, as claimed by the appellant—is not sound. In the case at bar, there was no judgment rendered or order made for the destruction of the property seized in this case, and, from aught that the records disclosed, it may have been turned back to the defendant, or still held by the sheriff, waiting the decision in this case. And we pass this proposition without further comment.

The judgment in this case will be reversed, and case remanded for new trial in accordance with the views herein expressed. All the judges concurring.

RULE v. BOLLES.

(Supreme Court of Oregon. July 20, 1895.)

REPLEVIN—EVIDENCE—OWNERSHIP OF BRAND—INSTRUCTIONS.

1. In replevin against a sheriff for horses seized as the property of plaintiff's husband,

evidence of the recording of the brand is competent to show change of possession of the horses branded therewith.

2. In a charge under Hill's Ann. Laws, § 3000, providing that the property of a married woman is to be deemed the property of her husband unless she makes and records a descriptive list thereof, the court stated that "this presumption may be overcome by any evidence that satisfies your minds to the contrary," instead of that the presumption may be overcome by "evidence to the contrary which satisfies your minds." *Held*, that there was no error.

3. A request to charge that "every sale of personal property capable of immediate delivery, unless the same is accompanied by immediate delivery, and followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller, disputable only by making it appear, on the part of the person claiming under such sale, that the same was made in good faith, for a sufficient consideration, without intent to defraud such creditors," was given with the modification "that the presumption may be overcome by any evidence that satisfies your minds to the contrary." *Held*, that the modification, when considered with the whole construction, was not erroneous, especially where the jury, by force of another instruction, must have found that the property was not in the hands of the vendor at the time it was attached.

Appeal from circuit court, Union county; James A. Fee, Judge.

Action by Eliza Rule against J. T. Bolles for conversion. Plaintiff had judgment, and defendant appeals. Affirmed.

J. J. Balleray, for appellant. J. H. Slater, for respondent.

BEAN, C. J. This is an action to recover the possession of 57 head of horses. The complaint is in the usual form. The defendant, who was the sheriff of Union county, justifies the taking and detention of the property in question by alleging that it was seized by him as the property of Robert S. Rule, the husband of the plaintiff, under a writ of attachment issued in an action against him by one Horner. The reply puts in issue the allegation of ownership in the answer, and, upon the issues thus made, the cause was tried, resulting in a verdict and judgment for plaintiff, from which the defendant appeals.

The evidence produced on the trial tended to show that in March, 1893, the plaintiff purchased of her husband, with whom she was then living, the horses in question, and that, after such purchase, she had them gathered up from the range, the brand with which they were marked recorded as her horse and cattle brand, and she and her sons subsequently took care of them; that, some time before they were attached, she had them driven from Sand Hollow, Morrow county, to Gibbon, in Umatilla county, from which point, accompanied by her husband, she started to drive them east to find a market, and while passing through Union county, in July, 1893, they were seized by the defendant; that before starting with the horses from Morrow county, in June or July, 1893, she had them assessed by the sheriff as her property, and paid the taxes thereon, but she

subsequently learned that the sheriff, without her knowledge, listed them as the property of her husband. There was testimony for the defense tending to show that up to the time the horses were taken from Morrow county, in June or July, 1893, the husband was the reputed owner thereof, and that, in the presence and with the knowledge of his wife, he had exercised acts of ownership over them. There was also a question, under the evidence, as to whether the horses were in possession of the plaintiff or her husband at the time of the attachment.

The record contains numerous assignments of error, but none of them are sufficient, in our opinion, to require a reversal of the judgment. It is claimed that the court erred in admitting in evidence a certified copy of the record of the brand recorded by plaintiff, for the reason that the ownership of a brand is no evidence of ownership of stock branded therewith. But the record shows it was not admitted for such purpose, but only as one of the circumstances tending to show a change in possession of the horses so branded; and for that purpose, under the circumstances of this case, it was entitled to go to the jury for whatever they might consider it worth.

The defendant requested the court to charge the jury that the property of a married woman is to be deemed the property of her husband, unless she makes and records a descriptive list thereof, as provided in section 3000 of Hill's Annotated Laws, which the court gave, with the modification that "this presumption, however, may be overcome by any evidence that satisfies your minds to the contrary." The objection to this instruction, as so modified, is that the court did not tell the jury that there must be evidence to the contrary to overcome the presumption, but left them to infer that anything which they might consider evidence would be sufficient, if it satisfied their minds. It is claimed the instruction should have been that the presumption declared by the statute from a failure to record a descriptive list of her property by a married woman may be overcome "by any evidence to the contrary which satisfies the minds of the jury." But this position, it seems to us, is too hypercritical to receive judicial sanction. The instruction would be, in substance, the same in both cases, and, so far as the rule of law applicable to this case is concerned, it is immaterial whether the jury were told the presumption "may be overcome by evidence which satisfies their minds to the contrary," or "by evidence to the contrary which satisfies their minds." To a literary critic, one expression may be more accurate than another, but for all practical purposes they amount to the same thing.

The defendant also requested the court to charge the jury that "every sale of personal property capable of immediate delivery to the purchaser, unless the same is accompanied by

immediate delivery, and followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller, disputable only by making it appear, on the part of the person claiming under such sale, that the same was made in good faith, for a sufficient consideration, without intent to defraud such creditors." The court gave the instruction as asked, but added thereto the following: "This presumption is subject to the same rule as the former. It may be overcome by any evidence that satisfies your minds to the contrary." It is claimed that it was error to so modify the instruction requested. The objection is that by the instruction as given the jury were at liberty to find that the presumption of fraud arising from a want of delivery could be overcome by any evidence which to them seemed satisfactory, while the statute provides that such presumption is disputable only by showing "that the sale was made in good faith for a sufficient consideration, without intent to defraud such creditors." But it seems to us that, when the entire instruction is considered, it is not properly subject to the objection urged. By it the jury are first told that the presumption of fraud is disputable only by making certain things appear, and then that it may be overcome by any evidence "which satisfies your minds to the contrary"; that is, that any evidence which satisfied the minds of the jury that the sale was made in good faith, for a sufficient consideration, and without intent to defraud creditors, was enough. It was only evidence of such facts which, under a rule of law as laid down by the court, could be "to the contrary"; and hence, by reference to what preceded, the language used is, in effect, that evidence satisfying the minds of the jury that the sale was made in good faith, for a valuable consideration, and without intent to defraud creditors, was sufficient to overcome the presumption of fraud arising from the want of a change of possession. But, whether this is a proper construction or not, the error was harmless, because the court instructed the jury, at the request of the defendant, that if, at the time of the seizure by the defendant under the writ, the husband of plaintiff was in possession of the horses, or exercising acts of ownership over them, and the sheriff had no notice of plaintiff's claim, the attachment was valid; and, as the jury found for plaintiff, they must necessarily, under this instruction, have found that the property was taken from the possession of plaintiff, and not her husband, and therefore the question as to the presumption of fraud declared by the statute was immaterial. The retention by the vendor of the possession of personal property capable of immediate delivery raises only a presumption of fraud, but this presumption continues no longer than the property remains in the possession of the vendor; and if, as the jury found, the possession of the

horses in dispute had been delivered to, and they were under the supervision and control of, the plaintiff, at the time the defendant attached them, there was no room for the application of the rule referred to. It was only important in view of defendant's contention that there never had been a change of possession; and that question having been submitted to the jury, and they having found against the defendant, any error committed by the court in instructing on the assumption that the possession remained in the husband was harmless. This view disposes of all the other assignments of error, and sustains the judgment of the court below.

The case seems to have been submitted to the jury on the theory that, if the property was in the possession of the plaintiff's husband at the time it was attached, she could not recover, whether she had purchased it in good faith or not. This was certainly as favorable to the defendant as he could reasonably ask, and, under the verdict rendered, any error committed by the court in instructing the jury in reference to the presumption of fraud arising from the want of delivery was immaterial. It follows that the judgment of the court below must be affirmed.

In re WONG HANE. (31 Cr.)

(Supreme Court of California. Sept. 4, 1895.)

CITY ORDINANCE—POSSESSION OF LOTTERY TICKET.

An ordinance making it "unlawful for any person to have in his possession, unless it be shown that such possession is innocent, any lottery ticket," is unconstitutional, in that it places on one accused of its violation the burden of showing the innocence of his possession.

In bank.

Application of Wong Hane for a writ of habeas corpus. Granted.

M. G. Norton, for petitioner. W. E. Dunn, for respondent.

HARRISON, J. The petitioner is held in confinement by the chief of police of the city of Los Angeles, under a warrant of arrest issued by the police judge of that city, upon a complaint charging him with the violation of a city ordinance, in that he did "willfully and unlawfully have in his possession—such possession being neither innocent nor for a lawful purpose—a certain tool, device, and paper used, and intended to be used, in and for the contriving, setting up, preparing, and drawing a certain lottery." The ordinance under which the complaint is made is as follows:

"The mayor and council of the city of Los Angeles do ordain as follows:

"Section 1. It shall be unlawful for any person to have in his possession, unless it be shown that such possession is innocent or for a lawful purpose, any lottery ticket; or any

ticket, certificate, paper or instrument, purporting or representing, or understood to be or to represent, any ticket, chance, share or interest in or dependent upon the event of any lottery; or any tool, instrument, stamp or device, used or intended to be used in or for contriving, preparing, making, writing, printing, stamping, or getting ready for sale or distribution any lottery ticket or tickets.

"Section 2. Any person who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or be imprisoned in the city jail for a term not exceeding six months, or by both such fine and imprisonment."

The effect of this ordinance is to make proof of the mere possession of a lottery ticket a misdemeanor, and to place upon the defendant the burden of showing that his possession was lawful or innocent. The mere possession of a lottery ticket does not, however, of necessity, involve the possessor in a crime. The ticket may be in possession of the court, or of one of its officers, to be used as evidence upon the trial of one charged with selling it. It may be in the possession of one who purchased it in a country which recognizes the right to traffic in lottery tickets, and who is merely passing through the city. The Penal Code of this state does not make the purchase of a lottery ticket an offense; the provisions of that Code being directed against the selling of such tickets. By the very terms of the ordinance under consideration, it is assumed that the possession of the ticket may be lawful or innocent, and that, in such case, the possessor is not guilty of a violation of the ordinance. The ordinance, however, throws upon the defendant the burden of proving his innocence; and by its terms, unless he shows that his possession is lawful or innocent, his mere possession of the ticket renders him liable to punishment. If there are any circumstances under which the possession of a lottery ticket may be lawful or innocent, a defendant who is charged with the offense of having such ticket in his possession is entitled to the presumption of innocence, and cannot be compelled to establish his innocence by affirmative proof. To the extent that the defendant is required to establish his innocence, the provisions of the ordinance violate his constitutional rights.

It is not sufficient to say that the prosecution may disregard this clause of the ordinance, and itself make proof of the criminal intent of the defendant, or show that his possession was not innocent, or for a lawful purpose. The ordinance is to be tested by its own terms. It has declared that the offense does not exist "unless it be shown that such possession is innocent, or for a lawful pur-

pose." Instead of enacting that the possession with a criminal purpose shall constitute the offense, the city council has industriously provided that the offense is established unless the possession is shown to be with an innocent purpose. This is a qualification attached to the definition of the offense, and is, of necessity, to be established by the defendant, since, if it were shown by the prosecution, it would establish the innocence of the defendant, and, therefore, that no offense had been committed. Nor can this clause in the ordinance be disregarded as being unconstitutional, and effect be given to the first part alone. The provisions of the ordinance are to be considered as a whole, and it is not to be assumed that the city council would have adopted the first clause without enacting the condition thereto. The connection of the two clauses by the conjunction "unless" shows that they are to be taken together, and that the first clause does not, by itself, express the legislative will of the council. It is well established that a statute may be in part constitutional, and in part unconstitutional, and, if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected; but, as was said in *Poin-dexter v. Greenhow*, 114 U. S. 305, 5 Sup. Ct. 903, 902: "These are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact." The same court also said in *Sprague v. Thompson*, 118 U. S. 94, 6 Sup. Ct. 988, where it was sought to apply the rule to certain illegal exceptions in a statute of the state of Georgia: "The insuperable difficulty with the application of that principle of construction to the present instance is that, by rejecting the exceptions intended by the legislature of Georgia, the statute is made to enact what confessedly the legislature never meant. It forces upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted, in view of the illegality of the exceptions." See, also, *Cool-ey*, Const. Lim. pp. 209-212; *Warren v. Charlestown*, 2 Gray, 84.

As we can consider the ordinance only in the form in which it has been enacted, we must hold that it did not authorize the arrest of the petitioner. The petitioner is, therefore, discharged.

We concur: GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.; VAN FLEET, J.; TEMPLE, J.

(5 Cal. Unrep. 119)

WRIGHT v. WRIGHT. (No. 19,511.)
(Supreme Court of California. Aug. 28, 1895.)**HUSBAND AND WIFE—COMMUNITY PROPERTY—
TRIAL—FINDINGS.**

1. Where property purchased with community funds is conveyed to the wife by direction of the husband, and with the intent that it shall become separate property, that conveyance will operate as a gift from him to her.

2. Where a complaint alleges the making of deeds to certain property in the wife's name, and that the property was paid for with community funds, and is community property, and the answer admits the making of the deeds, but alleges that the property was paid for with the wife's separate funds, and is her separate and individual property, there is no reversible error in a finding that the deeds were so executed by the instruction of the husband, for the purpose of vesting title in the wife, as her separate and individual property, and not as belonging to the community.

3. In an action by a husband to have set aside conveyances of certain realty to his wife, and to have the property declared community property, the complaint also alleging desertion of him by the defendant, judgment will not be reversed for want of a finding on that particular issue, the court having found that the property was the wife's separate estate.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; J. S. Noyes, Judge.

Action by M. V. B. Wright against Margaret D. Wright, his wife, to have set aside a certain conveyance of gift from him to her, and to have the property covered thereby declared community property. There was judgment for defendant, from which plaintiff appeals. Affirmed.

Carver & Preston and D. P. Hatch, for appellant. Oscar P. Taylor (John D. Bicknell, of counsel), for respondent.

BELCHER, C. Plaintiff and defendant intermarried in the state of Ohio in 1859, and have ever since been, and now are, husband and wife. In 1873 they came to this state to live, and settled at Riverside. In November, 1878, Hattie L. Traver conveyed to defendant, by a quitclaim deed, 20 acres of land, situate in what is now the county of Riverside; and in May, 1883, she again conveyed to defendant the same land, by a bargain and sale deed. On the 21st day of May, 1885, plaintiff executed to defendant a deed of the same land, which, after referring to the last-named deed, recites that: "Whereas, the conveyance thereof appears on the face of said deed to be community property; and whereas, the consideration paid therefor was from the separate estate of said Margaret Wright; and whereas, I am desirous of placing the title to said property in my wife, Margaret Wright, as her separate property: Now, therefore, in consideration of the premises, I hereby give and grant to Margaret Wright," etc. Subsequently, in 1888, defendant purchased two lots of land in the town of Riverside, and 30 shares of the capital stock of the Riverside Canal Company, taking the title thereto in her own name. Plaintiff and defendant lived

and cohabited together in Riverside until January, 1886, when plaintiff left defendant and went to Los Angeles, where he has ever since resided separate and apart from defendant. In May, 1893, plaintiff commenced this action, alleging that all the before-mentioned property was purchased and paid for with community funds, and is the community property of himself and wife; that the deed of May 21, 1885, was obtained by fraudulent misrepresentations on the part of defendant, and that plaintiff did not know the contents of the deed when he signed it, and never discovered the contents or nature and import thereof until January, 1892; that plaintiff never intended to give or grant any part of said land to his wife, but that since obtaining the deed she has deserted him, and has refused, and still refuses, to live with him as his wife, and has during all said time claimed to own all the said property as her own separate estate,—and praying that by the judgment and decree of the court the said deed of May 21, 1885, be declared null and void, and be set aside and canceled, and all the property described, both real and personal, be adjudged to be the community property of plaintiff and defendant, and be equitably divided between them. The defendant answered, setting up the purchase by herself of all the property involved in the action, and the payment therefor with money derived from her own separate earnings, and alleged to be her separate funds and estate; denying that plaintiff executed the deed of May 21, 1885, without knowing the contents and import thereof, and under fraudulent misrepresentations, and alleging that he "voluntarily, of his own free will and accord, executed the aforesaid writing, with the intention and for the purpose of thereby releasing, giving, granting, and conveying to defendant, as and for her separate and individual property and estate, any and all right, claim, and interest which said plaintiff then had, or might thereafter acquire either in law or equity, of, in, and to the aforesaid land, and every part thereof, and that plaintiff, at the time of executing said writing, knew well the full contents and import thereof"; denying that defendant has, for a long time past, or during any time, or at all, deserted the plaintiff, or refused to live with him as his wife, and alleging on the contrary, that plaintiff has, for more than 10 years last past, willfully deserted and abandoned defendant, and has lived separate and apart from her, and during all said time has willfully failed, neglected, and refused to provide for her the common necessities of life.

The court below found that Hattie L. Traver executed to defendant the two deeds, as before stated, and that the entire consideration for the conveyances, and the entire purchase price of said land, was paid by defendant from and out of her own separate property and estate, and that no part of said consideration was community property. The court further found, among other things, as follows:

(5) "That the plaintiff directed said Hattie L. Traver to so execute said deeds to the defendant in the name of the defendant, and directed said Hattie L. Traver to so convey said lands to the defendant, with the intention and for the purpose of thereby vesting the title to all said property in the defendant, as and for her separate and individual property and estate, and not as community property." (6) "That said deeds were so executed and said land was so conveyed to the defendant, and in the name of the defendant, with the full knowledge of the plaintiff, and that the plaintiff consented to, acquiesced in, and approved of the manner and form of such execution and conveyance, with the intention and for the purpose of thereby conveying to the defendant as a gift, and vesting in her as a gift, from himself, any and all right and interest which the plaintiff claimed to have in said property." (7) "That on May 21, 1885, the plaintiff executed and delivered to the defendant a deed of gift, conveying to the defendant all the right and interest which the plaintiff claimed in the above-described property; that the plaintiff, at the time of executing said deed of gift, well knew and understood the full contents, import, and meaning thereof; and that he executed the same voluntarily, and of his own free will and accord, and without any accident or mistake on his part, and without any fraud, deception, or undue influence on the part of the defendant, and with the intention of thereby giving and granting to the defendant, as and for her separate and individual property and estate, any and all right and interest which said plaintiff then claimed to have in said property." (10) "That all the property, real and personal, mentioned and described in the pleadings herein, and in these findings, is the sole and separate property and estate of the defendant, and that no part thereof is, or ever was, community property, and that the plaintiff has not now, and never did have, any interest therein." In accordance with the findings, judgment was entered that the plaintiff take nothing by his action, from which judgment he has appealed, and has brought the case here on the judgment roll, including a bill of exception.

Counsel for appellant earnestly contend that the earnings of defendant, with which the Riverside land was paid for, are clearly shown by the affirmative averments of the answer to have been community funds, and, therefore, that the said land became and was community property. This question has been very elaborately argued by counsel, but we do not deem it necessary to state or review the points made; for, conceding the argument to be sound, still, if the findings above quoted can be sustained, it is a matter of no consequence whether the original purchase money was separate or community property, as the judgment, in either event, must be affirmed. Under our statute, all property acquired by husband or wife after marriage, except that acquired by gift, bequest, devise, or descent,

is community property. And prior to the amendment to section 164 of the Civil Code, in 1889, all property conveyed to the wife was presumed to be community property. This presumption, however, could be met and overcome by extrinsic evidence showing that the property was acquired by her in one of the excepted ways above specified in the statute. And where property purchased with community funds was conveyed to the wife by direction of the husband, and with the intent that it should become her separate property, it has many times been held that the conveyance operated as a gift from him to her. *Peck v. Brummagin*, 31 Cal. 441; *Woods v. Whitney*, 42 Cal. 358; *Higgins v. Higgins*, 46 Cal. 259; *Read v. Rahm*, 65 Cal. 343, 4 Pac. 111; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695. In the case last cited it is said: "There is no evidence that he [the husband] was indebted to any one at the time, and if he was free from debt he had the right to give her [his wife] the property, and could make the gift effectual by simply directing the conveyance to be made to her." So, also, it has been held that when a husband himself conveys property to his wife, whether it be his separate property or community property, the conveyance operates to vest the title in the wife, as her separate estate. *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. 715; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. 869; *Oaks v. Oaks*, 94 Cal. 66, 29 Pac. 330; *In re Lamb's Estate*, 95 Cal. 397, 30 Pac. 568.

But, admitting that such is the law, still it is insisted that finding 5 is outside of the issues raised by the pleadings, and that each of the findings quoted is contrary to, and not supported by, the evidence. The complaint alleges the making of the deeds by Mrs. Traver to defendant, and that the property was paid for with community funds, and is now the community property of plaintiff and defendant. The answer admits the making of the deeds, and alleges that the property was paid for with defendant's separate funds, and is now her separate and individual property. The real issue, then, was as to whether the property purchased became community or separate property; and, to determine that issue, much evidence was introduced, without objection, on both sides. Of course, the general rule is that new matter must be specially pleaded, but that rule seems hardly broad enough to apply to this case, and put the finding complained of outside of the issues raised. But, however this may be, if that and the other findings are justified by the evidence, the judgment cannot be reversed on this ground.

The evidence was in many respects conflicting, but that was a matter for solution by the trial court. The plaintiff testified, "It is my recollection that I directed Mrs. Traver to make the deed to my wife." Defendant testified: "At the time of the Traver conveyance, plaintiff said it was my money paid for the land, and if he had the deed in his own name he could not take up a government claim; it was my money paid for it, and I

ought to have it. He so stated both before and after the deeds were made. After that, Mr. Wright always spoke of the property as being 'Mamma's property,' 'Mamma's ranch,' and said it was my money paid for it." C. W. Craven testified: "I live in Riverside. Have known plaintiff and defendant since 1880. Am their neighbor. Early in my acquaintance, I heard plaintiff, on several occasions, state, in substance, that no one should look to him for anything about the ranch; that he had no right—no part—in the property; that it was Mrs. Wright's property; and that he was to be held for no obligations. * * * Since 1885 I have heard him say the property was his wife's, and he was to be held for nothing financially." Plaintiff testified that, when Mr. Conway brought him the deed of May 21st for its execution, Conway "said that Mrs. Wright could get a loan of sixteen hundred dollars from Mr. McFarland, but that Mr. McFarland refused to loan the money unless I would sign away my community rights." S. J. Hinckley testified that in June, 1885, plaintiff told him "that Mr. Conway came to Colton, where he was teaching school, and had a paper, and got him to sign it; that he knew he was signing his rights away, but he didn't care." O. T. Dyer testified, in substance, that early in May, 1885, he was negotiating a loan for Mrs. Wright upon the property in question, and had a conversation with plaintiff about his joining in the execution of the mortgage; that plaintiff said he had no interest in the property, and would not join in the mortgage, or put his name on the note, but that he would deed the land to his wife, and she might do what she had a mind to with it; all he asked was to be let alone. John E. Wright, the son of plaintiff and defendant, testified that between 1887 and 1889 he had a conversation with his father about home matters. "I said to him, 'How did you come to sign that paper that mother said you signed, giving your property right away?' He said, 'Well, she owned the property, and she was not in very good health, and it seemed to worry her that she did not have the entire control, and I just signed it to please her.' * * * He further stated that his wife owned the property any way, and that he didn't see as his signing the paper made any difference." Without discussing the matter further, it seems to us that the evidence above recited is quite sufficient to support and justify the findings as to each of the deeds under which defendant claims title.

It is further urged that the judgment should be reversed because the court failed to find upon the issue of desertion, and upon the allegations found in paragraphs 10 to 17 of the answer. We do not think the judgment can be disturbed on this ground. The court having found that plaintiff directed Mrs. Traver to convey the property to defendant, with the intention and for the purpose of thereby vesting the title thereto in the defendant, as

her separate estate, and having further found that the deed of May 21, 1885, was a valid and operative deed of gift, it is wholly immaterial whether the property was paid for with separate or community funds, and equally immaterial whether the plaintiff or defendant had been guilty of desertion. "There should be findings on all the material issues in the case, but a judgment will not be reversed for want of a finding on a particular issue, where it is apparent that the failure to find on that issue is in no way prejudicial to the appellant." *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. 738. The judgment should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

108 Cal. 397

PEOPLE v. CHIN HANE et al. (No. 21,161.)
(Supreme Court of California. Sept. 2, 1895.)

HOMICIDE—EVIDENCE—WITNESS—IMPEACHMENT—
DEPOSITION.

1. For the purpose of showing motive for a murder, evidence that deceased was on the bail bond of one who was charged with assault with intent to murder defendant is admissible.

2. On an issue as to whether certain shots were fired from inside or outside of a building, the testimony of a witness, who was near the scene, that the shots sounded as though fired from inside, and that they sounded like a drum, is not objectionable as the expression of his opinion.

3. The state, after showing diligent effort to find an absent witness, offered the deposition of the witness, taken on the preliminary hearing. On cross examination, defendant produced a photograph of the absent witness, and offered it to the jury for inspection. *Held*, that the exclusion of the photograph was proper.

4. On a trial for murder, evidence that, while defendants were in jail, they threatened to kill a person who was sent to identify them, is admissible against them.

5. A witness testified that, when he went to the jail to identify defendants, they threatened to kill him. He also testified, under objection, that he identified defendants before the coroner's jury; but nothing was shown as to defendants' conduct or threats at that time. *Held*, that the latter part of the evidence should have been stricken out on motion, but, as no motion was made to that effect, defendants could not complain.

6. It was proper to admit testimony of a conversation had in the presence of a defendant Chinaman, where he was sufficiently acquainted with the English language to understand it.

7. A witness for the state testified that she identified defendants at the coroner's office. The defense afterwards proposed to show by another witness that the witness first pointed out another person as the guilty party. *Held*, that it was not the proper method of impeachment, as the state's witness should have been first examined with reference to that point.

8. On a trial for murder committed in an affray, defendants introduced evidence showing that a certain witness for the state was an active friend of deceased during the fight, and was arrested, shortly after the murder, for carrying concealed weapons, and had such weapons on his person at the time. *Held*, that it was proper for the state to show in rebuttal that the

charge against said witness was subsequently dismissed.

9. Where a witness for the defense, in a trial for murder committed in an affray, testified, in response to a question, that he did not know that the police had found a trunk containing armor in his room, the question was harmless.

10. On an issue as to where and how certain bullets struck a building, in a murder trial, it was not error to confine defendants' witness to a description of the bullet marks, without stating in which direction they went in, though the latter testimony would be admissible if called for by definite questions.

11. The discretion of the court, exercised in refusing to permit a witness to illustrate on a door of the court room how certain bullets struck a building, will not be reviewed, except for abuse.

12. On a trial for murder, evidence that the wife of deceased, who was a witness for the state, was an inmate of a house of prostitution, was not admissible to affect her veracity.

13. Though it was not proper to ask a witness for the defense, in a trial for the murder of a Chinaman, as to whether he was not "known as king of the highbinders," no reversible error was shown, where objection to the question was sustained, and the examination stopped there.

14. In order to impeach the credibility of a witness, he may be asked if he was ever convicted of a felony, and, under Code Civ. Proc. § 2051, the name of the particular felony may be mentioned.

15. On a trial for murder, the state, over defendants' objection that it was not cross-examination, elicited testimony from defendant that he never had any trouble with deceased, or with any one related to him. *Held*, that, as the evidence was favorable to the defense, it was harmless error to admit it.

16. Where defendant asserted that he was a doctor, it was proper, in rebuttal, to permit a witness to testify that he knew defendant for many years, but never heard of him as a doctor.

17. Const. art. 1, § 13, provides for the taking, in the presence of defendant and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. *Held*, on a trial for murder, that it was not error to admit the deposition of an absent witness, taken on the preliminary examination. *People v. Oiler*, 4 Pac. 1066, 66 Cal. 101, followed.

In bank. Appeal from superior court, Sacramento county.

Chin Hane and Hoey Yen Sing were convicted of murder, and appeal. Affirmed.

A. L. Hart and Johnson & Johnson, for appellants. Frank D. Ryan, Charles T. Jones, John T. Carey, and Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. The defendants were charged by the district attorney of Sacramento county, upon information, with the crime of murder. They were tried jointly and convicted, and, under the verdict of the jury, the court sentenced Chin Hane to be hanged, and Hoey Yen Sing to be imprisoned for life. This is an appeal from such judgment, and from the order denying a motion for a new trial. The killing occurred at about the hour of 10 p. m., in a building upon I street, in the city of Sacramento, at the inception or during the progress of an affray, carried on, very probably, by two rival Chinese societies, several Chinamen being killed at the time, and

others wounded, as the result of the discharge of many firearms. The principal witnesses upon both sides of the case were Chinese, and, as is the universal rule in this class of cases, the evidence upon the main questions involved was directly conflicting. There is no complaint made upon the law given to the jury by the trial court, and the grounds for appeal consist of 23 specific, numbered specifications of errors of law committed by the trial court, largely in the admission and rejection of evidence. Many of these specifications are exceedingly technical, and demand no extended consideration. Others of more importance we will proceed to notice.

1. The party killed in the present case was one Lee Gong, and the prosecution, for the purpose of showing motive upon the part of the defendant Hoey Yen Sing, offered evidence, under objection, to the effect that the deceased was upon the bond of one Fong Ah Sheung, who had been charged with an assault to murder the said defendant Sing. The objection is based upon the ground that there was no evidence that the defendant Sing knew that the deceased had gone upon the bond. The objection, we think, goes to the weight of the evidence, rather than to its competency. We think it fairly inferable, from all the facts and circumstances, that he was possessed of such information, but, if he had no knowledge of the fact, then the evidence was entirely harmless, and no injury to him could have possibly resulted from its admission. The committing magistrate testified that Sheung was found not guilty of the charge of assault with a deadly weapon upon the day that Lee Gong was killed. It is now argued that this evidence tended to show the commission of another crime by the defendant Sing. We think no such inference logically follows from the evidence. From all that appears by the record, Sheung, the defendant in that case, may have established an alibi, or some other defense equally inconsistent with guilt upon the part of this defendant Sing.

2. The prosecution claimed that the shots which killed the deceased were fired from inside the house. The defense insisted that they were fired in the open air. One Hill was near the scene of the affray at the time, and heard the shots. He was allowed to testify, under objection, that the shots sounded as though fired inside the building. He further testified that it sounded like it was a drum, or something deep. It did not sound like it was in the air. It is claimed that this evidence called for the opinion of the witness, and, for that reason, was not admissible. In the strict sense, the evidence given was not the opinion of the witness, any more than it was his opinion that the sounds were made by a drum. The evidence was simply a statement as to the nature of the impressions of sound left upon the ear, and, we think, clearly admissible. See *Robinson v. Fire Co.*, 103 Cal. 1, 36 Pac. 955. As an additional reason for holding this assignment of error unsound, it may be sug-

gested that the witness, without objection, had previously testified to the same effect. This fact would make the error harmless, if error had been committed.

3. The prosecution desired to introduce the deposition of one Lee Sam, taken at the preliminary examination, and, preliminary thereto, placed a witness upon the stand, who testified to his efforts in trying to find the witness. Upon cross-examination the defense produced a photograph of the absent witness, and offered it to the jury for inspection. An objection was sustained to the course of counsel, and, we think, properly so. We know of no authority for such a practice. The evidence of the witness Lee Lick, and also that of Fay, bearing upon this question, in no way was prejudicial to the defendants' rights, even conceding it to have been erroneously admitted.

4. It appears that, while the defendants were under arrest and in jail for the killing, one Lee Sam came to the jail and identified them. When identified, they each told Lee Sam, in the presence of the other, that they would kill him. This evidence was offered, under objection. We deem it admissible. Threats made by a defendant against a witness whom he expects to testify against him, with the evident purpose of intimidating the witness, are proper evidence. The fact that the defendants were in custody at this time is wholly immaterial. The question was further asked the witness: "Did you identify the defendants before the coroner's jury?" He answered, under objection, that he did. Nothing was shown as to the conduct of the defendants when so identified, and it would seem that the answer of the witness should have been stricken out, upon motion, for this reason; but no motion to that effect was made. See *People v. Mallon*, 103 Cal. 513, 37 Pac. 512.

5. Chief of Police Rogers testified, under objection, to a conversation occurring between Lee Sam, himself, and the defendant Chin Hane. The court admitted the evidence, upon the ground that the defendant Chin Hane was sufficiently acquainted with the English language to understand all that was said, and did understand it. We see no error in this ruling.

6. Ah Wah testified, when upon the witness stand, that she identified the defendants at the coroner's office as the men who killed the deceased. The defense proposed to show by another witness, who was present at the time of the identification, that Ah Wah first pointed out another Chinaman as the guilty party; but, upon objection, the evidence was rejected. We do not think the witness could be impeached in this manner. Ah Wah should have been recalled, and asked with reference to the matter, and, upon her denial of it, the foundation would then have been laid for her impeachment by this witness' testimony.

7. Lee Sam was an active friend of the deceased upon the night of the killing. A police officer testified that, subsequent to the killing, he arrested Lee Sam for carrying concealed weapons, and found upon him two

large pistols. The prosecution then asked the officer if he swore to a complaint, or prosecuted Lee Sam for carrying the weapons; an objection to the question was overruled, and the officer said he did not know whether or not he swore to a complaint, but that the charge was subsequently dismissed. It is not at all clear that the evidence of the police officer in the first instance was material to the case at bar, but, if material, we think clearly the opposing side had the right to explain it. It may further be suggested that the defendants were not prejudiced by the action of the court in admitting the evidence.

8. It was not error for the court to exclude evidence of self-serving declarations made by defendant Chin Hane in San Francisco, immediately prior to his departure for Sacramento. We see nothing in the conduct of the district attorney, in his examination of the witness as to his past criminal record, demanding a reversal of the judgment. The witness Cheong, in reply to a question by the people, under objection, testified that he did not know of the police officer finding a trunk in his room with armor in it. The answer of the witness thus renders the question harmless, and defendants were not prejudiced.

9. The witness Lowell, after testifying that he made an examination of the deceased's building after the killing, stated that he found several bullet marks upon the outside of the building. He then continued: "There was a bullet hole in the door jamb of Lee Gong's, also. That was six or seven feet high. Some, also, on the brick wall, on the outside, on the edge of the brick wall. It seems to me as if that, on the south side of the door, there was a big chunk taken out of the brick. I am not positive. There is quite a large corner knocked off of a brick there." The record further discloses as follows: "Mr. Hart: Q. Which way did it go; diagonally south, or straight in? Mr. Jones objected: That calls for the opinion of the witness. And the objection was sustained. Mr. Hart: Q. Which way did the mark go; directly south, or straight in? Mr. Jones objected that the question is improper. The mark is still there. At this point there was an argument among counsel, and at the conclusion Mr. Hart said: 'The court stated that I didn't know half the time what I was doing. I want that remark taken down, and take an exception.' The Judge: You contradicted the court. I said that you asked the question, and that it was indefinite. * * * The Judge: Q. Did you state that you could describe the piece which you said was knocked off the brick? You say there was a piece of brick chipped off? A. It is quite a large piece,—two or three inches long. I did not see it knocked off. I know, though, that it was knocked off. It was a three-cornered piece. It had been struck by some missile, and knocked off the corner. It was about seven feet from the sidewalk, I should judge. There were several bullet marks on the walls of Lee Gong's, and on the side of the store

there is a bullet hole in the edge of the door. Mr. Hart: Q. Now, take this door here, and tell where the bullet struck, and in which direction. Mr. Jones objected, as irrelevant, incompetent, and immaterial. They have no right to put a witness on the stand to show where a bullet struck. He can describe the marks. Objection sustained. Defendants duly excepted." This excerpt from the record contains three questions by defendants' counsel to which the court sustained objections. There appears to have been some little friction between counsel and the court at this particular time,—an event not without precedent in the past. And we may be allowed to suggest that we think that counsel for defense could well have been more explicit in framing the questions asked, and that the court could well have been more liberal in its treatment of these questions as asked. It is a very common practice to illustrate upon the wall, or upon a door in a court room, before the eyes of the jury, the location of a bullet mark, and we think it may well have been done here. But such matters are largely in the discretion of the trial court, and, in the absence of an abuse of such discretion, we cannot interfere. The prosecution offered to allow the witness to describe the bullet marks, and we think the defendants must be satisfied with such offer. If the question addressed to the witness, "Which way did it go; diagonally south, or straight in?" referred to the course of the bullet, or bullet mark in the wood or brick wall (which is far from plain, when we consider the context), then the objection that the question called for the opinion of the witness is not at all tenable; for he was simply asked to state something that he saw. It would be a statement based upon actual inspection, and, as far as we can see, entirely unobjectionable. But, beyond all this, the jury viewed these premises, and were particularly instructed to view these various bullet marks; and, taking all these matters into consideration, no grounds for a new trial of the case are shown.

10. The witness Ah Wah testified that she was the wife of the deceased. She further testified as to her manner of life, habits, etc. The defense attempted to prove that she had been an inmate of a house of prostitution. The evidence was inadmissible. Such matters were entirely collateral, and her veracity could not be impeached in that way. The defendant Chin Hane, upon his direct examination, claimed to be a doctor. On cross-examination he was asked if he was not known in San Francisco as king of the highbinders. Under objection, the question was not answered. Even conceding the question improper, the investigation in this direction here stopped, and nothing occurred of sufficient importance to reverse the judgment. In order to impeach the credibility of a witness, including a defendant when he testifies, the witness may be asked if he has ever been convicted of a felony. The details and circumstances comprising the offense should not be

gone into. But in view of the statute (section 2051, Code Civ. Proc.), which allows the proof of the fact to be made either by the evidence of the witness himself, or by the record of conviction, it would appear that not only the fact of the conviction could be shown, but the name of the particular felony of which the witness had been convicted. Beyond this the examination should not go.

11. Under objection of the defense, the defendant Chin Hane, upon cross-examination, in answer to interrogatories, testified that he had never had any trouble with Jesse Jim (the party who discovered him to the officers after the killing), nor Ah Wah (deceased's wife), nor the Lee family (to which the deceased belonged), nor the Chee Kong Tong. Under the facts forming the history of this case, we are inclined to think that this character of evidence would have been admissible, coming from the defense, as tending to show an absence of motive to do the killing. Objection was made to its introduction by the defense, upon the ground that it was not cross-examination; and, especially in view of the fact that the witness testifying was the defendant, we think it should have been excluded, if the court's attention had been called to that fact. But, as we view this whole line of evidence, it was rather favorable to the defendant than otherwise, and no prejudicial error was committed.

12. In rebuttal, the witness Cox, having known the defendant Chin Hane for many years in San Francisco, testified that he had never heard of him as a doctor. The motion to strike out this evidence was properly denied. While, in its nature, light, its weight was a question for the jury. The evidence of Clark, in rebuttal, as to the identification by Ah Wah, was properly admitted. It is contended that the deposition of an absent witness, taken at the preliminary examination, in a case of homicide, cannot be used at the trial, for the reason that such a proceeding is violative of section 13, art. 1, of the constitution of the state. That provision of the constitution has been construed contrary to the appellants' contention in the case of *People v. Oller*, 66 Cal. 101, 4 Pac. 1066.

For the foregoing reasons, the judgments and orders appealed from are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; HARRISON, J.; HENSHAW, J.

5 Cal. Unrep. 129
In re CARRIGER'S ESTATE. (S. F. 155.)
(Supreme Court of California. Aug. 29, 1895.)

REVIEW ON APPEAL—PRESUMPTIONS.

On appeal by an administrator from an order directing him to pay the widow of decedent a certain amount per month, as a family allowance, it will be presumed, in the absence of the evidence before the court below, that the condition of the estate was such as to authorize the allowance of the sum fixed in the order.

Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

In the matter of the estate of William W. Carriger, deceased. Appeal by Solomon Carriger, special administrator of said estate, from an order directing him to pay to the widow of said deceased a certain amount per month, as a family allowance. Affirmed.

Barclay Henley and Cary Howard, for appellant. Campbell & Campbell and Aylett R. Cotton, for respondent.

PER CURIAM. The special administrator of the estate of the deceased has appealed from an order of the superior court directing him to pay to the widow of the deceased the sum of \$50 per month, as a family allowance. The order was made after a citation to the appellant, and a hearing thereon before the court; but the appeal is presented here without any bill of exceptions or other showing of the matters which were considered by the court in making its order.

Section 1464, Code Civ. Proc., authorizes the court to make a reasonable provision for the support of the family "until letters are granted and the inventory is returned"; and by section 1466 the court is authorized to make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, "during the progress of the settlement of the estate." The only limitation upon the action of the court in this regard is that, in case the estate is insolvent, the allowance must not be continued longer than one year after granting letters testamentary or of administration. There is no intimation in the return of the special administrator that the estate is insolvent, and, by section 1467, the family allowance must be paid in preference to all other charges, except funeral charges and expenses of administration. Although the appellant, in his return to the petition, states that the funeral charges have not been paid, he does not give the amount of these charges, nor does it appear from the record what is the amount of the decedent's estate. The fact that the administrator has not in his hands sufficient money to pay the family allowance does not deprive the court of the power to fix the amount to be paid. If there is other estate which can be subjected to this payment, the court can make a proper order therefor. In the absence of the evidence which was before the court at the hearing, we must assume that it was fully shown that the condition of the estate was such as to authorize the allowance of the sum fixed in the order. The order is affirmed.

108 Cal. 608

HERWICK et al. v. LANGFORD. (No. 19, 565.)

(Supreme Court of California. Sept. 3, 1895.)

CONTEST OF WILL—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

1. On an issue as to whether a will was procured by undue influence of testator's wife, it appeared that testator frequently went alone to

the office of the attorney who drew the will, and who had no acquaintance with testator's wife; that he conversed freely and intelligently respecting the provisions of the will; that about three years afterwards he confirmed the will, in a codicil thereto, at which time he also appeared to be mentally sound; that testator's wife, in his presence, and about a year after the will was executed, gave directions in respect to the work on their residence; that testator was always anxious to please his wife, and was more jovial when away from her; that five years afterwards a difference of opinion as to certain domestic affairs was settled in accordance with his wife's views; that the testator dealt largely in real estate, and conducted all his negotiations alone. Evidence as to testamentary intent was given by the contestants themselves, who were children of the testator by a former wife, to the effect that the testator, at various times after the execution of the will, said he intended to divide his property between them. *Held* insufficient to show undue influence.

2. On a contest of a will, it was improper for contestants, who were children of a divorced wife, to testify that they objected to testator's marriage to proponent, but that he told them that proponent insisted on the marriage on account of their previous illicit relations, and that, after the marriage, testator was not as jovial as before.

3. The mere fact that testator's wife urged on him the propriety of leaving his property to her, though he had children by a former wife, does not constitute undue influence.

4. The presumption of undue influence is not raised merely by proof of interest and opportunity to influence the testator.

5. The fact that a will seems unnatural is not sufficient reason to deny its admission to probate, if it is shown to be the spontaneous act of a competent testator.

Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Maria M. Langford propounded for probate the will of Charles E. Langford, deceased. The probate of the will was contested by Mary J. Herwick and others. From a judgment denying probate to the said will, the proponent, Maria M. Langford, appeals. Reversed.

A. R. Metcalfe and Anderson & Anderson, for appellant. R. A. Ling, H. H. Appel, and H. T. Gordon, for respondents.

McFARLAND, J. This is an appeal by Maria M. Langford, widow of Charles E. Langford, deceased, and proponent in the lower court of his last will, from a judgment denying probate of said will, and from an order denying her motion for a new trial. The probate of the will was contested by children of the decedent by a former wife, upon the grounds that he was mentally incompetent to make a will, and that it was procured to be made by the fraud, and also by the undue influence, of appellant. In answer to interrogatories propounded to the jury, they found that at the time of the execution of the will, and also at the time of the execution of a certain codicil, the decedent was of sound and disposing mind and memory, but that it was procured by the fraud, and also by the undue influence, of the appellant. The finding of fraud may be dismissed with the remark that there is no evidence to support it. The alleged fraud was that the

appellant falsely and fraudulently represented to the decedent that the contestants cared nothing for him, had no love for him, and only wanted his money. There is nothing in the evidence to support these averments. As to the finding of undue influence, the contentions of appellant are that there is no evidence sufficient to justify it, and that the court committed material and reversible errors in rulings upon the admissibility of evidence on that issue, and we think that both contentions must be sustained.

The decedent and appellant were married in Fulton, Ill., in 1873. They resided there several years and then removed to Pasadena, Cal., where they resided until his death, and where the will was made. There can be no pretense that there is evidence of any direct influence exercised by appellant, or any other person, over the decedent, at the very time of the execution of the will, and affecting the testamentary act, or constituting part of the *res gestae*. To all appearances, and as far as the circumstances in proof show, he was acting with perfect freedom, and following his own uncontrolled wishes. The will was executed on November 29, 1887. Two or three weeks prior to that date he went to the law office of Winslow & Hester, at Pasadena, and after some conversation with Mr. Winslow, who was in very bad health, the latter introduced him to Mr. Frank J. Polley, who was a young lawyer then in the employ of Winslow & Hester, with the request that he (Polley) should draw a will for the deceased. The appellant had no acquaintance with Polley, Winslow, or Hester. Polley never saw her until the trial of this cause, which was over six years afterwards. After Winslow had turned over to Polley the business of the preparation of the will, the decedent visited the office several times, and had conversations about the matter with Polley. He always went to the office alone. Mr. Polley testified: "At such visits we conversed about the will. Our conversations were almost entirely in relation to the will, and related to the different provisions. Each provision in the will was requested by Mr. Langford. * * * At the time Mr. Langford executed the will, I do not think he was acting under any threat, menace, misrepresentation, nor fraud, nor undue influence, that I know of. Positively, he was not, so far as I am concerned. At that time Mr. Langford's mind was, I think, unusually clear. I had numerous conversations with him during the time I was drawing the will. He understood perfectly what he was doing." The will was completed and executed on November 29th, and was witnessed by Polley and Mr. Hester, who had been most of the time in the city of Los Angeles, attending to legal business there, but was at home on that day. The deceased took the will away with him, and it was found in his box at the bank a few days after his death. Both the subscribing witnesses testified at the trial. About

three years afterwards—on January 29, 1890—he made a codicil to the will. In the original will he left no property to his daughter Mabel, but left "her future welfare in the hands of my said wife, in whom I have full confidence that the dictates of a mother's love," etc.; and the codicil merely provided that, should his wife die before his death, the property devised to her should go to Mabel. This codicil was also drawn by Mr. Polley, who at that time was doing business, as a lawyer, for himself. He testified: "Mr. Langford came into the office, and asked me to draw a codicil. He stated his wishes in reference to it. * * * At the time Mr. Langford was not acting under fraud, menace, threats, or undue influence, so far as I know." He also testified that: "At the time he went over his financial affairs with me, talked about different matters, and said that now he thought he had his affairs in good shape. We had quite a long talk about his property, and his business relations with parties during the boom." He also testified that deceased read over the codicil, and that his mind was sound and strong. The codicil was witnessed by Polley and by a Mr. Wetherby, who was doing business in the house in which Polley had his law office, and who was called in by Polley to witness the execution of the codicil. Wetherby was a witness at the trial.

So far, therefore, as we are to be governed by the facts and circumstances directly attendant upon the execution of the will and codicil, and forming part of the *res gestae*, we are inevitably forced to the conclusion that the testator acted with a perfectly free volition. This is not the case where a man makes a will upon his deathbed, surrounded by those who turn out to be his devisees. Nor is it a case where a weak person, at the time of the execution of his will, is teased and tormented by the importunities of relatives, who do not allow him to be out of their sight, or to have any opportunity for quiet thought or independent advice. In the case at bar the testator, as found by the jury, was of sound mind; when he concluded to make a will, he went entirely alone to his attorneys, with whom he had various conversations; and he had ample opportunity to fully and freely think out what he wanted to do, and to change any conclusion which he might have arrived at, if he so desired. There is not a single suspicious circumstance immediately connected with the execution of the will or the codicil. What, then, are the other facts in proof which present the alleged basis for upsetting this will? The contention of respondents, when thoroughly sifted, seems to be about this: That there is evidence to the point that appellant had a general influence over the deceased, which ought to be classified as "undue," and that, therefore, although when he made his will, under the circumstances above stated, he was apparently free to act as he pleased, yet it must be inferred

that this general influence of appellant accompanied him, subverting his volition, and coercing him to act against his real wishes. To maintain such a strained and difficult theory would require evidence very different from that presented in the record. As to the evidence relied on, of occurrences which took place at any point of time reasonably near the time of the execution of the will, they are substantially these: The witness McCarty testified that in 1888—about a year after the execution of the will, and two years before the date of the codicil—he worked on a dwelling house that decedent was building. A Mr. McKenzie was foreman of the work. And the substance of McCarty's testimony is in these words: "I saw Mr. and Mrs. Langford there, and Mrs. Langford gave some instructions in reference to the work. Mr. Langford did not give any, as I know of." There is no significance whatever in this testimony. The wife had a perfect right to have a voice in the matter of the family residence. There is also the testimony of the witness Irish, who worked for the deceased during a period between 1889 and 1892, and was discharged. This was long after the execution of the will, but included the date of the execution of the codicil. His testimony was directed principally to an attempt at showing that the deceased was not of a strong mind. As to the question of "influence," he stated that Mr. Langford gave him his instructions, but that "sometimes he would tell me that Mrs. Langford wanted this done; that she wanted it done this way, or she wanted it done that way. Different times while I was there, why, he would say that Maria—he most always called her Maria to me—wanted the lawn mowed, or the flowers fixed, or the driveway fixed, or something of that kind." He was asked by respondents if, from his observations, the deceased "appeared to you to be in fear of his wife," and his answer was as follows: "Well, I could not answer that. He always seemed to want to—didn't never— He always seemed he didn't want to displease her in anything,—in no way displease her. I do not remember of any instance of him expressing himself in reference to pleasing or displeasing her. It may come to my memory. I know that Mrs. Langford went East." He was then asked directly if he noticed "any change in Mr. Langford's conduct while she was East," and he answered, "Yes"; that he seemed to be more jovial and friendly. He also testified that, when Mrs. Langford was about to return home, deceased told him that he must "clean up"; that "you know, when Maria gets home, everything will have to be renovated"; and that "it's a case 'when the cat's away the mice will play.'" He also testified that when he was discharged the deceased "stated that he would have to let him go on account of Mrs. Langford's account."

The foregoing is about all the evidence as to any occurrences which took place near

the time of the execution of the will or codicil, apart from certain alleged declarations by the deceased of testamentary intent, which will be noticed hereafter. There was, however, the testimony of the witness Reinke, who was a hired man of deceased for a period commencing in 1892. This was five or six years after the execution of the will, and about two years after the execution of the codicil. The facts to which he testified were that, while he was working for deceased, there was a difference of opinion between Mr. and Mrs. Langford as to whether some orchard land should be plowed at a certain time, whether some beans and corn should be planted at a certain place, whether a fresh milch cow should be bought for family use, whether a horse to be used about the place should be bought, and another one sold, and that it turned out that these things were done in accordance with the expressed opinion and desire of Mrs. Langford. In answer to a direct leading question of respondents' counsel, "Did he appear to be afraid of her?" the witness answered, "Yes, sir." One Rowland also testified that he was a veterinarian, and that when he was doctoring a sick horse of deceased, while Reinke was with him, the deceased told him, although he was an entire stranger, that he did not want Maria to know about it, because she might think that the horse was not sick enough to be doctored, and that he had more peace when he let her have her way. The testimony of the two witnesses last named, about trivial domestic affairs, if near enough to the time of the execution of the will to be admissible at all, is entirely too paltry to have any important bearing upon the real question at issue, particularly when contrasted with the testimony of at least 20 witnesses, consisting of men engaged in various kinds of business at Pasadena, who were brought into close contact with the deceased, and of various ladies intimate in his family. The testimony of these several witnesses covers a period which commenced a short time before the execution of the will, and extended to the date of the death of the deceased. It shows that his business was large, and quite varied; that, among other things, he owned, sold, and leased many different pieces of real property, and dealt largely with real-estate agents and purchasers of land; that he managed his business wisely, and made shrewd bargains; that he did all his business himself; his wife never being present; and that when men went to his house on business they saw him alone; and that, if she happened to be present at the beginning of the interview, she left the room. It was testified by ladies intimate in the family, by the pastor of his church, by his family physician, and by others having excellent opportunities of observation, that the relations between deceased and the appellant were as pleasant and cordial as those usually existing between husband and wife, with no evidence whatever that the deceased

was either afraid, or under any unusual influence, of the appellant.

There is some evidence of declarations of the decedent about his testamentary intent, consisting mainly of the testimony of the contestants themselves, and much of it too remote from the time of the execution of the will to be of any consequence, or even admissible. The son, and contestant, Charles E. Langford, said that he received in Minnesota a letter from the deceased, written at Pasadena, which was written, "as near as I can remember, a month or six weeks before Christmas, 1887." This letter had been destroyed, but was written in response to one sent by the witness to the deceased, asking for money. He says, from memory, that the letter contained the phrase "Please find inclosed fifty dollars, to help you out of your difficulty," and also a statement of certain moneys which the deceased had expended for Charles, amounting to a little over \$1,200. The witness then proceeds: "He said he wanted me to know my exact indebtedness to him, as he calculated to make a will before long, and to deduct all that each of us children had drawn out of the property. He calculated to divide his property among his children equally, and deduct what they had drawn out of it." He also produced a letter written to him by the deceased in September, 1890. The writer says that he incloses \$110, "as requested, to help you out." Some advice is then given Charles about getting into scrapes, and the only clause in the letter in point as to testamentary intent is the following, "I will depend on your honor, and, if you don't deal honorable, I will make it all right in my will." On October 18, 1888, about a year after the execution of the will, the deceased wrote a letter to his son-in-law Longshore, which contained the following: "Yours received, and contents noted. The amount of your note is due me the 1st of December next would be \$265; note \$200, September the 1st, '85, three years and three months' interest at ten per cent. more. I think you ought to pay this now, or the first of December. It will be for your advantage, for I shall remember my children in my will according to their worth and honor in dealing with me." The balance of the letter is about other things. John S. Herwick, son-in-law of the deceased, testified that in 1888, the year after the execution of the will, the deceased told him, in substance, that he had always told his children that his property should be theirs, and that he intended to stick to his word, and that, if they didn't get it, not to blame him. The witness Reinke (the hired man hereinbefore noticed) testified that when he worked for deceased, which was in 1892 or 1893, he said to decedent, "Well, I suppose your children are just as rich as you are," and that the deceased answered: "No,

they are not. Some of them are poor, but they ain't so very poor," he says, "probably I don't know anything,—didn't hear anything for several years of them that they are poor, but after I am dead," he says, "they can have it all." The foregoing is about all the evidence of declarations of testamentary intent, within any reasonable time of the execution of the will or codicil, which we can find in the transcript,—all, for instance, since the settlement of the deceased in California. Some of the contestants testified to other statements made so long before the execution of the will as to be either beyond the range of legitimate evidence, or too remote to have any appreciable value. If we consider the above stated declarations of the deceased (supposing them to have been fully proved) in the light of the other facts of the case, it is apparent that they did not express his real intentions. He is made to speak of dividing his property equally among his children in a will to be made, when he had already made a will which he never changed (as to the contestants), in which he had given them only a certain part of his property. Three years afterwards he solemnly republished that will,—at the time he made the codicil. We need not inquire whether the alleged declarations were made to hasten the payments of debts owing to deceased by some of the contestants, or to appease children of a former wife, who were bitterly opposed to his second marriage, or what other motive moved him to make them. The language of Justice Temple in the McDevitt will contest (95 Cal. 17, 30 Pac. 101), is peculiarly applicable here: "Whether, by this statement, the decedent intended to deceive the witness, or at the time intended to execute a new will, is alike immaterial; for such declarations have no weight, unless introduced in connection with evidence tending to prove undue influence, mental incompetency, or fraud at the time of the testamentary act." And the case at bar is much stronger in this respect in favor of appellant, than was the McDevitt Case. In the case at bar the jury found affirmatively on the issue of mental capacity, while in the McDevitt Case the only issue propounded to the jury was that of undue influence; and, as we have before stated, there was no evidence here of fraud. In the McDevitt Case the court, speaking of such declarations, further say, "In fact, in a case like this, where the testator was, beyond question, of sound mind, they were entitled to no weight at all, in the absence of proof of influence as to the very testamentary act"; and further: "Under such circumstances, this evidence, and all other of like character, is entitled to no weight." *Waterman v. Whitney*, 11 N. Y. 157. And the "circumstances" in that case did not bring it within the rule stated with so much absoluteness as do the circumstances here bring the case at bar within that rule.

The opinion in the *McDevitt Case*, and the citations therein made, afford full authority upon this point. In that case the verdict was against the validity of the will, and the judgment and order denying a new trial were reversed, and it would be inconsistent with the decision of this court in that case to affirm the judgment in the case at bar. Numerous authorities upon the subject may be found in the notes to *In re Hess' Will*, 31 Am. St. Rep. p. 665 (Minn.) 51 N. W. 614.

There was a good deal of evidence introduced over the objections of appellant which, in our opinion, was improperly admitted. The decedent was married to the appellant in the year 1873, and before that time had been divorced from a former wife, who was the mother of the contestants; and contestants were allowed to testify to declarations which, they say, the decedent made to them before, at the time of, and shortly after the marriage. For instance, some of the contestants, when they heard of the intended marriage, endeavored to persuade the decedent against it. They suggested that he give appellant money, to buy her off; and they were allowed to testify that decedent told them, in substance, that he could not avoid it, that appellant insisted on the marriage, and even that there had been illicit relations between him and appellant. There was also testimony admitted that shortly after the marriage he was not as jovial, and was apparently not as happy, as before the marriage. There was also testimony tending to show that appellant had done some dress-making in decedent's family before the marriage, with the view, we suppose, of showing that she made some efforts to captivate the affections of the decedent. All this was 17 years before the execution of the will, and 20 years before the codicil in which he reaffirmed the will. It was too remote in time to be admissible for any purpose, and that it was prejudicial to appellant is beyond question. There was also some testimony as to declarations and occurrences at a somewhat later period, but before decedent's removal from Illinois to California; and, if admissible at all, they are entitled to no weight, in the absence of evidence, either direct or circumstantial, that undue influence was brought to bear upon the very testamentary act. And such evidence must "do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator." *In re McDevitt*, supra.

It is sought to distinguish the case at bar from the *McDevitt Case* because in the case at bar there was the relation of husband and wife, and the position seems to be taken that such relation raises the presumption of undue influence. But there is no such presumption. "There is no legal presumption against the validity of any provision which a hus-

band may make in a wife's favor, for she may justly influence the making of her husband's will, for her own benefit or that of others, so long as she does not act fraudulently, or extort benefits from her husband when he is not in condition to exercise his faculties as a free agent. *Latham v. Udell*, 38 Mich. 238. Accordingly, the circumstance that the testator's wife urged upon him the propriety of leaving his property to her does not constitute undue influence, to vitiate the will. *Hughes v. Murtha*, 32 N. J. Eq. 288. And the mere fact that the will of the husband is changed to gratify the wishes of the wife does not raise a presumption of undue influence on her part. *Rankin v. Rankin*, 61 Mo. 295. Where a husband had made two wills, dividing his property between his wife and sister, and a few days subsequent to the making of the second will, and after several days of his last illness, he made another will, revoking his former wills, without apparent reason, and leaving all his property to his wife, this, in the absence of any other evidence of undue influence, will not raise the presumption of such influence, so as to require the submission of that question to a jury. *In re Nelson's Will*, 39 Minn. 204, 39 N. W. 143"; *Notes to Richmond's Appeal* (Conn.) 21 Am. St. Rep. 98, 22 Atl. 82. In *Mason v. Williams*, 53 Hun, 394, 6 N. Y. Supp. 479, it was held that "the fact that the wife of a testator had both opportunity and motive, and that the will makes provision for her beyond what the law would have given her, creates no presumption of undue influence. Nor does the additional fact that the will was executed six weeks after the testator had drawn a radically different will, in accordance with a draft submitted to him by his father." The presumption of undue influence is not raised by proof of interest and opportunity alone. *Turnure v. Turnure*, 35 N. J. Eq. 437. See other cases to same point cited in 21 Am. St. Rep. 98 et seq. In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made.

It is contended also that the case at bar differs from the *McDevitt Case* because here the will was unnatural. The consideration of the question whether or not a will is "unnatural"—by which is meant, we suppose, different from what it might be expected to have been—is of no importance, except in a case where there is some evidence immediately tending to show mental incapacity, fraud, or undue influence, in which event it might serve to help out a weak case. But there is no evidence in the case at bar that could be thus helped out. A will cannot be upset because, in the opinion of a jury or court, it is unnatural. In the opinion of the *McDevitt Case* it is said: "Although I do not think it of special interest here, it is well to remember that one has the right to make an unjust will, an unreasonable will,

or even a cruel will. Generally, such questions turn our thoughts, as they are often intended to, from the only question at issue, which always is, only, is the will the spontaneous act of a competent testator? Of course, juries lean against wills which to them seem unequal or unjust. But the right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper." See, also, *Latham v. Udell*, 38 Mich. 238. And, indeed,—if it were important to consider it,—we do not see how the will in the case at bar can be considered unnatural, in such extreme sense as to be remarkable. At the time of the execution of the will the contestants—children of the first wife—were all grown up, middle-aged people, with families of their own. He had seen but little of them after his marriage, and in a few years afterwards he had moved away from them to California. They had strenuously opposed the marriage, and had said unkind things of his wife; and, as was very natural, there was not much social intercourse between the families afterwards. Of course, the contestants blame the appellant for this; but although several of them visited her, and were entertained, at least, politely, there is no evidence that they ever invited her to visit them, except that on one occasion one of them said to her and the decedent, "Of course, you will come and see us soon." They had appealed to him a number of times for financial aid, and he had helped them, and he was displeased and angry because some of them followed him to California. One of the daughters, in stating the contents of a lost letter received from decedent, said: "He began by saying that he was sorry we had come here, as he had advised us not to come, and that it looked like we had come on purpose for him to help us; that we could—now that we had come we could—we could hoe our own row, he would mind his; he had enough of his own business to attend to. I think that was about all." Of course, the contestants attribute this to the influence of the appellant, and they testify to statements which they say the decedent made to them tending to support that view. Nevertheless, the fact was that they came to California against his protests, and thereby greatly displeased him. He and the appellant had one child, Mabel, who was only 14 years old at the time of decedent's death, and quite a young child at the time of the execution of the will. Therefore, under all the circumstances, it is not at all surprising that his affections bound him closely to his wife and Mabel, and that he left them property, the

income of which would support them. By his will he gave to each of the contestants \$1,000, and left the balance of his property, which was of the value of about \$50,000, to his wife, and, in the event of her death, to Mabel. The income of that amount of property would give the wife and daughter not more than a modest support; and, under all the circumstances, the disposition which he made of his property cannot be justly characterized as unusual or unnatural. At all events, being of sound mind and memory, it was for him to dispose of his property as he chose.

It is proper to notice particularly that the averment that appellant would not permit contestants to see the decedent is entirely unsupported by the evidence. Not only did he go about daily, attending to his business, entirely alone, but the appellant at one time visited the East for two months, the decedent remaining at home, and upon two occasions the decedent visited the East by himself.

Looking through the transcript in this case we see no evidence at all sufficient to warrant a jury in annulling the solemn acts by which the decedent executed his will, and republished it in the codicil. If the law is to be changed, and the right of disposing of one's property by will, the policy of which has been sanctioned by the wisdom and experience of many generations of men, is to be taken away, that result must be effected by the legislative department of the government. As the law now stands, that right cannot be frittered away, after the death of the testator, according to the tastes and notions of others. It is quite likely that in the case at bar the provisions of the will did not meet with the approval of the jurors, but their approval was not necessary. The judgment and order denying a new trial are reversed.

We concur: TEMPLE, J.; HENSHAW, J.

STATE ex rel. CITY OF BUTTE v. JOHNSON, County Clerk.

(Supreme Court of Montana. Sept. 26, 1895.)

ASSESSMENT OF TAXES—EXTENDING TAXES OF CITY.

1. An assessment for taxes is completed when the persons and property to be taxed have been listed and the amounts to be collected have been estimated.

2. Pol. Code, § 4017, requires taxes assessed before that statute took effect to be collected under the laws in force when the assessment was made. Id. § 4872, requires city councils, on the second Monday in August in each year, to determine the amount of taxes to be levied by the city for the current year, and the city clerk to certify to the city treasurer a copy of the same, and the city treasurer to collect the taxes as in the article provided. Id. § 4862, makes the county assessment the basis of taxation for cities. Id. §§ 4867, 4868, requires the county clerk to make a duplicate copy of the Corrected Assessment Book for each city, in a book provided by the city clerk, so that the city treasur-

er may extend the same, and collect the taxes. *Held* the duty of the city treasurer, and not of the county clerk, to extend on the tax list taxes of a city, the assessment of which was completed August 12, 1895.

Appeal from district court, Silver Bow county; William O. Speer, Judge.

Application, on relation of the city of Butte, against Charles Q. Johnson, as county clerk and recorder of the county of Silver Bow, for writ of mandamus to compel defendant to extend on the tax lists the city taxes assessed by the relator. From a judgment for defendant, relator appeals. Affirmed.

Levi J. Hamilton, for appellant. H. J. Haskell, for respondent.

PEMBERTON, C. J. This is an application for a writ of mandamus. Omitting the formal parts, the application for the writ, in substance, alleges that the city council of the city of Butte, as empowered by law, on the 12th day of August, 1895, duly determined by resolution the amount of city taxes to be levied and assessed for all purposes for the current year 1895 on the taxable property in said city; that the clerk of said city at once certified to said respondent, as county clerk, the amount of city taxes, for all purposes, so determined by said city council; that by said resolution the city council fixed and determined the amount of city taxes, for all purposes, to be assessed and levied upon the taxable property in said city of the year 1895; that said respondent, as such county clerk, failed and refused to extend the city taxes on the tax list of said county for said year, as it was his duty to do; that said respondent claims that it is not his duty, as county clerk, to extend said city taxes for said year on the county tax list, but that, under the law, it is the duty of the city clerk to certify the amount of city taxes fixed and levied by said council to the city treasurer, and that it is the duty of the city treasurer, under the law, to extend said city tax roll on the tax book for said year. The respondent, on being served with the alternative writ of mandamus issued in the case, demurred to the application. The court sustained the demurrer, dismissed the application, and rendered judgment against the relator for costs. From this action and judgment the relator appeals.

The question presented by this appeal is this: Is it the duty of the city treasurer of the city of Butte, or of the respondent, as clerk of the county of Silver Bow, to extend the taxes of said city for said year on the tax list or book? Section 4017, Pol. Code, provides: "All taxes assessed before the provisions of this title take effect must be collected under the laws in force at the time the assessment was made, and in the same manner as if this Code had not been passed." Section 4872, *Id.*, reads as follows: "The council must, on the second Monday in Au-

gust in each year, by resolution determine the amount of city or town taxes for all purposes, to be levied and assessed on the taxable property in the town or city, for the current year, and the city clerk must at once certify to the city treasurer a copy of such resolution, and the city treasurer must collect the taxes as in this article provided." Section 4862, *Id.*, makes the assessment by the county assessor for county purposes the basis of taxation for cities and towns.

The first question that presents itself is, when was the property in the city of Butte assessed? That is, when was the assessment completed? As to when an assessment is made, Judge Cooley, in his work on Taxation, at pages 351, 352 (2d Ed.), says: "An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. It does not, therefore, of itself, lay the charge upon either person or property, but it is a step preliminary thereto, and which is essential to the apportionment. As the word is more commonly employed, an assessment consists in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them. When this listing and estimate are completed in such form as the law may have prescribed, nothing remains to be done, in order to determine the individual liability, but the mere arithmetical process of dividing the sum to be raised among the several subjects of taxation, in proportion to the amounts which they are respectively assessed." See 1 *Desty, Tax'n*, § 93, to the same effect. Under this view of the law, the assessment was not made or completed until the 12th day of August, 1895,—the date of the resolution of the city council fixing and levying the amount of taxes to be levied and assessed for said year. If the assessment was not made until the date of the resolution of the city council, then, under section 4872, *supra*, it became and was the duty of the city clerk to certify the action and resolution of the city council to the city treasurer, whose duty it then became to collect the city taxes. No section of the law to which our attention has been called requires the city clerk to certify the resolution of the city council fixing, assessing, and levying city taxes to the county clerk. It is the duty of the county clerk, on or before the first Monday in October, to make a duplicate of the Corrected Assessment Book for each town or city in the county, which must contain a copy of the Corrected Assessment Book for such town or city. Such duplicate book must be made in a book furnished by the city or town clerk of each city or town in the county, and ruled in columns, specifying the different funds, so that the city or town treasurer may extend the same, and collect the taxes. Sections 4867,

4868, Pol. Code. These sections seem conclusive that it is the duty of the city treasurer, and not the county clerk, to extend the city taxes on the tax list or book. Upon the question of extending the tax, Judge Cooley says: "The subjects of taxation having been properly listed, and a basis for apportionment established, nothing will remain, to fix a definite liability, but to extend upon the list or roll the several proportionate amounts, as a charge against the several taxables. When that is done, but not until then, will a liability for any particular sum be fixed. When the sum to be raised is settled, and the assessment is completed, the calculation of the percentage of the tax, and the determination of the sum chargeable to each taxable, are clerical acts, and may be performed by any one." Cooley, Tax'n (2d Ed.) p. 423. The law provides that taxes levied for each year shall be liens upon the property taxed, and shall take effect as of the first Monday of March of each year. Pol. Code, §§ 3827-3829. This character of legislation is in force in many of the states of the Union. Judge Cooley says: "The time when the lien will attach to land must be determined by the terms of the statute. Sometimes the statute names a day as that from and after which the tax shall be a lien, and when that is done it may determine, as between subsequent purchasers and incumbrancers, the liability for the tax." Cooley, Tax'n (2d Ed.) p. 447, and authorities cited in note. But the question as to when taxes become a lien upon property is unimportant in the discussion of the questions involved in this appeal. The only question presented for our determination now is as to whose duty it is to extend the city taxes of the city of Butte on the tax book for the year 1895. From a consideration of the law and the authorities referred to above, we are of opinion that it is the duty of the city treasurer of the city of Butte. The judgment of the court is therefore affirmed.

DE WITT and HUNT, JJ., concur.

(16 Mont. 545)

STATE v. BYERS.

(Supreme Court of Montana. Sept. 23, 1895.)

CRIMINAL LAW—DECLARATIONS OF CONSPIRATORS—EVIDENCE AT PRELIMINARY HEARING.

1. On prosecution for conspiracy to steal and butcher cattle and sell the beef, statements and acts by one of the conspirators, after the theft, but before the sale, are, as part of the *res gestæ*, admissible against the other conspirators.

2. A copy of the stenographic report of the evidence of a witness on a preliminary examination, sworn by the stenographer to be a correct copy of his shorthand notes, is admissible against the defendant on trial for the offense, where defendant was present at the preliminary examination, and cross-examined the witness, and the witness is dead.

Appeal from district court, Deer Lodge county; Theo. Brantley, Judge.

August L. Byers was convicted of grand larceny, and appeals. Affirmed.

J. H. Duffy, Francis Brooks, and Miles Cavanaugh, for appellant. H. J. Haskell, for the State.

PEMBERTON, C. J. The above-named defendant was convicted of the crime of grand larceny, in Deer Lodge county, under an information charging him and Fred Byers and John F. Jones jointly with the commission of that crime. The said parties were tried separately. From the judgment against him the defendant appeals.

Counsel for the appellant contend that the trial court erred in permitting witnesses to give evidence on the trial of the appellant as to the acts and statements of his codefendants, Fred Byers and Jones, after the consummation of the larceny, as they claim, and not in the presence of the appellant. It does not appear that the acts and statements of Fred Byers and Jones, testified to by the witnesses, took place and were made after the consummation of the offense. The prosecution contended that the three defendants entered into a conspiracy to steal the cattle that were stolen, butcher them, and sell the beef. This contention is not without support in the record. It appears that the acts and statements of Fred Byers and Jones, testified to by the witnesses, took place and were made before the beef was sold in Butte by the appellant, and therefore before the consummation of the criminal conspiracy. And, besides, we are unable to find in the acts and statements of Fred Byers and Jones, testified to, anything to incriminate or injure the appellant. Fred Byers and Jones persistently stated and insisted that the appellant had nothing to do with the larceny of the cattle; that Fred Byers bought them, and that the appellant had no interest in them whatever. The statements objected to do not contain an admission or confession of guilt of the appellant or any one else. The acts and statements objected to were part of the *res gestæ*. The appellant's participation in the crime is shown by other evidence and circumstances than the acts and statements of Fred Byers and Jones.

At the preliminary examination of the appellant one John Young was a witness sworn and examined on the part of the state. The appellant was present, and cross-examined the witness. His evidence was taken down in full by the court stenographer, and afterwards transcribed and typewritten by him. Before the trial of this cause, the witness Young died. On the trial of the case the court permitted a transcribed copy of the stenographer's notes of Young's evidence, supported by his testimony that it was correct, to be read in evidence, over the objection of appellant. The admission of this evidence is assigned as error. In *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. 337,—a case involving precisely the same conditions as the case at bar,—Mr. Justice Brown, after an able and extended discussion of the subject, and

collating the authorities, English and American, old and new, pro and con, says: "Upon the other hand, the authority in favor of the admissibility of such testimony, where the defendant was present either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case, is overwhelming. The question was carefully considered in its constitutional aspect by the supreme judicial court of Massachusetts in *Com. v. Richards*, 18 Pick. 434, in which it was said 'that provision was made to exclude any evidence by deposition which could be given orally in the presence of the accused, but was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled rules of common law.' * * * The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of, and many of the very cases which hold testimony such as this to be admissible also hold that not the substance of his testimony only, but the very words of the witness, shall be proven. We do not wish to be understood as expressing an opinion upon this point, but all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, such as was produced in this case, is competent evidence of what he said." Counsel for appellant contend that this evidence was not admissible under the authority of *State v. Lee*, 13 Mont. 248, 33 Pac. 690. *State v. Lee* is widely distinguished from the case at bar. In the *Lee* Case the witness whose testimony was proved was not dead; he was absent from the state. In that case the justice before whom the absent witness testified at the preliminary examination had no notes of the testimony, and testified only to an imperfect recollection of what the testimony of the absent witness was. Under such circumstances we held the evidence to be inadmissible. We are of opinion that the errors assigned in this case are not well taken, and that the judgment should be affirmed. It is so ordered. Affirmed.

HUNT and DE WITT, JJ., concur.

STATE v. CAIN.

(Supreme Court of Montana. Sept. 23, 1895.)

INFORMATION—FILING BY COUNTY ATTORNEY—AUTHORITY TO FILE—REVOCATION.

The district court has power to dismiss an information filed by the county attorney against a member of the board of commissioners, charging him with extortion, where it is brought to the knowledge of the court that the grand jury, on investigation of the accounts of

the commissioners, found that defendant had been illegally paid certain sums, but presented no indictment.

Appeal from district court, Granite county; Theo. Brantley, Judge.

George B. Cain, against whom an information was filed charging him with corruptly and extorsively receiving certain sums as county commissioner, moved to set it aside. From an order granting the motion and discharging defendant, the state appeals. Affirmed.

Wingfield L. Brown, D. M. Durfree, and R. B. Smith, for the State. Rodgers & Rodgers, for respondent.

HUNT, J. Upon the 7th of May, 1894, by leave of court first obtained, the county attorney of Granite county filed an information against the defendant, George B. Cain, a member of the board of county commissioners of Granite county, for corruptly and extorsively taking and receiving a warrant for \$110.40, part of which amount was a charge made by said Cain, as county commissioner, for inspecting and supervising the construction of a sewer about the county jail of Granite county, for which services there was no authority of law to charge, and that the said charge was made with fraudulent intent. On the 14th of May, 1894, the defendant moved to set aside the information, because, at the time the information was filed, and leave of court was asked by the county attorney, the county attorney had made no statement to the court of the evidence or reason upon which the same was based, and the court did not require the same of him, and was not informed at that time, in any manner or way, by any person, of the offense, or the facts upon which the county attorney had determined to present the said information. This motion was supported by the affidavit of W. B. Rodgers, one of the attorneys for the defendant. Rodgers' statement was to the effect that the county attorney, when he asked leave to file the information, made no statement to the court, and gave no information to the court which he may have had, and upon which he based the information, or his belief that the defendant was guilty of the offense charged; nor did the court inquire into the matter at all; nor was the court informed, in any manner, or at all, at the time of filing the information, of any facts which had come to the knowledge of the county attorney, or to the knowledge of anybody, and which had caused the county attorney to file the information against the defendant. Affiant further stated that it appears by the report of the grand jury that at the March term of said court a grand jury had made an examination, as appears from their report, of the affairs of the county commissioners of Granite county, and into the conduct of the offices of the county commissioners during the year 1893, and that said grand jury failed to indict the said George B. Cain for any

offense whatever. It further appears by the record that, at the time the county attorney asked leave to file the information against the defendant, the report of the grand jury, which had been made in March preceding the time of filing the information, was on file with the clerk of the district court of Granite county. By this report the grand jury found that the defendant had illegally been paid moneys for inspecting the jail and sewer. No indictment was presented. The excess of payment was the basis of the criminal charge contained in the information subsequently filed for extortion. The court sustained the motion to dismiss the information, and ordered the defendant discharged, and his bondsmen exonerated. The state duly excepted, and appeals from the decision and judgment.

This case is within the rule laid down in *State v. Brett*, 16 Mont. —, 40 Pac. 873, where it was held that, if an instance should arise where a county attorney oppressively, maliciously, or otherwise illegally should attempt to unjustly harass any citizen by filing an information against him charging him with crime, the court, either of its own motion, or upon proper showing, would suspend or deny its leave to file a charge until an inquiry could be had into the reasons for the official acts of the county attorney in filing the information, and until it satisfactorily appeared by the showing made that the case was one where an information should be filed. The affidavit of W. B. Rodgers was sufficient to have warranted the court in refusing leave to permit an information to be filed against the defendant until some showing was made by the county attorney for charging the defendant with a crime based upon the identical acts into which a grand jury had inquired, but for the doing of which they had failed to find a true bill. The fact that the information was already on file when these facts were brought to the attention of the court cannot affect the right of the court to revoke the leave already granted. If the court, in the exercise of its sound judicial discretion, had a right to withhold its leave to file the information at all until inquiry could be had, under the limitations discussed in the *Brett Case*, supra, it had a right to revoke its leave, where the defendant, directly after his arrest, and at the first opportunity presented, brought to the notice of the court the fact that his conduct had already been investigated by a grand jury, and no true bill had been found. Such was the effect of the defendant's motion. It brought to the attention of the court matters upon the presentation of which the court, in its discretion, and for apparent good cause, suspended its approval to file the information, by revoking its former leave, and setting aside the subsequent proceedings. The record discloses no request thereafter by the county attorney to file another information, and no attempt on his part to demonstrate to the court that the

case was a proper one for further prosecution. The action of the district court being within its discretionary power, and without abuse thereof, the judgment is affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

STATE v. MORSE.

(Supreme Court of Montana. Sept. 23, 1895.)

Appeal from district court, Granite county; Theo. Brantley, Judge.

Information against G. W. Morse for receiving excessive fees. Judgment for defendant, and the state appeals. Affirmed.

W. L. Brown, D. M. Durfee, and R. B. Smith, for the State. Rodgers & Rodgers, for respondent.

HUNT, J. Information charging defendant, a county commissioner, with extorsively and corruptly receiving excessive fees from the county of Granite. The point herein raised is identical with that decided in *State v. Cain* (Mont.) 41 Pac. 709, and, upon the authority of that case, the judgment of the district court is affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

KNATZ v. WISE et al.

(Supreme Court of Montana. Sept. 23, 1895.)

PLEADING AND PROOF — JUDGMENT AGAINST ONE DEFENDANT — INTEREST.

1. Under Code Civ. Proc. §§ 239, 240, allowing judgment against one of several defendants, plaintiff having sued several persons as assignees for the benefit of creditors, and alleged that they were partners as W. & G., and that the assignment was to said W. & G., judgment may be had against G.; it appearing that the assignment was not to the firm, but to him individually.

2. Under the statutory provision allowing interest on money due on the settlement of accounts, from the day of such settlement, a wage worker to whom an assignor is indebted is entitled to interest from the time he demands his money from the assignee for the benefit of creditors; the assignee having accepted the notice of his claim, and acknowledged its correctness.

Appeal from district court, Granite county; Theo. Brantley, Judge.

Action by William Knatz against Meyer Wise and others. Judgment for plaintiff against defendant Goodkind, who appeals. Affirmed.

This appeal stands upon the judgment roll, and the documents in the roll which are pertinent to this decision are the complaint, answer, findings, and judgment. The complaint sets up that the defendants Meyer Wise, Charles Wise, Edward I. Goodkind, and A. L. Goodkind were copartners. It furthermore states that the plaintiff was working for wages for one Slick, in the town of Phillipsburgh; that prior to April 27, 1893, he had performed 53½ days' service for said Slick, at \$3 per day; that on said April 27th Slick was insolvent, and unable to pay his debts; that the firm of Wise & Goodkind

were his creditors to the amount of \$600; that on said day he assigned and transferred all of his property, valued at \$1,500, to said Wise & Goodkind; that he notified defendants of the amount and nature of said indebtedness of Slick, and that defendants accepted such notice, and acknowledged the correctness of the claim; that said amount has not been paid. As another cause of action, he sets up that one Majers was also a wage worker for said Slick, and in a position similar to that of the plaintiff, and that said Majers assigned his account to him (the plaintiff). No demurrer was interposed to this complaint. The case was heard to the court without a jury, and the court found all of the facts in favor of the plaintiff, and all the facts which brought the plaintiff within the beneficiary provisions of sections 2050 et seq., div. 5, Gen. Laws, known as the "Wage Workers' Law." The court found that the transfer made by Slick was an assignment for the benefit of his creditors. The finding, however, is that the assignment was made to Edward I. Goodkind, one of the defendants. Judgment was entered in favor of the plaintiff against Edward I. Goodkind, and the action dismissed as to the other defendants. As noted above, the appeal is from the judgment, and the record before us is the judgment roll only.

F. N. & S. H. McIntire, for appellant. H. R. Whitehill, for respondent.

DE WITT, J. (after stating the facts). The defendant, in his brief, contends that the facts in this case distinguish it from the cases of *Flanders v. Murphy*, 10 Mont. 398, 25 Pac. 1052, and *Marshall v. Bank*, 11 Mont. 351, 28 Pac. 312. But there is no evidence in the record, and we have no means of distinguishing the facts herein from those in the cases cited. The findings clearly bring this case within the two cases cited, and the judgment on the general proposition must be affirmed, on the authority of those decisions.

The only other question left is as follows: Appellant contends that the plaintiff sued the defendants as a copartnership, and that the court was not justified by the pleadings in entering judgment against Edward I. Goodkind alone, and dismissing as to the others. It is to be observed at the outset that while it is alleged that the defendants are partners, and that the assignment was made to the partnership, yet this action is not one upon a partnership debt or account; that is to say, this action has not to do with partnership affairs. It is true that it is alleged that the assignment was made to the partners, but the facts showed, as found by the court, that Goodkind alone was the assignee. Under our statute, we are of the opinion that, as the facts were found, judgment was properly entered against Goodkind, for the account of Knatz, out of the proceeds of the as-

signment. Sections 239 and 240 of the Code of Civil Procedure are as follows:

"Sec. 239. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.

"Sec. 240. In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper."

There was no demurrer to the complaint on account of misjoinder of parties. This question was passed upon in the case of *Conklin v. Fox*, 3 Mont. 208, in which the court says: "Under the Code of Civil Procedure of this territory, 'judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants.' Section 231. 'In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper.' Code Civ. Proc. § 232. We are satisfied that we may treat as immaterial the allegations of the complaint concerning the copartnership, and that a cause of action is stated against the defendants. The proof showed that too many persons had been joined as defendants, but this fact does not appear upon the face of the complaint, and the answer of the appellant did not plead it. The appellant thereby waived his objection to the misjoinder of the parties defendant. 'If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same.' Code Civ. Proc. § 86; *Parchen v. Peck*, 2 Mont. 567. The action of the court in entering the judgment is sustained by the following authorities: *Pom. Rem.* §§ 289, 290; *Rowe v. Chandler*, 1 Cal. 168; *Rutenberg v. Main*, 47 Cal. 213; *Clafin v. Butterly*, 5 Duer, 327. In *McIntosh v. Ensign*, 28 N. Y. 169, Mr. Justice Wright says: 'A plaintiff is not now to be nonsuited because he has brought too many parties into court. If he could recover against any of the defendants upon the facts proved, had he sued them alone, the recovery against them is proper, although he may have joined others with them in the action against whom no liability is shown.' The sections of the Code of Civil Procedure supra embody the principle which is maintained by these authorities. The allegations of the pleadings have been liberally construed, and substantial justice has been done between the parties. Code Civ. Proc. § 98." See, also, *Mining Co. v. Rumley*, 1 Mont. 201; *Wells v. Clarkson*, 5 Mont. 336, 5 Pac. 894; *Rowe v. Chandler*, 1 Cal. 168. See, also, *Lewis v. Clarkin*, 18 Cal. 389, where it is held that the common-law rule that, in a suit against several joint debt-

ors, plaintiff must recover against all or none, is changed by the statute which we have above quoted. See, also, *Tay v. Hawley*, 39 Cal. 93.

It is also contended that the judgment is erroneous in that the court allowed interest upon the account. Our statute provides that interest may be allowed "on money lent or money due on the settlement of accounts, from the day of such settlement of accounts, between the parties, and ascertaining the balance due." It appears from the complaint that on the 27th day of April, when the plaintiff, as a wage worker, demanded his money from the assignee, the defendant accepted the notice, and acknowledged the correctness of plaintiff's claim. We think this, under the statute above quoted, was a settlement of the account and the ascertaining of the balance due, and think, therefore, interest was properly allowed. The judgment of the district court is affirmed.

PEMBERTON, C. J., and HUNT, J., concur,

MONTANA MILLING CO. v. JEFFERIS.
(Supreme Court of Montana. Sept. 23, 1895.)

AGREED STATEMENT OF FACTS—AMENDMENT.

The court may amend an agreed statement of facts by inserting the amount for which judgment was to be entered as of a certain day in the event of plaintiff's recovery; such amount and date having, by inadvertence of counsel, been omitted, and it requiring no proof or inquiry to ascertain them, they being of record in the court, in a judgment referred to in the statement.

Appeal from district court, Lewis & Clarke county; William H. Hunt, Judge.

Action by the Montana Milling Company against C. M. Jefferis. Judgment for plaintiff. Defendant appeals. Affirmed.

A. J. Craven, for appellant. E. C. Russell, for respondent.

PEMBERTON, C. J. This case was originally tried in the district court on an agreed statement of facts. Judgment was rendered in favor of the defendant, and the plaintiff appealed to this court. This judgment was reversed, and the cause remanded to the trial court, with instructions to render judgment in favor of the plaintiff for the amount of its demand. (*Milling Co. v. Jefferis*, 14 Mont. 143, 35 Pac. 908.) By the terms of this agreed statement of facts, in the event of plaintiff's recovery, judgment was to be entered in its favor for the sum of \$127.34 and costs on September 22, 1890. But by inadvertence of counsel this amount, and the date, were omitted from said statement. After the case had been remanded to the trial court, as stated above, counsel for plaintiff asked leave of court to insert this amount and date in the statement of facts, in order that judgment might be rendered in accordance with the man-

date of this court. Over the objection of the defendant, this leave was granted, and judgment rendered accordingly. From this action of the court the defendant appeals.

The defendant contends that the insertion of the amount and date mentioned above into the agreed statement of facts was an amendment thereof which the court had no power to make. But we think the statement was not amended in any manner repugnant thereto by this action of the court. The amount and date ought to have been inserted in the statement at the time it was prepared, and evidently were intended by the parties to have been incorporated into it, but by inadvertence they were omitted. It required no proof or inquiry to ascertain the amount and date. They were of record in the court, in a judgment therein obtained by plaintiff against other parties, and which judgment is referred to in said statement. There was no dispute at any time as to the amount or date. Their insertion into the statement did not change or alter its terms, or the agreement and understanding of the parties thereto. This action was not repugnant to the agreed statement, or any of its terms. Comp. St. div. 1, § 280. In fact, the trial court had to insert this amount and date in the statement in order to comply with the mandate of this court. The appeal is entirely without merit. The judgment is affirmed.

HUNT, J., as a judge of the district court, having made the order appealed from, takes no part in the foregoing decision.

(12 Utah 84)

FIRST NAT. BANK OF HAILEY, IDAHO,
v. LEWIS et al.

(Supreme Court of Utah. Aug. 31, 1895.)

ESTOPPEL—FOREIGN JUDGMENT—ACTION AGAINST EXECUTOR.

1. Where, pending an action against him in Idaho, the defendant dies, and executors of his estate, also legatees, legally qualified under the laws of Utah, voluntarily appear as such in the action, on suggestion of their testator's death without ancillary administration, and adopt the answer of their testator, and judgment is rendered against them, the executors are estopped, in an action on the judgment in Utah seeking to charge them as executors de son tort, from denying the validity of the judgment on the ground that they were not in fact in such action executors.

2. An Idaho judgment charging executors duly qualified under the laws of Utah as executors de son tort is not binding on the estate in Utah.

3. The complaint in a suit against one as an executor de son tort must charge him as an executor generally.

4. Where the complaint clearly seeks to charge the defendants as executors de son tort, an allegation therein of presentation of the claim sued on against the estate, and rejection thereof, will be regarded as surplusage.

Appeal from district court, Fourth district; before Justice James A. Miner.

Action by the First National Bank of Hal-

ey, Idaho, against Hiram D. and J. S. Lewis, as executors, and others, on a judgment. There was a judgment for plaintiff, and from an order granting a new trial it appeals. Reversed.

Brown & Henderson, for appellant. Kimball & Gilbert and Maloney & Perkins, for respondents.

KING, J. In May, 1888, suit was commenced in the district court of Alturas county, Idaho, by W. S. McCornick & Co. against J. S. Lewis, W. H. Nye, and others to recover the sum of \$3,084, alleged to be due plaintiffs for money obtained by defendants, as copartners, from their bank. Personal service of summons was made on each defendant, and all answered separately, except Nye, against whom judgment by default was taken. J. S. Lewis denied the allegations of the complaint, and verified in person his answer. L. Price appeared as his attorney. Before the case was tried, Lewis died, and on the 6th day of June, 1890, his death was suggested and entered of record in the cause, and it was ordered that Hiram D. Lewis and John S. Lewis, executors of the estate of decedent, be substituted for the deceased. On the 9th of the same month said Hiram D. Lewis and John S. Lewis, executors of John S. Lewis, deceased, entered their appearance by Lytleton Price, their attorney, and by consent the case was continued until the following term. A trial was duly and regularly had, and the issues found against all the defendants, except Turner, and judgment entered (for the amount claimed) against Hiram D. Lewis and John S. Lewis, as executors of the estate of J. S. Lewis, deceased, and the other defendants. This judgment was assigned to plaintiff herein, and in February, 1891, it brought suit in the district court of this territory against Hiram D. Lewis and J. S. Lewis, as executors of J. S. Lewis, deceased, and the others, against whom judgment had been rendered in the Idaho court. The complaint alleged the partnership of the deceased and others in Idaho, their overdraft at the assignors' bank, the suit in Idaho, the death of the decedent, testate, and that said Hiram D. Lewis and John S. Lewis were his executors and personal representatives, and became and were his legatees, and as such appeared and acted in the further defense of said action, and were duly substituted for the deceased, and appeared at the trial; that the court was one of general jurisdiction, and that judgment, which is set out in *hæc verba*, was regularly entered; that the attorney who appeared for the defendants was entitled to practice in said court, and empowered and authorized to act for the parties; that the deceased died testate, being a resident of Ogden, Utah, at the time, and that said Hiram D. Lewis and John S. Lewis were the duly-qualified and acting executors of his will at the time they appeared in the Idaho court, and are still so

acting; that a certified copy of said judgment was presented to them for allowance, but was rejected. Judgment is demanded against the defendants. There is no prayer for it to be paid out of the estate. Hiram D. Lewis and John S. Lewis answered, denying the partnership or the overdraft, or any indebtedness, but admitted that suit was brought in Idaho, as alleged in the complaint, and that their testator was duly served and appeared in said cause, and that he died testate, and that they became and were and are his executors, personal representatives, and legatees. They allege that they were appointed executors by the probate court of Weber county, Utah, and reside in said county. There was no denial of appearance in the action brought in Idaho, but it was denied that they appeared and acted as executors. On information it is denied that as executors they were substituted in the action, or that judgment was obtained against them as executors. It is admitted that the judgment pleaded was entered in a court of general jurisdiction, but alleged to have been entered without authority or jurisdiction over them as executors of the deceased, and they never were executors or personal representatives in Idaho. Upon the trial the plaintiff offered in evidence the judgment roll from the Idaho court, duly authenticated. It was received over defendants' objection. No evidence was offered by defendants, and a verdict was given for plaintiff. Subsequently a new trial was granted, defendants alleging in their motion that it was error to admit the judgment roll, for the reason that the judgment as to the defendants Hiram D. Lewis and John S. Lewis was null and void, and did not show that the decedent was indebted to plaintiff. From the order granting a new trial plaintiff appeals.

Respondents contend that this is an action against the estate, and an attempt to subject the assets of the estate to the payment of the amount claimed; that the domicile of the testator having been in Utah, and the probate court of Weber county having jurisdiction over his estate, and there being no ancillary administration in Idaho, therefore they had no authority whatever to appear in said cause or bind said estate. They call attention to the statutes of Utah which require that any person having a claim against a deceased person shall present it to the executor or administrator for allowance or rejection, failing to do which, no recovery can be had therein, and also to the statute of Idaho which contains the same provisions; and they insist that, no executor having been appointed in Idaho, and the claim never having been presented there, the judgment was a nullity. Appellant's counsel admit that the judgment there obtained, and upon which this suit is founded, is not a valid claim against the estate, and can in no wise become a charge against it, and direct atten-

tion to the statute which requires a judgment against an estate to provide "that the executor or administrator pay in due course of administration, the amount ascertained to be due" (2 Comp. Laws, § 4134), and to the fact that the judgment sued upon does not contain this provision, and therefore they say it cannot be regarded as the foundation of a claim against the estate. Appellant's position is that, the defendants being the representatives of deceased, and his legatees, and having voluntarily gone into the courts of Idaho and entered their appearance, they became executors de son tort, and, while they were described as executors, still the judgment rendered was not de bonis testatoris, but de bonis propriis, and that this action is against them as executors de son tort, and not against the estate. We think the defendants' contention, that the judgment obtained in Idaho is invalid as against the estate, is correct. If this is an action to compel the estate to pay such judgment, then we have no hesitancy in saying that no error was committed in granting a new trial. The devolution of property left by deceased persons is governed by the law of the domicile, and the legal representatives derive their authority from the sovereignty appointing them. They cannot act extraterritorially, and bind the estate thereby. If property is left by a decedent in different states, the legal representatives must derive their authority from each of as many sovereignties as may have jurisdiction over the property so left, because the territorial element of the law, or rather of the sovereignty from which the law emanates, permits no other sovereignty to exercise authority over it, and each, therefore, must itself create the legal ownership necessary in its devolution. But defendants go further, and claim that no personal representative can sue or be sued in a foreign jurisdiction; and it is therefore argued that the defendants could not enter an appearance, and no judgment could be pronounced against them. In support of this proposition, section 513 of Story's Conflict of Laws is cited; also, *Vaughan v. Northup*, 15 Pet. 5. Mr. Story wrote the opinion in this case, and stated substantially the view expressed in the section of the work just referred to, the language being: "The question is broadly presented, whether an administrator appointed and deriving his authority from another state is liable to be sued here, in his official character, for assets lawfully received by him under and in virtue of his original letters of administration. We are of opinion, both upon principle and authority, he is not. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not de jure extend to other countries; * * * and whatever operation is allowed to it beyond the original territory of the grant is a mere matter of comity, which every nation is at liberty to

yield to or withhold. * * * Hence, it has become an established doctrine that an administrator appointed in an estate cannot, in his official capacity, sue for any debts due his intestate in the courts of another state, and that he is not liable to be sued in that capacity in the courts of the latter by any creditor for any debts due them by his intestate." The meaning of this decision is apparent when we look to the words "official capacity." The personal representative cannot bind the estate by his extraterritorial acts. Where he crosses the lines of the sovereignty in which he received his appointment he denudes himself of that authority as the legal representative of the decedent to bind the estate. As conclusive evidence of the correct interpretation to be placed on this decision, it is only necessary to allude to section 514 of Judge Story's work just cited. It reads: "But although an executor or administrator, appointed in one state is not in virtue of such appointment entitled to sue, nor is he liable to be sued, in his official capacity, in another state or country, yet there are many other questions which may require consideration, and in which a conflict of laws may arise in different countries. * * * Let us suppose that an executor or administrator should go into a foreign country, and, without there taking out new letters of administration, should collect property. * * * The question might arise whether he would not thereby, to the extent of the receipt and collection of such assets; be liable to be sued in the courts of that country by any creditor there. Upon general principles it would seem that he would be so liable. And, upon the principles of the common law, he would be liable as an executor de son tort. * * * For it would not lie in his mouth to deny that he had rightfully received such assets."

The question then arises, the nonliability of the estate being determined, was the judgment obtained in Idaho against the respondents a valid judgment against them as executors de son tort? The record is silent as to whether respondents' testator left assets in the state of Idaho or not. A fair presumption would be, not only from the pleadings in the case describing the deceased as a partner in certain mining and smelting works in Idaho, but also from the fact of the appearance of the executors after his death, that he had property interests there at the time of his demise. But we do not consider it indispensably necessary that the decedent should have left property in Idaho, in order to place upon his executors the vulnerable armor of executors de son tort. The wrongful intermeddling with the decedent's property, or the doing of any act characteristic of the office of executor, would constitute them executors in their own wrong. Respondents voluntarily appeared in the Idaho court, had themselves substituted as defendants, appeared at the trial, defended upon the answer made by the deceased,

and claimed to be and were his executors. Under the statutes of Idaho, the death of Lewis did not abate the action, but the plaintiff could proceed against his estate. His personal representatives came in, and the suit was revived as to them. And a personal representative may be admitted to defend an action pending in a foreign jurisdiction against the deceased prior to his death. *Brown v. Brown*, 35 Minn. 191, 28 N. W. 238; *Institution v. Jones*, 35 N. J. Eq. 406. Such conduct made them executors de son tort. *Woerner, Adm'n*, §§ 164, 186-193, inclusive; 1 *Williams, Ex'rs* (Rand & Talcott, Ed.) pp. 298-322. If one sued as rightful executor answers and defends as such, he becomes thereby an executor de son tort. *Lawes*, Pl. 190, note; *Hill v. Henderson*, 13 Smedes & M. 688; *Norfolk v. Gantt*, 2 Har. & J. 435; 1 *Williams, Ex'rs*, 138; *Davis v. Connelly's Ex'rs*, 4 B. Mon. 136. Respondents need not have appeared in the Idaho court, or they could have pleaded *ne unques* executor, and the plaintiff would have failed in affixing liability to them. They could also have pleaded *plene administravit*, and if their testator had left an estate in Idaho, and it had been administered and expended, they would have prevailed. *Woerner, Adm'n*, § 194; 1 *Williams, Ex'rs*, pp. 312, 313. Appearing in a foreign jurisdiction as they did, and not pleading their want of capacity to appear and defend, they waived it. *James v. Morgan*, 36 Conn. 348; *Dearborn v. Mather*, 128 Mass. 194. The judgment in Idaho was against the defendant executors personally, in the sense that it was not against the estate, but as executors de son tort. In the case of *Davis v. Connelly's Ex'rs*, supra, it appeared that Thomas Connelly was a resident of Kentucky, and lived and died there; that during his lifetime suit was brought against him in Ohio, process duly served, and he appeared and pleaded *non assumpsit*. Before trial he died, and his executors, appointed in Kentucky, voluntarily appeared in said suit as executors, and the same was prosecuted against them on their testator's plea. Judgment was in favor of plaintiff, and upon this judgment he sued them in Kentucky. They replied, alleging that they were not executors in the state of Ohio, nor that their testator left any estate or assets there; that the proceedings in the record of the suit declared on were had in Ohio against them as executors under the laws and within the jurisdiction of Kentucky; that the judgment rendered was null and void, not being within the jurisdiction of the Ohio court, and there being no law of Ohio authorizing the suing or reviving a suit already brought, by consent or otherwise, against executors qualified and acting in another state. The court say: "Whatever may be said of the averment of the plea that the proceedings against the defendants in Ohio were had against them as executors under the laws and within the jurisdiction of Kentucky, the exact import of

which it might be difficult to determine, the judgment is against the defendants as executors generally, and the replication states that they, professing to be executors of Connelly, and acting as such, entered a voluntary appearance in and to the suit, as his executors, etc., as appears by the record; which record shows that they were proceeded against as executors of Connelly, without this designation, and that their voluntary appearance was the ground of the proceeding. Upon the facts stated in the replication, and also in the record, they are estopped to deny that they were executors in Ohio. They have voluntarily assumed to be so, by act of record, and in that character sustained the defense of the suit to final judgment against them. Upon the face of the pleadings and the record, they were the executors of Connelly in Ohio, and if not lawful executors they made themselves executors de son tort by their acts; and, whether they could or could not have defeated an attempt at a compulsory revival of the suit against them by timely denial of the character ascribed to them, it is now too late to retract or deny what they voluntarily and solemnly, not only admitted, but assumed, to be their character, * * * and whether they were so [executors] lawfully or unlawfully is immaterial to the question of jurisdiction. In either case they are equally estopped from denying the character in which they appeared and defended the suit, and the judgment is equally valid and conclusive against them."

There is no pretense in the case at bar that the district court of Alturas county did not have jurisdiction of the subject-matter of the controversy and the defendants, including the deceased; and it is not contended that the estate would not have been bound if the executors had been properly before the court after ancillary administration, and after presentation and rejection of the claim. Nor is it denied that the respondents were actually before the court in person and by attorney, and were proceeded against as executors. Upon this point the court in the case just quoted from say: "But having been recognized as executors of Connelly in the tribunals of Ohio, and by the proceeding against them, and having admitted their character by not denying it, there was not only no necessity for proof in order to authorize the judgment against them, but the record and judgment are conclusive evidence against them for all the purposes and effects of that judgment, and the character which they therein assumed actually belonged to them." *Davis v. Connelly's Ex'rs*, supra. We are of opinion that the conduct of respondents in appearing in a foreign jurisdiction, and in failing to plead their want of capacity or interpose any other plea by way of abatement or otherwise, or to object to proceedings against them as executors, and in adopting the answer of their testator, and contesting the issues presented in the cause, estop them,

when sued in this territory as executors de son tort, from denying that they were executors there, or pleading the invalidity of the judgment. *Davis v. Connelly's Ex'rs*, supra; *Gleason v. Dodd*, 4 Metc. (Mass.) 333; *Moss v. Rowland*, 3 Bush, 505; *Bigelow, Estop.* 779, and note 290; 1 Woerner, Adm'n, § 164. Where a man has so acted as to become in law an executor de son tort, he thereby renders himself liable, not only to an action by the rightful executor, but also to be sued by a creditor of the deceased, or by a legatee; for an executor de son tort has all the liabilities, though none of the privileges, that belong to the character of executor. 1 Williams, Ex'rs, p. 310. And it would seem, under the facts in this case, that every principle of justice must prompt to this conclusion, and that a decent regard for the sovereignty of a sister state and its laws and courts, not speaking of that comity which ought to characterize the treatment by courts of the proceedings of judicial tribunals in other jurisdictions, would suggest this view. It is not to be overlooked that the respondents were the legatees of the deceased. They were in one sense the real parties in interest in this suit. If it could be established that the testator was not a partner as alleged, or did not obtain money from the bank, and was not indebted as claimed, their distributive portion of the estate would be increased pro tanto. They had their day in court, and were defeated, returned to their domicile and the home of the deceased, and now in effect say: "We were only experimenting with the Idaho courts. We had no authority to appear there, but we did, and conducted a moot case." Such trifling with the courts is not to be viewed with favor. And even if they are not to be regarded as executors de son tort, we think they are estopped from denying the character ascribed to them, and by them voluntarily assumed. We think, under the peculiar facts of this case, that the judgment obtained in the district court of Idaho was valid against the respondents as executors de son tort, and was not a judgment against the estate.

That brings us to the questions: Is the case at bar brought against the proper persons? Does the complaint contain the necessary allegations to entitle plaintiff to recover? Was the proof offered on the trial sufficient to warrant a verdict? And first it is to be remembered that the only objection made to the complaint was that it failed to state a cause of action against the respondents, either as executors or individually. It is announced by Mr. Woerner (section 193 of his work) that, in an action against an executor de son tort, he is to be sued as executor generally, although a different rule of liability applies. "In an action by a creditor, he shall be named executor generally, for the most obvious conclusion which strangers can form from his conduct is that he has a will of the deceased wherein he is appointed executor, but he has

not yet proved it." 1 Williams, Ex'rs, 310-311. In the case of *Davis v. Connelly's Ex'rs*, from which we quoted at length, the judgment was obtained in Ohio in the same manner as plaintiff's assignor obtained judgment in Idaho, and upon such judgment suit was brought in Kentucky against the executors as such. They denied being executors in Ohio, claiming to have derived their powers from the courts of Kentucky. The replication was that they had assumed to act as executors in Ohio, and it was held the court erred in sustaining the demurrer to the replication. The case of *Brown v. Leavitt*, 26 N. H. 493, was against the defendant, as executor of Morris Leavitt, to recover upon two promissory notes. Defendant pleaded in bar that he never was the executor of the last will of deceased, "and never administered, as such executor, any goods or estate which were of said Morris." Plaintiff replied that he had intermeddled with the personal estate of said Morris, to the value of the damages sustained by the plaintiff, and therefore as such executor ought to be charged therewith. The plea was held good. The authorities seem to be unanimous in holding that the complaint must charge the defendant, when sued as executor de son tort, as executor generally, the same as though he was in all respects a proper and legal executor. *Sawyer v. Thayer*, 70 Me. 340; *White v. Mann*, 26 Me. 361; *Shaw v. Hallihan*, 46 Vt. 389; *Lee v. Chase*, 58 Me. 432; 7 Am. & Eng. Enc. Law, 187. If the Code system of pleading permitted a replication to defendants' answer, it is quite apparent the plaintiff's plea to the answer would have been substantially the same as that interposed in the case of *Davis v. Connelly's Ex'rs*, supra. The plaintiff could have replied: "You appeared in Idaho. Your answer admits, in effect, that there were assets belonging to the estate in Idaho. You have not pleaded a failure of assets, and therefore have admitted receiving sufficient to meet this claim, and are therefore liable." The words "as executors" in the pleadings are something more than descriptio personæ. While the element of personal liability attaches to them, it is by reason of their representative capacity, and the voluntary assumption of a character which could not have been given them. So that, as to the plaintiff and its assignors, they are in one sense executors. But, under the pleadings, the plaintiff was entitled to meet the plea of ne unques executor by proof of their having acted as such in the state of Idaho. And upon this point the authenticated record of the proceedings and judgment in that state was, in the absence of other proof to the contrary, sufficient to justify an instruction for the jury to find for the plaintiff. If the plea of plene administravit had been made, and evidence offered to support it, the case would have resulted differently. This plea can be interposed simultaneously with the plea of ne unques executor by an executor de son tort as well as one de jure. 1 Williams, Ex'rs,

312; 1 Woerner, Adm'n, § 194. An executor de son tort is not liable beyond the property of the deceased coming to his hands. But, in order to excuse himself from liability if he falls on his plea of ne unques executor, he must deny receiving assets, or plead and prove that he has fully administered and paid out all that he has lawfully received. 1 Williams, Ex'rs, 312, 313. The answer of defendants was, in effect, that if the issue was found against them—that is, that they were not executors in Idaho—then they had received assets to pay plaintiff's debts. The answer was met by plaintiff showing a legal and valid estoppel against them. If they had pleaded a full administration of the estate in Idaho, and that nothing remained in their hands, then plaintiff could only have succeeded by proving a valid claim against the estate in this territory. It is true that the complaint alleges a presentation of the claim, and rejection, in the same manner as if suit were brought to compel payment by the estate. But it is evident that the purpose of the suit was to charge the respondents as executors de son tort, because it is well settled that, on a joint demand against an executor of a deceased obligor and surviving obligors, a joint judgment cannot be rendered, for the reason that, as to the former, the judgment will be payable de bonis testatoris, while, as to the latter, de bonis propriis. And unnecessary allegations in the pleadings may be regarded as surplusage. The plaintiff stated all the facts connected with the case, and if the court can ascertain the purpose of the pleader, and a cause of action is stated, it is the duty of the court to sustain it, and not sacrifice substance to shadow and form. The respondents, legatees and real parties in interest as they are, ought to be estopped from denying the validity of the judgment sued upon, especially in view of the fact that their answer in the case at bar was such as would lead plaintiff to a reliance upon the issues therein tendered, and to an omission to present the original claim as a liability against the estate. It would be great injustice, now that the statute of limitations has run against the plaintiff, to hold that the respondents are not liable in this action; their conduct induced this form of action. To allow them now to escape from paying a claim which a competent court pronounced just and valid, and as legatees carry off the estate of the decedent, would be repugnant to justice and fair dealing.

We think the court erred in granting a new trial. At most, the judgment ought to be corrected so as to indicate more clearly that it is against the respondents as executors de son tort. It is therefore ordered that the case be remanded, with directions that the judgment be so amended as to indicate that it is against the respondents as executors de son tort, and to be collected out of their property.

MERRITT, O. J., and BARTCH, J., concur.

(12 Utah, 104)

KRANTZ v. RIO GRANDE WESTERN RY. CO.

(Supreme Court of Utah. Aug. 31, 1895.)

ASSAULT ON PERSON AT STATION—LIABILITY OF COMPANY—NEW TRIAL—WHEN NOT GRANTED

1. When a peddler leaves a railroad station, to which he came as a passenger, to engage in his business, his relation as a passenger ceases, and the company is not liable for an assault on him, on the company's grounds outside its station, afterwards committed by its section foreman, because of his ill will, and not suffered by the company.

2. In an action against a railroad company, it appeared that plaintiff, a traveling merchant, came as a passenger to one of defendant's stations, situated in a sparsely-settled country; that the only means of transportation to or from such station was by rail; that plaintiff, after being assaulted outside of the station by the section foreman, started to walk along the track to the next station, when he was robbed by other persons; that he then returned to the former station, where he was again assaulted by such foreman and the men who assaulted him on the track; and that the station agent, to whose orders such foreman was subject, was present, and made no earnest effort to protect him. Held, that the company was liable for the last assault.

3. Where a verdict is right, and justice has been done, a new trial will not be granted because of errors on the trial.

Appeal from district court, Third district; before Justice S. A. Merritt.

Action by Joseph Krantz against the Rio Grande Western Railway Company for an assault committed by defendant's servants, in which there was a verdict for plaintiff. From an order granting a new trial, plaintiff appeals. Reversed.

E. W. Taylor and C. S. Varian, for appellant. Bennett, Marshall & Bradley, for respondent.

SMITH, J. In this cause, appellant, the plaintiff below, brought suit to recover damages on account of alleged personal injuries inflicted by the respondent's servants. There are two counts in the complaint, and upon the trial a verdict was directed for the respondent, the defendant below, upon the first count, and a verdict returned in favor of the appellant, plaintiff below, in the sum of \$4,000 upon the second count. The record discloses the following facts: Upon the 18th of July, 1892, appellant boarded one of the passenger trains of respondent at the station of Sunnyside, in this territory, and paid his fare to the next station, Lower Crossing, where he alighted from the train. Appellant was 51 years of age, and a traveling merchant by occupation, at the time engaged in traveling over the country, selling spectacles. Lower Crossing is simply a station on the line of railway, and its station house, together with the pump house and section house, were embraced, practically, within one inclosure. There was a platform extending from the station house to the section house, which was but a few yards distant. In alighting from the train, in pursuit of his business, plaintiff went towards the section house, for the pur-

pose, as he says, to sell his wares. Before he reached the house, the section foreman, then in the employment of the company, who, it appears, was under the impression that the appellant was a spotter and spy of the respondent company, without provocation or words, assaulted him with a shovel, and drove him back to the station house, following him. The foreman pulled him out of the station house, and ordered him to leave, saying that he would give him five minutes to get away, and threatening him with death unless he obeyed. The ticket agent was present, and saw the foreman assaulting the appellant outside the station house, and saw them back into the waiting room. Plaintiff, fearing further bodily injury, or worse, started to walk on the track away from the station, and towards Grand Junction, some 30 miles away. He was followed by two unknown persons, designated in the testimony as "tramps," who assaulted and robbed him after he had proceeded about a quarter of a mile upon his journey, taking his satchel, containing his stock in trade, together with his pocketbook, containing a few dollars in money. Thereupon he returned to the station house. The persons who robbed him returned also, and, it appears, located themselves at or near the pump house, which was opposite and across the tracks from the station house. Upon his return he entered the station and made complaint to the ticket agent of what had happened, and was talking with him about sending telegrams to Green River station, giving information of the robbery. The section foreman interfered, and directed the ticket agent not to send the telegrams, and immediately after crossed the track to where the two tramps were standing, when all three came over to the station, the foreman in advance, and, entering the waiting room, the three assaulted the appellant, brutally beating him. Appellant appealed to the agent and the bystanders for assistance, which was finally rendered by a stranger, the ticket agent making no effort to protect him, other than, as he says, to order them all out of the waiting room. He testifies that he knew the section foreman, for some reason or other, was bent upon injuring the appellant, and that he did not interfere to protect him because he was sick; that he would have had to fight to protect him; that the foreman was subject to his orders in the station house, but would not mind him, because they were at odds; that his authority as station agent would not have been sufficient to protect appellant. Appellant was driven from the station, and walked all night to Price station, a distance of 40 miles, in his sick and disabled condition, where he received attention. The injuries he received were severe and permanent in their nature. The first count in the complaint charges the respondent company with damages for the first assault upon the appellant by the foreman outside of the station house. The second count charges the

company for the assault and beating of the appellant by the foreman and the two tramps in the waiting room after he had been robbed. The district judge charged the jury that, in order to find for the plaintiff upon the second count, they must find "that this man was absolutely a passenger of the defendant company; that the relation of passenger and carrier existed between them at the time of the assault. There is a correlative duty existing on both the passenger and carrier: the passenger to pay, or offer to pay, his fare; if it is accepted, he then becomes a passenger; then the duty of the railroad company is to protect, by all means within their power, during his transportation, and while he remains in the station house in that character, awaiting the coming of a train, or the departure of a train, as the case may be. That relationship existing, it was the duty of the railroad company to protect him from assaults, not only from its own agents and servants, but from other persons, if within their power; more especially from their servants and agents. That correlative duty was imposed on the railroad company, if you find, I say, gentlemen, that he was a passenger at that time; and, to become a passenger, he must have paid his fare, or have offered and tendered to pay his fare." A new trial was granted upon the second count, and the plaintiff appeals from the judgment against him on the first count, and from the order granting a new trial.

We are of the opinion that when the plaintiff alighted from the train at Lower Crossing, and made his way towards the section house, for the purpose of engaging in his regular business, his relation as passenger to the respondent company had ceased, and that it no longer owed to him any duty as a passenger; that the acts of the section foreman were not within the scope of his duties or employment, and, not being suffered or permitted by the respondent company, the appellant cannot recover from the company. We do not think that the general rule which permits a passenger a reasonable time in which to depart from the company's premises after alighting from his train has any application, and therefore affirm the judgment upon this appeal upon the second count.

In support of the order granting a new trial, it is urged by respondent's counsel that a motion for a new trial is addressed to the discretion of the trial court, and that, in some particulars, the evidence being conflicting, that court should not disturb the order. It is further claimed that, in order to entitle appellant to the protection of the respondent company, he must not only have intended to become a passenger, but must also have announced such intention, and his proposition must have been accepted by or on behalf of the company. This view was adopted by the trial court, and the case submitted to the jury upon this theory, and this

alone. It is quite evident from the entire record that the new trial was granted because, in the opinion of the trial judge, the appellant was not a passenger or intending passenger within the rule declared in its charge. In other words, the new trial was granted because, in the opinion of the court, the verdict was contrary to the law, and not because of any conflict in the evidence. In the view we take, we are of the opinion that it is unnecessary to determine here when or how the relation of passenger begins. We think the case turns upon another rule of law. It appears from the record that the section house was situated in a desert country, sparsely settled, and with habitations few and far between; that the only method of transportation to and from Lower Crossing was by rail, and the station house was kept open for the reception of the public at large, as well as passengers, ordinarily, during all hours of the day. It is a matter of common knowledge, of which the court may take notice, that these railroad station houses scattered along the line of railroads in a sparsely-settled country, such as the locality here is proven to be, are thrown open for the use of the public, which, by invitation of the company, is permitted to use them at all times, before and after the arrival and departure of trains; that there was and is an implied invitation to all persons intending to avail themselves of the railroad service to enter and occupy the premises, and at any time, in the absence of reasonable regulations to the contrary, made by the company. And the offer to pay fare, or the announcement of the intention to pay fare, and the acceptance by or on behalf of the company, is not necessary to be made, by a person entering the station with such or other legitimate purpose, to entitle him to protection against violence by the company's servants. This case does not even depend upon this question. When the appellant was assaulted and beaten in the waiting room of the station, the company itself was present, in the person of the ticket agent in charge, who was its vice principal, and the injuries inflicted upon the appellant by one servant of a company, aided by strangers, in the presence of and under the very eye of the vice principal, who tamely acquiesced, and failed to exercise his authority for the protection of the appellant, were inflicted by the company itself. The agent should have protected appellant, or, at least, should have made an earnest effort to do so. *Railway Co. v. Hinds*, 53 Pa. St. 512; *Railroad Co. v. Burke*, 53 Miss. 227. We are not prepared to sanction the proposition that a man in the situation of the appellant, driven by the unprovoked and brutal violence of the company's own servants to seek the protection of its station house and waiting room in charge of its agent, has no recourse against the company for the willful and malicious acts of its employés, under circumstances which make

them the acts of the company. We think such contention is not only against public policy, but the settled rules of law. Upon the evidence, then, the verdict was clearly right, and, in our judgment, the amount was not excessive. The district judge erred in his construction of the law, and the case was submitted to the jury upon a wrong theory.

We are of the opinion from this record that the appellant is entitled to recover from the railroad company, and are not disposed, and do not find it necessary, to put him to the expense and trouble of a new trial. "Why should a verdict be set aside which is correct, because erroneous principles of law have been announced by the court? The object of a jury trial being to do justice between the parties, the annulment of the verdict, where this has been accomplished, on account of mistakes and misdirections on the part of the court, would seem akin to the criticism which censured a celebrated commander because he persisted in winning victories in violation of the rule of strategy." *Railroad Co. v. Burke*, 53 Miss. 227. The judgment upon the verdict as to the first count is affirmed, and the order granting a new trial as to the second count is reversed, and the original judgment upon the verdict reinstated as of April 28, 1894, the date of the original entry. As the two appeals were submitted upon practically one record, and briefed together, the costs of printing briefs and record will be taxed in the respective appeals as apportioned by the clerk.

BARTCH and KING, JJ., concur in the judgment.

(11 Utah, 149)

BURROWS et al. v. KIMBALL et al.
(Supreme Court of Utah. July 27, 1894.)

TERRITORIES—POWER OF LEGISLATURE.

The territorial legislature has no power to pass a law authorizing the county court to lease sections of land reserved by the United States for school purposes.

Appeal from district court, First district; before Justice Smith.

Action by W. L. Burrows and others against Oliver G. Kimball and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Zane & Zane, for appellants. Wm. H. King, for respondents.

MINER, J. In this case the judgment of the court below is reversed, and a new trial granted, on the ground that the territorial legislature has no right to pass the law giving the authority to the county court to lease sections 16 and 36, reserved by the United States for common-school purposes, as well as upon the ground that the lease made by the county court of Emery county to the plaintiff was invalid, even had the statute passed in 1892 been valid, the county court having failed to

follow the provisions of the law under which the law was made. The specific grounds upon which this decision is based will be given in the opinion of this court hereafter to be filed.¹

MERRITT, C. J., and BARTCH, J., concur.

(12 Utah 119)

UNITED STATES v. ELLIOTT.

(Supreme Court of Utah. Aug. 31, 1895.)

JUDGMENT—LAW OF THE CASE—PUBLIC LANDS—UNLAWFUL FENCING.

1. The supreme court may, on a second appeal, reverse its former decision, in a case involving the question of title of the United States to lands in such territory, where it is apparent that injustice will be done, not only in the particular case, but in other cases of like character.

2. Organic Act Utah, § 15 (Act Cong. Sept. 9, 1850), provides that, when lands in such territory shall be surveyed under direction of the government, sections 16 and 36 in each township "shall be, and the same are hereby reserved for the purpose of being applied to schools in said territory," etc. *Held*, that such grant was not absolute, and the lands, on being surveyed, were not so segregated from the public domain as to cease to be under the protection of Act Cong. Feb. 25, 1885, making it unlawful to inclose any public lands of the United States, where the party making the inclosure has no claim or color of title made or acquired in good faith, etc. 26 Pac. 1117, 7 Utah, 389, reversed.

Appeal from district court, First district; before Justice H. W. Smith.

Action by the United States of America against Lewis A. Scott Elliott for unlawfully inclosing public lands. From a judgment for defendant, in conformity with the decision and direction of the supreme court on a prior appeal (26 Pac. 1117), plaintiff appeals. Reversed.

The United States Attorney. Zane & Zane, for respondent.

MERRITT, C. J. The complaint in this case was filed on the 12th day of December, 1889, by the then United States attorney for Utah, alleging that the lands in township 15 S. of range 13 E., Salt Lake meridian, situate in Emery county, Utah territory, are public lands of the United States, and that the defendant had constructed and was maintaining a fence inclosing a body of public lands of the United States of about 16 miles in area; and that none of the lands so inclosed had ever been entered for settlement or purchased at any of the offices of the United States, nor settled upon nor appropriated with a view to entering or acquiring title to the same. The complaint further alleges that, at the time the fence was made, the defendant had no claim or color of title to any of the said lands so fenced, made or acquired in good faith, and had not theretofore asserted, and does not now assert, any right thereto by or under any claim made in good faith with a view to entering thereof

in the proper land office under the general laws of the United States. The defendant filed his answer to said complaint on the 1st day of February, 1890, in which he denied that all the lands in township 15 S. of range 13 E., Salt Lake meridian, situate in Emery county, Utah territory, were public lands of the United States, but alleged that portions of them had passed irrevocably out of the possession of the plaintiff, the United States, and that other portions thereof had been segregated by the plaintiff from the public domain. The answer also denied that the defendant had inclosed more than about 2,460 acres of land, most of which he alleged he owned in fee, and that a few acres of said land so inclosed were included within the limits of section 16 of said township and range, for which he had his certificate under sections 4 and 5 of the act of June 19, 1885, entitled "An act in relation to county recorders and acknowledgments of instruments in writing," and which had been segregated from public lands of the United States, and that the few acres of said section 16 so inclosed were not public lands of the United States. On the 5th of November, 1890, the case was heard before the Honorable John W. Blackburn, judge of the First judicial district, and he found the following facts: "That the lands in township 15 south of range 13 east, Salt Lake meridian, Emery county, Utah territory, are public lands of the United States; that the defendant has heretofore constructed, and now maintains, on and through section 16 of said township, a fence built of cedar posts and wire, and thereby incloses about 447 acres of said section; that no part of the said lands so inclosed has ever been entered for settlement or purchased in any land office of the plaintiff; that said land is surveyed lands of the plaintiff, and was surveyed and designated by its proper township and section at the time the defendant entered thereon; that, at the time said fence was made, said defendant had no claim or color of title to said lands, or any portion of it, made or acquired in good faith, and has not heretofore asserted and does not now assert any right thereto by or under any claim made in good faith with a view to entry thereof in the proper land office under the general laws of the United States." And as conclusions of law from said facts, the court found that the inclosure was unlawful, and should be destroyed in a summary way, unless it was removed in 10 days. The case was appealed to this court by the defendant, and the judgment of the district court was reversed by this court. The opinion was delivered by the Honorable Thomas J. Anderson, and concurred in by Judges Zane and Miner, and will be found at page 389, 7 Utah, and page 1117, 26 Pac.

This proceeding, as will be seen from the foregoing recitals, was instituted by the United States attorney under the act of congress approved February 25, 1885, making it un-

¹ No opinion has been filed.

lawful to inclose any of the public lands of the United States where the party making the inclosure has no "claim or color of title made or acquired in good faith or an asserted right thereto by or under a claim made in good faith with a view to the entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made." When the case was before this court on a former appeal, it was held that the lands contained in section 16 were not public lands of the United States, within the purview of the act of congress above mentioned, because of the reservation of such lands for school purposes by the fifteenth section of the organic act of Utah, which provides as follows: "That when the lands in said territory shall be surveyed under the direction of the government of the United States preparatory to bringing the same into market, sections numbered 16 and 36 in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory, and the states and territories hereafter to be erected out of the same." The judgment of the district court having been reversed, the cause was remanded with the direction that the First district court should proceed in conformity with the opinion in that case, and on the 7th day of July, 1894, the following judgment was entered: "In accordance with the facts found, and the decision of the supreme court heretofore rendered, it is hereby ordered and adjudged that the plaintiff take nothing by its complaint, and that this action shall be, and the same is hereby, dismissed." From this judgment, the United States has appealed to this court, and the case is now here for decision.

The first question is whether the former decision of this court is to be considered an adjudication by which this court is now bound; in other words, whether it is the "law of the case" in such a sense that this court cannot reverse its own judgment. In the case of *Steele v. Boley*, 6 Utah, 308, 22 Pac. 311, it was held that the statute of limitations begins to run, against one who claims public lands as grantee of the United States, in favor of the one in possession, claiming to have acquired the title thus acquired by the patentee, from the date of the patentee's certificate of the final proof and payment. Upon this holding, the judgment in the case was reversed, and the cause was remanded for further proceedings. Such proceedings were had as resulted in a judgment in accordance with that holding. A further appeal having been prosecuted to this court from that judgment, the former judgment was overruled, and this court held that the statute of limitations began to run against the patentee of public lands from the United States from the date of the issuance of the patent, and not from the date of the final payment for the land. 24 Pac. 755. The rule of former adjudication was pressed upon this court in

that case, but the court declined to adopt the suggestion, and reversed its former judgment. It is true that the court gave as a reason that the supreme court of the United States had decided the question differently since; but still the fact remains that, whatever may have been the reason for the court's action, it did reverse its former judgment in the same case. The rule of law which is generally invoked, commonly called the "law of the case," while a safe and salutary one to be followed, has its exceptions. In the case of *Railway Co. v. Shoup*, 28 Kan. 394, this rule was invoked, and was considered by the court. Judge Brewer (then upon the supreme bench of Kansas, and now upon the supreme bench of the United States), in the case mentioned, used this language: "We do not understand that the rule that a decision once made becomes the established law of the case is a cast-iron rule, and incapable of relaxation in any event. Cases may arise in which it will be clear that the first decision was erroneous; that, not only in the case at bar will wrong result from adhering to the decision, but also interests through the state will be imperiled. Hence, we do not doubt the power of the court to reconsider and reverse a prior decision in the same case." Why should such not be the case? Is the court to be bound, at all events, by a technical rule, when it is manifest that injustice will not only be done in the individual case, but, by the precedent made, injustice will follow in other subsequent cases of like character? Moreover, it may be suggested that this is not a court of last resort in cases of this kind, and therefore the rule of *res adjudicata* is inapplicable. In the case of *Lawrence v. Ballou*, 37 Cal. 518, the court say "that the rule that a previous decision becomes the law of the case applies only to the decisions of the court of last resort."

I come now to the main question in the case, and that is, are school lands reserved under the fifteenth section of the organic act, heretofore quoted, so segregated from the public domain as to cease to be under the protection of the act of congress of February 25, 1895, heretofore mentioned? It would seem that the mere reading of the two statutes ought to answer this question in the negative. First, let us consider what is the effect of the reservation. It is said, in the opinion of the court in this case, that "a reservation of the lands for school purposes for the use of the people of a territory or state is, in effect, a grant, and the title passes as soon as the lands are surveyed; and patents for school sections are not necessary, and are not issued; and the act is irrevocable without the consent of the people of the territory." I have made a careful examination of the cases cited by the learned judge who wrote that opinion, and do not hesitate to express the opinion that not one of them justifies the language quoted. And, considered independently of the authorities cited, the statute reserving the lands cannot, by any

possibility, be tortured into a grant of the lands to the territory when the survey is made; much less that the act making the reservation becomes irrevocable without the consent of the people of the territory. The truth is, a reservation can never be said, in the sense of the law, to vest a title in the reservee, where there was formerly no right or title existing in such reservee. There is nowhere, in any of the statutes making such reservation, any intimation that the congress of the United States intended that such reserved lands should pass out from under the dominion and control of the government; and, in the enabling act passed for the benefit of the people of this territory, congress has granted such lands to the state to be formed out of the territory, thus clearly showing that at no time has congress understood the mere reservation of the lands for school purposes to be equivalent to a conveyance of the same to the people of the territory. In the case of *Burrows v. Kimball* (decided by this court at the June term of 1894) 41 Pac. 719, this court held that the territorial legislature had no right to pass any law giving authority to the county courts of the several counties to lease the school lands reserved by the organic act, and the question is pertinent, if these lands are not under the control of the territory, under whose control are they? This whole question came before the supreme court of Washington territory in February, 1888, and that court, in a well-reasoned opinion, held, speaking of lands reserved for school purposes, that: "The mere survey of these lands would not cause them to lose their character of public lands. Such change could occur only when they have lost their public character by reason of a bona fide right of private entry or ownership under the United States. Now, because of the mere reservation or appropriation by the United States of these sections, for the purpose of being applied to the common schools of the future, do they lose their character of public lands? It is true that they are not public lands in that they are open to entry; but that fact alone does not prevent them being, in a certain sense, public lands. The government has, for a wise purpose, set apart and reserved these lands from the general domain, and announced the purpose for which they will be devoted. It retains control and dominion over these until the happening of a certain event. It is somewhat as a trustee of an express trust. It also retains the right, up to a certain time, to annul the act by which such sections were reserved, and might, within that limit, annul the former act, and throw these lands open as public lands. This reserved right in the government must give it control over these lands as absolute as that of any owner could be." Reasoning further, the court says, in speaking of the protection of school lands from trespassers: "The power of the United States to prevent any such wrong must be conceded, or the wrong would go unpunished." *Barkley v. U. S.*, 19 Pac. 37. And

such is the case in this territory. This court has decided that the territory has no right to pass any law concerning the disposition and control of the lands; and, if it shall now hold that the general government had no such right, then they are left entirely without any protection, and open to every one. The supreme court of the territory of Montana has likewise considered this question, and has come to a conclusion in harmony with that of the supreme court of Washington, and at variance with the decision of this court. *U. S. v. Blsel*, 19 Pac. 251. It will be found by an examination of the opinion of the chief justice, McConnell, in the Montana case, that the very cases cited by the learned judge who delivered the former opinion in this case were urged upon the court, and that the chief justice reviews these cases, and shows beyond question that they do not decide what is claimed. This court has held, speaking through Justice Barch, in the case of *Hyndman v. Stowe*, 9 Utah, 23, 33 Pac. 227, that the title to these school sections is in the United States. This opinion is in direct conflict with the language heretofore quoted from the case in 7 Utah. The truth is, the decisions of this court upon this question are in a state quite confused, to say the least.

Upon a full review of this case, I am of the opinion that the judgment should be reversed, and the cause remanded for a new trial.

BARTCH, J., concurs.

SMITH v. KAUFMAN et al.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

PLEADING—PROBATE COURT JURISDICTION.

1. An allegation that S. is not now, or never has been, legally appointed assignee for N. is a conclusion, and a demurrer thereto should have been sustained.

2. A probate court has no jurisdiction to render a judgment declaring an assignment under our statutes null and void.

(Syllabus by the Court.)

Error from probate court, K county.

Action by S. Kaufman & Co. against J. A. Newkirk. Judgment for plaintiff. P. W. Smith was summoned as garnishee. Judgment for plaintiff, and Smith brings error. Reversed.

Kceton & Cotteral, for plaintiff in error.

SCOTT, J. On the 27th day of January, 1894, S. Kaufman & Co. commenced suit in the probate court of K county, against J. A. Newkirk, to recover the sum of \$249.06, as payment for general merchandise sold to said J. A. Newkirk. On the same day the defendant entered his appearance, and confessed judgment for the amount claimed, which confession is as follows:

"Comes now the plaintiff, and the defendant in person, and says that he is justly indebted to said plaintiff in the sum of two

hundred and forty-nine and $\frac{9}{100}$ (\$249.06) dollars upon a contract for goods and merchandise sold and delivered to the defendant in the years of 1893 and 1894, and, with the consent of the plaintiff, confesses judgment in open court, and asks to have judgment rendered against him thereon for the said sum of \$249.06.

"J. A. Newkirk, being duly sworn, says that he has heard read the statements in the foregoing confession of judgment, and says that they are true, to his knowledge. J. A. Newkirk.

"Subscribed and sworn to before me, this January 27th, 1894. B. N. Woodson, Probate Judge."

Thereupon, on the same day, judgment was rendered upon said confession for the sum of \$249.06 and costs, and execution issued against the property of the said Newkirk in the hands of P. W. Smith on the 30th day of January, 1894. On the 5th day of February, 1894, the plaintiffs filed in the said court an affidavit of garnishment against P. W. Smith, also a bill in aid of execution, alleging that the sheriff of said county demanded the sum of the said P. W. Smith, and alleging that Smith had in his possession more than a sum sufficient to satisfy said execution, and that said Smith refused to turn over the sum of money, for the reason that he claimed the same on an assignment of J. A. Newkirk. The plaintiffs also alleged that said Smith had not been legally appointed assignee for said Newkirk, or the firm that he represented, and that he had sold large quantities of property belonging to said Newkirk; that the assignee was holding money of said Newkirk then in his hands, under the pretense of an assignee; and asked that said Smith be required to pay the same into court, and that the assignment be declared null and void. On the same day the probate court issued notice to J. A. Newkirk and P. W. Smith of said application. On February 10th said P. W. Smith filed a demurrer to said bill, alleging—First, that the court had no jurisdiction of the subject-matter of said proceeding; second, that the court had no jurisdiction of the person of the defendant P. W. Smith; and, third, that said bill failed to state facts sufficient to constitute a cause of action against the defendant P. W. Smith. The court overruled the demurrer, and allowed exception to such ruling. Smith then filed his answer to said bill, admitting his appointment as assignee of the estate of J. A. Newkirk, and alleged the same was legally made, and that bond was given as required by law; admitting that he had sold and disposed of all of the chattel property of said Newkirk belonging to him, before the assignment; and alleging that he was subject to the orders of the district court under said appointment as assignee. Afterwards, and on the same day, said Smith filed his answer in garnishment, denying that he had ever had in his possession any sums of money belonging to the

said Newkirk. On the 20th day of February, 1894, a hearing was had, and the court rendered judgment on the garnishment proceedings against the garnishee in the sum of \$249.06. Motion for a new trial was overruled, and exception allowed. On the same day an execution was issued against said Smith, which was returned satisfied. The plaintiff in error assigns numerous grounds of error as reasons for asking a reversal of the findings and judgment of the probate court, but we deem it unnecessary to notice all of them in order to arrive at a proper conclusion upon the material questions involved.

The defendants in error filed in the probate court a pleading, designated by them as a "bill in aid of the collection of an execution," having for its object three distinct purposes,—i. e. to obtain judgment against one P. W. Smith, who was not a party to the original action; to compel said Smith to pay into court the amount of judgment which plaintiff had obtained against J. A. Newkirk in the original action; and to have the assignment to said P. W. Smith declared null and void. An examination of the statutes relating to the proceedings in aid of execution discloses the fact that this so-called "bill" filed by the plaintiffs is, to say the least, of doubtful origin, and is not such a pleading as is contemplated by our Code practice; and, treating it as a document in the nature of a petition, as it seems to have been treated by the court and the parties, it fails in very essential particulars to state a cause of action in favor of the plaintiffs and against the defendant, P. W. Smith. The only allegation in said petition relating to the assignment made by J. A. Newkirk is embraced in the following language: "Plaintiff further alleges that said P. W. Smith is not now, or never has been, legally appointed assignee for J. A. Newkirk, or the firm that said Newkirk represented." This allegation is totally inadequate as a statement of a cause of action to revoke or annul an assignment, and there was nothing in the other allegations of the petition which even remotely showed any liability of the said P. W. Smith in favor of J. A. Newkirk; and, this being true, the probate court committed manifest error when it overruled the demurrer of defendant Smith to this bill or petition. In the subsequent proceedings there is an entire absence of any testimony going to show that Smith had any sum of money whatever in his hands belonging to the principal defendant, J. A. Newkirk, at the time he was served with notice of the filing of the "bill in aid of execution," and the order and judgment of the probate court, rendered and entered against said Smith, requiring him to pay into court the sum of \$249.06, and the costs of the action, was not sustained by the evidence, and was clearly erroneous, and the court erred in not granting the motion of the defendant for a new trial of said matters.

With respect to the question of the assignment made by Newkirk to Smith, and the

legal effect and validity of said assignment, from aught that appears in the record and transcript, the action taken and the steps pursued in perfecting the assignment of property appear on their face to be perfectly regular, and so far in conformity with the requirements of the statute as to make it a legal and valid assignment, and to vest the district court of K county with full control over the action of the assignee, and of the funds which came into his hands as such assignee; and we do not think that the probate court had any power or authority in this collateral proceeding to take cognizance of, or exercise jurisdiction over, the subject of the assignment, and certainly, under the allegations of the pleadings of the plaintiffs, and in the light of the evidence introduced, the court had no power or authority to declare such assignment null and void. This could only have been done by direct action in the district court, having for its object the annulment of the assignment itself; and so long as no direct steps had been taken in the proper court, impeaching the validity of the assignment, the probate court had no power to order a diversion of the funds in the hands of the assignee, and the payment of one creditor to the exclusion of others. And hence the court committed error in entering up judgment against the assignee, Smith, and requiring him to pay the money into that court.

For the reasons given, it is manifest that the action of the probate court must be reversed, and we need enter into no discussion of any of the other questions raised in the case. It is ordered that the findings and judgment of the probate court of K county be, and the same are hereby, reversed, with instructions to the probate court to sustain the demurrer of the defendant to the bill of the plaintiffs, and to dismiss said proceeding, and to award execution in favor of Smith for the recovery of the amount paid into court by him, and all costs of these proceedings. All the justices concurring.

BIERER, J., having been counsel in the case, not sitting.

DYSART et al. v. LURTY et al.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

UNITED STATES MARSHAL—LIABILITY ON BOND—TRESPASS OF DEPUTY.

A United States marshal and the sureties on his official bond are not liable, in an action on such bond, for the acts of a deputy who seizes a stock of liquors, beer, and other goods without any writ or process, and without the knowledge, instructions, or assent of his principal, and not in the discharge of any duty imposed upon him by law as such officer. His acts, in such case, constitute a naked trespass, for which he alone is liable.

(Syllabus by the Court.)

Appeal from district court, Logan county; E. B. Green, Judge.

Action by William H. Dysart and Barton

Smith against Warren S. Lurty and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

PER CURIAM. This action was begun by plaintiffs in the district court of Logan county, sitting with the powers and jurisdiction of a circuit court of the United States, to recover a judgment against Warren S. Lurty, on his official bond as United States marshal for Oklahoma, and against Joseph W. McNeal and Dennis T. Flynn, as sureties on said bond. It is alleged in the petition that the defendant Lurty was the duly appointed and qualified United States marshal for Oklahoma, and that the defendants McNeal and Flynn were the sureties on his official bond, which bond had been regularly executed and approved, and a copy was made part of the complaint; that on the 4th day of July, 1890, one Joseph W. Tillery was a duly qualified and acting deputy marshal, appointed by said Lurty; that a warrant issued by a United States commissioner for the arrest of the appellants Barton W. Smith for violations of the revenue laws of the United States was placed in the hands of said Tillery to be served; that at the time said warrant was served the appellants were engaged in the saloon business, and were doing a flourishing and profitable business, and had paid the amount required by the collector of the district for a stamp as retail dealers in liquors, but had not yet received the stamp, or posted the same in their place of business; that the deputy marshal served the warrant on Smith, and also, at the same time, arrested Dysart, and also took possession of several barrels of beer, some kegs of whisky, boxes of cigars, bar fixtures, soda pop, ice, and all other goods found in the saloon, and hauled the same to Guthrie, a distance of several miles, and that in taking and transporting said goods the same were so carelessly and negligently handled and cared for that the beer, ice, and pop were lost and destroyed, and other goods injured and destroyed, in the sum of \$372.50; and that they were damaged in the sum of \$2,000 in their business. The defendants answered, in substance, that the appellants were at the time violating the laws of the United States, disturbing the peace, and selling liquors in violation of the laws of the territory, and that said deputy acted without the knowledge or special orders of the marshal. The cause was submitted to a jury upon the issues and an agreed statement of facts, and the court instructed the jury to return a verdict for the defendants. Judgment was rendered for defendants, and the plaintiffs appeal.

The agreed statement of facts, upon which the case was disposed of, is as follows: "It is agreed between counsel that the defendant Lurty did not know personally any of the acts committed by the deputy marshal, Tillery, on the 4th day of July, 1890, at the time they

were committed, and did not authorize any of the acts committed on that occasion by the said Tillery, other than those which the law imposed upon him by reason of his appointing Tillery as his deputy to serve the process referred to in the complaint, and other like processes, outside of what appears by the writ. It is not, however, admitted that he did not know personally of the issuing of the writ, and the delivery of the writ to Tillery. That question is to be a matter of evidence. It is further agreed by and between counsel for plaintiff and defendant that the said Warren S. Lurty was the United States marshal for the territory of Oklahoma on said day, and had been some days prior to said day, and remained such marshal for some days subsequent to said day. It is also agreed that the said Joseph W. Tillery was a deputy United States marshal, appointed by the said Warren S. Lurty, and had been so appointed for some days prior to said day, and remained such deputy marshal for some days subsequent to said day. It is also agreed that the said Joseph W. McNeal and Dennis T. Flynn were the legal and qualified bondsmen of said Lurty during said time. It is also agreed that the said Barton Smith and William H. Dysart, defendants, were partners, doing business as alleged in the complaint, and owned the property therein described, and that said property was by the said Joseph W. Tillery, as deputy marshal, and other persons appointed and directed by him, seized and carried away as stated in plaintiff's complaint filed herein, and that he carried it away, claiming to act as said deputy marshal, and that a portion of said property was consumed or destroyed; but the quantity destroyed, and the value of the property, and the damages done said plaintiffs, are to be matters of evidence, subject to the instructions of the court. It is admitted that on the 30th day of June, 1890, the plaintiffs in the above-entitled action paid to Gregory A. Sears, deputy collector at Guthrie, Oklahoma territory, special taxes required of them by the laws of the United States to entitle them to engage in the business of retailing spirituous, malt, and vinous liquors and tobacco; that they engaged in said business on the 2d day of July, 1890, and had not on the 4th day of July, 1890, yet received the license or internal revenue stamps for the business." On motion of the defendants the court instructed the jury as follows: "The court instructs the jury that, upon the statement of facts agreed upon and filed in this cause, the law is that the plaintiffs cannot recover in this action against the defendants on the official bond of Warren S. Lurty, on which this action is brought, and the court instructs the jury to find a verdict for the defendants." To the giving of this instruction the plaintiffs excepted.

The one question presented by this record and argued by counsel is whether or not the marshal is liable on his official bond for the acts of his deputy in seizing and damaging the property described in the complaint. It

is not contended that the deputy seized the property by virtue of any process, or that any proceedings were pending to confiscate the property, or that it had actually been forfeited to the United States. The deputy had a warrant for the arrest of one of the defendants on a criminal charge, and without any process, without any orders from his principal, and without his knowledge, seized the liquors and other property, and took them away from appellant's place of business. There seems to be considerable confusion, and some conflict, in the authorities, as to the liability of officers and their sureties for unauthorized acts of deputies. It is generally conceded that, for acts done *virtute officii*, such persons will be held liable; but, as to acts done *colore officii*, the authorities are not harmonious. It is contended in this case that the seizure of this property was done *colore officii*, and that the marshal and his deputies are liable on the official bond. Acts done *colore officii* are such acts as the office gives no authority to perform. The apparent conflict in the adjudicated cases exists more in the confusion of the application and use of terms than in the principles enunciated. Where an officer, while doing an act within the limits of his official authority, exercises such authority improperly, or exceeds his official powers, or abuses an official discretion vested in him, he becomes liable on his official bond to the person injured. But where he acts without any process, and without the authority of his office, in doing such act he is not to be considered an officer, but a personal trespasser. The weight of authority seems to support the doctrine that sureties on an official bond are only answerable for the acts of their principal while engaged in the performance of some duty imposed upon him by law, or for an omission to perform some such duty. *Waymire v. State*, 80 Ind. 67; *Governor v. Perrine*, 23 Ala. 807; *Com. v. Swope*, 45 Pa. St. 535; *Griffith v. Com.*, 10 Bush (Ky.) 281; *Dorr v. Mickle*, 16 Minn. 20 (Gil. 8); *Huffman v. Kopplekom*, 8 Neb. 344; *State v. Mann*, 21 Wis. 684; *Turner v. Collier*, 4 Helsk. 89; *Thomas v. Browder*, 33 Tex. 783; *Boston v. Moore*, 3 Allen, 126; *Schloss v. White*, 16 Cal. 65; *People v. Pennock Co.*, 60 N. Y. 421. Difficulty often arises in determining whether the officer acting officially exceeds his authority, or whether his acts must be regarded as those of an individual. In the case of *Lammon v. Feustler*, 111 U. S. 17, 4 Sup. Ct. 286, relied on by counsel for appellants, the supreme court of the United States held a United States marshal liable on his bond for seizing the property of one upon a writ of attachment issued against the property of another. This case would seem to support the doctrine that an officer will be held liable for acts done *colore officii*, but the case only follows the weight of authority, which is practically unanimous that an officer who, in attempting to execute a valid writ, levies on the property of a third

person, will be held liable for his acts. He is then acting officially, under process apparently valid, and exceeds his authority, rather than acting without any authority. This case is not in conflict with the ruling of the supreme court of Kentucky in *Com. v. Cole*, 7 B. Mon. 250, wherein it was held that the sureties on a constable's bond could not be held liable for money collected under false pretense of having executions in his hands, when in fact he had no such executions. In the latter case the officer was not acting officially; or within the authority of his office, and his bondsmen had not undertaken to be responsible for his personal conduct. The general rule seems to be that if the deputy is acting under a writ of process, and, while attempting to execute the process, he exceeds his authority, and commits a wrong, or fails to perform the duty imposed upon him, his principal and the principal's sureties will be liable for any damages arising from such acts or omissions, or if he is acting without process, and under the orders or instructions, or with the assent, of his superior, then the principal and sureties are liable. On the other hand, if the deputy assumes to act without process, or without the knowledge or assent of his principal, and performs unauthorized acts, or commits a wrong, whether negligently or maliciously, he will be liable for a personal trespass, but his principal, and the bondsmen of the principal, are not liable. There are some exceptions to, and modifications of, these general rules, but, as general principles, they are in harmony with the weight of adjudicated cases. Seizing property without color of process, and without authority of law, does not render the sureties of an officer liable, but is a naked trespass. *State v. Mann*, 21 Wis. 684; *Gerber v. Ackley*, 37 Wis. 43. Where an officer, though he assumes to act as such, commits a wrong under circumstances where the law does not impose upon him any duty to act at all, the wrong is not a violation of any official duty, and consequently is not embraced within the sponsorship of the surety. *Hawkins v. Thomas* (Ind. App.) 29 N. E. 157. In the case of *Holliman v. Carroil*, 27 Tex. 23, the court held that, while a sheriff is officially liable for seizing the property of one person under an execution against another, he is not liable for seizing such property without any writ at all. The same principle is applied in case of *Eaton v. Kelly*, 72 N. C. 110; *Kendall v. Aleshire*, 28 Neb. 707, 45 N. W. 187; and *Clinton v. Nelson*, 2 Utah, 284. This principle is applicable here. The deputy, Tillery, seized the property in question without any process; without any instructions from, or knowledge of, his principal,—and not in the discharge of any duty imposed upon him by law. And when Tillery seized these goods he did so without authority of law, and without color of process, and it was his personal act, and not in the discharge of any official duty that his principal or their

bondsmen had contracted that he should faithfully perform according to law.

Under the agreed statement of facts, the defendants were not liable for the damages claimed, and there was no error in the instruction given. Judgment affirmed.

BRICKNER v. SPORLEDER.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

APPEAL FROM PROBATE COURT—BOND—OBJECTION TO SURETIES.

1. Section 5255, St. 1890, providing that an appeal from a justice's court is not effectual for any purpose unless an undertaking be filed, with two or more sureties, in the sum of \$100, etc., is essential and mandatory as a condition precedent, and cannot be enlarged or expanded to mean a single surety.

2. When the adverse party excepts to the sufficiency of the sureties as provided in section 5255, St. 1890, the failure of the party desiring to appeal to produce the same or other sureties, to qualify as provided in said section, renders the appeal as though no undertaking had been given.

3. Appeals from the final judgments of probate courts under section 1642, St. 1890, ratified by act of congress, shall be taken to the supreme court in the same manner as from the district court, and with like effect, when only questions of law are involved in the appeal, and to the district court of the county when questions of fact are to be tried in the appellate court; the appeal to be taken in the manner and form as appeals are taken from judgments of justices of the peace.

(Syllabus by the Court.)

Error to district court, Logan county; before Chief Justice E. B. Green.

Action by one Sporleder against one Brickner to recover the sum of \$300.15. The case was tried by a jury, and a verdict rendered in favor of the plaintiff for the sum of \$267.89. Defendant brings error. Affirmed.

S. D. Decker, for plaintiff in error. Keaton & Cotteral, for defendant in error.

SCOTT, J. Judgment was rendered in the probate court for defendant in error, plaintiff in the court below, on the 16th day of February, 1893, for the sum of \$267.89. On the 16th day of February, 1893, the plaintiff in error gave notice of appeal to the district court, and on the 17th day of February, 1893, entered into an appeal bond as required by section 5255, St. Okl. 1890, with the exception that but one surety was on the bond. To this bond the defendant in error, on the 21st day of February, filed his written exceptions. The record was then filed in the district court of Logan county. The defendant in error filed in said court his motion to dismiss the appeal for the following reasons: "First. Because no appeal bond with two or more sureties, as by law required, was ever filed in said cause. The pretended appeal bond filed in said cause has but one surety thereto, and is wholly insufficient in law. Second. Because the plaintiff duly filed his exceptions to the sufficiency of the sureties on the appeal

bond filed in said cause within five days after the same was filed, and the defendant did not produce the sureties to justify upon said bond, upon notice given to the plaintiff." Thereafter the said motion was, by leave of the court, amended as follows: "Third. Because there is no appeal to this court from the judgment of the probate court rendered in said court, and the court has no jurisdiction to entertain said appeal." On April 13, 1893, the plaintiff in error, Brickner, filed in the district court his motion and application to perfect his appeal by giving a good and sufficient appeal bond, setting up, as his grounds therefor, that when his appeal bond was given he had two sureties—William H. Coyle and George W. Taylor—to go on his bond, but that the probate judge failed to take the second surety, for the reason that he held the bond to be good with one surety, and approved it; which motion was supported by affidavit of George W. Taylor, and a new appeal bond, with W. H. Coyle and George W. Taylor as sureties, attached thereto. On the 13th day of June, 1893, the motion of plaintiff to dismiss the appeal was sustained, and the appeal dismissed, and exception taken and allowed, time being given to make a case for this court.

The decisive question in this case is whether the undertaking on appeal, executed by a single surety, is sufficient, when the terms of the statute providing for appeals in such cases require two or more sureties. The question is one of construction. The relevant portions of the Oklahoma Statutes on the subject of appeals of this character are in terms as follows: "An appeal from a justice's court is not effectual for any purpose unless an undertaking be filed, with two or more sureties, in the sum of one hundred dollars for the payment of the costs on the appeal; or if a stay of proceedings be claimed in a sum equal to twice the amount of the judgment. * * * The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking and unless they or other sureties justify before the justice before whom the appeal is taken, within five days thereafter, upon notice to the adverse party, to the amount stated in their affidavits the appeal must be regarded as if no such undertaking had been given." St. Okl. 1890, § 5255. The above provisions are made applicable to proceedings for the removal of causes from probate courts to district courts by appeal from final judgments of said probate courts. Id. § 1642. It is also by virtue of the section of the statute last cited that the district courts are vested with appellate jurisdiction to review the judgments of probate courts of this territory when exercising a jurisdiction other than testamentary, and as extended by chapter 19 of the Oklahoma Statutes of 1890, and subsequently ratified by act of congress. This statute vests in the district courts the appellate power to review the judgments of the

probate courts of the territory in these cases, and provides the mode of reviewing such judgment. The general rule is that, where a valid statute provides the mode of reviewing a judgment, that mode must be pursued. *Anderson v. People*, 28 Ill. App. 317; *Mining Co. v. Ross*, 20 Nev. 127, 18 Pac. 358. It is a well-recognized canon of construction in these cases that, where a statutory remedy or proceeding is specially provided, it cannot be enlarged by construction, nor made available or valid except on the statutory conditions; that is, by strictly following the directions of the act. *Suth. St. Const.* § 392, and cases cited. This rule is applied to the mode of taking a case to an appellate court, when prescribed by statute. Id. § 394; *Ricard v. Smith*, 37 Miss. 644; *Humphrey v. Chamberlain*, 11 N. Y. 274. Applying this doctrine of the strict construction to the case before us, it appears that the requirement of two or more sureties is essential and mandatory as a condition precedent, and cannot be enlarged or expanded to mean a single surety. Indeed, the language of the statute itself, which is the first principle of interpretation, is clear and unambiguous. It provides: "An appeal * * * is not effectual for any purpose, unless an undertaking be filed with two or more sureties." That is to say, not effectual for any purpose, including either stay of proceedings after judgment in the lower court, or for the purpose of founding the jurisdiction of the appellate tribunal. It is true that it devolves upon the appellate tribunal to decide its own jurisdiction. *Hungerford v. Cushing*, 8 Wis. 324. But, in so deciding, it must be governed by organic law, valid acts of the legislature, and the accepted rules of construction. In view of the plain enactments of the legislature upon this subject, in terms that are clear and unambiguous, we are not warranted in saying that an undertaking on appeal executed by one surety shall be effectual, for the purpose of founding the appellate jurisdiction of the district court, when the legislature has said that such an appeal is not effectual for any purpose unless an undertaking be filed with two or more sureties; and the mode of taking the appeal is recognized and applied by the same section that creates and vests the appellate jurisdiction of the district courts. Section 1639 relates in terms to pleadings, practice, and proceedings in said (probate) court, not in the appellate court, and the words "after judgment," in that connection, could not naturally be construed to mean a grant of appellate power and procedure in an appellate court, which is not even mentioned. The cases of *Judson v. Buler* (Dak.) 50 N. W. 482, and *Towle v. Bradley* (S. D.) Id. 1057, relied on by appellant, do not present the point under consideration here. In both of those cases there were two sureties, who executed the undertaking. In the first case the question arose upon what constituted a sufficient justification under the statute. In the sec-

ond case one of the two sureties was held disqualified and incompetent, and the undertaking, which had not been duly excepted to, was, it appears, under the circumstances of that case, treated as a voidable obligation, rather than void. But in this case there is upon the face of the proceedings a patent failure to comply with the requirements of the statute, and but one surety executes the undertaking, when the law requires two or more as a condition precedent to the appeal being effectual for any purpose.

It cannot avail appellant that he was innocently misled by the alleged statement of the probate judge that it was unnecessary for more than one surety to sign the bond, as it is good without it; for the trial court cannot decide upon the jurisdiction of the appellate court. *Hungerford v. Cushing*, 8 Wis. 324. The appellant is presumed to know the law, and "*Ignorantia legis excusat neminem*." It also appears that the defendant in error filed exceptions to the sufficiency of the sureties under section 5255, St. 1890, and the plaintiff in error failed to appear with his sureties for the purpose of justifying as provided in the same section. A failure to do this rendered the appeal as though no such undertaking had been given.

While the jurisdictional question raised as to the right of appeal from the probate court to the supreme and district courts is not necessary to a determination of this particular case, yet it is a question that should be settled by this court at the first opportunity; and, the proposition being squarely in this case, we will, so far as this case is concerned, definitely settle it. It appears, as above indicated, that by section 1642, St. Okl. 1890, the district courts of this territory are granted appellate jurisdiction over the probate courts. The language of this act is as follows: "Appeals from the final judgment of said probate courts shall be allowed and taken to the supreme court of this territory in the same manner as [from] the district court and with like effect when only questions of law are involved in the appeal. If questions of fact are to be re-tried in the appellate court the appeals shall be taken to the district court of the county in manner and form as appeals are taken from judgments of justices of the peace." A slight transposition of this phraseology will, it seems, make the intent more clear, if necessary, thus: When only questions of law are involved, appeals from the final judgment of said probate courts shall be allowed and taken to the supreme court of this territory, etc. If questions of fact are to be tried in the appellate court, the appeals shall be taken to the district court of the territory in the manner and form as appeals are taken from judgments of justices of the peace. This section classifies appeals with reference to questions of law and questions of fact, and confers appellate jurisdiction in the first description of cases upon the supreme court,

and in the second upon the district court of the county. In each class of cases the mode of procedure is provided by reference. If the question involved is one of law, the jurisdiction is conferred on the supreme court to determine the appeal, which is taken "in the same manner as [from] the district court, and with like effect." If the cause involves questions of fact sought to be retried, the appellate jurisdiction in the premises is conferred on the district court of the county "in the manner and form as appeals are taken from the judgments of justices of the peace." The jurisdiction is granted in each case to a designated court, and the mode of exercising that jurisdiction is prescribed. Applying this obvious construction to the case as presented,—it appearing from the record that the appeal from the probate court of Logan county to the district court of that county involved in this case only questions of law,—it follows that the district court was without appellate jurisdiction in the premises, and the judgment of dismissal of the appeal by that court was properly entered. Even if the provisions on this subject were deemed dubious or uncertain, it is presumed that there was no intention on the part of the legislature to depart from any established policy of the law, nor to oust the jurisdiction of the supreme court. The judgment of the lower court will be affirmed. It is so ordered. All the justices concurring.

BIERER, J., having been counsel in the case, not sitting.

TERRITORY *ex rel.* HUSTON *v.* PITTS. (Supreme Court of Oklahoma. Sept. 7, 1895.)

CLERK OF COURT—FEES.

The legislative assembly of the territory has no power to enact laws regulating the compensation and fees of clerks of the territorial courts, since, by the laws of congress and the rules and regulations of the department, such clerks are required to account for all fees earned by them, of whatever nature, to the treasury of the United States. *Pitts v. Logan Co.*, 41 Pac. 584, followed.

(Syllabus by the Court.)

Action in mandamus, on the relation of A. H. Huston, county attorney, filed in the supreme court April 15, 1895. Alternative writ awarded same date, returnable to the supreme court at the June term. Case submitted on briefs and oral argument. Peremptory writ denied.

A. H. Huston, Co. Atty., for the Territory.
Asp, Shartel & Cottingham, for respondent.

SCOTT, J. This is an original proceeding in mandamus filed in this court on the 15th day of April, 1895, on the relation of A. H. Huston, county attorney of Logan county, to compel Louis E. Pitts, clerk of the district court of Logan county, to pay into the county treasury of said Logan county certain fees earned by him as such clerk. The petition

alleges: "Your relator, A. H. Huston, shows to the court: That he is the duly elected, qualified, and acting county attorney of the county of Logan and territory of Oklahoma. That the defendant, Louis E. Pitts, is the duly appointed, qualified, and acting clerk of the district court of the county of Logan and territory of Oklahoma. That as such clerk the said Louis E. Pitts, from and after the 8th day of March, A. D. 1895, to and including the 31st day of March, A. D. 1895, collected, in fees, as clerk of such district court, in civil cases, the sum of sixty-five (\$65) dollars. That it was the duty of the said Louis E. Pitts, and is the duty of the said Louis E. Pitts, as such clerk, to pay over to the county treasurer of the county of Logan and territory of Oklahoma, under and by virtue of the provisions of the act of the territorial legislature of the territory of Oklahoma approved March 8, 1895, being entitled 'An act with relation to fees and salaries,' all in excess of the said sum so collected over and above the sum of thirty and $\frac{80}{100}$ (\$30.80) dollars; the same being the ratable proportion which the said Louis E. Pitts was authorized by the provisions of said act to retain for the portion of the unexpired quarter ending March 31, 1895, after the taking effect of said law as aforesaid. The said Louis E. Pitts, notwithstanding his duty in the premises, and his duty to file an account and statement with the board of county commissioners of the amount of his fees so collected in civil cases, and to return the excess thereof to the board of county commissioners, has failed, neglected, and refused, upon demand thereunto made upon him so to do, either to file his said account, or pay into the county treasury of said county the said sum of twenty-four and $\frac{20}{100}$ dollars, being the excess of fees collected in civil cases over and above the amount allowed by law to be retained by him. That your relator has been directed by the board of county commissioners of said county to prosecute this action to compel the said Louis E. Pitts to file the said statement of his said account as aforesaid, and to pay over the excess thereof into the county treasury of the said county. That your relator is without any other remedy than proceedings upon mandamus, and that your relator has no adequate remedy from the ordinary proceedings at law to compel the performance of the said act so as aforesaid imposed upon the said Louis E. Pitts by law. Wherefore your relator prays that an alternative writ of mandamus may issue in this cause, returnable according to law, and that upon final hearing hereof he have judgment awarding a peremptory writ of mandamus in said cause to compel the doing of the acts refused by the said defendant." On the same day said petition was presented to Chief Justice FRANK DALE, and an alternative writ was awarded, commanding said Louis E. Pitts, the respondent, to do and perform forthwith the acts complained of, or on the

3d day of June, 1895, before the supreme court of said territory, show cause why a peremptory writ of mandamus should not issue to compel him to do so. The same question, therefore, is involved in this case as presented in the case of Pitts v. Logan Co., 41 Pac. 584, decided by this court heretofore, except that in that case the clerk had instituted suit against Logan county for fees earned by him, and in this case the county of Logan institutes this proceeding to compel the clerk to pay into the county treasury certain fees alleged to be due under the same act of the legislative assembly. The clerk in this case, as in that one, denies the authority of the legislative assembly to prescribe his fees; claiming, under the organic act and federal fee bill, that his fees are fixed by a superior authority. The question was very fully discussed in Pitts v. Logan Co., supra, and we there held to this view: that the clerk was accountable to the United States for all the fees earned by him, and, acting in pursuance of these laws, declared the acts of the legislature were ultra vires, as beyond the prescribed limits of legislative power. The principle involved in that case is applicable here, and the reasoning supporting our view there will support the same doctrine here. The peremptory writ will therefore be denied. It is so ordered. All the justices concurring, except BURFORD, J., dissenting.

UNITED STATES ex rel. SEARCH et al. v.
CHOCTAW, O. & G. R. CO. et al.

(Supreme Court of Oklahoma. Sept. 7, 1895.)

INDIAN TERRITORY—LOCATION OF RAILROAD—APPROVAL OF SECRETARY OF INTERIOR—APPEAL BY UNITED STATES—BOND FOR COSTS—PRACTICE—MOTION FOR NEW TRIAL—APPEAL—MAKING COSTS—EXTENSION OF TIME—RECORD—EVIDENCE—STRIKING IRRELEVANT MATTER FROM RECORD—REVIEW—PARTIES—ENJOINING PUBLIC NUISANCE—AMENDMENT OF STATUTE—PUBLIC LANDS—INDIANS—INDIVIDUAL OCCUPANCY.

1. By an act of congress approved February 18, 1888, the Choctaw Coal & Railway Company, a corporation, was invested and empowered with the right of locating and constructing a railway through the Indian Territory "by the most feasible and practicable route." The conditions precedent stated in the act were: (1) That the corporation is authorized to use a right of way 100 feet in width through said territory; and (2) for all the purposes of railway, and for no other purpose; and (3) to take and use a strip of land 200 feet in width, with a length of 3,000 feet, in addition to the right of way, for stations, for every 10 miles of road; and (4) the right to use such additional ground, where there are heavy cuts or fills, as may be necessary for the construction and maintenance of the roadbed, not to exceed 100 feet in width on each side of the right of way; and (5) that no more than such addition of land shall be taken for any one station; and (6) that no part of the lands authorized to be taken should be leased by the company; and (7) that they should not be used except in such a manner, and for such purposes only, as should be necessary for the construction of said railroad; and (8) that when any portion thereof shall cease to be used such portion should revert to the nation or tribe of

Indians from which the same should be taken; and (9) that full compensation should be made to individual occupants according to the laws, usages, and customs of any of the nations or tribes through which it might be constructed; and (10) that, in case of failure to make amicable settlement, compensation was to be determined by the appraisal of three referees, one to be appointed by the president, one by the chief of the nation to which said occupant belongs, and one by the railway company, together with provisions for appeal to the district court; and (11) that upon the hearing of the appeal, if judgment was for a larger sum than the award of the referees, the costs of appeal were to be adjudged against the railway company; and (12) that when proceedings were commenced in court the railway company was to pay double the amount of the award into court, to abide the judgment thereof, before having the right to enter upon the property; and (13) that the railway company was to pay to the secretary of the interior, for the benefit of the particular nations or tribes through whose lands said railway may be located, the sum of \$50 per mile, in addition to compensation provided for in this act. The defendant company complied with all these conditions before filing its map of survey in the department of the interior, and submitting it to the secretary of the interior for his approval. It is also provided in the act, as conditions subsequent, that, (1) when any portion thereof (that is, of the land over which the right of way was granted) shall cease to be used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken; and (2) that congress shall have certain rights, so long as said lands are occupied and possessed by said nations and tribes, etc.; and, in section 7, (3) that the servants of the company may reside upon the right of way, but subject to the provisions of the Indian intercourse laws, and such rules and regulations as may be established by the secretary of the interior in accordance with said intercourse laws; and (4) concurrent jurisdiction is provided over controversies arising between said railway company and the nations and tribes through whose territory said railway shall be constructed, in the United States circuit and district courts for the Western district of Arkansas and the Northern district of Texas (it being here observed that jurisdiction over controversies is provided for between the railway company and Indian nations or tribes alone, and not between either of them and any white citizen or citizens of the United States); and (5) that all mortgages executed by the railway company upon any portion of its railroad were to be recorded in the department of the interior. The act provided "that when a map showing any portion of said railway company's located line is filed as herein provided for, said company shall commence grading said located line within six months thereafter or such location shall be void; and said location shall be approved by the secretary of the interior in sections of twenty-five miles before construction of any such section shall be begun." By a second act of congress, approved February 13, 1889, amending section 1 of the act of 1888, the company was authorized to build a branch line of railway, by the "most feasible and practicable route," to an intersection with the Atchison, Topeka & Santa Fe Railway Company, in what was then the northwestern part of the Indian Territory. In 1890 the company filed in the department of the interior a map of the route, running from a point near the eastern line in Oklahoma, in a westerly direction within the territory of Oklahoma, through the Pottawatomie Indian Reservation, to a point about 25 miles east of Oklahoma City, where it connected with another section of 25 miles, which had been theretofore approved by the secretary of the interior. By Act Cong. May 2, 1890, the lands in question had been included within the territory of Oklahoma, subject to the provision that: "Nothing in this act

shall be construed to impair any right now pertaining to any Indians or Indian tribe in said territory under the laws, agreements and treaties of the United States, or to impair the rights of personal property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights which it would have been competent to make if this act had not been passed." Upon the opening of the Pottawatomie Reservation to white settlement, the town site of Tecumseh was reserved, under the direction of the land department, for a town site, and the county seat of Pottawatomie county was located thereupon. The map for this section, filed in 1890, was not acted upon by the secretary of the interior, and it was not built upon by the railway company. The company became insolvent, its property was about to be sold, under foreclosure of mortgage, for the payment of its debts; and the road was, by reason thereof, reorganized in 1894 under an act of congress approved August 24, 1894, by which the defendant the Choctaw, Oklahoma & Gulf Railroad Company was incorporated, and authorized to purchase the property and franchises of the Choctaw Coal & Railway Company, and was "vested with all the right, title, interest and property in and to the rights of way and property of the said company, with all the rights, powers, immunities, privileges and franchises which had been hitherto conferred upon said company." and was required to do all the things necessary to enable the said company to maintain, use, and operate the railroads which it might become possessed of, in conformity with the provisions of the act of congress relating to and affecting the Choctaw Coal & Railway Company. The defendant company, in pursuance of the authority here given, purchased the property, rights, and franchises mentioned on the 3d day of October, 1894, and made a survey of a section of 25 miles of the said railway from the point on the eastern line of Oklahoma to a point about 25 miles east of Oklahoma City, and which is designated in these proceedings as section 4 of its railway survey, and upon its railway map, and, at the request of the secretary of the interior, filed the said map in the department of the interior, and presented it to him for his approval in December of 1894. The survey of 1890 was located 3½ miles from where the town of Tecumseh now is (and which was not then built or located) upon the amended map so presented to the secretary. The survey of 1894 was located between 5 and 6 miles from that town. Upon February 15, 1895, the secretary of the interior expressed his disapproval of the map filed in the department of the interior in December, 1894, except where its line coincides with the line shown upon the original map of the fourth section, filed in the Indian office in 1890. The defendant company has complied with all the conditions precedent designated above, under the numbers 1 to 13, before filing the map of survey, and submitting the same to the secretary of the interior for his approval. Thereupon the defendant company proceeded to grade its line through Oklahoma and Pottawatomie counties, crossing public roads, school lands, and through the Kickapoo Indian Reservation, which had been several years previously set apart, by executive order of the president, as a reservation for the occupancy of the Kickapoo tribe of Indians. The fee-simple title to said lands was in the United States, subject to the occupancy of the Kickapoo Indians by the executive order of the president. By agreement made September 9, 1891, the Kickapoo Indians ceded and relinquished all their interest in the lands to the United States government. This agreement was ratified and confirmed by acts of congress approved March 3, 1893. The agreement provided that each of said Kickapoo Indians should receive an allotment of 80 acres, and that said allotments should be held in

trust by the secretary of the interior, for the individual Indians, for the period of 25 years, and that the allotments should not be subject to alienation, and that upon their being made the remainder of the reservation should be opened for settlement by white citizens of the United States. Thereafter, on the 18th day of May, 1895, the president, by his proclamation of that date, declared that the said lands should be opened to settlement on the 23d day of May, 1895. The laws of Oklahoma authorize: "Any railroad corporation may, under the provisions of this article, extend its road from any point named in its charter or articles of organization, or may build branch roads either from any point on its line of road or from any point on the line of any other road connecting or to be connected with its roads," etc. It is held, that the defendant company having complied with all the conditions contained in the acts of congress "incorporating and authorizing" and "investing and empowering" it to locate and construct its line; and said conditions having been imposed for the purpose of protecting the Indian interest; and said approval having been required from the secretary of the interior, by section 6 of the act of 1888, for the purpose of compelling the performance of said conditions, and for the protection of the Indian interest; and said Indian interest, as such, according to the laws, customs, and usages of Indian nations and tribes, having been extinguished in the land over which said section 4, of 25 miles, is built; and the land now being subject to the laws of Oklahoma territory respecting railroads; and the defendant having complied with the laws of the territory, so as to authorize it to claim, and to entitle it to, the benefit of those laws; and the railroad laws of this territory not requiring the approval of the secretary of the interior,—said approval is not a necessary prerequisite to the right of said company to locate and construct its line of railroad.

2. The provision of section 1001 of the Revised Statutes of the United States, that "whenever a writ of error, or other process in law * * * issues from, or is brought up to the supreme court, or circuit court, either of the United States, or by direction of any department of the government, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs," does not apply to a case which is brought up from a district court of the territory to the supreme court of the territory. The Code of Procedure, from which section 1001 is taken, does not relate to the territorial courts. The rule of this court, therefore, applies, which requires that "no cause shall be docketed until security for costs shall be given," etc.

3. The practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, subject to such conditions as are expressed in the organic act itself, were intended to be left to the action of the territorial legislature, and to such rules as might be adopted by the courts themselves. They are not provided for by the civil procedure adopted by congress for the direction of the supreme court and circuit and district courts of the United States. The defendants are entitled to an order requiring the plaintiffs to give security for costs, to be approved by the clerk of the supreme court, conditioned for the payment of all costs for which the plaintiffs in error are liable, before they can require any further proceeding, or demand any further relief.

4. In an action in which the name and authority of the United States are authorized to be used by private parties, as relators, for the protection of private interests, such private parties would not be entitled to the benefit of a statute which provides that the United States shall be exempt from the payment of or security for costs upon writ of error or appeal. In such case

they are the real parties in interest, and are subject to the same liabilities for costs as are other litigants.

5. Our Code of Civil Procedure having been adopted from the state of Kansas, this court will follow the principles of construction and interpretation which have been applied to it by the supreme court of that state.

6. The motion for a new trial must be filed in strict conformity with the provisions of the statute,—that is, within three days after the verdict was rendered,—unless it is made to appear that the party making the motion has been unavoidably prevented. And, when no such showing that the party has been unavoidably prevented from filing his motion within the time specified has been made, the court cannot consider or review the errors occurring upon the trial.

7. The district court or judge has no power to extend the time for making a case after the time fixed by the statute or the time fixed by the order of the district court for extension of time for making a case made has elapsed.

8. The district court or judge, having no jurisdiction to extend the time by a direct order to that effect, cannot do so indirectly by revoking a final judgment after it has been made, and undertaking to make another final judgment of a later date, and by including in such final judgment an order extending the time for making a case made, and permitting at such later date, more than three days after verdict and judgment, a motion for a new trial to be made, after the time had expired within which the case might be made, or a motion be made for a new trial.

9. Affidavits, a map, and letters purporting to have been used as evidence at the hearing below, and an opinion of the district court brought here, annexed to the petition in error, and certified to by the clerk of the district court as "a true, full, and complete copy of the proceedings and papers in the case, as the same remains on file in my office," and not having been submitted to the judge who should settle and sign the same, do not bring the evidence here in such form as that it can be reviewed by this court.

10. The method prescribed by the statute for bringing evidence into this court by case made is the only and exclusive method by which evidence can be brought here to be reviewed and examined upon error. A written opinion prepared and filed in the case by the judge of the district court, in which are some of the affidavits used as evidence at the hearing, and which is by the decree expressly made a part of the record, the decree at the same time stating that "the proofs are made a part of the record," are insufficient to bring the evidence here for examination and review.

11. Upon trial of questions of fact by the court, if the court makes specific findings of fact and conclusions of law, and these are entered upon the journal at the request of one of the parties to the cause, although not made a part of the record by a bill of exceptions, are yet a part of the record, but the voluntary opinion of the court, although made in writing, not upon the request of one of the parties to the cause, and although it includes a statement of facts, is a general finding only, and is not a part of the record.

12. No evidence, depositions, affidavits, or judge's opinion is a part of the record, unless made so by being embodied in a bill of exceptions or case made; and neither the clerk, by his certificate, nor the direction of the judge himself, can be effective to incorporate these things in the record, in the absence of statutory authority.

13. A motion to strike from the transcript filed in the case affidavits, certificates, letters, and map purporting to have been used as evidence at the hearing below, but not brought here by case made or bill of exceptions, for the reason that they are not a part of the record, and so are improperly filed in the case, and to tax the

costs of making those portions of the transcript to the plaintiffs, is properly made, and will be sustained.

14. Evidence having been produced at the hearing below, and the judgment of the court having been rendered thereupon, and the evidence not having been brought here by a case made or bill of exceptions, this court will not go into an examination as to whether the trial judge erred in rendering the judgment which he did. Every presumption is in favor of the correctness of the finding of the trial court upon the facts, if it is a court of general jurisdiction, until the contrary is made to affirmatively appear.

15. Upon a motion for judgment upon the pleadings the rule is that if the motion has not been made in the trial court, and the opposite party thereby notified of defects which he would be entitled to amend in furtherance of justice, and an opportunity afforded to the trial court to consider and pass upon the questions involved, and the motion is made for the first time in this court, the party making the motion is not entitled to relief, but the judgment will be affirmed without looking into the merits of the action.

16. If an action be prosecuted in the name of the government upon the relation of individuals, the individuals who thus prosecute the action must be the real parties in interest. If the object of the proceeding is to compel the performance of a public duty, or to restrain the commission of a public wrong, the people are regarded as the real party in interest; and the action must be brought in the name of the territory, upon the relation of the prosecuting officer, or upon the relation of some member of the public who has a personal interest in the result. If the relief is sought merely for the protection of private rights, the relator must show some special interest in the matter in litigation, since he is regarded as the real party. His rights must clearly appear.

17. In an action for the prevention of a public nuisance, the petition must show that the relators have suffered some special or peculiar injury not shared by the public alike, in order to sustain the action.

18. If suit is brought by the United States for the protection of some private interest, it must appear that there is some obligation subsisting under which it is incumbent upon the United States to litigate in behalf of the public, or of those who offer themselves as relators in the proposed litigation. If these conditions do not appear, the litigation cannot be sustained.

19. An amendment to an act of congress, which, by its provisions, is but an amendment to a single section of that act, is made and must be accepted subject to all the provisions of the original act which has been amended.

20. The fact that a railway corporation has been incorporated under a special act of congress, which provides special conditions under which the company must accept the benefits therein provided, and which provides for the protection of special interests, will not prevent such corporation from complying with a general railway law of this territory, and accepting and availing itself of the benefits thereof, when the special conditions under which it was originally incorporated have been fulfilled, and when the special interests requiring protection at the time of the original incorporation no longer exist.

21. It cannot be claimed that this is an action in which the United States itself is the real party in interest. If it were in fact so, and this is a proceeding in which the United States is the real party in interest, there would then be a misjoinder of parties. The action would be the action of the United States, in which the relators have been improperly joined.

22. Individual occupancy of land is in pursuance of and a part of the laws, customs, and usages of the Indian tribes who have a right of occupancy only upon the public domain of the United States under executive order, as it

is also by tribes occupying such lands as are held in fee simple by the tribes themselves.

23. A provision of an act of congress empowering a railway company to locate its line "by the most feasible and practicable route" is a provision intended for the benefit of the railroad company, in order that it may provide for the most economical line, and that which would be most beneficial to the commercial objects and purposes which it has in view in constructing its line, and for the cheaper and more advantageous transportation of the persons and property of the public.

24. An Indian tribe having made an agreement with the United States upon September 9, 1891, by which it agreed to cede all its interest in certain lands theretofore occupied as a reservation, and congress having ratified such agreement upon the 3d day of May, 1893, and certain allotments having been provided by such agreement for the individual Indians of such tribe, and such individual Indians having accepted such allotments, the interest of the Indian tribe in the lands agreed to be ceded by such agreement became thereby extinguished.

(Syllabus by the Court.)

Error to district court, Pottawatomie county. Affirmed.

This is an injunction proceeding, in which the plaintiff below (plaintiff in error here) prayed that an injunction be issued, commanding each and every of the defendants, their officers, servants, employees, agents, contractors, and workmen, and all persons acting for or representing the defendants, to refrain from any further constructing or completing a railroad described in the bill of complaint, upon the line of its proposed location, as shown by a map filed in the office of the secretary of the interior in the year 1894, and from building, constructing, maintaining, operating, or in any manner using, a railroad upon the location shown by said map, or any other line or route whatsoever, without the approval of the secretary of the interior first being had as provided by the laws of the United States, and that upon the hearing of the cause the order be made perpetual, and for further relief. The case appears from the pleadings herewith given.

The bill of complaint was filed on the 19th day of March, 1895, in the district court for Pottawatomie county, Third judicial district, and sets forth that the United States of America, by Richard Olney, attorney general of the United States, on the relation of William S. Search, Samuel Clay, Wright Christian, Edward J. Kelley, and George A. Outcalt, presents this bill of complaint against the Choctaw, Oklahoma & Gulf Railroad Company, a corporation organized and existing under and in pursuance of the provisions of the act of congress approved August 24, 1894, and entitled "An act to authorize purchasers of the property and franchises of the Choctaw Coal and Railway Company, to organize a corporation and to confer upon the same all the powers, privileges and franchises vested in the company," and George S. Good and George S. Good & Co., a copartnership.

Plaintiffs say: That by act of congress approved February 18, 1888, as amended by the act of congress approved February 13, 1889,

entitled "An act to amend an act entitled 'An act to authorize the Choctaw Coal and Railway Company to construct and operate a railway through the Indian Territory,' and for other purposes," approved February 18, 1888, the Choctaw Coal & Railway Company, a corporation organized and existing under the laws of the state of Minnesota, was granted a right of way for a railroad, with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway, telegraph, and telephone line through the Indian Territory, beginning at a point on Red River, * * * in the Indian Territory, and running thence, by the most feasible and practicable route through the said Indian Territory, to a point on the east boundary line immediately contiguous to the west boundary line of the state of Arkansas, also a branch line of railroad to be constructed from the most suitable point on the main line for obtaining a feasible and practicable route, in a westerly or northwesterly direction, to the leased coal veins of the Choctaw Coal & Railway Company, in Tobucksey county, Choctaw Nation, and thence, by the most feasible and practicable route, to an intersection with the Atchison, Topeka & Santa Fé Railway at the most convenient point between Halifax station and Ear creek, otherwise known as the "North Fork of the Canadian River," and that in and by said act of congress, as so amended, it is provided that the said Choctaw Coal & Railroad Company should cause maps showing the route of its located lines through said territory to be filed in the office of the secretary of the interior, and that the location of said lines should be approved by the secretary of the interior, in sections of 25 miles, before the construction of any such section should be begun. That the point of junction of the branch line of the said Choctaw Coal & Railway Company with the Atchison, Topeka & Santa Fé Railway, as selected, is located in what is now Oklahoma county, in Oklahoma territory, formerly constituting a part of the Indian Territory. By subsequent acts of congress the time for the completion of said railroad lines was extended until February of the year 1896. In the year 1890 the Choctaw Coal & Railway Company filed in the office of the secretary of the interior a map of the fourth section (of 25 miles or thereabouts) of its said branch road, extending from its main line to the proposed junction with the Atchison, Topeka & Santa Fé Railway; but the map and the location of section 4, as shown thereby, were never approved by the secretary of the interior, nor was any action ever taken by the secretary of the interior in relation thereto, nor was any effort ever made by the Choctaw Coal & Railway Company to build thereon, but on the contrary the matter on the said map, and of the location of the said road as therein described, has been suffered to lapse and become of no legal effect. That the Choctaw Coal & Railway Company having become insolvent, as recited in

the aforesaid act of congress of August 24, 1894, the right of way, property, and franchises of the Choctaw Coal & Railway Company were sold under judicial process and decree of a court having jurisdiction in the premises; and thereupon the purchasers at the said judicial sale, and acting under and by virtue of the provisions of the act of congress of August 24, 1894, organized, in accordance with said provisions, the defendant corporation the Choctaw, Oklahoma & Gulf Railway Company,—whereby, the complaint insisted, the Choctaw, Oklahoma & Gulf Railway Company succeeded to, and became the owners of, the said Choctaw Coal & Railway Company, and became bound by the same limitations and provisions of law in regard to the use, enjoyment, and exercise of the same that had been obligatory upon the Choctaw Coal & Railway Company. That the Choctaw, Oklahoma & Gulf Railway Company did not claim to possess any corporate right, franchise, or privilege other than it derives from the aforesaid acts of congress. That on or about the — day of December, in the year 1894, the Choctaw, Oklahoma & Gulf Railroad Company filed in the office of the secretary of the interior, in compliance with the provisions of the aforesaid acts of 1888, a map of the route and location of the fourth section of its proposed line of railway, from its main line to the junction with the Atchison, Topeka & Santa Fé Railway, of which said map and location proof was to be made, which section begins at or about section 4, township 11 N., range 2 E. of the Indian meridian, in Oklahoma county, territory of Oklahoma, and thence, running in an easterly or slightly southeasterly direction, about 6 miles, through the county of Oklahoma, and about 7½ miles through the Kickapoo Indian Reservation, and about 11 miles in Pottawatomie county, in said territory of Oklahoma. That the map and the location of railway thereby exhibited have never been approved by the secretary of the interior, nor has his consent for construction of the branch line of railway upon the route indicated ever been granted; but on the contrary, and on or about the 15th day of February, 1895, the secretary of the interior did disapprove, in part, the proposed location, by writing on the map, over his signature, the words and figures: "Department of the Interior, February 15th, 1895. The within map is hereby disapproved, except where said line coincides with the line shown upon the original map of the fourth section, filed in the Indian office in 1890. Hoke Smith, Secretary." That the original map of the fourth section, thus referred to by the secretary of the interior as having been filed in 1890, is the unapproved map, heretofore referred to, of the Choctaw Coal & Railway Company, with which the location, as shown by the map of the defendant railroad company filed in 1894, does not coincide throughout, but, on the contrary, widely departs therefrom, from and between section 35, township 10 N., range 4 E. of the Indian

meridian, in Oklahoma territory, in Pottawatomie county, and section 36, township 11 N., range 2 E. of the Indian meridian, in Oklahoma county, said divergent line passing through the Kickapoo Indian Reservation.

The complainant further shows that no map of the location of the fourth section of the railroad has been approved, in whole or in part, by the secretary of the interior. And the plaintiff alleges and charges that, under the acts of congress aforesaid, it was and is not lawful for the Choctaw, Oklahoma & Gulf Railroad Company to construct its railroad upon the location so disapproved as aforesaid, or upon any part of the fourth section thereof, or in any location, without the approval, authority, and consent of the secretary of the interior, for that purpose to be first had and obtained. Nevertheless, in disregard of said disapproval, and without any approval by the secretary of the interior of the location shown by the map of 1894, the Choctaw, Oklahoma & Gulf Railroad Company, its officers, agents, and employes, and the said other defendants, who are contractors with and under the said last-named railroad company for the performance of certain labor or the furnishing of material, or both, in the construction of said road, have begun the construction of said road upon the location of section 4, as shown by the map of 1894, and have cut and removed timber from the location, and have graded the line upon the location, or portions thereof, upon the said section, as well as upon that part thereof disapproved by the secretary of the interior as aforesaid, as upon that part of the section whereupon the location, while not affirmatively disapproved, has not been approved, and the defendants, their officers, agents, and employes, and servants, are now constructing the railroad upon section 4, and are threatening to and intending to continue such construction thereon to completion, and the railroad company threatens to use and operate the road, when constructed, over and upon section 4, with its engines and cars, for the transportation of passengers and freight in the conduct of its railroad business. That such construction has been over, across, and upon public highways; some of the highways being in Pottawatomie county, and others in Oklahoma county, and others in the Kickapoo Indian Reservation; said Kickapoo Indian Reservation being surveyed lands of the United States, divided into townships, sections, and quarter sections; and that said highways in each of the said counties are, and for several years last past have been, dedicated to public use as public roads. Complainant charges that the construction of the railroad by the defendants, and each of them,—both the part already done, and also that part threatened and contemplated to be constructed,—is an encroachment upon the lands of the United States, an invasion of the rights of the United States in said lands and highways, an injury to the right of use by the public of such highways, and is a public nul-

sance. The section of road in question extends from and between section 16, township 19 N., range 5 W. of the Indian meridian, in Pottawatomie county to section 4, township 11 N., of range 2 E. of said Indian meridian, in Oklahoma county, and the proposed location of said section, as shown by the map of 1894, runs over and across section 16, township 9 N., range 5 E. of the Indian meridian, and section 36 in township 10 N., range 4 E. of the Indian meridian, known as "Public School Lands," and part of the lands of the United States, both sections lying in Pottawatomie county, and also through the allotments of lands to Samuel Wilson, Japtha Wilson, and others, all being Indians, holding their allotments as members of the Shawnee and Pottawatomie Indian tribes, from the United States, under contracts, and by patents similar in provision and character, to those hereinafter described as made with, and granted to, the Kickapoo Indians; said contracts being made in the year 1890, and the patents providing for a trusteeship by the United States, and a restriction of the powers of the Indians to convey or incumber such allotments for 25 years thereafter, under which contracts and patents said Indians yet hold their respective allotments, said allotments being in Pottawatomie county; also through, over, and across section 36, township 11, range 2 E. of the Indian meridian, in Oklahoma county, known as "public school lands," and parts of the land of the United States. That the land in the Kickapoo Indian Reservation over which the proposed line is intended to pass has, under agreement made by the United States with the Kickapoo Indian tribe dated June 21, 1891, and ratified and set out in the act of congress approved March 3, 1893, been allotted to members of the Indian tribe, except, to wit, one section, which remains the property of the United States. That under the contract between the United States and the Kickapoo Indians the patents for the lands so allotted (some of them have been, and others are to be, issued to said Indians) are made with the condition that the United States shall hold these lands in trust for the patentees for the period of 25 years from the date of the contract (or patent), at the end of which period, unless such period is extended by the president of the United States, patents in fee simple shall be issued to said allottees, respectively, who are prohibited, during the continuance of the said 25 years, from alienating any part of the said lands. That said allotments are yet held by the said Indians under the contract and act of congress. That said Kickapoo Indian Reservation has not, by proclamation of the president of the United States, been restored to the public domain.

The bill of complaint closes with the prayer for relief, as set forth above, and is signed by Richard Olney, attorney general, and is verified by the relators, severally and respectively, as true, except as to the maps, con-

tracts, and agreements with the Kickapoos, and acts of congress, which are verified upon knowledge and belief.

Thereupon, and in connection with the bill of complaint, the relators filed their agreement and obligation in this court in the following terms, after entitling the obligation and agreement with the title of the cause: "William S. Search, Samuel Clay, Wright Christian, and George A. Outcalt, and Edward J. Kelley hereby agree that their names shall be used as relators in the above-entitled cause, and that they will be responsible to the United States for its costs incurred therein. [Signed] William S. Search. Samuel Clay. Wright Christian. Edward J. Kelley. G. A. Outcalt."

Summons issued upon the same day upon which the petition was filed, and upon the next (the 20th day of May, 1895) a temporary injunction was granted as prayed, and was issued by the clerk, the original of which has, as stated in the transcript, been lost, and a copy of which cannot be supplied. The defendant the Choctaw, Oklahoma & Gulf Railroad Company filed its answer herein upon the 17th day of April, 1895, in the following terms:

"Come now the defendants, and, for separate answers to the petition in this cause, severally deny, all and singular, the allegations therein contained except such as are herein-after expressly admitted, and aver that they have a full and complete answer to the petition filed herein, and aver:

"(1) That by virtue of the powers conferred upon the railroad company by the act of congress approved August 24, 1894, and the conveyance made in pursuance of the decree of the United States court in the Indian Territory and of Oklahoma territory, the said company was invested and empowered with full authority to locate its line of railroad in Oklahoma territory, without any supervision or interference whatever by the secretary of the Interior. That under the act of February 18, 1888, conferring upon the Choctaw Coal & Railway Company the right to build said lines, and under the laws of the territory of Oklahoma, to all of which rights the defendant company, under the act of August 24, 1894, succeeded, the defendant was invested with the sole right of locating said line, and the secretary of the Interior had no legal right to approve or disapprove said location.

"(2) That immediately after the passage of the act of August 24, 1894, and in pursuance of said act, and by virtue of the powers conferred upon it by said act, the defendant the Choctaw, Oklahoma & Gulf Railroad Company began to make surveys between South McAllister and Oklahoma City for the purpose of making a location of the railroad it was authorized to build under said act, and to secure the most feasible and practicable route for the same. And on or about November 1, 1894, the engineers of the company

made a selection of the line covered by the map number four in question, and reported the same to the company, which line was afterwards adopted and approved by the board of directors of said company. That said line was on the most feasible and practicable route, and was the shortest and cheapest available route between said points. That the location was made by said company in good faith, governed solely by a desire to secure the shortest and best line.

"(3) Notwithstanding the fact that the secretary of the Interior had no legal authority in the premises, he assumed the right to control the location of the said line in Oklahoma territory, and after the company had made its location, and had commenced work on the same, the secretary requested the company to submit to him a map of its location over the twenty-five miles in question, for his approval, and at the same time notified the company that he would not permit it to construct any portion of its road without his approval. And while the company did not admit the secretary's authority to in any way control the location of its line in Oklahoma territory, or concede or admit the obligation or necessity of securing his approval, yet, in deference to the wishes of the secretary, it submitted to him the map of the location in question, knowing that the line selected was the shortest, most feasible and practicable, and knowing that it could in no way prejudice its rights, and believing that the only object of the secretary was to secure the most feasible and practicable route, it did then file with the secretary a map of the twenty-five mile section in controversy, which map is the one referred to in the petition filed in this cause. At about this time the relators in this case, who constituted a committee said to represent the town of Tecumseh, in Oklahoma territory, through their counsel, asked the secretary to withhold approval of the map upon the ground that a line could be located through the town of Tecumseh, which would be no more expensive, and would be as practicable and feasible as the line which the company had located. The secretary then appointed a time for the hearing of the matter, at which time the counsel for the relators affirmed that a line through Tecumseh could be located, which would be as short and as cheap as the company's line, which statement was denied upon behalf of the company, and thereupon the secretary of the Interior stated that in view of these conflicting statements he would be glad to obtain a report from an engineer to be selected by him, which suggestion was approved and acquiesced in by the parties; and thereupon, at the secretary's request, the representatives of the relators and of the company joined in a telegram to James Dun, chief engineer of the Atchison, Topeka & Santa Fé Railroad Company, requesting him to designate an engineer to make the examination suggested by the secretary, and to

report the results thereof, and thereupon such telegram was sent, in the form following, which telegram was prepared and dictated by the secretary himself: 'Washington, Dec. 20, 1895. James Dun, Atchison, Topeka & Santa F6 Railroad, Topeka, Kas.: Upon the application of the Choctaw Railroad for approval of its map, objection has been made by the people of Tecumseh. The line proposed by the Choctaw road runs six miles north of Tecumseh, and the claim is made that it is four miles shorter, and costs about two hundred thousand dollars less, than a line running through Tecumseh. The secretary desires to know whether this line is more feasible and practicable than a line through Tecumseh, and to what extent, if any, it is cheaper and shorter; also, what difference will be required between the two lines, as to grade. The secretary decided to refer this question to a competent engineer, and, with his approval, we request that you name such engineer to act in conjunction with Mr. J. P. Hinckley, chief engineer of the Choctaw Railroad, whose address is South McAllister, Indian Territory. Will you please name such engineer as soon as possible, and advise Mr. Hinckley; Mr. Horace Speed, at Guthrie, Oklahoma; and George A. Outcalt, at Tecumseh, sending telegram to latter place by Norman, Oklahoma. Horace Speed. Francis I. Gowan.' That at the said hearing, and prior to the sending of the telegram, and after the parties had agreed to the suggestion for an independent investigation, the secretary declared and stated that if the investigation showed that a line through Tecumseh would be either materially more expensive, or materially longer, that he would then approve the line as located by the company. Afterwards, on the 26th day of December, 1894, the secretary of the Interior sent to James Dun the following telegram: 'Washington, Dec. 26, 1894. James Dun, Chief Engr. A., T. & S. F. R. R., Topeka, Kansas: There is a difference between the Choctaw, Oklahoma & Gulf Road and the people of Tecumseh in regard to the location of their line. I have determined, after conference with the representatives of both parties, to request you to appoint an engineer to go over these lines with the Choctaw engineer, and report to me the difference in cost and distance between the two lines. This will probably require work of twenty-five miles of road. Two lines have been run by the railroad in the neighborhood of Tecumseh. It is claimed by the railroad authorities that the one six miles north of Tecumseh is four miles shorter, and will cost in the neighborhood of \$200,000 less than the road through or near Tecumseh. Please notify the chief engineer of the Choctaw road, by wire, of your selection, and where your engineer will meet him; also, notify the mayor of Tecumseh. Hoke Smith, Secretary.' Pursuant to the request contained in said telegram, one H. L. Marvin was named by the

said Dun as the engineer to make the examination in question, and after the sending of said telegram the secretary requested one W. T. Griswold, an engineer attached to the Geological Survey, in Washington, to act in conjunction with the said Marvin in making an examination.

"(4) That, as soon as the suggestion by the secretary for an independent investigation and report was agreed to by the parties, the relators, under the instruction of their chief counsel, employed a private engineer (one P. G. Burns) to survey the line through Tecumseh, who immediately commenced the survey of said line, and when the said Marvin and Griswold arrived on the ground, finding that the said Burns had the survey of his line nearly completed, and being satisfied from the topography of the country, and from the results of the survey of said Burns, that the same could not help showing the impracticability of the line through Tecumseh as compared with the company's line, they did not make any independent survey themselves, but confined their investigation to a personal examination of the country, and when the survey of said Burns was completed they took his figures as to the length and cost of said line, and based their report thereon, which figures as to the length and cost of said line the company did not, and it does not now, accept as correct, but both of said reports showed conclusively that the line through Tecumseh was both materially longer and more expensive than the company's located line; and thereupon the secretary stated to the representative of the company that these reports had satisfied him, and that he ought not consider a line through Tecumseh, and that he would, therefore, give no further consideration to such a line.

"(5) And thereupon the relators again, through their representative or counsel, appeared before the secretary for the purpose of endeavoring to induce him to still withhold his approval of the map of location filed by the company, upon the ground that another line, which would pass about three and a half miles distant from the town of Tecumseh, known as the 'line south of the river,' was an equally practicable line; and thereupon the secretary, notwithstanding his declaration that he would approve the company's line if the line through Tecumseh proved to be longer or more practicable, did give further consideration to the matter of approving said line, and finally agreed that if the said relators would procure for the company, free of all cost to it, the right of way on the line south of the river, suggested by them, that he would decide whether or not he would approve the company's line, and gave the relators two weeks' time within which to secure said right of way, and suspended all further action upon said matter for that time.

"(6) That, at the expiration of the time allowed by the secretary for this purpose, the said relators were able to procure deeds for

only a small portion of the right of way which they had secured, and even the deeds produced were shown to have been executed under such circumstances as would have made them illegal and worthless as conveyances, had the company thereafter undertaken to construct its railway on said line; but notwithstanding the fact that the company had then secured the right of way on its located line, and had a large portion of the same graded, and notwithstanding substantially all the allottees on the proposed line south of the river were objecting and protesting against the construction of the road over their lands, and notwithstanding the fact that the relators had utterly failed to procure the right of way as proposed by the secretary, and notwithstanding the further fact that the proposed line south of the river was deemed by all concerned to be three-fourths of a mile longer than the company's located line, yet the secretary of the interior still continued to hold the matter of the approval of said map under consideration, until, finally, on the 15th day of February, 1895, he returned to the defendant company the map in question, with the following indorsement: 'Department of the Interior, February 15, 1895. The within map is hereby disapproved, except where said line coincides with the line shown upon the original map of the fourth section filed in the Indian office in 1890. Hoke Smith, Secretary.'

"(7) The defendant company further averred that after the declaration made by the secretary, that he would approve the company's line if one through Tecumseh was found to be impracticable, the work of grading the line as located by the company was continued, in reliance upon said declaration by the secretary, and upon the belief, which turned out to be well founded, that the reports of the engineers would show that the line through Tecumseh was impracticable; and said twenty-five miles has been about four-fifths graded, at an expense of about eighty thousand dollars, which sum would be wholly lost to the company should it be prevented from building upon such a line. After the secretary became convinced that the location of the line through Tecumseh was out of the question, and after he had abandoned all idea of trying to compel the company to build through Tecumseh, the only reason stated by him to the representatives of the company for withholding the approval of the said map, and for finally disapproving the same, was that he wished to prevent the railroad from being built through the town of Shawnee, which was situated upon the line as located by the company, and this because he did not want the company to derive any benefit or advantage from the increase in value of certain lands which had been conveyed to the company by property owners of the town of Shawnee for the purpose of aiding and assisting the company in

the construction of its railroad. At no time did the secretary assert or claim that the line located by the company was not the shortest and most correct line that could be adopted, but, on the contrary, admitted the same, and all the reports which he had upon the subject showed this to be the fact, and no other reason did in fact exist than the determination on the part of the secretary to deprive the company of the benefit of the free gift of lands in the town of Shawnee."

Wherefore the defendants averred that, even conceding the propriety and necessity of the company's securing the approval of its line by the secretary of the interior, the action of the secretary in disapproving said location was without legal justification; and defendants further averred that after his declaration as aforesaid, and the company's reliance thereon, the secretary of the interior was stopped from thereafter disapproving said line, and, as a matter of law, must be held to have approved the same, so far as it affects the question of the company's right to construct its railroad over the said 25-mile section.

Further answering, the defendants admitted the enactment of the acts of congress approved, respectively, August 24, 1884, February 18, 1888, February 13, 1889, February 21, 1891, and January 22, 1894; the insolvency of the Choctaw Coal & Railway Company, and the purchase of its property by the defendants, as authorized by the act of congress of August 24, 1894, and the extension of time for the construction of the railroad therein authorized to February 18, 1896; and alleged that all of said acts of congress are, by the above references, made a part of the defendants' answer. Defendants further averred that the said Choctaw Coal & Railway Company and defendant the Choctaw, Oklahoma & Gulf Railroad Company were by said acts of congress, in addition to the grants enumerated, granted the right to take and use, for all the purposes of a railway, a right of way 100 feet in width through said Indian Territory for said main line, and through said Indian and Oklahoma Territories for said branch line, and to take and use a strip of land 200 feet in width, for a length of 3,000 feet, in addition to the right of way, for stations, for every 10 miles of road, and to construct, use, and maintain such turn-outs, branches and sidings, and extensions as said companies may deem to their interest to construct along and upon the right of way and depot grounds. Defendants, further answering, averred: That said Choctaw Coal & Railway Company, before the sale and transfer of said railroad and property as aforesaid, and prior to May 2, 1890, located sections 1, 2, and 3 of said branch road wholly within Oklahoma territory. Section 1 begins at the west end of section 4, and extends, in a westerly or northwesterly direction a distance of 25 miles. Section 2 begins at the west end of section 1, and ex-

tends, in a westerly or northwesterly direction, a distance of 25 miles. Section 3 begins at the west end of section 2, and extends, in a westerly or northwesterly direction, a distance of nearly 15 miles. That before said sale, and prior to May 2, 1890, said company caused maps showing the route of its said located line over sections 1, 2, and 3 to be filed in the office of the secretary of the interior, which locations were by him approved. That, prior to said sale, said company located 25 miles of the said branch of the road, beginning at the east end thereof, in the Indian Territory, and extending, in a westerly or northwesterly direction, said distance,—the same being section 9,—and caused a map showing the route of its said located line to be filed in the office of the secretary of the interior, who approved said location. That, subsequent to said sale, the defendant the Choctaw, Oklahoma & Gulf Railroad Company located its said line from the west end of section 9 to the east end of section 4, and caused maps showing the route of said located line to be filed in the office of the secretary of the interior, which were approved by him. Said sections were numbered 5, 6, and 8, respectively, and are wholly within the boundaries of the Indian Territory, and were also filed in the offices of the principal chiefs of the nations or tribes of Indians through whose lands said line was located. Defendants further averred that said Choctaw Coal & Railway Company, before said sale, constructed said railroad over sections 2, 3, and 9, and operated the same; that, since said purchase, defendant the Choctaw, Oklahoma & Gulf Railroad Company has operated its road over said sections, and has graded said sections 1, 5, 6, and 8, at a great expense, and is ready to lay track thereon. Defendants further averred that on or about the 1st day of November, 1894, the defendant the Choctaw, Oklahoma & Gulf Railroad Company located its said line between the east end of section 1 and the west end of section 5, a distance of 25 miles, and numbered it section 4, the same being the section referred to in plaintiff's petition; that its said line over said section was so located on the most feasible and practicable route; that on or about December 1, 1894, it caused a map of the said route of its said located line to be filed in the office of the secretary of the interior, and that the defendant company has complied with all the conditions of the said acts of congress to authorize it to construct said section; and, after such compliance, defendants entered thereon, graded and otherwise prepared the roadbed for the track, at an expense of \$80,000, and were ready to complete said road over said section, when they were stopped from proceeding further by these injunction proceedings. Defendants further averred that all of section 4 is within the territory of Oklahoma, as created and organized by an act of congress approved May 2, 1890.

Second. And defendants, for a separate and second defense to the bill of complaint in this cause, severally denied all and singular the allegations therein contained, except such as are expressly admitted; and then, after having repeated the admissions as before made, the defendants further averred: That the Choctaw Coal & Railway Company, before said sale, constructed said railroad over sections 2, 3, and 9, and operated the same, the secretary of the interior having approved the locations of the same; and that, since the purchase, the defendant the Choctaw, Oklahoma & Gulf Railroad Company has operated its road over the sections, and has graded said sections 1, 5, 6, and 8, at a great expense, and is ready to lay track thereon. That on or about the 1st day of November, 1894, the defendant the Choctaw, Oklahoma & Gulf Railroad Company located its line between the east end of section 1 and the west end of section 5, a distance of nearly 25 miles, and numbered it section 4; the same being the one referred to in plaintiff's petition. That its said line over said section was so located on the most feasible and practicable route. That on or about December 1, 1894, it caused a map of the route of its located line to be filed in the office of the secretary of the interior, fully complying with the requirements of the law and of the secretary of the interior in that regard. That the defendant the Choctaw, Oklahoma & Gulf Railroad Company had then, and has to this time, complied with all the conditions of said acts of congress to entitle it to begin work, build, and operate its road over and on section 4 of its located line. That the secretary of the interior, on the 15th day of February, 1895, refused to approve said plat, for the reason that he wanted the defendant the Choctaw, Oklahoma & Gulf Railroad Company to build its said road over a different route than the one designated by said map of section 4, and over one to be by him selected, and not because said route designated on said map passed over public lands, Indian reservations, school lands, public highways, nor any other reason than that above given. That the route which the secretary of the interior desired to select for the section was not the most feasible or practicable one, and that his disapproval of said plat was mainly for the purpose of accommodating and pleasing private individuals who desire to control the location of the route over section 4, for their individual and private gain, without any regard for the rights of the defendant company, or the rights of those to be affected by the construction of the road, or for carrying out his private views in this land as to the construction of railroads. That the defendant company has complied with all of the conditions of the acts of congress to authorize it to construct said section, and, after such compliance, defendants entered thereon, graded, and otherwise prepared the roadbed for the track, at an expense of \$80,000,

and were ready to complete the road over the said section, when it was stopped from proceeding further by these injunction proceedings. And averred that all of section 4 is within the territory of Oklahoma, as created and organized by an act of congress approved May 2, 1890.

Third. Defendants, for a third reason, and a separate defense to the bill of complaint in this cause, severally denied all and singular the allegations therein contained, except such as are hereinafter expressly admitted, and having made the admissions of acts of congress, etc., as hereinbefore recited, proceeded to aver that all of section 4 is within the territory of Oklahoma, as created and organized by an act of congress approved May 2, 1890, and within Pottawatomie county of said territory, and under the jurisdiction of the territorial court and authorities in said county, and subject to the territorial laws. Further answering, the defendants averred that, in addition to the grants contained in the said several acts of congress, the defendant the Choctaw, Oklahoma & Gulf Railroad Company has the right to construct, equip, and operate its road, over and upon the route designated on the said map of section 4, under and by virtue of the laws of the territory of Oklahoma; that said company, by resolution of its directors, entered in the records of its proceedings, designated the route of its said road from the west line of the Seminole Nation, Indian Territory, to Ft. Reno, Oklahoma territory, in the manner and as required by the president and secretary of said company, in the office of the secretary of said territory, and caused the same to be recorded as provided by law; that the route designated by said resolution begins at the east end of section 4, and extends westward to the west end thereof, on the route designated on map of section 4, and is in every respect the same route. Defendants, further answering, averred that defendant the Choctaw, Oklahoma & Gulf Railroad Company has purchased of the owners and occupants, and has releases and warranty deeds from such owners and occupants conveying it, for the right of way and station purposes, all lands over which said route on section 4, as designated by the map thereof, runs, for the width and to the extent granted by said acts of congress and authorized to be taken by the laws of said territory, and which it was authorized to take, receive, and purchase under the laws of the United States.

The defendants, having answered, thereupon prayed the court that the injunctions be dissolved, the petition dismissed, and the defendants discharged, with costs, and for other and further relief. The answer was sworn to by the president of the defendant company, upon knowledge and belief. No reply was filed by the plaintiff.

Upon the issues thus joined, the testimony submitted by affidavits, as set forth above, and the acts of congress authorizing the Choctaw

Coal & Railway Company to construct and operate a line of railway, as herein set out, the case was submitted to the judge at chambers on the 23d day of April, 1895, upon printed briefs and oral argument.

The acts of congress referred to in the pleadings, or so much of them as relate to the matters at issue in the case, are herewith given:

"An act to authorize the Choctaw Coal & Railway Company to construct and operate a railroad through the Indian Territory, and for other purposes.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled:

"That the Choctaw Coal and Railway Company, a corporation created under and by virtue of the laws of the state of Minnesota, be and the same is hereby invested and empowered with the right of locating, constructing, owning, equipping, operating, using and maintaining a railway and telegraph and telephone lines through the Indian Territory, beginning at a point on the Red river, the southern boundary line, at the bluff known as 'Rocky Cliff' in the Indian Territory, and running thence by the most feasible and practicable route through the said Indian Territory to a point on the east boundary line, immediately contiguous to the west boundary line of Polk and Sevier counties in the state of Arkansas; also, a branch line of railway to be constructed from the most suitable point on said mail line for obtaining a feasible and practicable route in a north-westerly direction to the leased coal veins of said Choctaw Coal and Railway Company in Tobucksey county, Choctaw Nation; with the right to construct, use and maintain such tracks, turnouts, branches, and sidings and extensions as said company may deem it in their interest to construct along and upon the right of way, and depot grounds herein provided for.

"Sec. 2. That said corporation is authorized to take and use for all purposes of railway, and for no other purpose, a right of way one hundred feet in width through said Indian Territory for said main line and branch of the Choctaw Coal and Railway Company, and to take and use a strip of land two hundred feet in width, with a length of three thousand feet in addition to the right of way for stations, for every ten miles of road, with the right to use such additional grounds where there are heavy cuts or fills as may be necessary for the construction and maintenance of the road bed, not exceeding one hundred feet in width on each side of said right of way, or as much thereof as there may be included in said cut or fill: provided, that no more than said addition of land shall be taken for any one station: provided further, that no part of the land herein authorized to be taken shall be leased or sold by the company, and they shall not be used in such manner and for such purposes only as shall be necessary for the construction and convenient operation of

said railroad, telegraph and telephone lines; and when any portion shall cease to be used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken.

"Sec. 3. That before said railway shall be constructed through any lands held by individual occupants according to the laws, customs and usages of any of the Indian nations or tribes through which it may be constructed, full compensation shall be made to such occupants for all property to be taken, or damage done by reason of the construction of such railway. In case of failure to make amicable settlement with any occupant, such compensation shall be determined by the appraisement of three disinterested referees to be appointed, one (who shall act as chairman) by the president, one by the chief of the nation to which said occupant belongs, and one by said railway company, who, before entering upon the duties of their appointment, shall take and subscribe, before a district judge, clerk of a district court, or United States commissioner, an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award, to, and filed with, the secretary of the interior within sixty days from the completion thereof; and a majority of said referees shall be competent to act in case of the absence of a member, after due notice. And upon the failure of either party to make such an appointment within thirty days after the appointment made by the president, the vacancy shall be filled by the district judge of the court held at Fort Smith, Arkansas, or by the district judge of the Northern district of Texas, upon the application of either party. The chairman of said board shall appoint the time and place for all hearings within the nation to which said occupant belongs. Each of said referees shall receive for his services the sum of four dollars per day, for each day they are engaged in the trial of any cause submitted to them under this act, with mileage at five cents per mile. Witnesses shall receive the usual fees allowed by the courts of said nation. Costs, including compensations of the referees, shall be made a part of the award and be paid by such railroad company. In case the referees cannot agree, then any two of them are authorized to make the award. Either party being dissatisfied with the findings of the referees, shall have the right within ninety days after making the award and notice of the same, to appeal by original petition to the district court held at Fort Smith, Arkansas, or the district court for the Northern district of Texas, which court shall have jurisdiction to hear and determine the subject matter of said petition, according to the laws of the state in which the same shall be heard for determining the damage when property is taken for railroad purposes. If, upon the hearing of such appeal, the judgment of the

court shall be for a larger sum than the award of the referees, the costs of said appeal shall be adjudged against the railroad company. If the judgment of the court shall be for the same sum as the award of the referees, then the costs shall be adjudged against the appellants. If the judgment of the court shall be for a smaller sum than awarded by the referees, then the costs shall be adjudged against the party claiming damages. When proceedings have been commenced in court, the railway company shall pay double the amount of the award into the court, to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railroad.

"Sec. 4. That said railway shall not charge the inhabitants of said territory a greater rate of freight than the rate authorized by the laws of the state of Arkansas, or Texas, for service and transportation of the same kind: provided, that passenger rates on said railroad shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway, and messages on said telegraph and telephone line, until a state government, or governments shall exist in said territory within the limits of which said railway or a part thereof shall be located, and then such state government or governments shall be authorized to fix and regulate the costs of transportation of persons and freight within their respective limits by said railway; but congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one state into another, or shall extend into more than one state: provided, however, that the rate of such transportation of passengers, local or interstate, shall not exceed the rate above expressed: and provided further, that said railway company shall carry the mail at such prices as congress may by law provide, and until such rate is fixed by law, the postmaster general may fix the rate of compensation.

"Sec. 5. That said railway company shall pay to the secretary of the interior, for the benefit of the particular nations or tribes through whose lands the said railway may be located the sum of fifty dollars in addition to compensation provided for in this act for property taken and damages done to individual occupants by either, construction of the railway for each mile of railway that it may construct in said territory, said payments to be paid in installments of five hundred dollars as each ten miles of road is graded: provided, that if the general council of either of the nations or tribes through whose lands the said railway may be located, shall, within four months after the filing of maps of definite locations, as set forth in section six of this act, dissent from the allowance hereinbefore provided for, and shall certify the

same to the secretary of the interior then all compensation to be paid to such dissenting nation or tribe under the provision of the act shall be determined as provided in section three for the determination of the compensation to be paid to the individual occupants of land, with the right of appeal to the courts upon the same conditions and requirements as therein provided: provided further, that the amount awarded or adjudged to be paid by said railway company for said dissenting nation or tribe shall be in lieu of the compensation that said nation or tribe would be entitled to receive under the foregoing provisions. Said company shall also pay, so long as said territory is owned and occupied by the Indians, to the secretary of the interior the sum of fifteen dollars per annum for each mile of railway it shall construct in said territory. The money paid to the secretary of the interior under the provisions of this act shall be apportioned by him in accordance with the laws and treaties now in force between the United States and said nations and tribes, according to the number of miles of railway that may be constructed by said railway company through their lands: provided, that congress shall have the right to, so long as said lands are occupied and possessed by said nations and tribes, to impose such additional taxes upon said railroad as it may deem just and proper for their benefit, and any territory or state hereafter formed, through which said railway shall have been established, may exercise the like power as to such part of said railway as may lie within its limits. Said railway company shall have the right to survey and locate its railway immediately after the passage of this act.

"Sec. 6. That said company shall cause maps showing the route of its located lines through said territory to be filed in the office of the secretary of the interior, and also to be filed in the office of the principal chief of each of the nations or tribes through whose lands said railway may be located, and after the filing of said maps no claim for a subsequent settlement and the improvements upon the right of way shown by said maps shall be valid, as against said company; provided, that when a map showing any portion of said railway company's located line is filed as herein provided for, said company shall commence trading said located line within six months thereafter, or such location shall be void; and said location shall be approved by the secretary of the interior in sections of twenty-five miles before construction of any such section shall be begun.

"Sec. 7. That the officers, servants and employees of said company necessary to the construction and management of said road shall be allowed to reside, while so engaged, upon such right of way, but subject to the provisions of the Indian intercourse law, and such rules and regulations as may be established by the secretary of the interior in accordance with said intercourse laws.

"Sec. 8. That the United States circuit courts for the Western district of Arkansas, and the Northern district of Texas, and such other courts as may be authorized by congress, shall have, without reference to the amount in controversy, concurrent jurisdiction over all controversies arising between said Choctaw Coal and Railway Company and the nations and tribes through whose territory the said railway shall be constructed. Said courts shall have like jurisdiction without reference to the amount in controversy, over all controversies arising between the inhabitants of said nations or tribes and said railway company, and the civil jurisdiction of said courts is hereby extended within the limits of said Indian Territory, without distinction as to citizenship of parties, so far as may be necessary to carry out the provisions of this act.

"Sec. 9. That said railway company shall build at least one hundred miles of its railway in said territory within three years after the passage of this act, and complete the main line of the same within said territory one year thereafter, or the rights herein granted shall be forfeited as to that portion not built; that said railway company shall construct and maintain continually all road and highway crossings and necessary bridges over said railway wherever said roads and highways do now or may hereafter cross said railway's right of way, or may be by the proper authorities laid out across the same.

"Sec. 10. That the said Choctaw Coal and Railway Company shall accept this right of way upon the express condition, binding itself, its successors and assigns, that they will neither aid, advise nor assist any effort looking towards the changing or extinguishing the present tenure of the Indians in their lands, and will not attempt to secure from the Indians any further grant of land, or its occupancy than is hereinbefore provided: provided, that any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railway company under this act.

"Sec. 11. That all mortgages executed by said railway company conveying any portion of its said road, with its franchises, that may be constructed in said Indian Territory, shall be recorded in the department of the interior, and the record thereof shall be evidence and notice of their execution, and shall convey all rights and property of said company as therein expressed.

"Sec. 12. That congress may at any time amend, add to, alter, or repeal this act.

"Sec. 13. That the right of way herein and hereby granted shall not be assigned or transferred in any form whatever prior to the construction and completion of the road, except as to mortgages or other liens that may be given or secured thereon to aid in the construction thereof.

"Approved February 18th, 1888."

The amendment to said act, being an act to amend section 1 of an act entitled "An act to

authorize the Choctaw Coal and Railway Company to construct and operate a railroad through the Indian Territory, and for other purposes," approved February 13, 1889, invests and empowers the Choctaw Coal & Railway Company with the right of locating, constructing, owning, equipping, operating, etc., a line, by the most feasible and practicable route, through the Indian Territory, to the west boundary line of the state of Arkansas, and of a branch line to intersect the Atchison, Topeka & Santa Fé Railway at the most convenient point between Halifax station and Ear creek, otherwise known as the North Fork of the Canadian river.

The act approved August 24, 1894, being an act to authorize the purchasers of the property and franchises of the Choctaw Coal & Railway Company to organize a corporation, and to confer upon the same all the powers, privileges, and franchises vested in the company, reads as follows:

"An act to authorize purchasers of the property and franchises of the Choctaw Coal and Railway Company to organize a corporation, and to confer upon the same all the powers, privileges and franchises vested in the company.

"Whereas, the Choctaw Coal and Railway Company, a corporation created under and by virtue of the laws of the state of Minnesota, and now doing business in the Indian Territory and Oklahoma territory under and by virtue of certain acts of congress empowering it so to do, is insolvent, and in order to enable the creditors and stockholders of the same to re-organize said company in such a way as to secure the completion of the railroad authorized to be constructed by said company, a sale of its property and franchises is necessary."

The act thereupon proceeded to provide that the purchasers of the rights of way, railroads, and other property, and the franchises of the Choctaw Coal & Railway Company, at any sale made under any process or decree of any court having jurisdiction thereof, shall be, and are, hereby constituted a corporation, and shall be vested with all the right, title, interest, property, etc., in and to such rights of way, railroads, and other property of the Choctaw Coal & Railway Company, and with all the rights, powers, immunities, privileges, and franchises which have been heretofore granted or conferred upon said company by any act of congress, or which it possesses by virtue of its charter under the laws of the state of Minnesota, and then proceeded to provide that such new corporation should not have the right to acquire and hold any houses or buildings at South McAllister situated off the right of way and depot grounds of the Choctaw Coal & Railway Company. Section 2 of the act made certain provisions as to the time and method of organization required of the new corporation. Section 3 provided that certificates of the organization of the new corporation and of the purchase of the property

of the Choctaw Coal & Railway Company should be filed in the office of the secretary of the interior. The remaining sections of the act made various provisions with reference to the perpetual succession, ability to sue and be sued, enactment of by-laws and regulations, and generally to do all and singular the matters and things which should be necessary or convenient to enable the said company to maintain, use, and operate their railroads and mines which it may become possessed of by virtue thereof in conformity with the provisions of the acts of congress relating to or affecting the Choctaw Coal & Railway Company, and with reference to meetings of stockholders and officers, and annual elections, and the reservation of authority in congress to, at any time, amend, alter, or repeal the act.

By an act of congress approved February 21, 1891, the provisions of the act of congress approved February 18, 1888, by which the Choctaw Coal & Railway Company was authorized to build its railroad through the Indian Territory, were extended for the period of two years, until February 18, 1894, when the time was again extended until February 18, 1896.

Further proceedings were had in the case as follows: After the filing of the answer, and upon the 19th day of April, 1895, the defendant filed his motion for the dissolution of the temporary injunction, for the reasons that (1) the petition did not state facts sufficient to constitute a cause of action, or to entitle the plaintiffs to an injunction; and that (2) the answer and affidavits of the defendants show that the defendant company has an absolute and legal right to construct its railroad over the 25-mile section in question, and the injunction should never have been granted, and should now be dissolved; and that (3) the action is improperly brought in the name of the United States, and because there is an adequate remedy at law; and that (4) because no bond was given by plaintiff. A hearing having been had on the 23d day of April, 1895, the judge of the district court, upon the 1st day of May, 1895, delivered a careful, elaborate, and able opinion upon the case, and ordered and adjudged that the temporary injunction be dissolved. The judgment of the court is in the following terms: "And afterwards, to wit, April 23rd, 1895, at 9 o'clock a. m., at chambers at Oklahoma City, O. T., pursuant to notice given as required by the order heretofore made, said cause came on for hearing on motion of defendants to dissolve the temporary injunction issued herein March 20th, 1895. Plaintiffs being present by C. R. Brooks, attorney for the United States of America for the territory of Oklahoma, and Horace Speed, attorney for the relators, and defendants by J. W. McLoud and John I. Dille, defendants submitted their evidence to sustain said motion, and plaintiffs their evidence resisting the same. Both parties having rested, and the argument of counsel heard, the case is

taken under advisement. And afterwards, to wit, May 1st, 1895, at 7:30 p. m., at chambers at Oklahoma City, O. T., pursuant to previous notice, all of the parties being present by their said attorneys, and the judge, being duly advised in the premises, finds that the route of the defendant the Choctaw, Oklahoma & Gulf Railroad Company's located line over the country in controversy, and designated in the petition and answer as 'section four,' is the one selected by the said company after a careful survey of the same, and is the most feasible and practicable route over said section; that said company prepared in due form a map of said definite route of location, and filed the same with the secretary of the interior on the — day of December, 1894, and has complied with all the requirements of law to entitle it to construct its railroad over said route; that said section four is wholly within the territory of Oklahoma; that there are no lands held by individual occupants according to the laws, customs, and usages of any Indian nation or tribe within said section four; that so much of said section six of the act of congress of February, 1888, as provides for the approval of the location by the secretary of the interior relates wholly to lands so occupied, and that such approval of the section of the route in question is unnecessary, and not required by law. It is therefore considered, ordered, and adjudged that said temporary injunction be, and the same is hereby, dissolved; to which plaintiff excepts. Plaintiffs are allowed twenty days to prepare and serve a case made. Defendants are allowed to suggest amendments, and case made to be settled on five days' notice to be given by plaintiffs to defendants. Witness my hand, this 1st day of May, A. D. 1895. Henry W. Scott, Judge."

And thereafter, upon the 23d day of May, 1895, a second order was passed in the case in the district court at Tecumseh, in Pottawatomie county, which, omitting the venue and title of the cause, reads as follows: "And now, to wit, on this 23rd day of May, A. D. 1895, it being one of the regular judicial days of the May, 1895, term of the district court of the Third judicial district in and for Pottawatomie county, O. T., this cause came on for final hearing and determination. And the court, after being fully advised in the premises, and after considering said cause, finds that the order of the judge of the district court of the Third judicial district dissolving a temporary injunction on the 1st day of May, 1895, at chambers in Oklahoma City, O. T., and all orders heretofore made, are hereby set aside and held for naught, and it is now ordered, adjudged, and decreed that upon the pleadings, proofs, and findings, by the judge of this court, of law and fact heretofore, which, with the opinion of the judge is ordered made a part of this record, that this action be, and the same is hereby, dismissed; it

being especially intended that the temporary injunction heretofore issued be dissolved and set aside, and that this proceeding be dismissed, with costs. To all of which plaintiffs except, which exception is allowed by the court. And the plaintiffs pray that a new trial be granted, and the court, after being fully advised in the premises, overruled said motion, which motion is in words and figures following, to wit: 'United States of America vs. The Choctaw, Oklahoma & Gulf R. R. Co. et al.: The plaintiff moves the court for a new trial in the entitled cause, and, for cause of new trial, says that the decision is not sustained by sufficient evidence; that the decision is contrary to law. [Signed] Horace Speed, of Counsel for Plaintiff.' To which action of the court the plaintiffs except, which exception is allowed by the court. Plaintiffs thereupon prayed an appeal to the supreme court of Oklahoma territory, which was allowed by the court; and ten days is hereby allowed said plaintiffs to make and serve a case made upon defendants. Five days are allowed for the suggestion of amendments, and case made to be settled five days after service of said case made, or ten days to appeal said cause upon transcript of the record of said cause; said record to be duly signed, settled, and certified as required by law. Done at Tecumseh, Pottawatomie county, O. T., this 23rd day of May, A. D. 1895. H. W. Scott, Judge."

Thereafter, upon the 25th day of May, a motion was filed in the case, by the defendants, to set aside the order of May 23d passed by the district court, and for a new trial, for the following reasons: (1) Because, heretofore, on the 1st day of May, 1895, the judge of the Third judicial district, at chambers at Oklahoma City, Oklahoma territory, made an order dissolving a temporary injunction theretofore issued in said cause, which order was final, and an appealable order, and thereupon, at the request of the plaintiffs, the judge of said court made an order allowing plaintiffs twenty days within which to prepare and serve a case made, which time expired on the 21st day of May, 1895; that plaintiffs, within said time, failed to prepare and serve a case made upon the defendants, and thereupon said order dissolving said injunction became a final judgment of this court, which could not be appealed from, and was a final adjudication of the plaintiff's action for the injunction herein, and the court was without jurisdiction to make the order of May 23, 1895, above referred to, and said order was contrary to law and void. (2) Because there was no trial of the cause on the 23d day of May, 1895, and no evidence whatever offered, and the defendants were not present, and were not represented by counsel, and had no notice whatever that said order would be applied for, and would be granted, and no one was present, except the counsel for the relators herein, and said order was either entered by the court upon its own motion, or upon the suggestion

of counsel for the relators. (3) Because of the happening of certain events and the going into effect of certain laws; that is, the law opening the Kickapoo country to white settlement, and the opening to white settlement of the same, since the making of the order herein on May 1, 1895, as to which defendants desire to file a supplemental answer, and hereby ask leave of the court to file the same. This motion of the defendants was submitted to the court upon the same day, and the following order was made therein: "And now, on this 25th day of May, 1895, come the defendants, and file a motion, supported by affidavit, to set aside the order herein of May 23rd, 1895, which motion is by the court overruled; to which defendants except, and such exceptions are allowed. It is further ordered by the court that the supplemental answer of defendants herein be allowed to be filed of this date, and the same is hereby ordered to be made a part of the record in this case. [Signed] H. W. Scott, Judge."

Thereupon the defendants filed their supplemental answer, which bore indorsement as follows: "Leave granted to file as of May 23rd, 1895, and prior to judgment of said date, this 27th day of May, 1895. [Signed] H. W. Scott, Judge." The supplemental answer sets forth that since the filing of the petition and answer herein, and motion to dissolve the injunction, and since the order of May 1, 1895, dissolving the injunction, the country or tract of lands described in plaintiff's petition as the Kickapoo Indian Reservation has been opened to homestead settlement by proclamation of the president, a copy of which proclamation is attached, and made a part thereof, and said country, in pursuance of said proclamation, was opened to settlement on the 23d day of May, 1895, and thereupon ceased to be, in any sense, an Indian reservation, or a reservation of any kind; and, further, showed that, since the proceedings heretofore had in this case, the territorial authorities of Oklahoma territory, consisting of the governor, secretary, and auditor of said territory, composing the board of railway assessors for said territory, have recognized defendants' right to the right of way over the 25 miles in controversy by assessing the said right of way, and said company's grade thereon, for taxation for the year 1895. The supplemental answer was verified upon belief by J. W. McLoud, attorney for the defendants.

In bringing the case to this court by petition in error, the plaintiffs make assignments of error as follows: That (1) the court erred in overruling the motion for a new trial, and in rendering judgment dismissing the action; and (2) in holding that the approval of the location of railroad required by the acts of congress, as set out in the complaint, was merely a ministerial act, not involving judgment or discretion on the part of the secretary of the interior, and that, if such acts on the part of the secretary of the interior were unnecessary, or merely ministerial, the loca-

tion could be made in 1894 different from the location in 1890, as indicated by the ruling of the secretary of the interior; and (3) in holding that the defendant company could locate its line of railroad through lands allotted to Indians in Pottawatomie county, indicated and described in the bill of complaint, and begin the construction of its road upon that line, without having the approval of the secretary of the interior; and (4) holding that the Kickapoo Indian Reservation was not, at the time the complaint was filed, and the judgment of the court was rendered, Indian country, and that over such reservation, and through the counties of Oklahoma and Pottawatomie, in said territory, and over and across public roads and highways in said counties, the defendant had a right to construct its line, without first having a map of location of said line of railroad approved by the secretary of the interior; and (5) that the defendant could locate its line of railroad as located on section 4, and over the land through which it is located in section 4, under the general laws of the territory of Oklahoma, and need not locate its line according to the provisions of the acts of congress specially authorizing the construction of such railroad, setting out the manner in which, and the conditions under which, such line should be located and constructed, and in holding that section 6 of the act of February 18, 1888, did not apply to approving of the map of the location of the right of way of defendant railroad company at the time its map of location was filed in December, 1894, as aforesaid; and (6) in holding that the act of congress of 1875 granted to railroad corporations the right to construct lines of railroad across the public lands without reference to special legislation, and that such acts governed the mode by which the defendant railroad should acquire its right of way, instead of the special acts providing the method by which said defendant railroad and its predecessor should acquire such rights of way; and (7) in holding that the provisions of the act of congress granting the rights of way to the Choctaw Coal & Railway Company and the defendant company were grants of such rights of way in present, so as to cut out and exclude the rights of the Indians, and others who, after the dates of such acts of congress, were allotted lands or took homesteads over which the line of said railroad company was thereafter located; and (8) in refusing to grant the permanent injunction as prayed in the bill of complaint, and in rendering a final decree upon the findings and conclusions indicated and set out in the order of May 23, 1895.

Richard Olney, U. S. Atty. Gen., and C. R. Brooks, U. S. Atty., for the Territory of Oklahoma, and Horace Speed, for plaintiff. J. W. McLoud and John I. Dille, for defendants.

McATEE, J. Various motions were filed by the defendant company in this court in

this case after the filing of the petition in error and transcript of record here, upon June 6, 1895. Under the direction of the court these motions were argued orally, and upon printed briefs, in connection with the argument upon the merits of the case, as presented in the transcript of the record, and will be here reviewed.

The defendant railroad company filed its motion on June 24, 1895, in this court, to require the plaintiffs to make a deposit and give security for costs. This motion was based upon rule second of the rules of practice of the supreme court of the territory of Oklahoma, which reads as follows: "No cause shall be docketed, nor process issued thereon (except in cases wherein the territory or the United States is appellant) until the plaintiff in error or appellant shall pay to the clerk, ten dollars advance fees; nor shall any civil cause be docketed until security for costs shall be given, approved by the clerk of the supreme court, conditioned for the payment of all costs for which the plaintiff in error may be liable." The argument admits that in this case no security for costs has been given as provided by the rule. It is, however, contended by the plaintiff in error that compliance with the rule is not necessary, since this is a suit by the United States, and that the United States is not required to pay costs, or to give the security here required, in order to avail itself of the rights and remedies provided by and within the jurisdiction of this court. This contention the plaintiff maintains upon the following sections of the Revised Statutes of the United States, which are a part of the judiciary act passed by congress in 1798, which reads as follows:

"Sec. 1000. Bond in Error and on Appeal. Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid.

"Sec. 1001. No Bond Required of United States. Whenever a writ of error, appeal, or other process in law, admiralty, or equity, issues from or is brought up to the supreme court, or circuit court, either by the United States or by direction of any department of the government, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent

fund of the department under whose directions the proceedings were instituted."

The sections here recited are a part of the procedure provided by congress for the supreme court and circuit and district courts of the United States, which are provided for under article 3, § 1, of the constitution of the United States, as follows:

"Section 1. Supreme and Inferior Courts. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges both of the supreme court and inferior courts, shall hold their offices during good behavior. * * *

In providing a mode of procedure for the "judicial power of the United States, * * * vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish," congress did not provide a code of procedure for the territorial courts. So far as congress has legislated with regard to territorial courts, it has legislated under the general powers which congress possesses over, and to provide a government for, the territories, and not under the constitutional authority given to it to ordain and establish one supreme court and inferior courts vested with judicial power for the United States. *Insurance Co. v. Canter*, 1 Pet. 511; *Stacy v. Abbott*, 1 Am. Law T. 84; *Benner v. Porter*, 9 How. Prac. 244. The same conclusion must be drawn from an examination of the context of the sections relied upon. Section 1000 provides that the judge shall take good and sufficient security, except in cases brought up by the United States, or by direction of any department of the government, and in section 1001, next ensuing, it is provided in what cases such security shall not be required; that is, in "Issues * * * brought up to the supreme court, or a circuit court, either by the United States or by direction of any department of the government, no bond, obligation, or security shall be required from the United States, or from any party acting under direction aforesaid," etc. The prohibition against requiring security from the United States, or from any party acting under the direction aforesaid, is in cases brought up to the supreme court of the United States, or a circuit court of the United States. The prohibition is not against bringing up the case by petition in error from the district court of a territory to the supreme court of a territory. And while the organic act of this territory provides that its district court "shall have and exercise, exclusive of any court heretofore established, the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States," the writ of error here is not to the supreme court of the United States, or to a circuit court of the United States, but to the supreme court of the territory of Oklahoma. It cannot be con-

tended that these sections are imported into the practice of this territory. "Laws regulating the proceedings of the United States courts are of specific application, and are, in truth and in fact, locally inapplicable to the courts of a territory. * * * The acts of congress respecting proceedings in the United States courts are concerned with, and confined to, those courts, considered as parts of the federal system, and as invested with the judicial power of the United States expressly conferred by the constitution. * * * They were not intended as exertions of that plenary municipal authority which congress has over the District of Columbia and the territories of the United States. They do not contain a word to indicate any such intent. The fact that they require the circuit and district courts to follow the practice of the respective state courts in cases at law, and that they supply no other rule in such cases, shows that they cannot apply to the territorial courts. As before said, these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction. * * * As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject also, however, to the right of congress to revise, alter, and revoke at its discretion. * * * From a review of the entire past legislation of congress on the subject under consideration, our conclusion is that the practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, subject, as before said, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves." *Hornbuckle v. Toombs*, 18 Wall. 648-657. There is in force in the territory of Oklahoma, and relating to appeals on writs of error from a district court of the territory to this court, no provision under which the United States is exempted from the rule of procedure of this court, under which it is provided that "no civil cause shall be docketed until security for costs shall be given," etc. We understand the rule to be that unless such special exemption is provided for, if the United States comes voluntarily into the court, it must do so under similar circumstances and upon the same conditions as if it were a private party, unless, indeed, exemption should be conceded to it upon the ground of sovereignty. *U. S. v. Thompson*, 93 U. S. 588; *U. S. v. Union Pac. R. Co.*, 105 U. S. 263. And such exemption is not relied upon in this case, since the liability here discussed has been provided against by the requirement made in behalf of the United States, and taken by those who represent the inter-

est of the United States, if it has any in the case, by the agreement, filed with the bill of complaint, that the relators should be responsible to the United States for its costs incurred therein. The case of *U. S. v. Bryant*, 111 U. S. 500, 4 Sup. Ct. 601, has been cited to support the contention of plaintiff that sections 1000 and 1001 relate and are applicable to writs of error from the district courts of this territory to the supreme court of this territory. The case does not support the contention. This was an action at law by the United States in the circuit court of the United States for the Southern district of Alabama, and cannot aid us in reference to the application of those sections to proceedings in the territorial courts.

If the United States should in fact itself be exempt from the application of the rule of court requiring security for costs, we should yet hold that the relators are themselves the real parties in interest, and that, as such, they would not be entitled to the benefit of the exemption thus provided in behalf of the United States. They, being thus the real parties in interest, and having invoked the name and authority of the United States in the bringing of this action, would not be permitted to prosecute it for their own benefit without complying with the rule. In the absence of any special provision, this action must be prosecuted in the name of the real parties in interest, and, if these parties are here with any legal rights, it is by reason of being here in that capacity. Article 4, § 26, Code Civ. Proc. (page 757, St. Okl.); *State v. Commissioners of Jefferson Co.*, 11 Kan. 66; *Nixon v. School Dist.*, 32 Kan. 511, 4 Pac. 1017; *Atchison, T. & S. F. R. Co. v. State*, 22 Kan. 17. The view here taken was undoubtedly that of the department of justice, in charge of these proceedings, and has been provided against herein, since there was filed in the district court on March 19, 1895, in conjunction with and annexed to the bill of complaint, an agreement and obligation to the United States, which recites that William S. Search, Samuel Clay, Wright Christian, George A. Outcalt, and Edward J. Kelley hereby agree that their names shall be used as relators in the above-entitled cause, and that they will be responsible to the United States for its costs incurred therein. We hold that the defendants in this action are entitled to an order requiring the plaintiff herein to give security for costs, to be approved by the clerk of the supreme court, conditioned for the payment of all costs for which the plaintiffs in error may be liable, before they could require any further proceeding or demand relief herein.

Upon June 24, 1895, the defendant also filed his motion in the cause to strike from the transcript filed in the cause the affidavits of Dunn, Webster, and others, together with certificates, letters, map, and opinion of Judge Henry W. Scott, for the reason that "none of the same were made a part of the record in this case by a bill of exceptions or case made,

and therefore are no part of the record, and were improperly filed with said transcript," and also moved the court to tax the costs of making the portions of the transcript above referred to, to the plaintiffs herein, for the reason that the same were improperly filed with the transcript in this court. Two methods are provided by the statutes of this territory, either of which may be adopted in bringing appeals to this court from the district courts in all civil causes: (1) By a transcript of the record; and (2) by case made. The Code of Civil Procedure (chapter 66, pp. 855, 856, St. Okl. 1893) provides, with reference to the second method of taking an appeal from the district court, that:

"Sec. 564. In all actions hereafter instituted by petition in error in the supreme court, the plaintiff in error shall attach to and file with the petition in error, the original case made, filed in the court below, or a certified transcript of the record of said court. * * *

"Sec. 565. A party desiring to have any judgment or order of the district court, or a judge thereof, reversed by the supreme court, may make a case made, containing a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of to the supreme court.

"Sec. 566. The case so made, or a copy thereof, shall, within three days after the judgment or order is entered, be served upon the opposite party or his attorney, who may within three days thereafter suggest amendments thereto in writing, and present the same to the party making the case or to his attorney. The case and amendments shall be submitted to the judge, who shall settle and sign the same, and cause it to be attested by the clerk, and the seal of the court to be thereto attached. * * *

"Sec. 567. The court or judge may, upon good cause shown, extend the time for making a case made and the time within which the case may be served; and may also direct notice to be given of the time when the case may be presented for settlement after the same has been made and served, certified and signed by the judge who tried the cause."

The final judgment or order was made by the judge of the district court at chambers, on the 1st day of May, 1895, by which it was ordered that "the temporary injunction be, and the same is hereby, dissolved, to which plaintiff excepts." By this order the plaintiffs were allowed 20 days to prepare and serve a case made. Thereafter, on the 23d day of May, 1895, "it being one of the regular judicial days of the May term of the district court," the court finds that the order of the judge of the district court of the Third Judicial district, dissolving the temporary injunction on the 1st day of May, 1895, at chambers, in Oklahoma City, O. T., and all orders heretofore made, are hereby set aside and held for naught." And the court then proceeded especially to dissolve and set aside the order of May 1, 1895, to all

of which the plaintiff excepted. The plaintiff thereupon made a motion for a new trial, upon the following grounds: (1) That the "decision is not sustained by sufficient evidence"; and (2) that the "decision is contrary to law,"—which was overruled, to which the plaintiff excepted. Upon which the plaintiff prayed an appeal, and the order of the court then passed provided that "ten days is hereby allowed said plaintiffs to make and serve a case made upon the defendants." The first judgment, entered May 1, 1895, and the second judgment, dated May 23, 1895, are, in all essential respects, identical, except that the first judgment includes no statement of a motion for a new trial with ruling and exception, and with the further exception that in entering the second judgment the court undertook to allow an appeal to the supreme court, and also allow from that date "ten days to make and prepare a case upon the defendants."

It is provided by the Code of Civil Procedure (section 320, p. 814, St. Okl.) that "the application for a new trial must be made at the term the verdict, report or decision is rendered; and, except for the cause of newly discovered evidence, material for the party applying, which he could not with reasonable diligence, have discovered and produced at the trial shall be within three days after the verdict or decision was rendered, unless avoidably prevented." The decision rendered May 1st was in all respects final. The decision rendered May 23, 1895, was, as to the material thing ordered and accomplished by the judgment,—that is, the dissolution of the temporary injunction,—in no respect more effective in its terms than that which had been passed by the court on May 1st. This was an injunction proceeding, properly heard at chambers, and the fact that the first judgment was entered at chambers made it in no respect invalid or ineffective. The fact that the second judgment was entered upon a "judicial day," and by the court, had no virtue, nor could it make a judgment dismissing the temporary injunction in any respect more final or conclusive. There could have been no reason why the court should have undertaken to set aside by the judgment entered May 23d the final judgment which had been entered on May 1st in the same matter, except a strong desire to oblige the plaintiffs in error, by enabling them to make their motion for a new trial within the time prescribed by the statute, if possible, and for the purpose of extending the time in their behalf, within which to prepare and serve a case made for the supreme court, or "ten days to appeal said cause upon the transcript of the record in said cause." Our Code of Civil Procedure has been adopted from the state of Kansas, and this court uniformly follows the principles of interpretation and construction which have been applied to it by the supreme court of that state. It has been by that court repeatedly held, with reference to the motion for a new trial, that a

motion must be filed in strict conformity with the provisions of the statute, i. e. within "three days after the verdict * * * was rendered, unless unavoidably prevented" (Mercer v. Ringer, 40 Kan. 191, 19 Pac. 670; Bubb v. Cain, 37 Kan. 692, 16 Pac. 89; McDonald v. Cooper, 32 Kan. 58, 3 Pac. 786), and that when no showing has been made that the party has been unavoidably prevented from filing his motion within the time specified, the court cannot consider or review the errors occurring upon the trial (Odell v. Sargent, 3 Kan. 73; Mitchell v. Milhoan, 11 Kan. 461; Nesbit v. Hines, 17 Kan. 316; Dyal v. City of Topeka, 35 Kan. 62, 10 Pac. 161). And it has been by the same court uniformly held that the district judge has no power to extend the time for making a case after the time fixed by the statute, and by the order of the court, has once elapsed. Insurance Co. v. Koons, 26 Kan. 215; Dyal v. City of Topeka, 35 Kan. 62, 10 Pac. 161; Dodd v. Abram, 27 Kan. 69. When, therefore, the court, in its judgment in this case, of May 1, 1895, which was final as to the only matter involved, to wit, the revocation of the temporary injunction, extending the time, upon the application of plaintiffs, for 20 days, to make a case made, and when the time so extended had expired, upon the 21st day of May, the district judge had no power to extend the time for making a case. The power did not exist in him, in any form. He was without authority. He could not extend the time by an order intended simply for that purpose, nor could he do so by any method less simple and direct. Not having jurisdiction to extend the time directly, he could not do so by indirection, and hence the order extending the time for making a case made after the time had expired within which the case was to be made, under the order of May 1st, was void, notwithstanding the fact that it was attempted to be accomplished through the instrumentality of revoking the judgment of May 1st, upon the temporary injunction, and renewing the order for extension of time by the new order dated May 23, 1895, and purporting to be a final judgment, which assumed to be the only order by which the temporary injunction was then, for the first time, revoked. The second decision, of May 23d, purporting to be a final judgment, can have no effect to extend the time specified in the statute for the benefit of the plaintiffs in error, nor have any other effect except as a substantial testimonial of the willingness of the district judge to strain the limits of his jurisdiction in an effort to relieve the plaintiffs in error, and to aid them in appealing to this court for review.

The large number of affidavits, certificates, letters, and the map, which are furnished and annexed to the petition in error, are certified to by the clerk of the district court of the Third judicial district as "a true, full, and complete copy of the proceedings and

papers in the case of The United States of America v. The Choctaw, Oklahoma and Gulf Railroad Company and George S. Good & Company and others, a copartnership, defendants, as the same remain on file in my office." Together with other evidences of its insufficiency as a case made, it has not "been submitted to the judge, who shall settle and sign the same." The evidence consisting of affidavits and papers purporting to have been used as evidence at the hearing below are not, therefore, in such form as that they can be reviewed by this court. We understand the statute prescribing the method of making up an original case made, and providing for its certification, by sections 564, 565, 566, and 567 of the Code of Civil Procedure, above referred to, constitutes the only and exclusive method by which evidence may be brought into this court in such form as that it may be reviewed and examined upon error. This is the case, unless, indeed, it should appear upon examination that, as is claimed by the plaintiffs in error, "the decree adopts the opinion, and expressly makes it a part of the record, and the proofs are also made a part of the record; that the findings are all in the opinion"; and that this order of the court, making the opinion and proofs referred to therein parts of the record, was sufficient for that purpose.

It is, by the decree of the district court dated May 1, 1895, stated that the "defendants submitted their evidence to sustain said motion, and plaintiffs their evidence to resist the same, and both parties having rested," and by the subsequent order, dated May 23d, it is "ordered, adjudged, and decreed that upon the pleadings, proofs, and findings by the judge of this court, of law and fact, heretofore had, with the opinion of the judge, is ordered made a part of this record."

We hold that the decree of May 23, 1895, is void as to either of these purposes sought to be accomplished by it, by which a motion for a new trial can be made, or the evidence from the trial in the lower court be brought here for the review of errors, in lieu of the method prescribed by the specific and exclusive provisions which are made by the statute for the bringing of evidence into this court by a case made, by which "hereafter in all actions instituted in the supreme court the original case made shall be attached to the petition in error," and that such case made shall be "served upon the opposite party or his attorney for the suggestion of amendments," and that the case so made shall then "be presented for settlement to the judge who shall settle and sign the same and cause it to be attested by the clerk," etc. In support of their proposition, however, we are referred by the plaintiffs in error to section 192, Elliott, App. Proc.; to McCullagh v. Allen, 10 Kan. 121; to Stapleton v. Orr, 43 Kan. 170, 23 Pac. 109; to Thomas v. Tanner, 14 How. Prac. 426; to Weyman v. Bank, 59 How. Prac. 331; to Auld v. Smith, 23 Kan.

42; to *Smith v. Auld*, 31 Kan. 266; to *Mitchell v. Insley*, 33 Kan. 658, 7 Pac. 201; to *Redden v. Metzger*, 46 Kan. 288, 26 Pac. 689; and to *Lumber Co. v. Buchtel*, 101 U. S. 633. To review these authorities:

It is stated in *Elliot*, App. Proc. § 192, that "the statute requires an order of the court, in the nature of a special order, and, without such an order, instruments of evidence, instructions, or the like, cannot be regarded as in the record, unless, of course, brought in by a bill of exceptions." The reference here made is to the statute of the state of Indiana, which provides that "the transcript of motions, affidavits, and other papers, * * * depositions, and papers filed as mere evidence, shall not be certified, unless made a part of the record by exception or order of court." We do not practice under such a statute. Our statute provides (Code Civ. Proc. § 430, p. 831) as follows: "The record shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court. * * * Evidence must not be recorded."

But it is urged by the plaintiff, upon the authority of the Kansas cases, that the opinion contained findings of fact and conclusions of law, and, "by order of the court, all are made a part of the record." We do not find that this conclusion can be drawn from the authorities cited from that state. Our Code of Civil Procedure, adopted from Kansas, provides (section 302, St. 1893, p. 812), that: "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its findings, except generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state, in writing, the conclusions of fact found, separately from the conclusions of law." It will be here seen (1) that, in the absence of an express request by one of the parties to the cause, it is not made the duty of the "court to state its findings, except generally"; and (2) that if one of the parties, with a view of excepting to the decision of the court upon the questions of law involved in the trial, request it, it shall then become the duty of the court to state in writing the conclusions of fact found, separately from the conclusions of law. If the court, not being requested, and not having in view the taking of exceptions to its decisions upon the questions of law involved in the trial, does yet volunteer to prepare a written opinion, including a recitation of the facts, or a part of them, in so far as it sees fit to do so, it is yet acting under that provision of the statute which only makes it its duty to find no further or otherwise than "generally for the plaintiff, or for the defendant." The voluntary statement of his opinion in writing thus made, including such facts as he would see fit to include in his opinion, is not such

special finding of fact and conclusion of law as is provided for by the statute, when either party to the cause so requests it; and such voluntary action of the court has been universally treated as a general finding, only, notwithstanding any case which it may have taken in the preparation of a written opinion. Such general finding, under the voluntary action of the court, is radically different from the special findings of fact and conclusions of law provided for under the second branch of the statute. Such special findings of fact and separate conclusions of law, when made by the court upon the request of either party, and entered upon the journal, although not signed by the judge, or made a part of the record by a bill of exceptions, have yet been held to be a part of the record by the supreme court of the state of Kansas, in *McCullagh v. Allen*, 10 Kan. 121. Nor do the other Kansas cases go further. It is urged by the plaintiff that in the case of *Stapleton v. Orr*, 43 Kan. 170, 23 Pac. 109, "the evidence in the case is attached to the opinion, and referred to in the opinion as a part of it. Thereby the evidence becomes a part of the record." The fact in this case, as extracted from the opinion of the court, was that, upon the motion to dissolve the attachment, "we could not, we think," examine the testimony submitted before the district court, and "do so in order to determine whether or not the order of dissolution was correct; but, as the defendant has made it a part of his answer, we certainly can treat it as a part of the pleadings in this case." It will thus be seen that the evidence was not attached to the opinion, and referred to in the opinion as a part of it. The case does not aid us.

The case of *Lumber Co. v. Buchtel*, 101 U. S. 633, cited by the plaintiff in support of the proposition that "the findings of a referee upon which the judgment was rendered, like the verdict of a jury, constitutes an essential part of the record of the case." We find, upon an examination of the case, that exceptions were taken to the report, and overruled by the court below. That case, therefore, came regularly into the supreme court by a bill of exceptions, as we must infer from this statement in the opinion of the court, and the case does not support the statement of plaintiff's brief that the referee's report would form part of the record without such exceptions.

The New York practice, pressed upon our attention in the brief of plaintiffs, in the case of *Thomas v. Tanner*, 14 How. Prac. 426, and *Weyman v. Bank*, 59 How. Prac. 331, does not support their contention. It is, in the syllabus of the former case, declared that: "The decision, which, by the 267th section of the Code, is required to be given in writing and filed by the clerk, is a very different thing from the opinion which the judge may think proper to write. The decision can only appear by his signature or allocator. The opinion never should be carried bodily into the record." On the contrary, in the absence of

such a statutory provision as that found in the state of Indiana, it has been repeatedly held that no evidence, depositions, affidavits, judge's minutes, notes, or opinions are a part of the record until they are embodied in a bill of exceptions or case made, and that neither the action of the clerk, by his certificate, nor the power of the judge himself, unless authorized by statute, can be effective to incorporate these matters in the record in any other manner than that which they are limited to, as prescribed by the legislative will. The provisions of the statute, as above set out, are made for the protection of the defendant in error. He has a right to avail himself of them, and the courts have no power to deprive him of the benefit of those provisions, if that is demanded. *Haraszthy v. Horton*, 46 Cal. 545; *Thorne v. Hammond*, 46 Cal. 531; *Mill Co. v. Vandall*, 1 Minn. 250 (Gil. 195); *Baltimore & P. R. Co. v. Trustees of Sixth Presbyterian Church*, 91 U. S. 130; *Lumber Co. v. Pennington*, 2 Dak. 467, 11 N. W. 407; *Backus v. Clark*, 1 Kan. 287. The finding of a court, no matter how full and exhaustive or how complete and adequate may appear to be its statement of facts, unless it appears by the record that it was made, upon the request of one or both of the parties, as a special finding of fact and conclusion of law, will be but a general finding, and not a part of the record, unless made so by a bill of exceptions. *Conner v. Town of Marion*, 112 Ind. 517, 14 N. E. 488.

In an additional brief upon this motion, filed by the plaintiffs July 26, 1895, the cases of *Tolman v. Railroad Co.*, 92 N. Y. 353, and *Snyder v. Snyder*, 96 N. Y. 92, are cited as supporting the proposition that the order of the court made the opinion and proofs referred to therein parts of the record, and effectual in bringing the evidence here to review. The case of *Tolman v. Railroad Co.* was an appeal from an order of the general term affirming an order of the special term denying a motion to compel the plaintiff to file security for costs. The only question in the case was whether the lower court could "exercise its discretion in requiring security for costs." The question was jurisdictional. The court declared that it "did not possess the power," and filed its decision in making the order. There was no evidence in the record. It was simply a proposition of law, and the court of appeals looked into the decision in order to ascertain upon what grounds the lower court declared "its want of power to grant the application." It concluded, upon a comparison of sections of the New York statute cited in the decision of the lower court, that "the opinion constitutes an important and material part of the record, and is expressly referred to in the orders," declaring at the same time, as a general proposition, that "while the opinion cannot ordinarily be referred to, to show the ground upon which an order is made, this case is not brought within any such rule. The reason for the rule is, it forms no part of the

record, and, therefore, cannot be referred to, to explain the meaning of the record." Upon the authority of this case, the court again declared in *Snyder v. Snyder*, 96 N. Y. 92, that, "notwithstanding the general rule that an appellate court is not to look beyond the order to ascertain the ground of judgment, it may do so when the terms of the order are ambiguous, or when the order itself refers to the opinion." The opinion does not cite any statute upon the subject, nor show what the statute of the state of New York provides shall be the contents of the record brought to the court of appeals, nor in what manner the contents of such record shall be certified, as we have seen has been fully and carefully provided for by our own statute, and the interpretations made thereupon by the courts of that state, from which our Code was adopted. The rule which now seems to be accepted in New York, upon the strength of the case of *Tolman v. Railroad Co.*, is not the rule here. And these authorities do not support the proposition that evidence can be imported into the record by an order of the court or of the judge. Such a holding would render nugatory the provisions of the statute for making up the record, and substitute for them the choice of the judge, when, in ruling upon an appealable matter, he might see fit to exercise his discretion, or indulge his caprice. The case of *In re Holbrook*, 99 N. Y. 543, 544, 2 N. E. 887, also cited, furnishes nothing further upon the matter. We must, therefore, hold that the opinion of the court, including such statements of fact as may be contained therein, is not a part of the record by the order of the judge; that he is not authorized by the statute of this territory to make such an order; and that the order so made in the decree of May 23, 1895, would have no such effect if the decree passed May 1, 1895, had not been final as to the dissolution of the temporary injunction, which was the only matter then to be determined, and exhausted the jurisdiction of the court in that matter. The motion to strike from the transcript filed in the case the affidavits of Dunn, Webster, and others, together with certificates, letters, map, and opinion of the judge of the district court, etc., as described in the motion, for the reason that "none of them were made a part of the record in this case by a bill of exceptions or case made, and are, therefore, no part of the record, and were improperly filed with the said transcript," and "to tax the costs of making the portions of the transcript, above referred to, to the plaintiffs, for the reason that they were improperly made and filed with the transcript in this court," will be sustained.

It has also been moved by the defendants in error that the court affirm the judgment of the court below, without consideration of the merits of this action, for the following reasons: (1) For the reason that the decision of the court below was based upon evidence which has not been made a part of the record by case made or bill of exceptions, and is not before this court for review; and that

no other questions are presented by the record for the consideration of this court. This motion presented the question whether, evidence having been produced at the hearing below, and the judgment of the court having been rendered thereupon, and the evidence not having been brought here by a case made, this court can go into an examination as to whether the trial judge erred in rendering the judgment which he did. It has been uniformly held by the supreme court of the state of Kansas that, "in order to have the question whether the evidence supports the findings and judgment examined, a case made should show that it contains all the evidence." *Hill v. Bank*, 42 Kan. 364, 22 Pac. 324. And it has been uniformly held by this court in the case of *W. A. Wood Co. v. Farnham*, 1 Okl. 375, 33 Pac. 867 (Burford, J.), that: "Unless the bill of exceptions is shown on its face to contain all the evidence, this court will not review the action of the court below in overruling a motion for a new trial because the verdict is not sustained by the evidence." *Railway Co. v. Henly*, 88 Ind. 535; *Railway Co. v. Murdock*, 82 Ind. 381; *Swift v. Stine* (Wash. T.) 13 Pac. 904; *Forelander v. Hicks*, 6 Ind. 450. Notwithstanding the fact, therefore, that a large number of affidavits are annexed to the transcript which has been brought here, they will not be examined or reviewed by this court. No means are furnished to us by which the correctness of the determination upon the facts by the district judge can be examined into, and, under such circumstances, the practice has been necessary and uniform, in both federal and state courts, to affirm the decision of the district judge. Every presumption is in favor of the correctness of the finding of the trial court upon the facts, if it is a court of general jurisdiction, until the contrary is made to affirmatively appear. *Altshiel v. Smith*, 9 Kan. 90; *James v. Bank*, 7 Wall. 692; *Mullaney v. Humes*, 47 Kan. 99, 27 Pac. 817; *Hopkins v. Hopkins*, 47 Kan. 103, 27 Pac. 822; *Swift v. Stine* (Wash. T.) 13 Pac. 904; *Bedford v. Ruby*, 17 Neb. 97, 22 N. W. 76; *Roehl v. Roehl*, 15 Neb. 655, 19 N. W. 632. But the petition, answer, and judgment have been properly brought here, and the question arises whether the plaintiffs are entitled to relief in this court by way of judgment on the pleadings. The Code of Civil Procedure of this territory (section 424, p. 830, St. 1893) provides that: "Where, upon the statement in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though the verdict has been found against such party." Upon a precisely similar statute in the Code of Civil Procedure of the state of Indiana, the supreme court of that state has repeatedly held that, no such motion having been made at the trial, and the defendant not being thereby notified of defects which he would be entitled to amend in the furtherance of justice, and since no opportunity was afforded the trial court to consider and decide the question, the sound

rule of law is that the question of the right of the party to judgment on the pleadings cannot be first made on appeal. *Cupp v. Campbell*, 103 Ind. 213, 2 N. E. 565; *Dunham v. Courtmay*, 24 Neb. 627, 39 N. W. 784; *Fowler v. Bank*, 113 N. Y. 450, 21 N. E. 172; *Willson v. Fuller*, 9 Kan. 181; *Railroad Co. v. Duckett*, 20 Kan. 623. We hold, upon this point, that the defendants are entitled to have the judgment below affirmed without looking into the merits of the action.

In its motion to this court for the affirmation of the judgment below without looking into the merits of the action, the defendant assigns as a second reason: "(2) That the record fails to show that either the United States or the persons upon whose relation this action was brought have any interest in the subject of the action, or would be in any way affected by the construction of defendant's road over section four, as mentioned in the petition, or in any way interested in obtaining the relief prayed." The Code of Civil Procedure of this territory provides (page 767, c. 68, § 26) that: "Every action must be prosecuted in the name of the real party in interest. * * * If the relators, therefore, are entitled to prosecute this action, it is because they are the real parties in interest. When the question is one of public right, and the object of the proceeding is to compel the performance of a public duty or to restrain the commission of a public wrong, the people are regarded as the real party, and the action must be brought in the name of the territory, upon the relation of the prosecuting officer, or upon the relation of some member of that public, who has a personal, special, or peculiar interest in the result, as a part of the public. The decided weight of authority supports the proposition that, where relief is sought merely for the protection of private rights, the relator must show some separate and distinct personal interest in the matter, since he is regarded as the real party, and his rights must clearly appear. *High*, Extr. Rem. § 431; *Pumphrey v. Mayor*, etc. of Baltimore, 47 Md. 145; 28 Am. Rep. 446, and note 448; *Dane v. Derby*, 89 Am. Dec. 740, note. The interest of the relators must appear in the petition. If it is sought in this action to prevent a wrong to the public, the petition should, at least, show that the relators are citizens or residents, and, as such, are interested in the execution of the laws. If the action is brought by the relators for the protection of private rights, they should show in the petition some personal or special interest in the subject-matter. The petition shows neither. The relators are neither described, nor is it shown in any way in the pleadings that they are citizens, or even residents, of the territory, or of the United States. No interest is in any manner exhibited which would entitle them to appear as seeking redress and relief in the preservation of either public or private rights. The relators appear in

the action as mere volunteers, and as such are not entitled to the relief sought. 2 High, Inj. 1556; State v. Board of County Com'rs, 11 Kan. 66; State v. Marston, 6 Kan. 524; State v. McLaughlin, 15 Kan. 228; Smith v. Houston, 6 Ohio, 101; Putnam v. Valentine, 5 Ohio, 187.

It is alleged in the petition that the building of the defendants' line, in the manner and at the places to be enjoined, is a public nuisance; and in that case the petition must show that the relators have suffered some special or peculiar injury, independent of, and distinct from, the common and general injury shared by the public alike. No such special or peculiar injury to the relators is alleged or shown in the petition. 2 High, Inj. 1555; Bigelow v. Bridge Co., 14 Conn. 535; Doolittle v. Supervisors, 18 N. Y. 160; Hinchman v. Railroad Co., 17 N. J. Eq. 75; Williams v. Smith, 22 Wis. 594. It cannot be claimed that this is an action in which the United States itself is the real party in interest. If it were in fact so, and this is a proceeding in which the United States is the real party in interest, there would then be a misjoinder of parties. The action would be the action of the United States, in which the relators have been improperly joined. The petition is verified by each of the relators, respectively. This verification has been made in pursuance of the provision of Code Civ. Proc. § 108 (page 780, St. Okl. 1893), which is that: "In all actions, allegations of the execution of written instruments * * * duly verified by the affidavit of the party, his agent or attorney, shall be taken as true," etc. And since the verification does not show that it was made by agents or attorneys, and since the statute provides that such verification of pleadings may only be made by the party, his agent or attorney, it must have been made by the affiants, who, being themselves the relators, believed themselves to be, and accepted responsibility as, the real parties in interest. Before the institution of this suit, an agreement was executed by the relators, by which they bound themselves that they would be responsible to the United States for its costs incurred therein. This agreement was filed with the petition in the district court at the time the suit was brought, as has been stated, and the fact that it was taken by the United States from the relators, and that the relators verified the petition in their own behalf, as the real parties in the case, abundantly shows that the action, while it was instituted in the name of the United States of America, was instituted for the benefit of the relators; that it is a suit to protect a private interest, and that the permission to use the name and authority of the United States for the institution of the action was only permitted upon the execution of this agreement; and that the relators, and not the United States, have been the active, interested, and real

parties in interest, and that the United States was to stand no otherwise engaged than to protect the interests of the relators themselves. If the United States had any real interest in the matter in controversy here, it is able, and it is proper that it should be responsible for and defray its own costs. The attorney general would not, under such circumstances, call upon private persons to secure the United States against the payment of the expenses of litigation on its behalf. The United States comes into court, if it comes at all, upon precisely the same footing, and upon the same conditions, with private persons. It must show its interest. It must show that it has been, or is itself about to be, prejudiced by some action of the defendant or defendants. It must show that it has some pecuniary or other interest at stake. Or, if suit is brought by the United States for the protection of some public interest, or, at the relation of private parties, for the protection of some private interest, it must appear that there is some obligation subsisting under which it is incumbent upon the United States to litigate in behalf of the public, or of those who offer themselves as relators in the proposed litigation. If these conditions, or some of them, do not appear, the action cannot be sustained. And it has been declared by the supreme court of the United States that "if the fact is manifest that the suit has actually been brought for the benefit of some third person, and that if no obligation exists which requires the United States to bring it, then the suit must fail." U. S. v. San Jacinto Tin Co., 23 Fed. 279; Id., 125 U. S. 235, 8 Sup. Ct. 850; U. S. v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1063.

So much has been decided. But is, in fact, the United States the redresser of public or of private wrongs? If the federal government is a government of delegated powers, it is incumbent upon the plaintiffs to show that some power has been conceded by the constitution or laws to the United States, under which it is authorized to conduct such proceedings as these. Under our government, power goes from the people to the government, and the authority assumed by the attorney general, in England, to institute, in his own name, proceedings of a character similar to this, as cited to us in the brief of plaintiffs, has no existence. Nor does the practice in the state of Massachusetts, similarly cited by plaintiffs upon the authority of the case of Attorney General v. Algonquin Club (Mass.) 27 N. E. 2, aid us. Whatever the authority of the attorney general may be in England, or the practice, under a state statute or otherwise, may be in Massachusetts, the plaintiffs here are the United States ex rel. Search and others, and the attorney general appears, not as the party in interest, or as the actor bringing the suit in his own name, but as attorney general, acting in the usual capacity of attorney, in behalf of the plaintiffs in the case, in the conduct of the legal proceedings in court. If is

fact a public wrong is about to be committed, and this action is brought to restrain it, it would be brought, not in the name and upon the authority of the United States, but in the name of the territory, on relation of the attorney general of the territory, or in the name of the territory of Oklahoma, upon the relation of an individual of that public, naming him, who is personally affected by such wrong, and this interest and damage must affirmatively appear by the petition. This doctrine has been held by this court in the case of *Territory v. Chicago, R. I. & P. Ry Co.* (1894, no opinion filed). Upon the considerations herein mentioned, we hold that the judgment below should be affirmed by this court, without looking into the merits of the action, because neither the United States nor the persons by whom the action was brought have shown any interest in the subject of the action, or have shown that they are in any way interested in obtaining the relief prayed for.

For a third reason urged by the defendants why the judgment below should be affirmed without looking into the merits of the action, the defendants allege: "(3) For the reason that plaintiffs' cause of action, as set out in the petition, is based wholly and solely upon the secretary of the interior's alleged disapproval of section four of the route of the defendants' road; that defendants, by their third paragraph of answer, set up an affirmative defense by alleging, among other things, that, in addition to the grants contained in said several acts of congress (mentioned in the petition and answer), the defendant the Choctaw, Oklahoma and Gulf Railroad Company, has a right to construct, equip, and operate its road over and upon the route designated on the said map of section four, under and by virtue of the laws of Oklahoma territory; that said company, by resolution of its board of directors, entered in the records of its proceedings, designated the route of its said road from the west line of the Seminole Nation, Indian Territory, to Fort Reno, Oklahoma territory, in the manner and as required by the laws of said territory, and filed a copy of such record, certified by the president and secretary of said company, in the office of the secretary of the territory, and caused the same to be recorded as provided by law; that the route designated by said resolution begins at the east end of said section four, and extends westward to the west end thereof, on the route designated on said map of section four, and is in every respect the same route; that to this answer plaintiffs did not file a reply, and thereby admitted said facts to be true, which warranted the judgment of the court below; and for the further reason that the evidence under this paragraph of defendants' answer is not in the record, and this court cannot determine the facts in relation thereto, except as admitted by the plaintiffs' failure to reply to defendants' answer, and the judgment of the court below will be pre-

sumed to be in accordance with the evidence." Section 128 of the Code of Civil Procedure (St. Okl. 1893, p. 782) provides that: "Every material allegation of the petition, not controverted by the answer, and every material allegation of new matter in the answer, not controverted by the reply, shall, for the purposes of the action, be taken as true." Since no reply was filed by the plaintiffs, and since the third paragraph of the answer of defendants, set forth in this motion, constitutes new and affirmative matter, and was not controverted by the reply, its allegations must, for the purposes of the action, be taken as true. Whether these allegations constitute such material matter as would, of itself, be an adequate defense to the action is a proposition which will be hereinafter examined. It was said by Judge Brewer in *Altschiel v. Smith*, 8 Kan. 63, that inasmuch as there was no information upon which the district judge acted, although there were some copies of affidavits in the transcript and the certificate of the clerk, showing that they were on file the day after the decision, and inasmuch as it had been decided in the case of *Backus v. Clark*, 1 Kan. 303, that affidavits on a motion in the lower court, to become a part of the record so as to be reviewable by the supreme court, must be included in a bill of exceptions, and "as all presumptions are in favor of the correctness of the decision of the judge of the district court, and we are not placed in possession of the testimony upon which he acted, we have no alternative than to affirm the decision." We therefore find that the plaintiffs would not be permitted to prosecute this action further, for their own benefit, without complying with the rule of this court requiring security for costs; that while a large number of affidavits, map, and opinion accompanied the transcript of record, they have not been brought here in such manner as to enable us to review the evidence; that the affidavits, map, and opinion should be, therefore, stricken from the files, and the costs of bringing them here taxed, as prayed in the motion, to the plaintiffs; that, the findings and judgment of the district court having been made upon the facts produced in evidence before him, the judgment cannot be inquired into and reversed, owing to the absence of such evidence; that the defendants are entitled to have the judgment affirmed on the pleadings, without looking into the merits of the action, no motion for such relief having been made below, and since the application for such relief cannot be made for the first time in this court, and because it does not appear that the United States has any interest in the subject-matter of the case, and that the interest of the relators has not been made to appear, either in the subject-matter of the litigation, or even that they are residents or citizens of the territory, or of the United States. The case will therefore, and for these reasons, be dismissed, and the judgment of the lower court affirmed. This is a legal right of the

defendants, of which, since they are here demanding it, they cannot be deprived.

It is, however, in view of the great importance of the case, and the extensive interests involved, considered by the court desirable to examine the legal questions proposed in the pleadings, and concluded in the judgment of the court below, and to express their views thereupon, and this examination will therefore now be made.

The sole question in the case is whether, upon the facts presented by the pleadings and the acts of congress therein recited and referred to, the defendant company may proceed to construct and operate its road, notwithstanding the fact that the secretary of the interior on the 15th day of February, 1895, disapproved the map of the proposed new route, except as the same coincides with the old survey, by writing on the map: "Department of the Interior, February 15th, 1895. The within map is hereby disapproved, except where said line coincides with the line shown upon the original map of the fourth section, filed in the Indian office in 1890. [Signed] Hoke Smith, Secretary." The object must be to discover the purpose for which, and the object to be promoted by, that provision of section 6 of the act of congress of February 18, 1888, which provides: "That when a map showing any portion of said railway company's located line is filed as herein provided for, said company shall commence grading said located line within six months thereafter, or such location shall be void; and said location shall be approved by the secretary of the interior in sections of twenty-five miles before construction of any such section shall be begun." The concessions made by the act of congress referred to were made seven years ago. Within this period important political and social changes have occurred in the Indian Territory. In the area of country to which the acts of congress herein recited respectively relate, semi-civilized tribes, under the close and paternal guardianship and protection of the government, and living and holding all their interests in the lands in common, under the laws, usages, and customs of Indian tribes, trusting to the protection of the United States government, its legislature, and its various civil departments, together with its army, for their protection, under all circumstances of negotiation, and at all points of contact with the white race, have given place to that white race itself. Rights of possession and occupancy, and the whole Indian interest, as such, upon this part of the public domain, have been extinguished, and the possession, and a vested interest in the ownership, of the whole country have devolved upon individual Indians, who have received allotments of specific portions of the lands, in which they are now entitled to acquire an absolute and private ownership, separate from any ownership in common, or otherwise, with other Indians, and upon individual citizens of the United States, endowed

with all the rights, and incumbered by all of the duties, provided for in the homestead act. These changes in the condition of the country must be observed and taken into account. They reflect upon the intention of congress, and upon the purpose for which the various provisions in the acts of congress in question were made. These circumstances and conditions, including the history of the country, its condition at the time of the passage of the first act referred to, and its condition now, are facts of such an open, known, and public character that the courts must take notice of them. *Railroad Co. v. Barney*, 113 U. S. 625, 5 Sup. Ct. 606; *U. S. v. Denver & R. G. Ry. Co.*, 150 U. S. 1, 14, 14 Sup. Ct. 11, 16; *Suth. St. Const.* pars. 298, 380. The 25 miles of road included in section 4, now in controversy, is built within the territory which became a part of the public domain of the United States by virtue of the Louisiana purchase from France in 1803, and is within Oklahoma territory, as constituted by the act of congress of May 2, 1890, and had been conveyed by the United States to the Creek and Seminole Indians by treaties executed in 1832 and 1833, found upon pages 102-106 of the *Revision of Indian Treaties*. By subsequent treaties, executed March 21st and June 14th, respectively. In 1866, these nations of Indians re-ceded these lands to the United States, "in compliance with the desire of the United States to locate other Indians and freedmen thereon." By a subsequent treaty made with the Creek Nation for the purpose of "entirely freeing from any limitations in respect to the use and enjoyment thereof, the interests of the Creek Nation were entirely extinguished," and this agreement and treaty was ratified by congress by the act of March 1, 1889, which provided that the lands thus acquired by the United States should be a part of the public domain. 25 Stat. 757-759. A similar release and conveyance was obtained from the Seminole Nation. An act ratifying such release and extinguishment of interest also provided that the lands thus acquired should be a part of the public domain. *Id.* 1004-1006. The lands of the section of country in question became, by these treaties and conveyances made by the Indian tribes, and ratified by act of congress, a part of the public domain, and were held by the United States in fee simple, subject only to a location of the Kickapoo Indians upon the tract, including part of the 25-mile section in question, by an executive order of the president made upon August 15, 1883. Upon September 9, 1891, the Kickapoo Indians entered into an agreement to relinquish their occupancy of said lands to the United States, which was approved by act of congress, March 3, 1893 (*St. U. S. 2d Sess.*, 52d Cong. 1893). Thereafter the president of the United States, having been authorized thereto by the act of congress accepting, ratifying, and confirming the said agreement with the Kickapoo Indians, approved March 3, 1893 (27 Stat. 557-563, §

3), issued his proclamation upon the 18th day of May, 1895, in which, after reciting that "by a written agreement made on the 9th day of September, 1891, the Kickapoo Nation of Indians in the territory of Oklahoma ceded, conveyed, transferred, and relinquished forever and absolutely, without any reservation whatever, all their claim, title, and interest of every kind and character in and to the lands particularly described in article one of the agreement: provided that in said tract of country there shall be allotted to each and every member, native and adopted, of said Kickapoo tribe of Indians, eighty acres of land, in the manner and under the conditions stated in said agreement"; and that " * * * whereas, allotments of land in severalty to said Kickapoo Indians have been made and approved in accordance with law and the provisions of the before-mentioned agreement with them"; and that "whereas, all the terms, conditions, and considerations required by said agreement made with said tribe of Indians, and by the laws relating thereto, precedent to opening said lands to settlement, have been, as I hereby declare, complied with,"—the president thereupon proceeded to declare that all "of said lands hereinbefore described acquired from the Kickapoo Indians by the agreement aforesaid will, at and after the hour of twelve o'clock * * * on the 23d day of the month of May, 1895, and not before, be opened to settlement under the terms, and subject to all the conditions, * * * contained in the said agreement, the statutes above specified, and the laws of the United States applicable thereto, saving and excepting such tracts as have been allotted, preserved, or selected under the laws herein referred to, and such tracts as may be properly selected by the territory of Oklahoma under and in accordance with the provisions of the act of March 3, 1893, hereinbefore quoted, prior to the time herein fixed for the opening of said lands to settlement." The proclamation referred to, and made a part of it, "a schedule of lands within the Kickapoo Reservation, Oklahoma territory, to be opened to settlement by proclamation of the president." And a further provision was made, attaching the lands of the Kickapoo Reservation, then opened, to the Eastern land district and Oklahoma land district, both of Oklahoma territory. The allotments therein referred to were the allotments of land in severalty to individual Indians, to be held by each of them, respectively, not as parts of an Indian reservation, nor as Indian lands, nor to be held under the laws, usages, and customs of Indian tribes or nations. The Indian interest, as such, was wholly extinguished. The reservation, as such, was obliterated. The tribal unity was destroyed, together with the tribal rights of ownership and occupancy. The Indian allottee became an individual owner of the separate tract of land allotted and set apart to him under the treaty referred to, subject only to the pro-

vision that the secretary of the interior should hold the lands in trust for his use and benefit, and that they should be incapable of alienation for the period of 25 years. The surveillance, protection, and control of the United States government, mainly through the secretary of the interior, over the rights of the Indian to his land then allotted, which has been uniformly likened by the courts to that of a guardian over his ward, ceased. He and his rights passed, subject to the provisions mentioned, under the protection of the common law, of the laws of the United States, and the laws of this territory; and he became entitled to all the rights and subject to all the duties of a resident, and probably to those, also, of a citizen of the United States and of the territory of Oklahoma.

It is contended by the defendants in error, that sections 3, 5, and 6 of the act of 1888 are applicable only to the Indian Territory as it is now (at the time of the hearing of this case) constituted, and that these sections were incorporated into the act for the protection of the Indian tribes, and individual occupants of these tribes, which would be inapplicable to country owned and controlled absolutely by the United States. We do not find that this contention can be sustained. At the time of the passage of the act of 1888, all of the territory now comprised within the boundaries of Oklahoma territory, together with that portion of country now included within the boundaries of the Indian Territory, constituted but one territory, under the name of the "Indian Territory"; and when, in that act, the Indian Territory is spoken of, we understand it to refer to the whole body of land included within the boundaries of the Indian Territory as it then existed. We do not understand that the mere fact of the separation of a portion of that territory, and its erection into the new territory of Oklahoma, by the act of congress of May 2, 1890, releases the Choctaw Coal & Railway Company, or its successor, the defendant in this case, from the performance of any of the conditions and requirements which are imposed by the act of 1888. We cannot hold that the conditions stipulated for in the sections of the act of 1888 referred to apply the less to the territory so separated because it happens to be included within the boundaries of the territory of Oklahoma. When the act undertook to provide "full compensation for any lands held by individual occupants, according to the laws, customs and usages of any of the Indian nations or tribes" through which it may be constructed, together with other conditions, including "the payment of fifty dollars per mile to the secretary of the interior," etc., and the provision that "congress should have the right, so long as said lands are occupied and possessed by said nations and tribes, to impose such additional taxes on said railroad as it may deem just and proper for their benefit," these provisions did not relate solely to those lands which be-

long to the Indians by a fee-simple title executed to them by the United States government, but that they also applied as well to such tribes as the Kickapoos, who were located upon a part of the public domain of the United States, with the simple right of possession and occupancy, subject to executive order. And when by the act of congress of February 13, 1889, by which section 1 of the act of 1888 was amended, the Choctaw Coal & Railway Company was authorized to construct and operate its railway through that portion of the Indian Territory occupied by the Kickapoo tribe (the land in question in this case, and now a part of the territory of Oklahoma), by the most feasible and practicable route, to an intersection with the Atchison, Topeka & Santa Fé Railway, it was an amendment of a single section of the act of 1888, and, being such, was made and accepted as an amendment, only, of the original act, subject to all the other provisions and conditions of the act of 1888, as they then stood, unaltered and unchanged. Individual occupancy of lands was in pursuance of, and a part of, the laws, customs, and usages of the Indian tribes who occupied the public domain of the United States under executive order, as it was, also, of tribes occupying such lands as were held in fee simple by the tribe itself. That this was the meaning and intention of congress is manifest from the repeated provisions in the act itself with reference to Indian "occupancy," and which provide that congress shall have certain rights "so long as said lands are occupied by said Indians and tribes"; so that the legislation related, not to lands which were owned by said Indian tribes, but to lands which were in the occupancy of such tribes. Nor did the passage of the act of August 24, 1894, by congress, providing for the organization of the defendant company as the successor of the Choctaw Coal & Railway Company, have the effect to render nugatory, or to abridge the extent or force of, the conditions and requirements of the act of 1888; relating, as those provisions and conditions of that act, including those of February 13, 1889, did, to the whole extent of the defendant's railway, including that portion now included within the territory of Oklahoma, as well as that portion now included within the Indian Territory, as it is at present constituted. The concessions and authorizations were made to the defendant company in 1894, subject to the provision that they should, as provided in section 5 of the act of that date, be done "in conformity with the provisions of the acts of congress relating to or affecting the Choctaw Coal and Railway Company." We hold this view conclusively upon these considerations, and upon the provision of the organic act constituting the territory, by which it is, in a conditional clause which forms a part of the first section of that act, passed May 2, 1890, stipu-

lated: "That nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said territory under the laws, agreements and treaties of the United States, or to impair the right of personal property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights which it would have been competent to make if this act had not been passed." If, then, it should be found that sections 3, 5, and 6 of the act of 1888 were intended for the protection of the rights of any Indians or Indian tribe in said territory,—that is, the Indian Territory,—whether those rights existed among the Indians or Indian tribes who owned and occupied their lands, or as they related to Indians or Indian tribes who merely occupied and were in possession of certain portions of the public domain under executive order from the president, this provision of the organic act thus plainly provides for their preservation and protection as they existed at the time of its adoption. We do not now treat of the applicability or inapplicability of the sections of the act of 1888 referred to, as applied to the changed conditions of the country, but do announce it as our opinion that the act of 1888 was applicable to the land in question in this case, for all the purposes and protections intended in that act, notwithstanding the fact of the change of political organization, and the erection of the new territory of Oklahoma, including the land through which the section of 25 miles herein referred to extends, designated as section 4, and as applicable alike to the defendant as originally to the Choctaw Coal & Railway Company itself, throughout the whole extent of the line built under and by virtue of the act of 1888, as well in the Indian Territory as now constituted as in that portion of the Indian Territory as it then existed, which has since been erected into the territory of Oklahoma.

It is, in the next place, urged by the defendant railroad company that the acts of congress gave to it the sole right of selecting its own route, of locating its own line, and of determining for itself what was the most feasible and practicable route therefor, and that, if it observed the conditions prescribed for it by those acts of congress, having accepted the granted powers and entered upon its work, it has the right to build its line, notwithstanding the fact that the secretary of the interior may withhold his approval of the route as selected. By the act of February 13, 1888, the Choctaw Coal & Railway Company was "hereby invested and empowered with the right of locating, constructing * * * a railway * * * line through the Indian Territory * * * by the most feasible and practicable route." It was by section 5 provided that "if the general council of either of the nations or tribes through whose lands said railway may be lo-

cated, shall, within four months after filing the maps of definite location, as set forth in section six of this act, dissent from the allowance, hereinbefore provided for, * * *"; and by the last clause of section 5 of the same act it was provided that "said railway company shall have the right to survey and locate its railway immediately after the passage of this act." And it is, by section 6, provided that "said company shall cause maps showing the route of its located lines through said territory to be filed with the secretary of the interior." By the act of February 13, 1889, it was again provided "that the Choctaw Coal and Railway Company, * * * is hereby invested and empowered with the right of locating, constructing, * * * a railway * * * line through the Indian Territory * * * and thence by the most feasible and practicable route to an intersection with the Atchison, Topeka and Santa Fé Railway; * * * otherwise known as a point on the North Fork of the Canadian river." The power given by these acts was by the act of August 24, 1894, vested in the defendant railroad company, with "all the powers, rights, immunities, privileges and franchises which have been heretofore granted to, or conferred upon, said company by any act or acts of congress." "To locate" is defined in Webster's Dictionary as "to place; to set in a particular spot or position." It is defined in Stormonth's Dictionary as "to set in a particular place or position." It is defined in the Century Dictionary as "to determine the situation or limits; to locate a tract of public land by surveying it and defining its boundaries." When, therefore, the rights and privileges of the Choctaw Coal & Railway Company devolved upon its successor, the defendant company, it was invested and empowered with the right of settling its railway line in a particular spot or position; with the right of fixing the place of its railway line, and of determining its situation, of surveying the place where it was to go, and defining its boundary,—unless, indeed, it should eventually be determined that the clause of section 6 of the act of 1888, providing that "said location shall be approved by the secretary of the interior in sections of twenty-five miles before the construction of any such section shall be begun," should be construed to authorize the secretary of the interior to defeat the right of surveying and locating its railway immediately after the passage of that act, and with which the defendant company was "invested and empowered," notwithstanding that the defendant company had, as appears by the pleadings, fulfilled all the conditions stipulated in the said acts of congress, and notwithstanding that such withholding of approval should be derived from some matter or cause wholly outside of, and disconnected with, the provisions of the acts of congress by which the authority and power to "locate" were given. The view here taken is one which, while seeming to require no support, is in fact corroborated by the general rule, which is that: "Where a

railway corporation is formed under a special charter, authorizing it to construct its road between certain points, the right of selecting the route and location of the road is left to its discretion, and the question whether its charter warrants the location as recorded is one of judicial construction, for the courts. But neither a court of equity nor of law will attempt to control the exercise of this discretion within the designated termini." 2 Beach, Inj. § 1332; 2 Wood, Ry. Law, § 237; Railroad Co. v. Stoddard, 6 Minn. 150 (Gil. 92); Parke's Appeal, 64 Pa. St. 137; Hentz v. Railroad Co., 13 Barb. 646; Railroad Co. v. Speer, 56 Pa. St. 325; Struthers v. Railway Co., 87 Pa. St. 282; People v. New York C. & H. R. R. Co., 74 N. Y. 302. And upon an act of congress, containing a like provision, authorizing the Kansas Pacific Railway Company to "locate" its line, it was said by the supreme court of the United States, in the case of Railroad Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, that: "We are of opinion that under this grant, as under many other grants containing the same words, or words of the same purport, an act which fixes the time of definite location is the act filing the map or plat of those lines in the office of the commissioner of the general land office. * * * After this no such rights can be attached, because the right of the company becomes, by that act, vested. * * * The company makes its own preliminary and final surveys by its own officers. It selects for itself the precise line on which the road is to be built, and it is by law bound to report its action by filing its map with the commissioner, or, rather, in his office. The line is then fixed."

It is, however, contended by the plaintiff in error, that, if the approval of the secretary of the interior was not necessary, the filing of the map in 1890 fixed the location. This contention takes no account of the changed conditions of the country, of the extinction of Indian interest and of the interest of the United States in the land, as a part of the public domain. Nor can it be sustained in view of that provision of section 6 of the act of 1888, which provides "that when a map showing any portion of said railway company's located line is filed as herein provided for, said company shall commence grading said located line within six months thereafter, or such location shall be void." Nor could the stipulation indorsed by the secretary of the interior on February 15, 1895, upon the map filed by the defendant company in the department of the interior in December, 1894, to the effect that "the within map is hereby disapproved, except where said line coincides with the line shown upon the original map of the fourth section filed in the Indian office in 1890," have any effect to restore to the defendant company the right to build upon the line upon which it was expressly declared by congress that such location should become void if not built upon within six months after filing its map of location.

It is further contended by the plaintiff in

error that the filing of the map in 1890, known as the "Old Survey," exhausts the power of the company to file, and it could not make a new selection. While it is provided that, if the company locates the line, it must commence grading said located line within six months thereafter, or the location shall be void, this provision does not take away the right of the defendant company to make a new location, or to build its line thereafter, under the act of 1888, by which it was provided, in section 9, that: "Said railway company shall build at least one hundred miles of its railway in said territory within three years after the passage of this act, and complete the main line of the same, within said territory, within one year thereafter, or the rights herein granted shall be forfeited as to that portion not built." Under the acts of congress of February 13, 1880, and of January 22, 1894, it was provided that: "The time for the construction of the railway of the Choctaw Coal and Railway Company * * * shall be extended for the period of two years from that date, so that said company shall have until February 18th, 1896, to construct the lines of railway authorized by the act approved February, 1888." The provisions of section 6 of the act of 1888, by which a particular location is made void if not graded upon within six months after filing the map of its located line, was doubtless intended for the benefit of such Indians as, being individual occupants, should desire to make improvements subsequent to the filing of the original plat, and was a condition intended to provide compensation for such additional improvements, to the Indians so making them, upon the proposed right of way, if the railroad company should not proceed within the six months specified to build its line then located, and was not intended to defeat the final and complete building of the line, and to make new selections of location, if, by reason of not having begun grading thereon, a location formerly made should become void. The provisions made in the first section of the act of 1888, that the company was invested and empowered with the right of locating "by the most feasible and practicable route," was a provision intended, not to promote the interests of the Indian tribes or nations through whose lands the line was then being projected, nor for the benefit of the United States, who could have no interest in the matter, but was a provision for the benefit of the railroad company, that it might provide the most economical line, and that which would be the most beneficial to the commercial objects and purposes which it had in view, and for the cheaper and more advantageous transportation of the persons and property of the public. It had the means to make such selection, and to correctly ascertain what was in fact the most feasible and practicable route.

The judge of the district court, in review-

ing and summing up the testimony produced before him by the expert engineers who were selected by the secretary of the interior to go over and examine and report to him the various routes surveyed, as well as a number of civil engineers and persons having knowledge of the matter, "testified that the line in question is the most feasible and practicable route." The conclusions based upon this statement of the testimony will, in the absence of the testimony, be affirmed here. The act of congress upon that point has, therefore, been complied with, as is also stated by the defendant company in its answer in the case. If the fact had been ascertained, and the findings made by the court, that the railroad company had, in fact, not built its line by the most feasible and practicable route, it would, indeed, have formed a reason upon which the secretary of the interior might have acted in disapproving the location, for it has been repeatedly decided by the supreme court of the United States that railroads are, for many purposes, public highways, in which the convenience of the public as to transportation of persons and property must be consulted, and that their construction should be made without unnecessary length between the termini designated in the acts authorizing them, and that the road should be constructed upon the most direct and practicable line, and that no unnecessary deviation from such line should be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant. *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U. S. 643, 9 Sup. Ct. 402; *U. S. v. Northern Pac. R. Co.*, 152 U. S. 292, 14 Sup. Ct. 538.

In determining the purpose of the act of 1888, it must be observed, with regard to the condition of the Indian Territory, that at that time the whole of it was set apart for the occupancy of Indian tribes and nations alone. White men were rigidly excluded from it, except upon terms which were carefully provided by the Indian intercourse act found in the Revised Statutes of the United States. This intercourse act was administered by the interior department, under the general direction of the secretary of the interior. Persons other than Indians were permitted to trade, and to have limited commercial privileges, within the territory, only under regulations provided by that act, and by such further regulations as should be found necessary by the secretary of the interior himself, or by the commissioner of Indian affairs. But under no circumstances were white men permitted to acquire any interests in land within any portion of the Indian Territory, except for certain temporary and limited purposes, under the limitations of the Indian intercourse act, and the regulations provided thereunder. And it will be found, upon a careful consideration of the act of congress of 1888, and of the subsequent acts under which the

defendant company was authorized to build its line, that all the conditions imposed by congress upon the Choctaw Coal & Railway Company and its successor, the defendant company, were provisions intended solely for the protection of the Indian interests in the land, except such as are intended for the protection of the railroad company itself. It was provided by the original act of 1888 that (1) the corporation is authorized to use a right of way 100 feet in width through said territory, and (2) for all purposes of railway, and for no other purpose; and (3) to take and use a strip of land 200 feet in width, with a length of 3,000 feet, in addition to the right of way, for stations, for every 10 miles of road; and (4) the right to use additional ground, where there are heavy cuts or fills, as may be necessary for the construction and maintenance of the roadbed, not to exceed 100 feet in width on each side of said right of way; and (5) that no more than such addition of land shall be taken for any one station; and (6) that no part of the lands authorized to be taken should be leased or sold by the company; and (7) that they should not be used except in such a manner, and for such purposes only, as should be necessary for the construction of said railroad; and (8) that, when any portion thereof shall cease to be used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken; and (9) that full compensation shall be made to individual occupants according to the laws, usages, and customs of any of the nations or tribes through which it might construct its road; and (10) that, in case of failure to make amicable settlement, compensation was to be determined by the appraisement of three referees, one to be appointed by the president, one by the chief of the nation to which the occupant belongs, and one by the railway company, together with provisions for appeal to the district court; and (11) that, upon the hearing of the appeal, if judgment was for a larger sum than the award of the referees, the costs of appeal were to be attached against the railway company; and (12) that, when proceedings were commenced in court, the railway company was to pay double the amount of award into court, to abide the judgment thereof, before having the right to enter upon the property; and (13) that the railway company was to pay to the secretary of the Interior, for the benefit of the particular nations or tribes through whose lands said railway may be located, the sum of \$50 per mile, in addition to compensation provided for in that act. Other conditions of the act, not here recited, indicated with equal clearness that the conditions exacted from the railroad company were for the benefit and protection of Indian interests alone. Other provisions of the act exhibit with equal force that the right of way which the company was by

that act authorized to locate had reference to lands which either belonged to Indian nations or tribes, or were in their occupancy, and to no others. It is provided in the act referred to, in the last clause of section 2, that (1) "when any portion thereof [that is, of the lands over which the right of way has just been granted] shall cease to be used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken"; and (2) that "congress shall have the right so long as said lands are occupied and possessed by said nations and tribes," etc.; and, in section 7, (3) that the servants of the company may reside "upon the right of way," but subject to the provisions of the Indian intercourse laws, and such rules and regulations in accordance with said intercourse laws; and (4) concurrent jurisdiction is provided, over controversies arising between said railway company and the nations and tribes through whose territory said railway shall be constructed, in the United States circuit and district courts for the Western district of Arkansas and the Northern district of Texas (it being here observed that jurisdiction over controversies is provided for between the railway company and the Indian nations or tribes alone, and not between either of them and any white citizen or citizens of the United States); and (5) that all mortgages executed by the railway company upon any portion of its railroad were to be recorded in the department of the Interior. No conditions precedent to the right to build the road are to be found in the act of 1888 and those which follow it, except such as provided for the protection of the Indians, or granted authority to the railroad company. The railroad company, then, accepted the grant upon the conditions therein provided, and no others. It had the right to rely upon the grant of powers made to it, upon condition, only, that it should fulfill and comply with the precedent conditions upon which the powers were granted. The company, having accepted the conditions upon which it was provided that it might build its line in the Indian Territory, and having entered upon its location and construction, had a right to locate and construct its line without the imposition of further conditions. Congress itself would have had no right to impose them, unless it should undertake to do so under the power, reserved in the act itself, "to amend, add to, alter, or repeal this act,"—a reservation of authority which does not exist in the secretary of the Interior.

It is apparent from the allegations of both the petition and answer that the cause of the secretary's disapproval of the location of section 4, was that "there was a difference between the Choctaw, Oklahoma and Gulf Railroad and the people of Tecumseh in regard to the location of their line. * * * Two lines were run by the road in the neighborhood of Te-

cumseh, one through Tecumseh, and the other about six miles north of Tecumseh." The railroad company's right to build the line nearest to Tecumseh had become void before the time that the road upon which Tecumseh is built was opened to settlement. It would have had no right to build on that location without making a new survey, map, and location. While the motive of the secretary of the interior arose, without doubt, from a sincere desire to protect the interest of that city, and of its people, we cannot find that the duty approving, or the right of disapproving, can be gathered from any other source than from the terms of the act which authorized the railroad company to build its line, and under which it did build it from a point eastward to the eastern terminus of section 4, and from a point westward to the western terminus of section 4, thus leaving a most important breach, which would remain unbuilt, and destructive, to a great degree, of the value of the eastern and western sections of the line, if the completion of the road could be defeated by reason of the consideration given by the secretary to interests which were not established at the time of the passage of the act of 1888, and could not have been in the contemplation of congress at that time. The government, too, of the United States, had a right to exact of its grantee the full performance of those conditions. It had a right to make such a provision as would secure their performance. That provision was made in the sixth section of the act of 1888,—that "said location shall be approved by the secretary of the interior in sections of twenty-five miles before construction of any such section shall be begun." We understand that this provision, authorizing the secretary of the interior to approve the location, imposed a duty upon him, which was to see that the map and location were in compliance with, and in conformity to, those conditions which congress had, in the act of congress authorizing it to build, imposed upon the railway company. We do not understand the secretary of the interior to have been charged with any other duty, or to have had any matter involving discretion imposed upon, or committed to, him. We believe this to have been the extent of the authority reposed in the secretary of the interior by this act. If so, the function committed to him was ministerial only, and not judicial.

It is alleged by the answer, and not denied by the plaintiff, and it is admitted for the purpose of this discussion, that the conditions had all been complied with; and, with great respect for the secretary of the interior, we believe that, whatever may be the character of the "approval" required of him by other acts of congress charging him with the exercise of discretion, we do not believe that the authority committed to him by this act was any further or other than to ascertain if the conditions of the act had been complied with, and that the duty can be interpreted no other or

larger than ministerial only; and, so holding, we shall find that the conditions of this act had been complied with, and that the railway company was entitled to have the approval by the secretary of the interior, under the direction of the act that "said location shall be approved before construction of any such location shall be begun." We hold that the defendant company, having fulfilled all the conditions required of it by the act of congress under which it was built, should not be restrained from building its line by the withholding of his "approval" by the secretary of the interior.

In order to show that the "approval" of the secretary of the interior was an essential prerequisite to the building of the road upon the location selected, the plaintiff in error has cited the cases of *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. 100; *Railroad Co. v. Parker*, 143 U. S. 57, 12 Sup. Ct. 364; *U. S. v. Missouri, K. & T. Ry.*, 141 U. S. 374, 12 Sup. Ct. 13; *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 5 Sup. Ct. 208; *Williams v. U. S.*, 138 U. S. 514, 11 Sup. Ct. 757; *Miller v. Mayor, etc.*, of the City of New York, 109 U. S. 385, 3 Sup. Ct. 228. All of these cases, except the two last named, relate to concessions from the United States, to railroad companies, of alternate sections of the public lands. In the acts of congress, respectively, by which the grants of land were made, it is provided that selections shall be made "under the direction of the secretary of the interior," or that he shall "cause to be selected," or that it "shall be the duty of the secretary of the interior to select," the respective sections to be conveyed to the railroad companies, and, in doing so, to determine whether or not there still remains a deficiency in the grant, whether the particular public lands desired by the railroad company could properly be taken, or whether any lands within the limits prescribed had been disposed of to settlers under the land laws of the United States, and, if so, to determine what lands should be selected and granted to the railroad company in lieu thereof. In the case of *Williams v. U. S.*, the plaintiff had sought, by a gross fraud, to secure the conveyance of a portion of the public lands, and to use the rights provided under the land laws of the United States to aid him in the perpetration of this fraud. In order to complete the fraud, it was necessary that he should secure the approval of the secretary of the interior, which was properly withheld; the supreme court, by Brewer, J., saying that: "We do not mean to imply that any arbitrary discretion is vested in the secretary; but we hold that the statute requiring the approval by the secretary of the interior vests a discretion in him by which wrongs like this could be righted, and equitable considerations, so significant and impressive as this, given full force." The case of *Miller v. Mayor of New York* arose under an act of congress (15 Stat. 336) giving to the secretary

of war supervision of the construction of a bridge across the Hudson river. The navigation of that river being of the highest importance, the act required that the bridge company should furnish all the necessary evidence, including the specifications of the bridge, and of the condition of the stream, and such evidence as the secretary of war might need to enable him to determine whether or not the bridge, as proposed, would obstruct navigation. In all of these cases discretion was expressly committed to the secretary, and its exercise was necessary, and in each instance the approval of the secretary of the interior, or of the secretary of war, was held to be necessary. But these cases do not aid us in the interpretation of a statute which commits no duty to the secretary, except to see that the conditions prescribed in the act imposing the duty upon him are fulfilled, where no discretion is given to the secretary of the interior, and where no gross fraud upon the government or upon individuals has been alleged or sought to be perpetrated.

After the order made by the district court on the 23d day of May, 1895, in which, at the instance of the plaintiff, the district court undertook to set aside the final judgment which it had rendered in the case on May 1, 1895, in the absence of, and without notice to, the defendant, on the 25th day of May, 1895, filed its motion for a new trial, which application was, upon the same day, by the court overruled, and leave granted to the defendant to file its supplemental answer in the case, at that time tendered to be filed, and an order made that the same should be filed as of May 23, 1895, and made a part of the record in the case. In this supplemental answer the defendant sets up that "the Kickapoo Reservation had, since the order of May 1, 1895, dissolving the injunction, been opened to homestead settlement by a proclamation of the president; that said country had been opened to settlement on the 23d day of May, 1895, and thereupon ceased to be in any sense an Indian reservation, or a reservation of any kind." It is by the defendant strongly urged in argument that, by reason of their compliance with the general laws of Oklahoma territory applicable to railroads, it is now entitled to take advantage of these laws, and to build its line without the approval of the secretary of the interior, since these laws do not require such approval. As appears by the proclamation of the president referred to, the Kickapoo Nation of Indians, through which that portion of "section 4" in question is located, "conveyed, transferred, and relinquished forever, and absolutely, all of their claim, title, and interest of every kind" to those lands; and that this agreement was ratified and confirmed by act of congress approved March 3, 1893. The allotments of land, of 80 acres each, to individual Indians, provided for in that act, having been made, the president,

as has been stated, upon the 18th day of May in the year 1895, declared that the lands of the reservations, not already appropriated as such allotments by individual Indians, would be opened for settlement under the homestead laws of the United States on the 23d day of May, 1895. These lands thereby became a part of the territory of Oklahoma. By the contract of September 9, 1891, by the act of congress ratifying the same, by the making of the allotments therein provided for, and by the proclamation of the president, the rights of individual occupancy were extinguished, and the lands of the whole reservation became subject to the laws of the territory of Oklahoma, subject only to the provision and the agreement referred to; and "when the allotments of land shall have been made and approved by the secretary of the interior, the title thereto should be held in trust for the allottees, respectively, for the period of twenty-five years in the manner and to the extent provided in the act of congress approved February 8th, 1887" (24 Stat. 388). *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. 100. By section 26, art. 9, c. 17, of the Statutes of Oklahoma of 1893, upon "Railroad Corporations," it is provided: "Any railroad corporation chartered and organized under the laws of the United States, or any state or territory, whose constructed railroads shall reach and intersect the boundary line of this territory at any point, may extend its railroad into this territory from any such point or points to any place or places within the territory, and may build branches from any point on such extension. * * * It is alleged in the answer, and not denied by the plaintiff, that the defendant company has complied with all the requirements of this statute, which entitles it to the benefits therein provided. By section 9 of the same article, it is provided that: "Every railroad company so authorized to construct, operate and maintain a railroad in this territory * * * shall have the power, first, to make surveys, * * * fourth, to lay out road, and fifth, to construct its road. * * * The defendant company is entitled to the provisions and benefits of the general railway laws of the territory of Oklahoma to the same extent as if it had been incorporated under the laws of a state or territory. In the case of *U. S. v. Denver & R. G. R. Co.*, 150 U. S. 14, 14 Sup. Ct. 11, 16,—a case in which the railroad company, having been incorporated under a special act, claimed the benefit of the general railroad law of the United States passed in 1875,—the court says: "Upon what principle does the enjoyment by the defendant of the rights and benefits conferred by the earlier special act preclude or estop it from accepting the benefits offered by the latter general act, after the special rights and privileges had terminated? We know of no such principle." In the case of *Central Branch U. P. R. Co. v. Atchison T. & S. F. R. Co.*, 26 Kan. 669, it

was said by the court (Brewer, J.): "The question simply is whether a specially chartered corporation can avail itself of the general procedure established by law for all railway corporations, and the question must be answered in the affirmative."

We therefore hold that the Choctaw, Oklahoma & Gulf Railroad Company was authorized by the acts of 1888 and 1894 to locate its own line through the section of country wherein "section 4" is built, and has located its line by the most feasible and practicable route; and inasmuch as the rights of location and construction were dependent only upon the performance of the conditions set forth in the acts, and these conditions were for the protection of the Indian tribes and nations, or of Indian occupants, under the laws, customs, and usages of the Indian tribes or nations, and that the defendant company has fully complied with the conditions,—that the defendant company is invested and empowered with the right to locate and construct its line, and to the approval of the secretary of the interior therefor; and that, the Indian interest having been extinguished, the land became subject to the laws of the territory of Oklahoma without the intervention of the limitations of the Indian intercourse act; and that the defendant company, having complied with the provisions of the laws of this territory authorizing the laying out and construction of railways, is entitled to locate and construct its line thereunder; and that the approval of the secretary of the interior is not necessary under the provisions of said act; and that injunction will not lie to restrain the defendant railroad company from building its line without such approval. The judgment of the district court is, therefore, affirmed. All the justices concurring, except SCOTT, J., not sitting, having presided as trial judge.

(23 Nev. 22)

HOLMES v. IOWA MINING CO. (No. 1,435.)

(Supreme Court of Nevada. Oct. 1, 1895.)

APPEAL—TRANSCRIPT—ORIGINAL PAPERS.

Where, instead of a regular transcript, the original papers are sent up on the appeal, under St. 1895, p. 58, they must be certified to be such originals, and to constitute, in whole or in part, the record on appeal. Where there is no certificate to that effect, the appeal will, upon motion, be dismissed.

(Syllabus by Bigelow, C. J.)

Appeal from district court, Storey county; Charles E. Mack, Judge.

Action by George M. Holmes against the Iowa Mining Company. From the judgment rendered, defendant appeals. Heard on motion to dismiss. Granted.

H. K. Mitchell, for appellant. F. M. Hufaker, for respondent.

BIGELOW, C. J. The respondent moves to dismiss the appeal upon the ground that the record is not certified or authenticated as required by law. It consists of the original papers, as authorized by St. 1895, p. 58. The act provides that, when the appellant desires to have the original papers sent to the supreme court, they shall be "certified by the clerk of the district court, or by the respective parties or their attorneys, to be such originals, and to constitute in whole or in part the record on appeal." Several of the papers in the case are not certified in any manner, either as copies or originals, and none of them are certified to constitute, in whole or in part, the record on appeal. The motion must, therefore, be granted. This is a defect that doubtless could have been remedied, but, although the motion was made more than two months ago, and thereby the appellant's attention particularly called to the matter, no attempt has been made to do so.

Objection is also made to the manner in which a question upon a motion to set aside a sheriff's sale is sought to be presented, and, although unnecessary to notice the point upon this appeal, it is not improper to call attention to the fact that the statute mentioned has in nowise altered the method of presenting questions to the supreme court. Wherever a motion for new trial or a statement on appeal was previously necessary to their proper presentation, it is still necessary. The only difference is that, instead of having to present a transcript of the papers to be used on the appeal, the originals may now be certified up. The appeal is dismissed.

BONNIFIELD and BELKNAP, JJ., concur.

(22 Nev. 425)

BUCKNER v. LYNIP. (No. 1,436.)

(Supreme Court of Nevada. Sept. 27, 1895.)

ELECTION CONTEST—BALLOTS—APPEAL.

1. Gen. St. § 1569, provides that where an election is annulled by the district court, and no appeal has been taken therefrom within 30 days, the certificate, if any has been issued, shall thereby be rendered void. *Held*, that a judgment declaring the election of a candidate whom the official returns showed to have been defeated did not annul the election, so as to require the dismissal of an appeal taken from said judgment after the expiration of 30 days.

2. New trials and appeals in contested election cases are regulated by the civil practice act, and not by Gen. St. § 1524 et seq., relating to elections.

3. St. 1891, c. 40, § 24 (Australian Ballot Law), provides that "no ballot shall be deposited in the ballot box unless the watermark, as hereinbefore provided, appears thereon, and unless the slip containing the number of the ballot has been removed therefrom by the inspector." Id. § 28, provides that any vote not bearing the watermark, and any ballot on which appear names, words, or marks, written or printed, shall not be counted. *Held*, that it was proper to count ballots from which the inspector failed, through ignorance, to remove the

strips bearing the number, though his failure to do so made the voter's ballot capable of identification. Belknap, J., dissenting.

Appeal from district court, Humboldt county; C. E. Mack, Judge.

Proceeding brought by B. F. Lynip against L. A. Buckner, to contest the latter's election to office. The contestant had judgment, and the contestee appeals. Reversed.

Thos. E. Haydon and R. M. Clarke, for appellant. David S. Truman, for respondent.

On Motion to Dismiss Appeal and Strike Out Statement.

BELKNAP, J. This is an election contest. The parties were candidates for the office of district attorney for Humboldt county at the general election of November, 1894. According to the official returns, Gen. Buckner received the highest number of votes, and a certificate of his election was issued. Thereafter a contest was inaugurated by respondent, Lynip, and such proceedings had as resulted in a judgment of the district court in his favor, and against Buckner. A motion for a new trial was made in the district court by appellant, and denied by that court; and from the judgment, and the order denying the motion for new trial, this appeal is taken. Respondent moves in this court to dismiss the appeal upon the ground that it was not taken within the time required by the statutes of the state for an appeal to be taken in election contests. The motion is made upon the provisions of section 46 of the act relating to elections (Gen. St. § 1569), which reads as follows: "1569. Sec. 46. Whenever an election shall be annulled and set aside by the judgment of the district court, and no appeal has been taken therefrom within thirty days, such certificate, if any has been issued, shall thereby be rendered void, and the office become vacant." The judgment was rendered February 20, 1895. The motion for new trial was denied upon the 11th day of May,—more than 30 days thereafter. The judgment was to the effect that Lynip was the duly-elected district attorney of the county, and, upon his doing the acts required by the statutes to be done in such cases, was entitled to the office, etc. This judgment is not one in which an election has been annulled and set aside. The result of the election has been reversed in this: that Lynip, who was shown by the returns to the board of county commissioners to have been defeated, was declared elected by the judgment of the district court. But the election itself has neither been annulled nor set aside, but, on the contrary, it has been upheld. If it had been annulled, the statute declares, the office becomes vacant, and, if there is a vacancy, it must be filled as required by law. We do not understand counsel to admit that a vacancy does exist, but if the provisions above quoted are applicable to this case, and the election has been annulled, a vacancy in the office must be the result.

Our attention has been called to the meaning of the words "annulled and set aside," as employed in section 1561, Gen. St. The section is as follows: "1561. Sec. 33. When any election held for an office exercised in and for a county, is contested on account of any misconduct on the part of the board of inspectors of any precinct, or any member thereof, the election shall not be annulled and set aside upon any proof thereof, unless the rejection of the vote of such precinct shall change the result as to such office in the remaining vote of the county." This provision is unimportant to the matter in hand. It states a principle applicable to all election contests; that is to say, that the person officially declared elected shall not be disturbed by vain and fruitless contests, and, unless a different result of the election can be reached, his election shall not be contested.

Respondent also moves the court to strike out all of the record in the case, except the judgment roll, upon the ground that the district court had no jurisdiction of the case after the entry of the judgment. The statute relating to elections (section 1524 et seq., Gen. St.) confers original jurisdiction upon district courts in this class of cases (section 1563), and provides that a certified copy of the judgment of the supreme court may be used as proof in certain cases; but, with these exceptions, it is silent upon the subject. Nothing is said, in direct terms, upon the subject of new trials or appeals; and, under these circumstances, we must look elsewhere for the mode of procedure. The civil practice act was adopted long before the passage of the act relating to elections. It provides a mode for review upon motion for new trial or appeal in all cases tried by district courts, and, in enacting the election law, it was unnecessary to provide for any further mode of procedure than the practice act furnished. The decisions from California to which we have been referred are inapplicable to our statute concerning contested elections. The motions are denied.

BIGELOW, C. J., and BONNIFIELD, J., concur.

On the Merits.

BIGELOW, C. J. The contestant and contestee, who, for convenience, we shall call plaintiff and defendant, were rival candidates for the office of district attorney of Humboldt county at the election of 1894. Upon the returns, as canvassed by the board of county commissioners, the defendant had a majority of five votes; but, upon the trial of this contest in the district court, it was found that the plaintiff had received three more votes than his opponent, and he was accordingly declared elected. From this judgment, and an order refusing a new trial, defendant appeals.

In Rebel Creek precinct, in that county, it appears that defendant received 15 votes; the plaintiff, 1; and another candidate (H.

Warren), 12. The court rejected all the votes of that precinct, cast under the following circumstances: The ballots were printed, as required by law, with a strip on the left side, intended for a stub, separated from the ballot proper by a perforated line, and with a like strip on the right side, also separated by a perforated line. Upon each of these strips the number of the ticket was printed. By some accident, the binding of the stubs into book form had become broken, permitting the ballots to separate into loose sheets. When a voter applied for a blank ballot, the entire sheet was given him by the inspectors, including the stub, which should have been separated from the ballot, and retained by the inspectors. When the ballot was returned to them for deposit in the ballot box, the inspectors removed the strip intended for a stub, but failed to remove the other strip. It is not charged that this was done by the inspectors fraudulently or intentionally, and the evidence is clear and uncontradicted that it was the result of a mistake upon their part; they, and apparently every one connected with the election, supposing that they had removed everything from the ballot that the law required to be removed. It does not appear when the mistake was discovered, but certainly not until after the polls had closed. Our statute, adopting what is popularly known as the "Australasian Ballot Law" (St. 1891, c. 40, § 11), provides that the secretary of state shall furnish to the county clerks the paper on which the ballots are to be printed, which is to be watermarked with a design to be chosen by the secretary. The ballots are to be printed under the direction of the county clerks. They are to contain the names of all candidates whose nomination has been certified and filed according to the provisions of the act, and no other name. The names are to be arranged under the designation of the office, and the political designation of each candidate is to be printed opposite his name. When a ballot is handed to a voter, the number of the ballot is to be written on the registry list, opposite his name. He must prepare his ballot by marking with a black lead pencil a cross or X after the name of the person for whom he intends to vote. Upon handing the ballot to the inspector, that officer "shall separate the strip bearing the number from the ballot, and shall deposit the ballot in the ballot box." Sections 24 and 26 of the act, read as follows:

"Sec. 24. No ballot shall be deposited in the ballot box unless the water mark, as hereinafter provided, appears thereon, and unless the slip containing the number of the ballot has been removed therefrom by the inspector."

"Sec. 26. In counting the votes any ballot not bearing the water mark as provided in this act shall not be counted, but such ballot must be preserved and returned with the other ballots. When a voter marks more

names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office, his vote for such office shall not be counted. Any ballot upon which appears names, words or marks written or printed, except as in this act provided, shall not be counted."

Any officer willfully neglecting or refusing to perform any duty devolved upon him by the act is, upon conviction, to be imprisoned in the state's prison for from one to five years.

It will be noticed that the statute does not expressly direct that a ballot upon which this strip has been left shall not be counted, but these ballots were rejected upon the ground that they came within the latter part of section 26, which inhibits the counting of ballots "upon which appears names, words, or marks written or printed, except as in this act provided"; and this is the point to be determined upon the appeal, so far as they are concerned. It is, perhaps, a close question, and one upon which courts and judges may easily disagree. It is to be observed that the voters of this precinct were themselves in no wise in fault. They possessed every qualification for voting, and had complied with every requirement of the law as to registration, marking their ballots, etc.; and it is earnestly pressed upon us by defendant's counsel that if this law is to be construed as preventing the counting of their votes, either for the willful fraud or innocent mistake of the inspectors, in not removing the slip, it is unconstitutional, within the principles of *Stinson v. Sweeney*, 17 Nev. 309, 30 Pac. 997; *Davies v. McKeeby*, 5 Nev. 369; *Clayton v. Harris*, 7 Nev. 64; and similar cases. See, also, *Moyer v. Van De Vanter* (Wash.) 41 Pac. 60 (recently decided). As we are, however, of the opinion that that is not the correct interpretation of the act, it is unnecessary to consider this argument any further than as it throws light on the proper construction of the statute. It seems to us that ballots cast under the circumstances existing here should not be rejected, and we will now state, as briefly as possible, the reasons upon which our conclusion is based:

The right of voting, and, of course, of having the vote counted, is one of most transcendent importance,—the highest under our form of government. "That one entitled to vote shall not be deprived of his privilege by action of the authorities is a fundamental principle." *Cooley, Const. Lim.* (6th Ed.) 775. We need not go outside the decisions just cited from our own court, to show how jealously this right is guarded. But while the legislature cannot directly deprive the elector of this privilege, section 6, art. 2, of the constitution specially authorizes it to enact laws for the registration of electors, to preserve the purity of elections, and to regulate the manner of holding and making returns

of the same. Such laws will necessarily sometimes have the effect of preventing the elector from voting. For instance, a law for the registration of voters, to be effectual, must provide that one not registered shall not vote; and, to guard the purity of the elections, it may require him to mark his ballot in a certain way, and to comply with many other conditions. But in all these matters the voter had the privilege of voting, by a compliance with the law, and his failure to do so is somewhat owing to his own negligence or misfortune. Whether he can also be deprived of it through the fraud, negligence, or mistake of others would involve the constitutional question suggested, and upon which we find it unnecessary to pass in this case. At least, this great constitutional right is not to be taken from him upon any doubtful construction of a statute. Assuming the constitutionality of the law, before it should be construed to work his disfranchisement it must be clear that, under the circumstances then existing, the legislature intended such to be the case. The spirit in which such laws are to be construed is well stated by Andrews, J., in *Talcott v. Philbrick*, 59 Conn. 435, 20 Atl. 436, as follows: "All statutes tending to limit the exercise of the elective franchise by the citizen should be liberally construed in his favor, and, unless the ballot comes within the letter of the prohibition against a particular kind of ballot, it should be counted. A great constitutional privilege—the highest under the government—is not to be taken away on a mere technicality, but the most liberal intendment should be made in support of the elector's action, whenever the application of the common-sense rules which are applied in other cases will enable the courts to understand and render it effectual." "All statutes tending to limit the citizen in his exercise of this right should be liberally construed in his favor. Unless the ticket comes within the letter of the prohibition, it should be counted." *Owens v. State*, 64 Tex. 500, 509. To the same effect are *State v. Saxon*, 30 Fla. 668, 12 South. 218; *State v. Phillips*, 63 Tex. 390; *Boyd v. Mills*, 53 Kan. 594, 37 Pac. 16; *Kellogg v. Hickman*, 12 Colo. 256, 21 Pac. 325; *Bowers v. Smith*, 111 Mo. 61, 20 S. W. 101; *Parvin v. Wimberg*, 130 Ind. 561, 30 N. E. 790; *State v. Russell*, 34 Neb. 116, 51 N. W. 465; *Stackpole v. Hallahan* (Mont.) 40 Pac. 80.

Laws are also to be construed according to their spirit and meaning, and not merely according to their letter. "It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers." *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188. "It is one of the great maxims of interpretation to keep always in view the general scope, object, and purpose

of the law, rather than its mere letter." *Rutledge v. Crawford*, 91 Cal. 533, 27 Pac. 779. "A rigid and literal reading would, in many cases, defeat the very object of the statute, and would exemplify the maxim that 'the letter killeth, while the spirit keepeth alive.' Every statute ought to be expounded, not according to the letter, but according to the meaning. * * * And the intention is to govern, although such construction may not, in all respects, agree with the letter of the statute." The reason and object of a statute are a clue to its meaning, and the spirit of the law and the intention of its makers are diligently to be sought after, and the letter must bend to these. *Tracy v. Railroad Co.*, 38 N. Y. 433, 437. This meaning is undoubtedly to be ascertained from the language of the act, viewed in the light of the circumstances under which it is used. If plain and unambiguous, it must be construed as it reads, no matter how unreasonable its operation may be. But as it is not to be presumed that the legislature intended to enact an unreasonable or unjust law, where such would be the result of its operation, if construed in a certain way, and the language is not positive and direct to that effect, it is the duty of the courts to cast about to see if it is not susceptible of some other construction, and in doing this they should consider, not only the language used in some particular section, but the whole scope and purpose of the act, and adopt, if possible, such a construction as will harmonize the various sections with this purpose, and with the demands of justice.

What was the object and purpose of the enactment of the Australian ballot law, the essential features of which have now been adopted by nearly every state in the Union? This question has often been answered by the courts, and sometimes in language that we shall not attempt to improve upon. In one case the supreme court of Connecticut said: "The object of the statute of 1889 is obvious. It is to secure an honest vote, correctly expressing public sentiment, by preventing fraud, corruption, and intimidation." After speaking of certain provisions of the Connecticut law, the court resumed: "This would seem to effectually preclude any opportunity for fraud or imposition. Corruption, by making it impossible for any one who would bribe or otherwise corrupt a voter to know that the required vote was actually deposited. Intimidation, by giving to each voter an opportunity to select and prepare his ballot, and to deposit it, free from observation, and in such manner that no one but himself can possibly know how he votes, unless he chooses to disclose it." *Talcott v. Philbrick*, 59 Conn. 472, 478, 20 Atl. 436. In another case it was said: "A study of the statute upon the subject of elections leaves no doubt that its purpose is to secure a fair expression of the will of the electors of the state, by secret ballot, uninfluenced by brib-

ery, corruption, or fraud. The disfranchisement of whole precincts by reason of an honest mistake on the part of the election officers is inconsistent with that purpose." *Parvin v. Wimberg*, 130 Ind. 561, 30 N. E. 790. And again: "The evident intent of this provision was to provide against voters marking the individual ballot which they cast in such manner as to distinguish it." *Lindstrom v. Board*, 94 Mich. 467, 54 N. W. 280.

This being the object of the law, it should be so construed as to remedy the evil against which its provisions are directed, and, at the same time, not to disfranchise voters further than is necessary to attain that object. It would be almost the work of omniscience to enact a law in such language that it would not, under any circumstances, do more nor less than was intended by the lawmaker. Even words most carefully chosen will, in some unanticipated situation, overrun that intention, and in others fall short of it. It is the duty of the courts to keep that intention, once it is ascertained, steadily in view, and to endeavor to apply the law where it was intended to apply, and to except those cases where it was not. It being, then, the purpose of the law to effectually prohibit and prevent intimidation and vote buying, all its provisions were enacted with that end in view. Where it is forbidden to count ballots containing names, words, or marks other than those provided for in the act, notwithstanding the generality of the language, only such as tend to distinguish the ballots were intended, and such as were, or may have been, placed upon the ticket for that purpose. For instance, all nominations for state offices are to be filed in the office of the secretary of state, and he is to certify them to the various county clerks. It certainly never was intended that if he should, either by inadvertence or design, certify the name of a person who had not been nominated, and which was therefore wrongfully printed upon the ballots, this should invalidate, and require the rejection of, every vote cast in the state; and yet this would be the result of a strict adherence to the letter of the law, for it would be a name on the ballot not provided for by the act. The same may be said of the wrongful printing of a name on the ballots by order of the county clerk, or the insertion by the printer of a word or mark not provided for by the law, and which would be on all tickets alike. This would in no manner tend to distinguish one ballot from another, and could not be used for a fraudulent purpose. Such a word or mark would not be within the spirit of the law, although within its letter; and in such case the law should be liberally construed in favor of the voter, and not so as to disfranchise a whole county. This simply illustrates the proposition that there are situations in which the legislature could not have intended that ballots with forbidden words or marks upon them should not be counted. They are in-

stances of where the language has overrun the intention. But in the case we have to deal with here the marks upon the ballots (admitting that marks upon the strip attached to the ballot are marks upon the ballot itself, as is doubtless within the intention, if not the letter, of the law), although not placed thereon intentionally, nor with the voters' knowledge or consent, are such as to identify the ballots. Does this alter the case? Under the circumstances existing here, could this fact have been used for the purposes of intimidation or bribery? It is not possible to intimidate a man into voting for men or measures against his will, unless he has reason to believe that if he does not so vote it will become known to the intimidator. Here the voter knew that if the law was complied with no one could ever ascertain how he had voted. It is not shown that any knew that it was not being complied with, and in fact the fair inference from the testimony is that it was not known to any one until after the polls had closed. All supposed that the slips were being removed, and it follows that none could have been intimidated by the fact that they were left on the ballots. But the principal reason for forbidding these distinguishing marks was undoubtedly to defeat bribery. It was believed that the vote buyer would not invest money in the purchase of votes if there was no way by which he could ascertain whether the voter had voted as agreed. The only way in which this could be done by means of marks would be by some mark being placed upon the ballot which had been agreed upon between them; and it must be done either by the voter himself, or by some one else with his knowledge and consent. It is clear that this slip was left on the ballots accidentally, and not for any such purpose as that; and therefore it is not within the spirit or meaning of the law, so far as corruption is concerned. By the blunder of the inspectors, the strips and numbers were left upon the ballots, whereby it was possible to ascertain just how each one had voted. This was done unintentionally, and without the voters' knowledge. Consequently, as we have tried to show, it could not have been made the means of intimidation, nor the agent of corruption. But by reason of it, without being at all in fault themselves, the voters have incurred all the odium and disadvantage of having the knowledge of how they voted made public. What reason can there be for adding to their punishment that of disfranchisement? To so hold would be like piling Ossa upon Pelion, and, it would seem, was clearly not intended by the law. To hold that it was, would be not to liberally construe the act in favor of the voter, but strictly against him.

In addition to what we have said of the scope and spirit of the ballot law, we think there is that in the letter of the act which strengthens our conclusion very much. By section 24, already quoted, it is provided that

no ballot shall be placed in the ballot box upon which the watermark does not appear, nor from which the slip has not been removed. But, while section 26 provides that ballots found in the box not bearing this watermark shall not be counted, it says nothing about the slip being left on. Considering the juxtaposition of those terms in section 24, it is hardly probable that the omission to mention the slip in section 26 was accidental. If not, it clearly indicates an intention that leaving the slip on should not cause the rejection of the ballot. There is reason, too, why such a distinction should be made. If a citizen votes a ballot not bearing the watermark, he is somewhat in fault himself; and, besides, there could be but one purpose for substituting such a ballot for one that was genuine, and that would be fraud. On the other hand, the slip is to be removed by the inspector after the ticket is surrendered to him, and with this the voter has nothing to do; and very often, as in this case, it might be left on the ballot by oversight or accident. In this connection we quote from the recent decision by the supreme court of Washington, already mentioned. Speaking of the decisions that have been rendered under the ballot laws of the different states, the court said: "These cases cannot all be harmonized, but the general trend thereof has been to recognize a clear distinction between those things required of the individual voter and those imposed upon election officers. There is a disposition to hold the former valid and mandatory; but where there has been a substantial compliance with the law on the part of the individual voter, and it is made to appear that there has been in fact an honest expression of the popular will, there is a well-defined tendency to sustain the same, although there may have been a failure to comply with some of the specific provisions of the law upon the part of the election officers, or some of them." *Moyer v. Van De Vanter* (Wash.) 41 Pac. 60. In that case the law required the inspector, or one of the judges, to write his initials on the ballot before it was delivered to the voter, and directed that any ballot not bearing those initials should be void, and not be counted. But it was held that the law was unconstitutional, and, where the officials had failed to so mark any of the ballots of a precinct, that they should still be counted. There are decisions conflicting with the views we have expressed, but we believe the greater number, and the better-considered cases, support our conclusions. We have examined them all, but it would be an endless and unprofitable task to review them, and we shall not attempt it. Our conclusion concerning these ballots renders it unnecessary to pass upon the other ballots objected to by appellant. Judgment and order refusing a new trial reversed, and cause remanded.

BONNIFIELD, J., concurs.

BELKNAP, J. (dissenting). The law of 1891 directs that the number of each ballot shall be the same as that of the corresponding stub (section 12, c. 40), and that the number of the ballot shall be written upon the registry list, opposite the name of the voter receiving it (section 19, c. 40). After preparing the ballot, it must be delivered to the inspector, who shall separate the strip bearing the number from the ballot, and deposit the ballot in the ballot box. Section 20, c. 40. At Rebel Creek precinct, the inspector, through ignorance of the law, and not willfully, neglected to separate the strip bearing the number from the ballot. The entire vote of the precinct was cast in this way. The act of the inspector was in direct disobedience to the requirements of the law, which, in section 20, c. 40, declares that the strip and number shall be destroyed before the ballot is cast; and by section 24, c. 40, that no ballot shall be deposited in the ballot box unless the slip containing the number of the ballot has been removed by the inspector. I refer to these provisions, not as authorizing the canvassers to throw out the ballots, but as illustrating the intention of the legislature in passing the statute providing for a secret ballot. The prohibition against counting ballots is contained in the twenty-sixth section of the act, as follows: "Sec. 26. In counting the votes any ballot not bearing the watermark as provided in this act, shall not be counted, but such ballot must be preserved and returned with the other ballots. When a voter marks more names than there are persons to be elected to any office, or if for any reason it is impossible to determine the voter's choice for any office, his vote for such office shall not be counted. Any ballot upon which appears names, words or marks, written or printed, except as in this act provided, shall not be counted." Under the last sentence of this section, these ballots should not be counted. The purpose of the act, as expressed in its title, is "An act relating to elections and to more fully secure the secrecy of the ballot." No act of the inspectors was so well calculated to expose the vote, and defeat the intention of the legislature, as their neglect to destroy the number on the slip. Any person, upon inspection of the registry list, could have ascertained the vote of each elector. I admit that if my views are to be adopted the voters of the precinct at that election will be disfranchised, but I am confronted with what I think are clear and imperative provisions of law, incapable of judicial construction. Under the English law of 1872, the presiding officer at the polling station marked upon the face of the ballot given to each the number of the voter appearing on the burgess roll, which would enable any one, upon inspection, to identify the way in which the party had voted. It was held that these ballots were void, and should not have been counted; but the error did not affect the result of the election; the

prevailing candidate having been elected, irrespective of the contested ballots. *Woodward v. Sarsons*, L. R. 10 C. P. 733. In *West v. Ross*, 53 Mo. 350, the law of Missouri required the ballots to be numbered, and provided that any ballot not numbered should not be counted. The judges of election, through inadvertence, neglected to number any of the ballots; but the court held that the statute was mandatory, and all of the ballots were rejected. The court said: "This case may be a hard case, and doubtless is; but the legislative enactment is clear, and although it may deprive a portion of the citizens of the county of their right to be heard in the election of a clerk at one election, it is better that they should suffer this temporary privation than that the courts should habituate themselves to disregard or ignore the plain law of the land in order to provide for hard cases. In the present case the legislature has provided and required that the ballots should be numbered, and then provides, in express terms, that no ballot not numbered shall be counted. Can we say that such ballots shall be counted, without an attempt at judicial legislation? I think not, and it would be a misapplication of terms to say that such a statute is only directory." For these reasons I dissent from the judgment.

(22 Nev. 447)

DENNIS v. CAUGHLIN. (No. 1,442.)

(Supreme Court of Nevada. Sept. 28, 1895.)

AUSTRALIAN BALLOT—DISTINGUISHING MARKS—CONTEST—ERRORS CONSIDERED ON APPEAL.

1. St. 1891, p. 40, §§ 20, 28 (Australian Ballot Law), provide that the voter shall place a cross after the name of the person he intends to vote for; that such marking shall be done only with a black lead pencil; that when a voter marks more names than there are persons to be elected to an office his vote for such office shall not be counted; and that any ballot on which appear names, words, or marks, written or printed, except as in this act provided, shall not be counted. *Held*, that a mark, appearing to have been accidentally made, and not from an evil purpose, should not be construed as a distinguishing mark, so as to avoid the ballot.

2. On appeal in an election contest the supreme court can consider only such errors as appellant complains of.

Appeal from district court, Washoe county; G. F. Talbot, Judge.

Proceeding by John H. Dennis against W. H. Coughlin to determine whether defendant or John Hayes was legally elected to the office of sheriff of Washoe county. From a judgment for defendant, plaintiff appeals. Reversed.

T. E. Haydon, for appellant. Torreyson & Summerfield, for respondent.

BELKNAP, J. This is a contest brought by John H. Dennis, an elector of Washoe county, against the respondent, to determine whether John Hayes or W. H. Coughlin is legally entitled to the office of sheriff of

Washoe county. According to the official returns, respondent received the highest number of votes, and was declared elected by the board of canvassers. At the trial it was stipulated that all returns and all ballots of each and every precinct in the county should be examined and considered, and legal ballots counted for whom cast, and under this stipulation the trial was had. Respondent recovered judgment.

One of the first questions to be determined is whether we can review all the rulings of the district court or only such as have been assigned as error by the appellant. It has frequently been decided that a party who has not appealed from a judgment cannot, on an appeal by the opposite party, obtain a review of the rulings of the court against him. In *Dougherty v. Henarie*, 47 Cal. 9, the plaintiff offered to dismiss the action as to one of the defendants, who objected, and the court thereupon denied the motion to dismiss, the plaintiff excepting. Said the court: "But he cannot avail himself of his exception on this appeal. Having submitted to the judgment, and prosecuted no appeal from it, he cannot, on an appeal by the defendants, review the rulings of the court which he claims are to his prejudice." *Maier v. Swift*, 14 Nev. 324; *Moresi v. Swift*, 15 Nev. 215; *Nesbitt v. Chisholm*, 16 Nev. 40. Again, in *Whittam v. Zahorik*, 59 N. W. 57, the supreme court of Iowa said in an election contest case: "The appellee complains that ballots similar in marking to some of those we hold should have been excluded were offered by the contestant, and counted for him; but, as the incumbent does not appeal, we cannot determine the question he thus presents." Our conclusion is that only such errors as the appellant complains of can be considered upon this appeal.

The errors assigned by the appellant embrace the rulings of the district court upon 32 ballots. These rulings involve a construction of the statute of 1891 generally known as the "Australian Ballot Law." The provisions of the statute relating to the preparation of the ballot by the elector, and its rejection in certain cases, are as follows:

"Sec. 20. On receiving his ballot the voter shall immediately retire alone to one of the places, booths or compartments. He shall prepare his ballot by marking a cross or X after the name of the person for whom he intends to vote for each office. In case of a constitutional amendment or other question submitted to the voters, the cross or X shall be placed after the answer which he desires to give. Such marking shall be done only with a black lead pencil. Before leaving the booth or compartment the voter shall fold his ballot in such manner that the water-mark and the number of the ballot shall appear on the outside, without exposing the marks upon the ballot, and shall keep it so folded until he has voted. Having folded his ballot, the voter shall deliver it to the inspector, who

shall announce the name of the voter and the number of his ballot. The clerk having the registry list in his charge, if he finds the number to agree with the number of the ballot delivered to the voter shall repeat the name and number, and shall mark opposite the name the word 'Voted.' The inspector shall then separate the strip bearing the number from the ballot, and shall deposit the ballot in the ballot box. Said strip and number shall be immediately destroyed."

"Sec. 28. In counting the votes any ballot not bearing the water-mark, as provided in this act, shall not be counted, but such ballot must be preserved and returned with the other ballots. When a voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office, his vote for such office shall not be counted. Any ballot upon which appears names, words or marks written or printed, except as in this act provided, shall not be counted."

Statutes more or less similar in their nature have been adopted in many of our sister states, and a reference to some will aid in the construction to be placed upon our law. In *Re Vote Marks*, 21 Atl. 962, the supreme court of Rhode Island said: "A cross is the only mark authorized by the statute to be used to designate the person voted for, and it is only by force of the statute that it gets its significance for that purpose. If another mark be used, there is nothing to certify its meaning. It might be conjectured that it was used inadvertently instead of a cross, but, in our opinion, such a conjecture would not justify the counting of it. The statute declares: 'No voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him.' If marks other than crosses were counted, they might be used both to answer the purpose of crosses and to identify the ballots." In *Whittam v. Zahorik*, 59 N. W. 57, in considering a law of this nature adopted in Iowa, the court said: "It is not practicable to adopt a rule in regard to identifying marks which would be applicable in all cases. It will not do to say that all ballots which bear marks not authorized by law should be rejected. All voters are not alike skillful in marking. Some are not accustomed to using a pen or pencil, and may place some slight mark on the ballot inadvertently, or a cross first made may be clumsily retraced. It is evident that in such cases, and in others where the unauthorized mark is not of a character to be used readily for the purpose of identification, the ballots should be counted; but where the unauthorized marks are made deliberately, and may be used as a means of identifying the ballot, it should be rejected." In *Indiana* it was provided that the voter should indicate his choice by stamping a certain square opposite the candidate's name, and, if he desired to vote for all candidates of one party, should place the stamp on the square preceding the party

designation. The court held that the provision concerning the use of the stamp was mandatory, the stamping of the square being the only method prescribed by which the voter can indicate his choice. The statute was amended at the next session of the legislature so that a stamp placed upon a ballot which does not touch a square thereon was declared to be a distinguishing mark, and was not to be counted. The court said: "This amendment was intended, we think, to make certain that which, prior to its passage, was left in some measure to construction; but it only makes certain that which was intended by the legislature when it passed the original section." *Parvin v. Wimberg*, 130 Ind. 561, 30 N. E. 790. In *Maine* the statute provides that "the voter shall prepare his ballot by marking on the appropriate margin or place a (X) as follows: He may place such mark opposite the name of a party or political designation; or he may place such mark opposite the name of the individual candidates of his choice for each office to be filled." *St. Me.* 1891, c. 102, § 24. The court said of this provision: "Its distinguishing feature was its careful provision for a secret ballot. The leading purpose of it was to give the elector an opportunity to cast his vote in such a manner that no other person would know for what candidates he voted, and thus to protect him against all improper influences, and enable him to enjoy absolute freedom from restraint and entire independence in the expression of his choice." "If it be conceded that the intention of the voter may be correctly inferred from the mark actually made by him in each of these instances, it is still a fatal objection to the ballot that such an irregular and unauthorized mode of marking it might readily be, and probably would be, agreed upon with the voter as a distinguishing mark to identify the ballot cast by him, whenever identification was desired. Such a palpable disregard of the plain requirements of the act strikes at the root of the secret-ballot system." *Curran v. Clayton*, 86 Me. 42, 29 Atl. 930.

These decisions show that the only way the voter can indicate his choice is by a cross or X, used in the manner required by the statute. The statute of this state is less liberal in its terms than those of the other states, and if its provisions relating to "marks," in the twenty-sixth section of the act, are to be literally enforced, many voters would be disfranchised. This section provides that any names, words, or marks, except as in the act provided, shall invalidate the ballot. Under the terms of the statute, any mark, although innocently or accidentally made, would come within its provisions. The evils against which the statute was directed were bribery and intimidation, and to repress these the secret ballot was adopted. Its aim was that the ballot should not disclose by whom it was cast, and for this reason all of the means by which it may be identified were interdicted.

Courts should construe statutes with such liberality, if practicable, as to advance the object and correct the evils which the legislature had in view. A mark satisfactorily appearing to have been inadvertently or accidentally made, and not for an evil purpose, is not within the meaning of the statute, and should not be construed as an identifying or distinguishing mark; and we think the statute should be read as if this qualification were attached to it. Adopting this view, a ballot written by a hand unaccustomed to the use of a pencil, or awkwardness in its use, or carelessness, or an apparent attempt to retrace a clumsily made cross X, or an effort to make it more certain, and in doing so employing more lines than are necessary to properly make a cross, or a slightly blurred spot to correct a mistake, not indicating an intention to identify the ballot, or a slight erasure for the same purpose, or cross made when the ballot paper was defective, and to avoid the defect, and make the vote more certain, a second cross was made, or a slight pencil mark, clearly made by accident, and not design, or a stain of tobacco, will not avoid the ballot.

There are 15 ballots numbered as follows: 45, 49, 50, 78, 68, 73, 74, 53, 27, 72, 59, 75, 40, 36, 66, to which these objections were made, and we think that all of them should be counted for the appellant. But blurred spots, plainly made by a lead pencil, which may have been made for the purpose of canceling a cross, but which might have been made also for identification, or a cross not opposite the name of any candidate, or two or more crosses instead of one, or a number of crosses in a bunch, or a mark not a cross, or the use of a blue lead pencil instead of a black one, or a straight line, thus, —, over the word "No," or writing a word instead of employing a cross, are grounds for rejecting the ballot. There are 17 ballots to which these objections apply, and we think the court properly rejected them. These ballots were numbered as follows: 30, 39, 44, 69, 33, 38, 60½, 71, 41, 48, 66¾, 37, 52, 35, 54, 57, 77. The district court found that Hayes was entitled to 558 votes, and Caughlin 561. Adding to Hayes' vote the 15 votes that we have found for him, changes the result of the election.

Similar motions were made in this case as those in *Buckner v. Lynip* (Nev.) 41 Pac. 762, and upon the authority of that case the motions are dismissed. Judgment reversed and cause remanded for a new trial.

BONNIFIELD, J., concurs.

BIGELOW, C. J. (concurring). As held in *Buckner v. Lynip*, 22 Nev. —, 41 Pac. 762, the spirit and purpose of the ballot law was to exclude only ballots bearing distinguishing names, words, or marks, and not those where it satisfactorily appears that the marks were not intended for distinguishing marks, and were not placed thereon with the knowledge

or consent of the voter. Doubtless, in the first instance, the presumption should be that all marks not authorized by law were placed thereon for the purpose of identification, and, in the absence of satisfactory evidence to the contrary, should exclude the ballot from the count. But clearly it was not the intent of the lawmakers that marks that do not identify the particular ballot, or that clearly appear to have been accidental or inadvertent, as where made by the slip of a pencil, by soiled fingers, through awkwardness in making the cross, or by other unintentional means, and that are not such as to be readily used for purposes of identification, should cause the rejection of the entire ticket. On the other hand, where the marks were apparently made intentionally, and are such as to readily distinguish the ticket, and such as may have been made for the purpose of distinguishing it, it should not be counted. Of course, this rule calls for the exercise of some discretion in the canvassers, and is not so simple as it would be to follow the letter of the law, and reject all ballots upon which any unauthorized mark appears; but we believe it to be more in consonance with the spirit of the statute and with the genius of our institutions. Our government is founded upon manhood suffrage, and in the effort to prevent intimidation and corruption in the elections, although a most commendable purpose, and one we would encourage by every means possible, it will not do to adopt rules so strict as to practically disfranchise a considerable number of innocent voters. This would be too heroic a remedy. If the sole, or even the main, purpose be to prevent fraud in the elections, this could be best accomplished by permitting no one to vote. The marking upon a ballot may be such as to prevent its being counted for a particular candidate upon two grounds: Where it is not so marked as to indicate the voter's choice as to that office, and where it bears distinguishing marks. Upon the first ground, no other mark than that of a cross or X, placed after the candidate's name, will suffice; but a failure to mark upon some office, or a defective marking, should not usually be classed as a distinguishing mark. Probably a cross or an X could be so made as to constitute an identifying mark, but we should be very certain that such was the purpose before we would be justified in rejecting the ballot on that ground. The statute recognizes that there may be defective marking upon some particular office that is still not sufficient to reject the entire ballot, by providing that when, for any reason, it is impossible to determine the voter's choice for any office, his vote for that office shall not be counted. All men do not make crosses and X's alike, nor do all possess the same degree of skill in making them. It would seem that any honest attempt to make the proper mark, and nothing else, even if in-

sufficient to authorize counting the vote for that candidate, should not be treated as sufficient to cause the ballot's rejection.

The following examples will illustrate the distinctions we think should be drawn: Ballot No. 27 has a faint cross, very nearly erased, opposite the name of McNees, another candidate for the same office. It is evident that this mark was made inadvertently, and that the voter sought to change his vote from McNees to Hayes. It is perfectly clear for whom he wished to vote, and, as the faint outline of the cross does not constitute a distinguishing mark, no reason appears why it should not be counted as intended. No. 49 has a mark opposite the name of a state candidate intended for an X, but the second stroke only comes down to, but does not cross, the first. While this was a failure to make a cross, so that probably the vote should not have been counted for that candidate, it was clearly unintentional. Had the second stroke been extended the thirty-secondth part of an inch, it would have been a cross. No. 50 has a light third line across the X opposite the name of a state candidate, doubtless made through accident or carelessness. No. 53 has a light mark, apparently made by a dirty finger, or in an attempt to erase a cross in a square, but which was again made and allowed to remain. No. 73 has crosses made with lines across the top and bottom of the X's, intended to be the same as the X is made in the statute. As the act does not provide how the cross shall be made, we do not see why that is not as correct as one made simply with two straight lines crossing. We think that such ballots as these, and similar ones, should be counted. On the other hand, No. 35 has in two places a number of crisscrossed lines nearly filling a square. No. 37 has the printed word "No" crossed out with a pencil. No. 38 has crosses not opposite the name of any candidate. No. 39 has a heavy round spot, made with a pencil, apparently for the purpose of covering up or blotting out a cross in a square opposite the name of a candidate. Very likely, in all these instances, the marks were made innocently, and not for the purpose of distinguishing the tickets; but they were made intentionally, and not by accident or inadvertence, and are such as might have been placed there for identification. They were, therefore, properly rejected.

All questions concerning the manner of making a cross, or of where it shall be placed, can be avoided, and an advantageous change made in the law, by the legislature adopting an amendment providing for the use of a rubber stamp instead of a lead pencil, as is directed by the statutes of Indiana and some other states.

I concur in the conclusions announced by Justice BELKNAP as to the ballots that should or should not be counted.

LONES et al. v. LONES. (Sac. No. 3.)
(Supreme Court of California. Sept. 5, 1895.)

WILLS—REVOCATION AND REVIVAL

Under Civ. Code, § 1297, the mere execution of a subsequent revocatory will ends the first will, and such first will is not revived by the revocation of the last will unless it is revived by the terms of such revocation.

Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Proceeding by John H. Lones and others against William B. Lones in his own right and as administrator with the will annexed of the estate of H. A. Lones, deceased, to contest such will, in which there was a judgment for contestants. From an order refusing a new trial, defendant appeals. Affirmed.

Frank T. Nilon, for appellant. Thos. S. Ford and Smith & Riley, for respondents.

TEMPLE, J. This is a contest of a will, in which the contestants recovered a judgment. The appeal is from an order refusing a new trial. The deceased made a will in 1856, and another in 1884, which in terms revoked the will of 1856; and another in 1885, which in terms revoked all former wills. He died in 1893, and the will of 1856 was duly admitted to probate, but within the year the plaintiffs, who are heirs of the decedent, inaugurated this contest. The fact of the execution of the subsequent wills, and that they in terms revoked former wills, was established beyond question. The defendant, William B. Lones, however, who was executor and the sole beneficiary of the will of 1856, contends that in the cancellation of the will of 1885 the testator revived the will of 1856. The court found against this contention, and the statement does not contain an iota of testimony tending even in a remote degree to prove that at the time of the revocation or cancellation of the will of 1885 the testator intended to revive any former will. The testimony does not show when or how that will was canceled, and, of course, there could be no evidence tending to prove that "by the terms of such revocation" the former will was revived. But by no act or manifestation of intent in writing or otherwise, not executed with the formalities with which a will should be executed, would the will of 1856 have been revived upon the cancellation of the will of 1885. The will of 1885 did not revoke the will of 1856, but that of 1884, and only the will of 1884 could have been revived by the revocation of the will of 1885. That the revocation of a revocatory will revives the will revoked by the last will is upon one of two grounds: either that the revocation, being itself revoked, leaves the will which had been annulled by the revocation then unrevoked, or that a will is ambulatory, and has no operation

until the death of the testator and its probate; and, if the revocatory will is itself revoked, and therefore cannot be probated, it never had any operation, and therefore the first never was revoked. Whichever view is taken, the revocation of the will of 1885 could not have revived a will which had not been revoked by its execution. But all such speculations are ended by section 1297, Civ. Code. The mere execution of a subsequent revocatory will ends the first will, and such will is not revived by the revocation of the last will unless it is revived by the terms of such revocation. What sort of a revocation it must be which can by its terms revive a prior will is shown by the first subdivision of section 1292, Id. The order is affirmed.

We concur: MCFARLAND, J.; HENSHAW, J.

(108 Cal. 627)

In re WALKERLY'S ESTATE. (No. 15,592.)

(Supreme Court of California. Sept. 3, 1895.)

BEQUESTS — CONDITIONS AS TO TIME OF PAYMENT — PERPETUITIES — ASSIGNING HOMESTEAD — WILLS — CONSTRUCTION — ESTOPPEL — PAROL EVIDENCE.

1. A direct bequest to a person, conditioned, however, that the principal thereof should not be paid till distribution of the residue by trustees, which was not to be till after the death of such person, is a present gift vesting immediately, and is independent of the trust, except as to the time of payment, which, being repugnant to the gift, as impossible on its face, is void.

2. A devise of the residue of an estate to trustees to hold and manage for a fixed period, and then sell, and distribute among certain persons or their heirs, is void as creating a perpetuity; Civ. Code, § 715, providing that the absolute power of alienation shall not be suspended by any condition or limitation longer than during the continuance of lives in being at the creation of the limitation or condition, and section 716 declaring void every future interest which, by any possibility, may suspend such power of alienation for a longer period, and declaring that it is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.

3. Even though the future interest of the beneficiary be vested like a remainder, and be thus alienable, it is not such an interest as will by transfer carry an absolute interest in possession.

4. The provision in a devise in trust that the trustee shall sell the property, and distribute it among certain persons or their heirs only after the lapse of 25 years, cannot be rejected as a condition void because repugnant to the interest conveyed.

5. Even if the rule against perpetuities did not apply to personal property, the doctrine of equitable conversion could not be invoked, so that land devised in trust to be sold only after a fixed period should be treated as already sold and converted into personality.

6. The word "heirs," in Code Civ. Proc. § 1468, declaring that, if the property assigned as a homestead be selected from the separate property of deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of deceased, subject to such order, cannot be construed to mean "heirs or devisees."

7. Though a devise in trust allows the trustees to sell the property at any time, still, it being provided that the trustees shall hold and invest the proceeds till distribution, which is not to be made till a definite time, a perpetuity is created; Civ. Code, § 771, declaring that the suspension of all power to alienate the subject of a trust other than power to exchange it for other property, to be held on the same trust, or to sell it, and reinvest the proceeds, to be held on the same trust, is a suspension of the power of alienation, within the inhibition of section 715.

8. The inhibition of Civ. Code, § 715, against suspension of the absolute power of alienation, applies to personal as well as real property, the section being in that part of the Code dealing with the modifications of ownership and restraints on alienation of "property in general."

9. Though a legatee, by taking under a will, is estopped to deny its validity as a will, she may insist on a due interpretation of its provisions disconnected with the bequest, though they create a trust void as against the statute as to perpetuities.

10. A court whose duty it is, on distribution of a testator's estate, to give effect to his legal devises and bequests, cannot, even with the consent of the parties, declare valid trusts which are opposed to the express provision of the statute against perpetuities.

11. Where the provisions of a will are plain and unambiguous, parol evidence is not admissible on the question of testator's intent.

In bank. Appeal from superior court, Alameda county; W. El. Greene, Judge.

In the matter of the estate of William Walkerly, deceased. From the decree of distribution, testator's widow and minor child appeal. Reversed.

Rodgers & Paterson, for appellants. Frederick E. Whitney, H. O. Firebaugh, B. B. Newman, Fox, Kellogg & Gray, H. W. Hut-ton, and F. D. Brandon, for respondents.

HENSHAW, J. William Walkerly died testate upon September 18, 1887, leaving as heirs at law his widow, Blanche M. Walkerly, and a posthumous child, born February 14, 1888. This appeal is by the widow and the minor child from the decree of distribution rendered in the matter of his estate.

Upon June 2, 1887, Walkerly executed his will containing the following provisions: "First. I declare that my entire estate is my separate property, having been acquired by me prior to my marriage. Second. I direct my executors hereinafter named to pay all my just debts and funeral expenses without unnecessary delay. Third. I give, bequeath, and devise to my dear wife, Blanche M. Walkerly, all my household furniture, books, pictures, jewelry, and plate, to her sole use and benefit forever. I also give and bequeath to her during her widowhood the free use and enjoyment of my residence consisting of block number 121, with dwelling, stable, etc., thereon, situated in the city of Oakland. Upon the death or second marriage of my said wife, my trustees herein named are hereby directed to take possession and control of said dwelling and premises, and to manage and administer the same in the same manner and for the same purposes as they are directed in

this will to manage and administer other property herein bequeathed and devised to them. Fourth. I hereby give and bequeath unto my dear wife, Blanche M. Walkerly, an annuity of two thousand four hundred (\$2,400) dollars during her life, payable quarterly, in gold coin of the United States, and I do hereby make the said annuity a charge and burden upon that certain piece of real estate situate on the northwest corner of Post and Stockton streets, in the city and county of San Francisco, known as the Walkerly Block or Building; and I do request my trustees hereinafter named to see that this annuity or allowance for the support and maintenance of my wife is promptly paid as herein directed. Fifth. I give and bequeath unto my grandnephew, Andrew Rungay, the sum of two thousand dollars. Sixth. I do hereby give, bequeath, and devise unto Martin Bacon, Frank Barker, and Columbus Bartlett all the rest and residue of my estate of every description and wheresoever situated, in trust, for the following uses and purposes, to wit: (1) To take the possession, charge, and management of the property, and collect the rents, issues, and profits thereof. (2) Out of the income or rents and profits to pay quarterly the annuity or allowance hereinbefore made to my wife, Blanche M. Walkerly, for her support and maintenance. (3) To pay to my sister, Mary Windley, the sum of five hundred dollars per annum, during her life, payable semiannually. Should my sister die before her husband, then, and in such case, the annuity left shall not cease and determine, but shall go on, and shall be paid to Stephen Windley during his lifetime. (4) To annually distribute the residue of the rents and profits of the trust estate, after deducting the sum of \$2,400 to be paid to my wife, and the \$500 to be paid to my sister, Mary, or her husband, and the taxes, insurance, and expenses, and charges of administration, equally among my nephews and nieces. Upon the death of any nephew or niece, his or her share shall go and be divided equally between his or her children, share and share alike. (5) To sell and convey all the trust property and estate at the expiration of twenty-five years from the date of my death, and to distribute the proceeds equally among my nephews and nieces or their heirs, the descendants or heirs of any deceased nephew or niece taking collectively the share which their father or mother would take were he or she living. Provided, that no final sale or distribution of the trust estate be made during the lifetime of my wife, Blanche M. Walkerly, but only after the expiration of twenty-five years from date of my death, and after her death. Upon the distribution of the proceeds of the sale of the trust estate among the parties entitled, then this trust shall cease and determine. Should any one or more of my said trustees die or resign, the remaining trustees or trustee must immediately appoint some suitable person to fill the vacancy, so as

to keep the number of trustees at three. Seventh. I hereby nominate and appoint my nephews Martin Bacon and Frank Barker and my friend Columbus Bartlett the executors of this my last will and testament, without bonds, with full power and authority to sell any part of my estate, real or personal, whenever, in their judgment, or that of a majority of them, it is necessary or advisable to do so, excepting my residence in the city of Oakland, and the Walkerly Building in San Francisco. In the event that the proceeds of the sales of my other property shall not prove sufficient to pay my debts, expenses of administration, etc., then, in such case, but not otherwise, I hereby authorize my executors to negotiate, execute, and place a mortgage on the Walkerly Building, for the purpose of raising sufficient funds to pay the residue of my debts, etc. It is my will that the Walkerly Block be transferred and delivered over to my trustees hereinbefore named so soon as can be conveniently done after my death, to be managed by them in pursuance of the trust hereinbefore created, and that my residence be not sold while occupied by my widow. Should she marry again, then my trustees are directed to take possession of the same, and manage it for the benefit and as part of the trust estate, with power to sell the same whenever in their judgment it is best to do so."

Upon September 7, 1887, he republished said will with the following codicil thereto: "I, William Walkerly, of the city of Oakland, Alameda county, California, do make, publish, and declare this as and for a codicil to my last will and testament. That is to say, being informed by my wife, Blanche Walkerly, that she is pregnant with a child by me, I desire to make provision for such child, should it be born alive, and to make a more liberal and different provision for my said wife than I have made in my will to which this is a codicil. First. I hereby revoke the gifts, bequests, and devises made in my said will to and for the benefit of my wife, Blanche Walkerly, and in lieu thereof I do hereby give and bequeath to her the sum of one hundred thousand dollars (\$100,000), to be paid to her when the Walkerly Block shall be sold, as described and provided for in my will, and in the meantime to be a lien, mortgage, and burthen upon said Walkerly Block, bearing interest at the rate of five per cent. per annum. Said interest to be paid to her semiannually by my trustees, Martin Bacon and Columbus Bartlett. Second. I give, bequeath, and devise unto my child, which shall be born unto me lawfully, begotten upon the body of my wife, Blanche Walkerly, the sum of one hundred thousand dollars (\$100,000), to be paid when the Walkerly Block shall be sold as described and provided for in my will, and in the meantime to be a lien, mortgage, and burthen on said Walkerly Block, bearing interest at the rate of five per cent. per annum. And my trustees, Martin Bacon and Columbus Bartlett, are hereby directed to

pay the interest on this bequest semiannually to the guardian of such child. Third. I hereby nominate and appoint my nephew Martin Bacon the guardian of the estate of any child which shall lawfully be born to me, without bonds."

Upon the hearing of the petition for distribution the court, first making certain findings of fact, hereinafter considered, rendered its decree, which itself contained a recital of the findings of fact above adverted to, and which, after further specifically setting forth the proceedings in probate showing that the estate was ready for distribution, and that the widow had remarried, and was the wife of William F. Burbank, made distribution as follows: "It is hereby ordered, adjudged, and decreed that the residue of said estate of William Walkerly, deceased, hereinafter particularly described, and now remaining in the hands of said executors, and any other property now known or which may hereafter be discovered which may belong to said estate, or in which the said deceased may have any interest, be, and the same is hereby, distributed unto Martin Bacon, Frank Barker, and Henry Davis Hawks, in trust, for the following purposes and uses, to wit: First. To take the possession, charge, and management thereof, and to collect the rents, issues, and profits thereof. Second. Out of the income or rents or profits of said trust estate to pay semiannually \$2,500 to Blanche Walkerly-Burbank, formerly Blanche M. Walkerly, and \$2,500 to William Martin Walkerly, a minor, and to distribute annually the residue of the rents and profits of said trust estate, after the aforesaid payments and expenses of the trust property have been paid, equally among the nephews and nieces of said William Walkerly, deceased; and upon the death of any nephew or niece his or her share to be divided equally between his or her child or children, share and share alike. Third. To sell and convey all the trust property and estate as soon as practicable, and convert the same into money, and distribute the same as follows: (1) Out of the proceeds obtained from the sale of the Walkerly Block in San Francisco, hereinafter mentioned, \$100,000 to Blanche Walkerly-Burbank, with interest thereon from the 27th day of November, 1893, at the rate of five per cent. per annum, payable semiannually. (2) Out of the proceeds obtained from the sale of the Walkerly Block in San Francisco, \$100,000 to said William Martin Walkerly, a minor, with interest thereon from the 27th day of November, 1893, and after deducting therefrom said sum \$2,000 paid as attorney's fees to Arthur Rodgers, the attorney of said minor, appointed heretofore by this court, and interest as stated in the decree. (3) The remainder of the proceeds of the sale of said Walkerly Block in San Francisco, and all other property of said estate, to be equally divided among the following named persons. * * * The nephews and nieces and the children of deceased

nephews and nieces are then named, and their respective shares allotted to them. The residue so distributed to the trustees comprised the Walkerly Block, block 121 in Oakland, which had been set apart to Blanche Walkerly and the child as a homestead during her widowhood, and personal property, consisting of moneys to the amount of \$4,615, and certain stocks, judgments, and claims of considerable amount, but small actual value.

The first proposition urged by appellants against the decree may be thus stated: The decree declares trusts other and different from those set up by testator in his will. The trusts sought to be established by testator in his will are void. The trust declared by the decree, read by itself and apart from the will, whose provisions it is supposed to formulate, is legal, and requires no independent consideration. But does it fairly interpret and represent the trusts sought to be created by the will? This vital point must first receive attention. Omitting from present consideration the language of the codicil, Walkerly bequeathed and devised the residue of his estate to the trustees named upon certain defined trusts: (1) To pay an annuity of \$2,400 to his widow during her life, making the annuity a charge upon the Walkerly Block; (2) to pay an annuity of \$500 a year to his sister during her life, and upon her death to her husband during his life; (3) annually to distribute the remainder of the net income and profits of the estate to testator's nephews and nieces, and upon the death of any nephew or niece to distribute his or her share among the children of such decedent. The trusts so declared belong to those classes of express trusts which, as to real property, are alone permitted to be created by our statutes. Civ. Code, § 857, subs. 2, 3. So far, then, as concerns their objects and purposes, up to this point they contravene no law, and are undoubtedly legal. But there is still to be considered the life of the trust,—the event upon the happening of which, or the time upon the arrival of which, the testator has declared it shall cease and determine. These provisions are found in sections 5 and 7 of the will above quoted. At the expiration of 25 years from the date of testator's death the trustees are required to sell all the trust property, and to divide the proceeds among the then living nephews and nieces or their heirs, the "descendants or heirs" of a deceased nephew or niece taking collectively the share of the ancestor. That there may be no room for construction of his meaning as to when the sale shall be made, the testator further declares in the same connection that "no final sale or distribution of the trust estate shall be made during the lifetime of my wife, Blanche M. Walkerly, but only after the expiration of twenty-five years from date of my death, and after her death." This language is certain, precise, and free from doubt. The testator had left as a legacy to his wife an annuity of \$2,400, the payment of which was made a

charge upon the most valuable portion of his estate, the Walkerly Block. His special purpose was to preserve this property unaliened and inalienable for at least 25 years; for a longer period if his wife should live longer, but, if she should die sooner, still for 25 years. This purpose is made manifest not only from the clauses of the trust already discussed, but, in addition, by the exemption of this property from the operation of the power of sale conferred in the seventh paragraph of the will. To the grant of power to sell, therein made, is expressly attached a reservation excepting this property.

Turning now to the codicil, which is to be construed with the main instrument, it will be seen that the testator's declared purpose therein is to make a more liberal provision for his widow and for the child with which he has been informed she is pregnant. This he does by revoking the annuity, and giving her a present legacy of \$100,000, with payment only deferred. It is to be paid "when the Walkerly Block shall be sold as described and provided for in my will," and in the meantime to be a charge upon that property. There is here not only no modification of the original time of the sale of this land and the extinguishment of the trust, but the provisions of the will in this regard are referred to with particularity as fixing the time of payment. The circumstance that the time of payment thus fixed must be after the death of the widow, and that, therefore, the legacy could not be paid to her, cannot affect or modify the terms of trust. The legacy is put wholly without, and made entirely independent of, the trust, except as to the date of payment. It is a present gift, vesting immediately, and, if the condition deferring the time of its payment is repugnant to it as being impossible upon its face, the condition would be void. *Hone's Ex'rs v. Van Schaick*, 20 Wend. 568; *Oxley v. Lane*, 35 N. Y. 350. In passing may be pointed out the radical and important distinction between the present gift to the wife and child each of \$100,000 to be paid when the Walkerly Block is sold, and the future interests of the nephews and nieces, to whom nothing was directly given. All of the residue was devised to the trustees, who were to sell as provided, and upon sale to distribute the proceeds to the nephews and nieces who should be then alive, and the "descendants or heirs" of those who might be dead. The legacy to the child presents no features meriting special attention. No other conclusion, therefore, can be reached than that the general purpose of the testator as to all his property, clearly expressed by his will, was that it should be held by the trustees for 25 years before distribution, and that his special purpose as to that particular property called the "Walkerly Block" was that in no event should it be sold or aliened before the expiration of 25 years from his death.

But the trust estate consisted (1) of the

Walkerly Block; (2) of the homestead, block 121, in Oakland; and (3) of personal property; and, as the terms and conditions of the trusts are not uniform as to these, a separate and more particular consideration of them and of the law bearing upon them becomes necessary. We proceed to consider:

1. The trust declared upon the Walkerly Block. This property comprises by far the greater portion in value of the testator's estate. It was devised to the trustees upon the trusts indicated, namely, to manage the property, and apply the proceeds for the use of the persons designated, and at the expiration of 25 years, or, if the widow should at that time be alive, then upon her death, to sell the property, and distribute the proceeds among the then living nephews and nieces and the "descendants or heirs" of those who might be dead. The purposes indicated come within the purview of subdivisions 1 and 3 of section 857 of the Civil Code. The fatal defect in the trust is that it provides for an absolute period of years for its determination, during which period the power of alienation is suspended. Section 715, Civ. Code: "The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition." Section 716, Id.: "Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed." Section 749, Id.: "The delivery of the grant, where a limitation, condition or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition or interest, within the meaning of this part of the Code." Section 771, Id.: "The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and re-invest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section 715." It would seem as though all need of discussion were foreclosed as to the trust under consideration by the plain terms of the Code above set forth, yet, because of the great value of the property involved, and the serious consequences which must follow to the interests of respondents, it would perhaps be unjust to leave this consideration without further amplification. We will therefore discuss, so far as we have been able to follow them, the propositions made by respondents in support of this trust. A perpetuity is any limitation or condition which may (not which will or must) take away or suspend the absolute power of alienation for a period

beyond the continuance of lives in being. The absolute power of alienation is equivalent to the power of conveying an absolute fee. *Chapl. Suspen.* § 64. The law against the suspension of the power of alienation applies to every kind of conveyance and devise. It applies to all trusts, whether created by will or deed, whether providing for remainders or executory devises, or, as here, merely restraining the power of alienation for a fixed period of years, and then providing for sale with gift over. In short, it "covers the entire field of estates, interests, rights, and possibilities." *Id.* § 2. Says Perry: "A perpetuity will no more be tolerated when it is covered by a trust than when it displays itself undisguised in the settlement of a legal estate." Perry, *Trusts*, § 382. And section 771, *Civ. Code*, is but an enactment of this rule. Every express trust, valid in its creation, vests the whole estate in the trustees. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust. Section 863, *Id.* If this trust be not valid in its creation, the trustees would take no estate, but neither would the beneficiaries whose rights are dependent upon the validity of the trust. If it be valid, then the "whole estate" vests in the trustees. The "whole estate," as has been pointed out (*Embury v. Sheldon*, 68 N. Y. 227), means the whole of such an estate as is necessary to the performance of the trust. In the one under consideration it embraces the whole legal and equitable estate which the testator enjoyed, since no less would be sufficient to enable the trustees to carry out the purposes: first, to apply the income for 25 years (*Civ. Code*, § 857, subd. 3); and, second, at the expiration of that time to sell the property, and dispose of the proceeds (*Id.* subd. 1). The beneficiaries herein, then, take no estate as such, their interest being the right to the enforcement of the trust.

But, if we understand the position of respondents, it is contended that the nephews and nieces take a future estate, which future estate is vested and is alienable, and that, therefore, it is a valid estate, since only those future interests are void which by possibility may unduly suspend the power of alienation. Following this argument, and for this purpose treating the interest of the beneficiaries as a future interest or estate within the contemplation of the Code (*Civ. Code*, § 716), it may be first suggested that all expectant estates, whether vested in interest or contingent with a vested right, or entirely contingent, pass by succession, will, and transfer, like present estates and interests (*Id.* § 699). But the fact that such interests may pass does not relieve from the operation of the rule, unless there are persons in being who, by combining and conveying all their distinct interests created by the original grant or devise, can pass an absolute interest in possession. Conceding that

the future interest of the beneficiaries is vested in the sense in which remainders are spoken of as vesting, and that the interest would thus be alienable, it still is not such an interest as would by transfer carry an absolute interest in possession. As is pointed out by the court in *Vanderpoel v. Loew*, 112 N. Y. 167, 19 N. E. 481, the vesting of an estate involves absolute alienability only so far as that particular estate is concerned. The fact that a given remainder is vested renders it absolutely alienable, so far as it is itself concerned; but the absolute fee may at the same time be inalienable. Therefore, to convey this absolute interest in possession, the beneficiaries would be compelled to unite with their conveyance that of the trustees in whom the fee is vested. But the trustees cannot convey until the expiration of 25 years. An attempt by them to convey before that time would contravene the trust, and be a void act (*Civ. Code*, § 870), and so even by this method of progression our path leads to that barrier of perpetuity which cannot be surmounted. So, even though the beneficiary should be a remainder-man under such a trust as this, he still could not alienate the land within the trust period so as to avoid the statute. Such a trust cannot be terminated or destroyed during the period fixed for the existence, even by the consent and joint act of all the trustees and beneficiaries. *Douglas v. Cruger*, 80 N. Y. 15; *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413. Hence the question whether the interest of the beneficiaries is contingent or vested is here of no possible moment. The absolute alienability required by section 715 of the *Civil Code* does not imply vesting, and it affords no escape from the operation of the rule because the interest which the beneficiaries take may be relieved from uncertainty as to persons or event. When so relieved, the interest may be said to be vested. But it is not such a vesting, nor yet such an interest, as removes the bar of the statute, since all of the interests and estates, contingent and vested, cannot convey the fee so long as the terms of the trust from which alone their interests are derived stand in the way. The perpetuity here does not result from too remote limitations, or the failure of future estates to vest, but it arises by the direct act of the testator in forbidding his trustees to alienate for a period not tolerated by the law.

Nor is the 25 years a "condition" which may be rejected as void, because repugnant to the interest conveyed. It is a limitation, a restraint upon alienation, forming an integral part of the trust. To the constitution of every valid express trust it is essential that there should be a trustee, an estate conveyed to him, a beneficiary, a legal purpose, and a legal term. While equity will in certain instances make good the absence of the first requisite, if the second or third be lacking, or the fourth or fifth be illegal, the trust itself must fail. Of the express trusts permit-

ted by the statute there are two great classes, one of which does and the other does not involve a suspension of the power of alienation. Under the first class are included all those whose very purpose and essence it is that the land shall not be alienated by the trustee during the trust term, and where, consequently, a sale by him would be in direct contravention of the trust. In the case of such express trusts as occasion the suspension of the absolute power of alienation, the term of duration is the vital subject of inquiry. *Chapl. Suspen.* 146, 148. Trusts such as those under consideration in their very nature operate to suspend the power of alienation. That power must be suspended in the one case while the trustee is distributing the rents and profits, and in the other case it is suspended by the express duty imposed upon the trustee to sell only at the expiration of a fixed period. The law has seen fit to insist that the measure of the period of suspension shall be lives in being, and it will not countenance the suspension for any fixed period or term of years for the sufficient reason that during the time of such a limitation, however short, the person capable of conveying the absolute interest might die,—a possibility not to be endured. So it happens that whenever a testator, through temerity or ignorance, violates the plain mandate of the statute, as in this case, and creates a trust by which the absolute power of alienation is sought to be suspended for a term of years, he must pay the penalty of his rashness or folly in the destruction of his cherished design. Such, though grievous, have always been the necessary and logical decisions of the courts, and the books abound in cases which, while monuments to the learning of the judges, are equally monuments to the persistency of testators, or to the recklessness of their advisers. Thus it is, as is said by the vice chancellor in *Field v. Field*, 4 Sandf. Ch. 528, that "the statute restricts the suspension of alienation and ownership to lives and lives only. It does not admit of a suspense for a term of years, however short nor one dependent in part upon life and in part upon a fixed period of time." The rule has been applied in New York alone to terms of varying length of from 21 years to 3, from the leading case of *Hone's Ex'rs v. Van Schaick*, 20 Wend. 504, through a long and unvarying series of judicial determination (*Bolles, Power Allen*, note to section 78, where cases are collated), while in other states the authorities are as uniform, if not so numerous. *Mandlebaum v. McDonell*, 29 Mich. 78; *Farrand v. Pettit*, 84 Mich. 671, 48 N. W. 156; *DeWolf v. Lawson*, 61 Wis. 473, 21 N. W. 615; *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413.

Nor can the doctrine of equitable conversion be invoked to aid this trust. If we understand the argument of counsel upon this point, they urge that under that doctrine the land should be treated as now sold and con-

verted into personal property, and that such a trust in personal property would be valid, and that, therefore, this trust must be upheld. This would not only be a surprising application of the doctrine, but would be a novel and startling method of evading the law against perpetuities by invoking an equitable fiction. The rule of equitable conversion merely amounts to this: that where there is a mandate to sell at a future time, equity, upon the principle of regarding that done which ought to be done, will for certain purposes, and in aid of justice, consider the conversion as effected at the time when the sale ought to take place, whether the land be then really sold or not. But whenever the direction is for a future sale, up to the time fixed the land is governed by the law of real estate. *Savage v. Burnham*, 17 N. Y. 561; *Vincent v. Newhouse*, 83 N. Y. 506; *Underwood v. Curtis*, 127 N. Y. 533, 28 N. E. 586; *DeWolf v. Lawson*, 61 Wis. 469, 21 N. W. 615. Whether a trust of personalty for a fixed term would be valid is a matter of consideration hereinafter.

The intestacy of the testator as to the Walkerly Block is the harsh result which must follow this void trust, and the property will descend to his heirs. It is true that such was not the testator's intent, but a testator must do more than merely evince an intention to disinherit before the heirs' right of succession can be cut off. He must make a valid disposition of his property. *Haberg-ham v. Vincent*, 2 Ves. Jr. 204; *Hawley v. James*, 16 Wend. 150; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938.

2. The trust as to block 121. The first objection presented by the appellants to the disposition of this land made in the decree is that it has been removed from administration, and no longer forms a part of the residue of the estate or of the trust property. The argument in support of the contention is based upon the following facts: Upon application the court set apart block 121 as a homestead to the widow and minor child "during her widowhood." This life estate was terminated by her marriage to William F. Burbank, whose wife she now is. Section 1468, Code Civ. Proc., declares that if the property assigned as a homestead be selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order. The claim of the widow, therefore, is that the title to block 121, notwithstanding the testamentary disposition made of the property to the trustees, vested in herself and child, by virtue of this section, eo instanti, when the court made the homestead order, and that consequently her subsequent marriage, while it terminated the homestead right, had no effect upon the title to the property which had vested in her as an heir of her husband. Against this respondents urge that the words

"heirs" was not used in the section to exclude devisees, and that it should be construed as broad enough to include them. The right of testamentary disposition is itself only a right given by statute, and may be restrained, modified, or abrogated entirely. But still it is unquestionably the general policy of our law to allow full power of testamentary disposition, saving as that power may be abridged by specific enactments. The Code provisions making disposition of the homestead and of estates in value less than \$1,500 are instances of the limitations put by the legislature upon the free power of testamentary disposition, and from the lack of uniformity and harmony in their terms these homestead provisions have presented questions of much doubt and vexation to the courts. The present question is one of that kind. Did the legislature mean by section 1468 to do more than declare the ordinary rule of succession and descent in cases of intestacy, but subject always to the right of testamentary disposition; or did it mean that, as to separate property, upon which the homestead character had been impressed by order of court, any devise would be void, and the property must descend to the heirs? The latter view places a limitation upon a testator's power, and removes from the disposition of a will any property which may chance to be selected and set apart to the widow and children, and may thus defeat by a curious uncertainty the object of a testator's worthy bounty. It may do more than that, as in this case. The widow, to whom a homestead of the estimated value of \$30,000 had been set aside "during her widowhood,"—the time in contemplation of a beneficent law during which she may be dependent and is entitled to maintenance from the estate of her deceased husband,—by marrying again, while thus cutting off any further right of homestead or maintenance, is enabled to obtain a perfect and untrammelled fee in the property which her husband had devised to others, and which, in the general contemplation of the law, was to be set aside to her use only during the limited period of her widowhood and dependency. But nevertheless such an interpretation is borne out by the language of the statute. Upon the other hand, the former view is certainly more in accord with the apparent policy of the law; but the language of the section before and after amendment to its present form stands in the way of its adoption. Where a homestead has been selected from the separate property of a husband during his life, and without his consent, it goes, upon his death, to his "heirs and devisees," subject to the power of the court to assign the same for a limited period, under section 1265 of the Civil Code; while by section 1474 of the Code of Civil Procedure the same property vests in "the heirs," subject to the same power of limited assignment in the court. It is not easy to see, as

this court has before said, why the rule of devise or descent as to a homestead upon separate property declared during life should differ from that which obtains in case it be set apart after death, and it is still less easy to perceive why the two sections last above cited should be left inharmonious; but nevertheless, if the legislature has seen fit to prescribe different rules, it is the bounden duty of the court to give them effect. This the court was reluctantly driven to do in *Mawson v. Mawson*, 50 Cal. 539. Section 1465, Code Civ. Proc., at that time provided that the homestead, on being set apart, should be the property of the surviving widow or husband, if there were no minor children. *Mawson* died intestate. There were no minor children. A homestead was set apart to the widow out of the separate property. The deceased left two children of a former marriage,—heirs at law,—and they appealed. This court adjudged that the title vested in the widow to the exclusion of the heirs at law. By the amendment to section 1465, adopted in 1880, the title under such circumstances is now declared to vest in the heirs; and we cannot, without doing violence to the meaning of the word, hold that it includes devisees; nor can we, without doing equal violence to all rules of statutory construction, read into the section the words "or devisees." Code Civ. Proc. § 1858. The section is plain and unambiguous. Its meaning is in no way uncertain, and, when that meaning is found, nothing is left but to declare it. The wisdom of the law is for the legislature alone. It is concluded, therefore, that the section is a limitation upon the power of testamentary disposition, and operates to vest the title to the homestead in the heirs at law, and so to withdraw it from the disposition made by the testator under his will. Such being the case, the trust in block 121 falls for lack of subject-matter. But, were the other view to obtain, and the property to be considered a part of the trust, the position of respondents would not be bettered; for the trust as to this land differs from that of the Walkerly Block only in permitting a sale of the property before the expiration of the twenty-five years. In all other essential respects the trusts are the same. In the event of a sale, still the proceeds are to be held and invested until distribution, which, as in the case of the Walkerly Block, is deferred to a fixed time. The mere power of sale does not, under such circumstances, save the provisions of the trust, since the proceeds of the sale are still to be held in violation of the law. Civ. Code, §§ 715, 771; *Estate of Hinckley*, 58 Cal. 457, 481; *Hawley v. James*, 16 Wend. 163; *Haynes v. Sherman*, 117 N. Y. 438, 22 N. E. 938. Nor is it the law of this state that the provisions against restraints upon alienation do not apply to trusts of personal property, as we will proceed to consider.

3. The trust in personal property. The es-

stantial difference in this state between trusts in real property known as "express trusts" and those in personal property are: First, the former can only be of the kinds permitted by the statute, and no others (Civ. Code, § 857), while the latter may be created generally for any purpose for which a contract may be made (Id. § 2220); second, the former must be created and declared by writing (Id. § 852), while the latter may rest upon parol (Id. § 2222). But to all trusts, whether of real or personal property, the limitation upon the suspension of the power of alienation expressed in section 715, Civ. Code, directly applies. The section is found in division 2, pt. 1, tit. 2, of the Code, where the lawmakers are dealing, as expressly declared, with the modifications of ownership and restraints upon alienation of "property in general." Again, section 771, Civ. Code, shows plainly the applicability of the law to personal property; for if it be only the suspension of the power to alienate real property which is under the ban, power to sell the realty would relieve the difficulty, and yet it is by that section expressly declared that personal property held after sale under the terms of the original trust operates to suspend the power of alienation under section 715, Id. And, finally, the applicability of section 715 to trusts in personal property has often been recognized, and never questioned. *Estate of Hinckley*, 58 Cal. 457; *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. 50; *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394; *Whitney v. Dodge*, 105 Cal. 192, 38 Pac. 636. We are not unmindful of the fact that the statutes of the state of New York in express terms put a limitation upon the power to suspend the ownership of personal property. 1 Rev. St. p. 773, § 1. And we have not overlooked the circumstance that the supreme courts of Michigan and Wisconsin have uniformly held that their statutes, similar in terms to our Code provisions, do not apply to trusts in personal property. But it is to be observed that the legislature of this state, in adopting section 715 of the Civil Code, placed it where it must apply; and therefore made it apply to "property in general," while the corresponding section in the Michigan statutes (How. Ann. St. Mich. § 5531) and that of the Wisconsin statutes (Rev. St. Wis. § 2039), are found in the chapters of the law relating to estates in real property, and so have been construed by the courts to be applicable only to trusts in such property. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814; *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, and 50 N. W. 1103; *Palms v. Palms*, 68 Mich. 355, 36 N. W. 419; *De Wolf v. Lawson*, 61 Wis. 469, 21 N. W. 615. In those states it is held that, as to trusts in personal property, the common-law rule still obtains. And it is for the application of this rule that respondents here contend. But even this would not avail to save the trust. The common-law rule against perpetuities does not, as counsel argue, apply only to landed estates.

Executory devises, springing and shifting uses, and trusts, whether of realty or personality, were all within its terms. 1 Jarm. Wills, c. 9; Lewis, Perp. 159; Perry, Trusts, §§ 377, 384; Lewis, Trusts, c. 7; Gray, Perp. § 202; 4 Kent, Comm. 271; *Cadell v. Palmer*, 1 Clark & F. 372. As Jarman states: "To the test of the rule settled by *Cadell v. Palmer* every gift of real or personal estate, by will or otherwise, must be brought." 1 Jarm. Wills, 217. By the *Thelluson* act (39 & 40 Geo. III. c. 98) the maximum period during which the power of alienation could be restrained was lives in being and 21 years and 9 months. Tested by that act, still would this trust be invalid. We hold, however, that section 715 of the Civil Code not only applies to trusts in personal property, but also that it shortens the period permitted by the common law to lives in being. Private trusts in personal property which suspend the power of alienation must be limited, like private trusts in realty, to lives in being; and the trusts here are consequently destroyed by the same vice which invalidated those first considered.

We have thus far construed the trusts without noticing some objections urged by respondents against the right of appellants to be heard. Of those the first is that appellants are estopped from attacking the validity of the trusts. No estoppel is found against the appellants, but the facts which were claimed to establish one are set forth in the findings. Briefly, those facts are that the widow and child had been receiving a family allowance. By stipulation it was agreed that the order of family allowance should be vacated, and that the executors would thereafter pay the widow and child each \$416.66% per month, being at the rate of 5 per cent. per annum upon the legacies provided to be paid in the codicil to the will; and the amounts so paid should, upon distribution, be treated as payments of interest upon account of said legacies. The court made its order in accordance with the stipulation. No mention is here made of the trusts, and no waiver, express or implied, of the right to demand a legal interpretation of them could thus arise. The legacies, as has been pointed out, were not within the trusts, but were independent and valid bequests. The fact that under these circumstances the widow had elected to take under the will would have estopped her from denying the validity of the instrument as a will, but did not and could not operate to estop her from insisting upon a due interpretation of the instrument. Appellants still stand affirming the validity of the will as a will, but insist that the trial court has not correctly interpreted some of its provisions. It became the duty of the court for the first time upon distribution to give effect to the legal devises and bequests of the testator, and it could not, even with the consent of the parties, declare valid trusts such as these which are opposed to the express mandate and policy of the law.

It is next urged that, as the court made findings concerning the testator's intent, and decreed distribution in accordance with these findings, and as the findings are not attacked, and will sustain the decree, and as "a volume of extrinsic circumstances bearing on the question was introduced without objection," these appellants are not in a position to combat the decree. But as to this it need only be said that it is the duty of the court in all cases to ascertain the intent of the testator from the language of the will, and the occasions which render parol evidence of circumstances admissible do not here arise. Civ. Code, §§ 1318, 1340. The terms of the will are plain and unambiguous. It may be said of all wills that the testator's intent is to make a valid disposition of his property, and as to most provisions which are deemed invalid there is no difficulty in arriving at his actual meaning and intent. But a court is not, therefore, authorized to modify or vary the plain language of the testator, and thus create a new and valid will for him, even if it were certain that the testator would have adopted the interpretation of the court had he known his own attempt was invalid. So of the trusts decreed by the court it may be said, as was said in *Coster v. Lorillard*, 14 Wend. 349: "This would approximate nearer to the will of the testator than any other proposed alteration. But, after a diligent inquiry, I have not been able to satisfy myself that there is any principle or decision that would authorize such an interference. It would be arbitrary, and establish a precedent for courts, not to construe wills according to the intent of the testator as derived from a consideration of the language used to express it, but to make a will for him; such an one as we undertake to presume he would have made, if advised that his own was void as against law. This I cannot consent to do. Better that the intent of a testator should fall in a particular case than that the court should assume such arbitrary and undefined discretion over his estate. If we cannot execute the whole will, or some distinct and independent portion of it, the whole had better be declared void. The law makes a better one than will usually be made by the court." So, too, where the language of the provisions of a will is plain and unambiguous, the courts are not permitted to wrest it from its natural import in order to save it from condemnation. *Cottman v. Grace*, 112 N. Y. 290, 19 N. E. 839.

The determination that the trusts are void renders unnecessary any consideration of the other points presented. The trusts being void, it follows as to the property attempted to be devised in trust, that the testator died intestate. It therefore descends to the heirs living at the time of his death. For the foregoing reasons the decree is reversed.

We concur: BEATTY, C. J.; McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; TEMPLE, J.; VAN FLEET, J.

In re WALKERLY'S ESTATE. (No. 15,592.)

(Supreme Court of California. Sept. 3, 1895.)

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

In the matter of the estate of William Walkerly, deceased. From the decree of distribution certain of the beneficiaries appeal. Affirmed.

Rodgers & Paterson, for appellants. Frederick E. Whitney, H. C. Firebaugh, B. B. Newman, Fox, Kellogg & Gray, H. W. Hutton, and F. D. Brandon, for respondents.

PER CURIAM. This is an appeal from the decree of distribution taken by some of the beneficiaries under the trusts seeking modification of the decree in certain minor particulars. The points raised are made of no moment by the decision of this court upon the appeal of the widow and child from the same decree (No. 15,592, filed Sept. 3, 1895, 41 Pac. 772). The modifications asked for are denied.

In re WALKERLY'S ESTATE. (S. F. 6.)
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In the matter of the estate of William Walkerly, deceased. From the decree of distribution certain beneficiaries appeal. Affirmed.

Rodgers & Paterson, for appellants. Frederick E. Whitney, H. C. Firebaugh, B. B. Newman, Fox, Kellogg & Gray, H. W. Hutton, and F. D. Brandon, for respondents.

PER CURIAM. This is an appeal by certain beneficiaries from the decree of distribution entered in the matter of said estate. The decision of this court in the appeal of the widow and child in the same matter (No. 15,592, filed Sept. 3, 1895, 41 Pac. 772), renders superfluous any consideration of the points here presented, saving that it may be said that it was the duty of the court in probate, upon distribution, to distribute under the will the residue of the estate to the trustees, upon the theory that the trusts were valid. This is what was done. But, the trust having been determined to be void, that attempted distribution was, of course, invalid. The motion to dismiss this appeal, while in point of fact perhaps meritorious, may be denied under the circumstances, without injury to the moving party. It is denied, and the proposition of appellant that the court had no power under the will (and assuming a valid trust) to distribute to the trustees is decided adversely to appellant's contention.

In re WALKERLY'S ESTATE. (S. F. 6.)
(Supreme Court of California. Sept. 5, 1895.)

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

In the matter of the estate of William Walkerly, deceased. From orders, judgments, and decrees settling the final account of the executors certain beneficiaries appeal. Appeals dismissed.

Rodgers & Paterson, for appellant. Frederick E. Whitney, H. C. Firebaugh, B. B. Newman, Fox, Kellogg & Gray, H. W. Hutton, and F. D. Brandon, for respondents.

PER CURIAM. It appearing from the statement of counsel made in open court that his appeal upon behalf of certain beneficiaries from the order, judgment, and decree of the supe-

rior court made and given upon November 27, 1893, settling the final account of the executors of the will in the matter of the above-entitled estate, and his appeal from the order, judgment, and decree made and given by the superior court upon August 17, 1892, settling the final account of the executors of the will in the matter of the above-entitled estate, have been, and each of them is, abandoned, and no transcript upon these appeals, or either of them, having been filed as required by law and the rules of this court, it is ordered that said appeals be, and each of them is, hereby dismissed.

106 Cal. 664

KOELLING v. RUTZ. (S. F. 219.)

(Supreme Court of California. Sept. 4, 1895.)
APPEAL TAKEN FOR DELAY—DISMISSAL—DAMAGES.

On motion to dismiss an appeal, respondent's attorney made affidavit that, prior to giving notice of appeal, appellant urged him to take less than the amount of the judgment, and said that, unless such sum was accepted, an appeal would be taken, and collection indefinitely delayed; that delay was all he wanted; and that after his refusal, and after notice of appeal was given, and an undertaking filed, appellant, through his attorneys, renewed the proposition to press the appeal if the less sum was not accepted. Appellant filed no transcript, and did not controvert such statements. *Held*, that the appeal should be dismissed, with damages against appellant for delay.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Koelling against Rutz, in which defendant appealed from a judgment in favor of plaintiff. Plaintiff moves to dismiss the appeal, and for allowance of damages. Motion granted.

John J. Roche and Isador Danielwitz, for appellant. Otto Tum Suden, for respondent.

HARRISON, J. A motion is made to dismiss the appeal for failure to file the transcript within the time prescribed by the rules of this court, and that the respondent be allowed damages upon the ground that the appeal is not taken in good faith, but for the purpose of hindering and delaying the plaintiff in the collection of the judgment. In support of the latter part of the motion, the attorney for the respondent has filed an affidavit stating that after the rendition of the judgment, and prior to the service of the notice of appeal, one of the attorneys for the defendant proposed to him that the plaintiff accept a less sum than that for which judgment had been given, and informed him that, unless such less sum was accepted in full payment, an appeal would be taken, and the plaintiff delayed in the collection of the judgment for an indefinite period. To the suggestion that the time for presenting a bill of exceptions or a motion for a new trial had expired, and that the appeal must be upon the judgment role alone, which was free from error, the attorney replied that delay was all he wanted, and that the plaintiff had better take a smaller sum at once than the full sum after the disposal of an appeal and its attending labor and trouble; that the

plaintiff ought to accept a less sum than the amount of the judgment, and avoid the delays that an appeal would bring; and that, for that reason, the appeal would be taken if a less sum was not accepted. The plaintiff's attorney declined to accept the proposition, and notified the defendant's attorney that if the appeal were taken, and not perfected, he should ask for damages against the appellant for delay. Thereafter the notice of appeal was taken, an undertaking given to stay execution, and the appellant, through his attorneys, renewed his proposition to press the appeal if the less amount were not accepted.

The statements in this affidavit are not controverted by the appellant, and are corroborated by his failure to file any transcript in this court. As they must, therefore, be taken as admissions by him that they are correct, the respondent is entitled to the damages asked. *Duncan v. Grady*, 99 Cal. 552, 34 Pac. 112. The appeal is dismissed, and the respondent is allowed \$50 damages as a part of his costs on appeal.

We concur: GAROUTTE, J.; VAN FLEET, J.

100 Cal. 12

WOODWARD v. FARIS. (No. 18,439.)

(Supreme Court of California. Sept. 5, 1895.)
ADVERSE POSSESSION—WHAT CONSTITUTES—QUIETING TITLE.

1. Where a grantee of land takes and holds possession of land not described in the deed, claiming to own it, his possession is adverse, though such possession is under the mistaken belief that the land is within the boundaries described in his deed. *Smith v. Roberts* (Cal.) 9 Pac. 104, distinguished.

2. Civ. Code, § 1007, provides that occupancy sufficient to bar an action to recover property "confers a title thereto, denominated a title by prescription, which is sufficient against all." *Held*, that one who has lost title to land by adverse possession of another is not entitled to a decree, quieting his title to such land, against a person in possession, who fails to connect himself with the title of the person who acquired title by such adverse possession.

Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by George Woodward, executor of the estate of Michael Bemmerly, deceased, against James Faris, to quiet title, in which there was a judgment for plaintiff. From an order denying a motion for a new trial, defendant appeals. Reversed.

J. W. Hughes and F. E. Baker, for appellant. E. R. Bush and E. B. Mering, for appellee.

TEMPLE, J. This is an action brought to quiet title by the executors of M. Bemmerly, deceased. The evidence and the findings of the court show that M. Bemmerly and his grantors were the owners of the record title to the demanded premises. The findings show that Michael Bemmerly, plaintiff's tes-

tator, had owned the southeast quarter of section 33 since 1866, and was the owner at the time of his death. But the court also found that "on or about the 16th day of April, 1866, W. W. Hannum, the defendant's predecessor in interest in and to the said south half of said section 34 (but not including the lands described in plaintiff's complaint), entered into possession of said land and premises, under claim of title thereto, exclusive of any other right, founding such claim upon a certain indenture of deed, bearing date the 16th day of April, 1866, duly executed, acknowledged, and delivered by one Peter Robinson to the said W. W. Hannum, as being a conveyance of said land and premises; that, at the time of the execution and delivery of said deed, the said Peter Robinson did not have possession of the land described in plaintiff's complaint, or any part thereof, nor did he deliver possession of the same, or any part thereof, to said Hannum, at that time, nor did the said Hannum ever, at any time, take or have possession of the same, or any part thereof, until some time between the year 1869 and the year 1872 (the precise time not being ascertainable from the evidence); that in the deed from the said Robinson to said Hannum the said lands were described as the south half of section 34; that at said date, between the years 1869 and 1872, the said Hannum, supposing that the true line of said south half of section 34 included therein the lands described in plaintiff's complaint, extended his said line so as to include said lands, and the said Michael Bemmerly, being at that time alive, and also supposing that the true line of said south half of section 34 included said lands, made no opposition thereto; that, in such supposition and belief, both the said Hannum and the said Bemmerly were mutually mistaken; that there was never any agreement of any kind by and between said Hannum and said Bemmerly that such line should be the true line between their said lands, but that the same remained the boundary line between said parties, as explained in finding 5 herein, from said date till the commencement of this suit; that from said date, between the years 1869 and 1872, until and including the 14th of October, 1879, that said Hannum was in quiet, peaceable, open, notorious, and exclusive occupancy and possession of said lands and premises, claiming title thereto as in this finding expressed, but that such possession and occupancy of said Hannum was not adverse to said Bemmerly; and, in truth and in fact, the lands described in plaintiff's complaint were a part and portion of the said southwest quarter of section 33." It was also found that on the 14th day of October, 1879, defendant entered into possession of the south half of section 34, and of the land in controversy, under a deed from W. W. Hannum, conveying to him the south half of section 34, and has since remained in the occupancy of the demanded premises;

but his possession was not adverse to Michael Bemmerly, and defendant did not enter into possession of said land under such deeds as being conveyances thereof. Also, that since 1878 Bemmerly paid all the taxes which were assessed upon the strip of land in controversy. It was doubtless upon this ground that the court considered that defendant's possession could not be the foundation of any adverse right. The court also found as a fact that the plaintiff's cause of action was not barred by the statute of limitations. Judgment having been rendered for the plaintiff, defendant moved for a new trial, and now appeals from an order denying his motion.

It would seem to be plain that, if Bemmerly was the owner of the disputed strip when defendant went into possession of it, in 1879, defendant has not been holding adversely, so as to set the statute of limitations moving in his favor, because he has not paid the taxes on the land. Defendant contends, however, that Hannum was in possession, claiming adversely, for five years prior to 1878, when the statute was passed which requires the payment of taxes by one in possession, claiming adversely to the true owner, in order to set the statute running; that, such being the case, Bemmerly had no title; and as he must recover, if at all, upon his own title, and not upon the weakness of defendant's title, his suit must fail; that, while the court finds that Hannum did not hold adversely, it finds facts which show that he did so hold; and that the general finding is manifestly an erroneous conclusion from the specific facts found. Since this appeal is from an order denying a new trial, and there is an exception that the evidence is insufficient to sustain the finding that plaintiff's testator was the owner of the demanded premises, if the evidence sustains the finding of specific facts we need not consider whether the finding of the ultimate fact will control the finding of the specific facts from which it is a conclusion.

The first question, then, is, do such facts show that Hannum's possession was adverse? All the elements of an adverse possession are found, but it is supposed that the holding was not adverse because Hannum took possession of the land in dispute, and held possession of it, claiming to own it, under the mistaken belief that it was within the boundaries of the south half of section 34. Since, therefore, he claimed no title to any land outside of section 34, and this was not included in that section, there was lacking an essential element of adverse holding, to wit, the claim of title. I find some color for this contention in decisions of other states. *Ross v. Gould*, 5 Me. 204; *Brown v. Gay*, 3 Me. 128. The doctrine has not, however, obtained generally, and is, I think, founded upon a fallacy. Most cases of adverse possession which have ripened into title commenced, I doubt not, in mistake. It must be either by mistake or deliberate

wrong. It is through mistake only that one can honestly claim to own that which really belongs to another. But this discussion need not be prolonged, for it is only necessary, to set the statute running, that the party should be in possession as owner. The question has been passed upon by this court, and there is no conflict in the decisions. *Silverer v. Hansen*, 77 Cal. 584, 20 Pac. 186; *Grimm v. Curley*, 43 Cal. 250. The reasons for the rule are elaborately considered in *Pearce v. French*, 8 Conn. 439. See, also, *Bunce v. Bidwell*, 43 Mich. 542, 5 N. W. 1023.

The case of *Smith v. Roberts* (Cal.) 9 Pac. 104, is not in conflict with this position. If Hannum had made his inclosure, not claiming that his fences were upon the line, but expecting to move them to the true line when it should be determined, he would not, in that case, be claiming adversely, and the statute would not run. In all the cases cited by the respondent upon this point it appears that the party did not claim that his fence was upon the true line, but admitted, at least, that he was uncertain as to his boundary. In such cases the parties may agree upon a line which shall be the boundary, whether right or wrong; but if one of the coterminal owners takes possession, and claims title to the extent of his possession, he holds adversely, although he was induced to locate his possession through a mistake as to the boundary. If this be so, then Hannum, by adverse holding, acquired a perfect title to the demanded premises. *Arrington v. Liscom*, 34 Cal. 365; *Cannon v. Stockmon*, 36 Cal. 540; *Williams v. Sutton*, 43 Cal. 65; *Langford v. Poppe*, 56 Cal. 73; Civ. Code, § 1007. But when Hannum conveyed to defendant he simply described the south half of section 34, which does not include the land in controversy. Respondent, therefore, contends that, as defendant has not connected himself with Hannum's title, he cannot claim the benefit of any right which Hannum may have acquired. There is some plausibility in this contention, arising from the fact that it has been constantly held that the defense of the statute is a personal privilege, and is waived unless pleaded. And it has been hinted that no title is acquired by limitation, but that the bar is merely a statutory estoppel. *Grant v. Burr*, 54 Cal. 300. Whatever may have been the correct view under the former condition of things, there can be no doubt under the Code. Section 1007 provides that occupancy sufficient to bar an action to recover property "confers a title thereto, denominated a title by prescription, which is sufficient against all." No title can be better or more absolute than that. If this be so, then the estate of Bemmerly has no title to the land in controversy, and is not entitled to a decree quieting its title thereto.

It is not necessary here to discuss the rule of pleading which requires a party claiming title by limitations to plead it, when, if he

derived his title from any other source, he might avail himself of it without a special plea, and without stating the source of his title. That rule is a survival from a different condition, or prevails because no pains have been taken to discriminate between actions to recover land and actions to enforce personal obligations. If that rule prevails still, a title acquired by limitations is as good as any other title, only, to avail himself of it as conferring a right, a party must specially plead it.

This appeal is only from the order refusing a new trial, and we cannot change the judgment to make it consistent with the findings. The judgment is, therefore, reversed, and a new trial ordered.

We concur: MCFARLAND, J.; HENSHAW, J.

109 Cal. 86

STEPHENS et al. v. SOUTHERN PAC. CO.
(No. 18,369.)

(Supreme Court of California. Sept. 7, 1895.)

CONTRACTS—PUBLIC POLICY—LIMITING LIABILITY.

1. A stipulation, in a lease by a railroad company, exempting the lessor from liability for damages by fire to the lessee's property caused by the lessor's locomotives, or otherwise, is not void as against public policy.

2. A contract that is valid when made is not affected by a change in public policy of the state.

Department 1. Appeal from superior court, Tulare county; W. A. Gray, Judge.

Action by R. K. Stephens and others against the Southern Pacific Company to recover damages for the value of property destroyed through defendant's negligence. Plaintiffs had judgment, and defendant appeals. Reversed.

Foshay Walker, for appellant. Van Ness & Redman, for respondents.

GAROUTTE, J. The plaintiff Stephens was the owner of a certain warehouse situated upon land adjoining the defendant's depot grounds in the town of Hanford, Cal. The said land was held by Stephens under a lease from the defendant. One of the covenants of said lease was as follows: "And it is further agreed that the said party of the first part [defendant] shall not be responsible for any damage caused by fire, whether from railroad engines or from the buildings of the said party of the first part, or by fires caused from any other means, but the risk and damage, from whatever source, shall be alone sustained by the said party of the second part [Stephens]." Upon August 8, 1891, and while said lease was in force, the said warehouse was destroyed by fire which had been kindled by defendant's employes upon adjoining land for the purpose of burning the dry grass, rubbish, etc., thereon. At the time of said fire, the plaintiff Stephens was carrying insurance on said warehouse, in the two

insurance companies, plaintiffs, in the sum of \$9,000. The insurance was paid, and this action was brought by the insurers and insured jointly to recover from the defendant the value of the premises so destroyed. The verdict and judgment were for the plaintiffs, from which judgment, and from a subsequent order denying its motion for a new trial, the defendant has appealed.

The trial court held the foregoing provision of the contract of lease void, as against public policy, and our attention shall be addressed to the consideration of that question, for, as we view the case, a solution of it is determinative of the litigation. The fact that the defendant is a common carrier has no place in the case. The rights of parties dealing with common carriers, and the duties of common carriers towards parties with whom they deal, and towards the public in general, are elements foreign to any question here involved. At that time it was not dealing with plaintiff Stephens as a common carrier, nor was Stephens contracting with it upon any such understanding or hypothesis. As far as this transaction was concerned, the parties, when contracting, stood upon common ground, and dealt with each other as A. and B. might deal with each other with reference to any private business undertaking. It follows that all those principles of law denying or restricting the right of common carriers to limit their legal liabilities for damages arising from injury to person or property stand upon a different plane, and are not controlling here.

Is this provision of the contract void as against public policy? That the principle of law involved is an original one, as applied to the present state of facts, is apparent when we consider that but a single case has been found directly in point, although it is evident from the argument that counsel upon both sides have very industriously sought for precedents. This provision of the contract is declared by respondents to be opposed to public policy, in this: That it has a tendency to lessen the amount of care that defendant would exercise, both in the selection and operation of its machinery, and in the general conduct of its business, through its employes, in respect to the control of fire, the element here involved. That the undoubted effect of a contract exempting a party from damages flowing from his negligent use of fire is to increase the chances of conflagration,—that is, one who is protected by an agreement against the results of his carelessness in this respect will not take the same care as he otherwise would,—and, therefore, carelessness occasioned and caused by the agreement, increasing the probabilities of conflagrations, injuriously operates upon the interests of the public at large.

The foregoing line of reasoning is ingenious, but we cannot indorse it as sound in law. It has been well said that public policy is an unruly horse, astride of which you are car-

ried into unknown and uncertain paths, and here that horse would be carrying us beyond all limits ever reached before, if respondents' position should meet with our approval. While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts, recognizing this, have allowed parties the widest latitude in this regard; and, unless it is entirely plain that a contract is violative of sound public policy, the court will never so declare. "The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." *Richmond v. Railway Co.*, 28 Iowa, 191. "Before a court should determine a transaction which has been entered into in good faith, stipulating for nothing that is *malum in se*, to be void, as contravening the policy of the statute, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical." *Kellogg v. Larkin*, 3 Pin. 125. "No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people." *Swann v. Swann*, 21 Fed. 299.

Turning our attention to this provision of the lease, let us concede, for present purposes only, this covenant to be opposed to the policy of the law, if its results are fairly and truly stated by respondents. But we deny that such results would follow. Respondents' argument is that the inevitable and necessary tendency of the covenant is to reduce in some appreciable degree the quantum of care exercised by the defendant in guarding against the destruction of the property of the public by fire. Not the warehouse of the plaintiff Stephens, for, as between him and the defendant, considered alone, there can be no question as to the validity of the contract under consideration. It is the rights and interests of the public which it is claimed are infringed upon, and a trespass upon their interests and rights must be shown, or a case of the present character is a total stranger to any question of public policy.

Were the dangers and risks to the public as to the destruction of its property by fire in any degree increased by the aforesaid covenants? Answering respondents' argument by a like argument, we say, "No." It may be conceded that the covenant had the effect, as to plaintiff's warehouse, to lessen defendant's care in guarding against fire, but, as defendant's care lessened, the owner's care proportionately increased. Knowing that the defendant was absolutely absolved from any

legal responsibility for its destruction by fire, we must assume that plaintiff Stephens, the owner, in the protection of his building from the negligence of the defendant's acts, exercised a degree of care commensurate with the dangers that surrounded it; for it cannot be gainsaid that a man of ordinary business understanding, having bartered away any right of action for damages for destruction of his property by fire which might thereafter accrue from defendant, would increase his care and watchfulness in preserving his property from such destruction. We think it must be assumed that, in proportion as the amount of care exercised by defendant in the protection of this property from fire decreased, the amount of care exercised by plaintiff in its protection increased. Having sold his remedy for damages in case of fire, it behooved him to be ever on the alert in the protection of his property. Under any aspect of the case, this question is only material in view of the contingency of a spreading of the conflagration from the warehouse of plaintiff to the property of the public in general, for the whole argument concedes that, if the danger and risk by fire to the property of the public are not increased, then there is nothing whatever in the contention. And thus it is again made apparent to what distant and untrodden paths that unruly horse, public policy, will carry you, unless he be guided by a steady hand and a strong rein.

The remaining question presents itself: Is the result of this covenant necessarily to lessen the degree of care formerly exercised by the defendant towards the property of the public, and which the law ever enjoins upon it to exercise? In other words, are the probabilities of the destruction of the property of the public by fire communicated by defendant—not via the warehouse of plaintiff, but directly communicated—increased by reason of this covenant in the lease? It is argued that, defendant's losses by fire arising from its negligence being materially reduced if a large number of these contracts were outstanding, it would necessarily become careless in the selection of its servants, and neglectful and over-economical in the selection of modern machinery, and thus the dangers to the public from conflagration would be multiplied. We do not see that such result would follow. It must be borne in mind that the lessees of defendant under these contracts are no part of the public. Each one of them has sold his right as one of the public, and is not in a position to complain as to the burdens cast upon him as an individual. The public here are the people holding no leases. The defendant in this case not only owes the public the same duty after the execution of the lease that it did before, but there is no reason in the world why it would not perform that duty in the same way as it had done in the past, however careful or neglectful that performance might be. Why would not this be so? For

the public had the same rights and the same remedies against the defendant after as before the execution of the lease, and, likewise, the defendant was liable for damages in the same amount, upon the same property, and upon the same facts. It thus appears that the contract in no way changed the relations and conditions existing between the defendant and the public; and, such being the fact, no reason exists for a change upon its part in the manner of the conduct of its business. While it is true that the making of this contract withdrew plaintiff as one of the public, and, it may be said, thereby reduced the proportions of the public to that extent, still it would seem the refinement of absurdity to hold, for such reason, that, the public being reduced, the care exercised by defendant towards the public would be reduced *pro tanto*.

The late case of *Griswold v. Railway Co.* (Iowa) 57 N. W. 843, in its facts is fully analogous to the case at bar, and, upon a rehearing and reargument, a similar covenant in a lease was sustained, as in no manner contravening public policy. Especially is this case valuable as precedent when we pause to consider the stringent provisions of the Code of that state in dealing with the liability of common carriers for damages to property arising from fire and other causes. And doubly so in view of the further salient fact that the lease in that case upon its face appears to indicate that benefits to the lessor in its capacity as a common carrier would accrue by reason of the making thereof. These matters are not found in the case at bar, and, to that extent, the case occupies much broader ground than we are required here to take. The dissenting opinion of the learned chief justice is based, to some extent at least, upon these provisions of the Iowa Code, and the further claim that the railroad company was acting in its capacity as a common carrier in making the lease,—conditions which, we have already suggested, do not surround us here. The remaining objection of the learned chief justice to the validity of the judgment ordered by the majority of that court is in line with these respondents' contention, and, we think, unsound.

Farmer A. is in the habit of burning his stubble field in the fall of the year. B. leases from him a small portion of his farm, for storage or residence purposes, there being a clause in the contract similar to the one here involved. Farmer A., in burning his stubble, allows the fire to escape from his control, and B.'s property is destroyed. Or A. is the owner of a powder factory, and leases to B. an adjoining tract of land. This exemption damage covenant is placed in the lease. The powder plant explodes, and B.'s property is destroyed. These illustrations in principle are parallel with the case at bar. Both the farmer and the factory owner owed the duty to the public of exercising

a certain degree of care, one in burning his stubble field, the other in carrying on his factory. If this covenant in the present case had the effect to lessen the degree of care exercised by defendant, it had the same effect in the lease of the farmer and the powder man. If the risks and dangers to the property of the public from fire were increased in this case by reason of the covenant, they were likewise increased in those cases. Yet it would seem a gross trespass upon the rights of parties to make contracts to hold the covenant void, as against the policy of the law, in the hypothetical cases cited. To hold that the interests of the public were of such gravity, and were so interwoven into such a contract, as to vitiate the contract, would carry us far beyond any principle of law yet recognized by courts or law writers.

If the doctrine enunciated by respondent be sound, then a multitude of contracts, covering many and diverse subjects, and which are being entered into every day of the world, and recognized and acted upon both by parties and courts, must fall to the ground. As a striking example, the ordinary contract of fire insurance cannot stand the test, for it cannot be gainsaid that such a contract necessarily has the tendency to lessen the care which the owner would otherwise exercise in the protection of his property from fire. Upon respondents' line of argument, such owner owes a duty to the public, possibly in the protection of his own property from fire, certainly in the protection of the property of the public, and, if his care is lessened in the performance of that duty by reason of the contract of insurance, then, surely, the dangers and risks to the property of the public are increased. Yet, notwithstanding this reasoning, courts everywhere have upheld this class of contracts, and repelled all assaults upon them as being opposed to the policy of the law. While it may not be found in the contract itself that the negligence of the owner in causing the fire shall be no bar to a recovery, it has been held always and everywhere that such is the law, even in the absence of express stipulation to that end; and an express stipulation inserted in the contract in accordance with the general principle would certainly in no wise weaken the doctrine. As sustaining this general principle, see *Insurance Co. v. Coulter*, 3 Pet. 222; *Insurance Co. v. Lawrence*, 10 Pet. 507; *Waters v. Insurance Co.*, 11 Pet. 213; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 438, 9 Sup. Ct. 469.

Let us look at another class of contracts which have been sustained by the courts, but sustained wrongfully, if the soundness of the argument advanced by respondents can be maintained. Courts have sustained contracts, made by common carriers with insurance companies, whereby property under their control and in transit has been insured against negligence of their employés,

California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365; *Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 1176. Following respondents' line of argument, surely such contracts would have a tendency to lessen the care otherwise exercised by common carriers in the transportation of goods, and would thereby trespass upon the rights of the public, and, so trespassing, would render void all contracts of that character. But the courts, after careful investigation, have arrived at a contrary conclusion.

To support the invalidity of this contract, counsel rely upon an act of the legislature, found in the Statutes of 1891 (page 473), which declares a party guilty of a misdemeanor who starts fires in certain localities (without first taking certain precautions), whereby the property of an adjoining or contiguous owner is injured, damaged, or destroyed. If for no other reason, this act of the legislature cannot be relied upon to assist respondents' case, for it was passed subsequent to the making of the contract, and, if the contract was valid when made, no subsequent act of the legislature can render it invalid. It is laid down as an elementary principle in *Greenhood on Public Policy* that, if a contract conform to the public policy of the state when made, a change in public policy will not avoid it.

We conclude that the line of reasoning indulged in by respondents to support the invalidity of this contract is more specious than sound; that the interests of the public in the contract are more sentimental than real; and that such a contract violates no statute, conflicts with no principle of law, and in no way infringes upon public policy.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

(109 Cal. 96)

KING et al. v. SOUTHERN PAC. CO. (No. 18,370.)

(Supreme Court of California. Sept. 7, 1896.)

RAILROAD COMPANIES—LIABILITY OF LESSOR—LIMITING LIABILITY—FIRES—DAMAGES.

1. Defendant railway company leased certain property, with a stipulation that defendant should not be liable for damage by fire caused by its locomotives or otherwise. Plaintiff was an employé of the lessee, and had goods of his own stored in the lessee's warehouse, which were destroyed by fire caused by defendant's negligence. *Held*, that the fact that plaintiff had knowledge of said stipulation in the lease would not exempt defendant from liability.

2. In an action for the value of goods destroyed through defendant's negligence, an instruction directing the jury, if they found for plaintiff, to assess his damages at a certain sum, with interest from the date of the fire, was erroneous, as, under Civ. Code, § 3288, providing that in "an action for breach of an obligation arising from contract, interest may

be given in the discretion of the jury," the question of interest should have been left to the jury.

Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by Charles King and others against the Southern Pacific Company to recover the value of goods destroyed through defendant's negligence. Plaintiffs had judgment, and defendant appeals. Reversed.

Foshay Walker, for appellant. Van Ness & Redman, for respondents.

GAROUTTE, J. In an action entitled *Stephens v. Southern Pac. Co.* (No. 18,369; this day decided) 41 Pac. 783, damages were sought to be recovered from this defendant for the destruction of a certain warehouse by fire engendered by the negligence of defendant. The plaintiff and respondent King, in this case, had charge of this warehouse, as the agent of Stephens, the owner, at the time of the fire, and now seeks to recover from defendant damages for the destruction by that fire of certain property belonging to him, and then stored in said warehouse. Judgment went against defendant, and this is an appeal from such judgment, and from an order denying the motion for a new trial.

At the trial defendant offered to prove that the plaintiff King had actual notice of the covenant, in the lease to Stephens, exempting defendant from liability for property destroyed by fire, which covenant we have considered at length in the above-mentioned case of *Stephens v. Southern Pac. Co.* Under objection, defendant was not allowed to make the proof, and the ruling of the court in this regard forms the main ground for the present appeal. Was the question of plaintiff's knowledge of the existence of such a covenant material to the merits of this litigation? We fail to see its materiality. It is not necessary to determine the length and breadth of this covenant, for, of itself, it could in no way bind third parties. Whatever liabilities Stephens assumed thereunder were a matter solely with him and the defendant. And the defendant's primary liability to third parties was the same after as before the making of such a lease. Conceding that all property stored in the warehouse, as between the parties to the lease, was the property of Stephens, yet, as to third parties, such contention avails defendant nothing. Plaintiff King, as the agent of Stephens, received goods in storage, and we do not see that he can be in a different position by reason of having stored his own goods therein than though he had received upon storage the goods of other parties. These goods were not stored by King as Stephens' goods, but rather by Stephens, through his agent, as King's goods. King's agency would seem to be an immaterial element in the case, and no principle of law is cited that would bar a recovery from the defendant, for the destruction of goods arising from its negligence, by

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any person storing goods in the warehouse under contract with the owner. The question of notice as to this covenant would be immaterial, as a matter in which third parties had no interest. Let us suppose a party storing goods had notice of the lease in this particular. It would put him upon notice of what? Why, simply that by the lease, in its widest possible sense, Stephens would indemnify the defendant against any loss from the destruction by fire of property situated upon the leased land,—a matter certainly of no interest or moment to a party contemplating a storage of his goods in the warehouse. Stephens could not recover for the destruction of his warehouse, or his property stored therein, nor could his lessee, having notice of the covenant. *Thomas v. Railroad Co.*, 82 Mo. 538; *Nolon v. Railroad Co.*, 23 Mo. App. 355. But plaintiff King occupied no such position. He was no lessee. No rights or interests ever passed to him under the lease, and he was in no sense in privity with Stephens. His right to recover grows out of, and is based upon, the fact that he was lawfully entitled to store his goods in the warehouse, without any regard to the exemption clause of the lease made by the owner, and that, while so stored, they were destroyed, through the negligence of the defendant's employees. The cases relied upon to support appellant's contention fall short of the mark. *McCoy v. Railway Co.*, 94 Cal. 568, 29 Pac. 1110, is based upon a section of the Civil Code, and must be read in the light of that section. If the plaintiff in that case had been a tenant of the Boyds, without notice as to their agreement with defendant regarding the opening in the fence, then the doctrine of the Missouri cases above cited would probably have been applicable, and a recovery sustained; but the status of plaintiff was held to be that of a mere licensee of the Boyd Bros., they being at all times in the actual possession of the land, and, for the purposes of the statute heretofore referred to, the owners thereof.

The court gave the jury the following instruction: "If, from the evidence, you are satisfied that the plaintiff King had in the warehouse and addition thereto, referred to in the testimony as 'Blum's Warehouse' the property testified to by him; and that the value of said property was, at the time of its destruction by fire, of the value testified to by him; and that said fire and the destruction of said property was caused by the negligence of the defendant,—you will find a verdict for plaintiffs for \$5,500, with interest thereon at the rate of seven per cent. per annum, from the date of the fire." This instruction is clearly erroneous, in this, that it arbitrarily required the jury to add interest from the date of the fire to such sum as they might find to be the amount of the damage caused. In a case of this character, the question of interest must be left to the discretion of the jury. Section 3288, Civ. Code, provides: "In an action for the breach of an ob-

ligation arising from contract, and in every case of oppression, fraud or malice, interest may be given in the discretion of the jury." We think the exception to the instruction sufficiently full and explicit, and, the verdict being for a lump sum, a modification of the judgment cannot be made.

For this reason, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

(100 Cal. 116)

GIDDINGS et al. v. 76 LAND & WATER CO. (No. 18,452.)

(Supreme Court of California. Sept. 11, 1895.)

CONTRACT—CONSTRUCTION—SPECIFIC PERFORMANCE—TIME GIVEN PLAINTIFF TO PAY FOR LAND—DISCRETION OF COURT—APPEAL—BILL OF EXCEPTIONS—WHEN NECESSARY.

1. A contract between plaintiffs and defendant, a land and water company, gave plaintiffs the option to buy from defendant land described therein, at a certain date, "in accordance with the rules of" the company, at a price stated. *Held*, that plaintiffs were not entitled to any water rights with the land, if they elected to buy, in the absence of any rules by such company entitling them to such rights.

2. A land and water company adopted a system to procure farmers to take leases of lands on cropping contracts, for a period, with the privilege of purchasing; "the purchase price of the land to be in full payment of, and entitle the purchaser to, a permanent water right to the use of the water from defendant's canal, corresponding to the number of acres bought by him, to wit, one inch of water, miners' measurement, per acre." *Held*, that such system did not constitute "rules" of the company, such as would entitle a lessee who decided to purchase "in accordance with the rules" of the company to any water rights with the land.

3. An order denying a motion for leave to file a supplemental complaint is not one of those which are deemed to have been excepted to, under Code Civ. Proc. § 647, so that it may be reviewed, on appeal from the judgment, without a bill of exceptions.

4. In an action for specific performance of a contract to convey land, and also certain water rights, where the court finds plaintiffs entitled to a conveyance of the land, but not of the water rights, and it appears that plaintiffs will not take the land without the water rights, it is not an abuse of discretion for the court, by its decree, to require plaintiffs to pay for the land in 10 days.

Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by E. Giddings and another against the 76 Land & Water Company for specific performance of a contract to convey land, and also certain water rights. From a judgment in favor of plaintiffs for the land only, they appeal. Affirmed.

Thompson & Thompson and O. L. Abbott, for appellants. Daggett & Adams, for respondent.

TEMPLE, J. This appeal is from the judgment, without a bill of exceptions. The ac-

tion was brought to enforce specific performance of a contract to convey certain land and water rights. The judgment awards to plaintiffs the right to purchase the land, but decides that there was no contract for the sale of any water rights. The contract was in writing, but is not set out at large in the pleadings or in the findings; but the latter contain the terms of payments to be made, and two stipulations taken from the contract. One is as follows: "And it is further agreed that the parties of the second part, their heirs and assigns, shall have the right and privilege of buying the land herein described, from the party of the first part, on or about October first, 1885, in accordance with the rules of the party of the first part, at such rate or price as is now fixed by it for said land, viz. north one-half of northwest one-quarter at twenty-eight dollars (\$28), south one-half of north-west one-quarter and southwest one-quarter at thirty dollars (\$30), all in section seven, township sixteen south, range twenty-four east, Mount Diablo base and meridian, at — dollars, United States gold coin, per acre." The other stipulation had reference to the right to continue the lease which contained the contract for two more years. The court further found as follows: "The court finds the fact to be that the defendant never did, in either of said contracts, or orally, or otherwise, or at all, agree to sell or convey to plaintiffs, or either of them, any waters or any water rights or water privileges whatever." The controversy is as to whether plaintiffs were entitled to any water rights with the land in case they elected to purchase. It is admitted that the contract contained no covenant or stipulation to that effect, unless it can be found in the agreement above recited,—that plaintiffs shall have the privilege of buying the land "in accordance with the rules of the party of the first part." Counsel contend that this provision distinguishes this case from *Abbott v. 76 Land Co.*, 101 Cal. 567, 36 Pac. 1, because here is an express reference to the rules of the company. But no rules of the company upon the subject are alleged, or found to exist. The allegation relied upon by plaintiffs' counsel in this respect is as follows: "That, for and in said business of selling its property, defendant, on or about the 16th day of October, 1883, adopted a system which was as follows: 'To procure farmers to take leases of parcels of said lands upon cropping contracts, for the period of one year, with the privilege to the tenant of extending said term from year to year for a further period not exceeding two years, and with the privilege of buying,' etc., * * * 'the purchase price of the land also to be in full payment of, and entitle the purchaser to, a permanent water right to the use of the water from the defendant's canal corresponding to the number of acres bought by him, to wit, one inch of water, miners' measurement, per acre.'" This indicates no rule of the company, but only a system of seeking customers for their land,

and a practice, when a customer was found, of entering into a specific contract with him. If the contracts so made were similar, this would not establish rules of the company, such as would satisfy the reference contained in the contract. But the allegation is denied in the answer, and the above extract from the findings is responsive to the issue so made. In the first place, the answer contains a denial that at the times mentioned in the complaint the defendant had or owned any waters or water rights, by which the lands could or can be irrigated. And then it is denied that the lease or agreement contained any provision which entitled the purchaser to a permanent, or any, water right. And lastly it is averred that "the price established for said land described in said amended complaint was \$28 per acre for the north half of the northwest quarter of section seven, described in said amended complaint, and the sum of \$30 per acre for the south half of the northwest quarter and the southwest quarter of section seven, described in said amended complaint, without any water privilege or any water right, and that the price of said land was so established for said land alone, and without any water privilege or water right appurtenant thereto, or in connection therewith." If the reference is to such system, it is not proven that the privilege of purchasing the water right was a part of said system.

Appellants also complain of an order refusing to allow plaintiffs to file a supplemental complaint. There is no bill of exceptions in the record, and it is objected that we are in no way legally apprised of the fact, if it be so, that plaintiffs ever asked for leave to file a supplemental complaint, or that such leave has ever been refused. Appellants contend that the order may be reviewed upon the appeal from the judgment, because, as they claim, it was an order made before judgment, and is deemed excepted to, under section 647, Code Civ. Proc. There is printed in the transcript, although not legally a part of the record, what purports to be a copy of the proposed supplemental complaint, of a certain notice, and sundry affidavits; also, a copy of a minute order, and a certificate of the judge that in deciding the motion for leave to file the proposed supplemental complaint he based the decision upon the proposed supplemental complaint and the affidavit of Giddings. It does not appear from this certificate or statement that notice was given of the hearing to the adverse party, nor that it was represented at the hearing, nor how the motion was decided. Counsel contend that this case comes under section 951, Code Civ. Proc., which they say has been construed as not requiring a bill of exceptions, but only that the moving papers be identified. Not conceding that any such rul-

ing has been made as stated, but waiving the point, it is evident that the section referred to can only apply to orders which are themselves appealable. This is an appeal from a judgment. What are the papers used on the hearing which resulted in the judgment? Certainly not papers used on the hearing of the application to file a supplemental complaint, for the papers printed in the transcript show that it was made some months after the trial. Had it been otherwise, however, the judge could not have certified that they were used on the hearing as to the decision or ruling from which the appeal was taken. But the order is not one of those which are deemed to have been excepted to, under section 647, Code Civ. Proc. It is not an amendment to a pleading, and is not so classified in the Code. It is only authorized for the purpose of bringing before the court "facts material to the case occurring after the former complaint or answer." Section 464, Code Civ. Proc. It leaves the former pleading intact, but an amendment to a pleading makes a substituted pleading. Section 472, Code Civ. Proc. I see no distinction between an amendment to a pleading and an amendment of a pleading, and if it is proper to say that both expressions are used in section 473, Code Civ. Proc., the context shows that they refer to precisely the same thing, so far as concerns this attempted distinction. I think the ruling upon the application for leave to file a supplemental complaint cannot be reviewed on this appeal.

The limitation of 10 days which plaintiffs were allowed, after judgment, within which to pay for the land, seems too short, unless it appeared to the court perfectly obvious that plaintiffs would not complete the purchase. And it must have so appeared, for plaintiffs have never offered to complete the purchase without the water right; and counsel for appellants, in their brief in this court, say that without the water right the land was never worth the price charged for it, and which they are required by the decree to pay. Such being the case, it was not an abuse of discretion on the part of the lower court to allow but a short time for payment. If the plaintiffs' counsel could not procure a modification of the judgment in other respects, they would not purchase, and if a modification were obtained a new opportunity would necessarily be afforded. I presume the point was made only to enable this court to afford such opportunity in case appellants should be successful in their contention as to their right to purchase the water right, and, if the view here taken on that question prevails, the point is of no consequence. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

3 Cal. Unrep. 148.

ETTER v. HUGHES et al. (No. 18,402.)
(Supreme Court of California. Sept. 18, 1895.)
JUDGMENT—ENTRY ON A VERDICT AGAINST ONE
DEFENDANT ONLY.

In assumpsit against W. and M., husband and wife, on a verdict "in favor of defendant M. against plaintiff," without mentioning W., judgment was entered that plaintiff take nothing by the action, and that M. recover her costs. *Held*, that the judgment meant that plaintiff take nothing by his action as against M., and the court was authorized to enter judgment in favor of plaintiff as against W.

Commissioners' decision. Department 1. Appeal from superior court, Madera county; W. M. Conley, Judge.

Action by A. J. Etter against Matilda B. Hughes and William M. Hughes for the recovery of money. The latter consented that judgment be entered against him, and, from a judgment in favor of Matilda B. Hughes, plaintiff appeals. Affirmed.

W. H. Larew, for appellant. H. H. Welsh, for respondents.

BELCHER, C. This action was brought to recover the sum of \$452.70, alleged to be due from the defendants, who are husband and wife, to the plaintiff, for groceries, dry goods, and general merchandise sold and delivered by him to them at their special instance and request. Defendant William M. Hughes answered, admitting the indebtedness as against himself, and consenting that judgment be entered against him for the amount claimed by plaintiff in his complaint, and all legal costs of the action. Mrs. Hughes answered separately, and denied generally and specifically each and every allegation in the complaint contained. The case was tried before a jury, and the verdict was "in favor of the defendant Matilda B. Hughes against plaintiff," without any mention of the other defendant. On this verdict, judgment was entered that the plaintiff take nothing by reason of the action, and that Mrs. Hughes recover her costs and disbursements incurred in the action. The plaintiff appeals from the judgment on the judgment roll, without any statement or bill of exceptions.

It was not necessary for the jury to find and return a verdict upon the claim against William M. Hughes. As to that claim, there was no issue, and there could be no trial. And as to him, the court was authorized to enter judgment in favor of the plaintiff upon the pleadings, and it may still do so. "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants." Section 578, Code Civ. Proc. The judgment entered, when properly construed, was only that the plaintiff take nothing by his action as against Mrs. Hughes, and that she recover her costs. There is no substantial merit in the appeal, and the judgment should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

5 Cal. Unrep. 144

ANDREWS v. WILBUR. (No. 18,313.)
(Supreme Court of California. Sept. 12, 1895.)
APPEAL—EXTENT OF REVIEW—CONFLICTING EVIDENCE—RIGHT TO INTEREST.

1. On appeal from an order denying a new trial, only rulings of the trial court assigned as error, and the sufficiency of the evidence to sustain the verdict, can be considered.

2. The verdict of a jury on conflicting evidence will not be disturbed on appeal.

3. An attorney who buys his client's note at less than its face value, and then collects from the client its full value, is liable for interest, on the excess of the amount received by him over the amount paid, from the date of its receipt.

Department 1. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Action by Sarah Andrews against J. L. Wilbur. Judgment for plaintiff. From an order denying his motion for a new trial, defendant appeals. Affirmed.

Wm. G. Murphy and M. C. Barney, for appellant. Forbes & Dinsmore, for respondent.

HARRISON, J. It is alleged in the complaint that, while the defendant was acting as the attorney and confidential agent of the plaintiff, he purchased a promissory note and mortgage that had been executed by her to one Wheeler; that, by reason of his position as her attorney, he received information that the note could be purchased for less than its face, and that thereupon he did so purchase it, in violation of the confidence reposed in him by her, and without her knowledge; that afterwards he received from her the full amount of said note. The plaintiff therefore asked judgment for the amount received by the defendant from her in excess of the amount paid by him for the note. The case was tried by a jury, who rendered a verdict in favor of the plaintiff. A new trial was asked by the defendant, and denied by the court, and from this order he has appealed.

The sufficiency of the complaint is not involved in this appeal. Upon the appeal from the order denying a new trial, we can only consider the rulings of the court assigned as error, and the sufficiency of the evidence to sustain the verdict. The only ground specified by the appellant, in his statement on motion for a new trial, in which the evidence is insufficient to sustain the verdict, is that the evidence failed to show that at the time of the purchase of the note he held the relation of agent or attorney to the plaintiff. Upon this point it is only necessary to say that this proposition was sharply contested at the trial, and that the main portion of the transcript, containing over 100 pages, relates to evidence upon this point. The appellant in his brief seeks to show that the verdict should have been otherwise; but, as we are

precluded from weighing the testimony, the verdict of the jury thereon must be taken as conclusive.

No exception appears to have been taken to the instructions to the jury, and the rulings of the court upon the admission of evidence, to which objections were made, are not such as to justify a reversal.

The plaintiff was entitled to interest, upon the amount received from her by the defendant in excess of the amount he had paid, from the date of its receipt. It was money in his hands belonging to her, which he had received to her use, and which he detained from her. Civ. Code, § 1917. The order is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

In re WELCH'S ESTATE.

WELCH v. YOUNG et al.
(No. 16,010.)

(Supreme Court of California. Sept. 12, 1895.)

PARTIAL DISTRIBUTION OF DECEDENT'S ESTATE.

Partial distribution of a decedent's estate in the hands of a special administrator appointed pending proceedings to remove the general administrator cannot be decreed.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Henry Welch, deceased. Appeal by Mary C. Young and Sarah J. Phillips from a decree directing the payment to Honor Welch, widow of said deceased, of a certain amount. Reversed.

Geo. W. Johnson, for appellants. Garret W. McEnerney, for respondent.

PER CURIAM. The decree of partial distribution appealed from herein was considered by this court, upon an appeal from the same decree on behalf of the special administrator, in case No. 15,890, decided March 15, 1895 (39 Pac. 805), and was then declared to have been made without authority. Upon the authority of that case, and a stipulation filed herein on behalf of the respondent, the decree is vacated and set aside, without costs to either party.

100 Cal. 50

BROOKS v. CITY OF SAN LUIS OBISPO.
(No. 19,549.)

(Supreme Court of California. Sept. 5, 1895.)

PRINTING ASSESSMENT LIST—OUT OF WHAT FUNDS PAYABLE.

Under Act March 6, 1889, § 8, prohibiting the drawing of a warrant for any expense of the improvement of a street on any other than the special fund raised by assessment for such improvement, the expenses of printing a delinquent assessment list in proceedings to improve a street are only payable out of such special fund.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Assumpsit by Benjamin Brooks against the city of San Luis Obispo. Judgment for defendant. Plaintiff appeals. Affirmed.

Wm. Shipsey, for appellant. W. H. Spencer, for respondent.

VANCLIEF, C. Action of the nature of the common-law action of assumpsit, to recover from the defendant city \$362.25 for publishing a delinquent assessment list, pursuant to section 16 of the act of the legislature of March 6, 1889 (St. 1889, p. 70), entitled "An act to provide for laying out, opening, extending, widening * * * any street, * * * and to acquire land," etc., for those purposes. It appears from the complaint that the delinquent assessments, a list of which was published by plaintiff, were levied by the defendant in a proceeding, under said act, to widen Chorro street, and that plaintiff, being the proprietor and publisher of a newspaper, published said delinquent list in his paper at the instance and request of the defendant and its superintendent of streets; that the service was reasonably worth the sum demanded, but that defendant refused and failed to pay therefor any sum whatever. The court sustained a demurrer to plaintiff's complaint, and thereupon, the plaintiff declining to amend, rendered judgment in favor of the defendant. The plaintiff brings this appeal from the judgment on the judgment roll.

It appears that the demurrer was sustained on the ground that the complaint does not state facts constituting a cause of action, because, although it states that there was in the general fund of the treasury of the defendant more than sufficient money to pay the same, there is no allegation that there was any money in the special fund applicable to the expenses of widening Chorro street. Appellant admits that there was no money in said special fund exclusively devoted to the payment of the expenses of widening Chorro street, but contends that he was not restricted to such fund for the payment of his demand, and whether or not he was so restricted is the only question presented by his appeal. Respondent contends that section 8 of said act prohibits the defendant from paying plaintiff's demand from any fund except the special fund raised by assessment for the purpose of widening Chorro street. Section 6 of the act, after providing for the appointment of commissioners to make the assessment, etc., further provides, that "for their services, the commissioners shall receive such compensation as the city council may determine from time to time. * * * Such compensation shall be added and be chargeable as a part of the expenses of the work or improvement." Section 7 authorizes the commissioners to employ such assistance, legal or otherwise, as

they may deem necessary and proper; also, to rent an office, and provide such maps, diagrams, plans, books, stationery, lights, postage, expressage, and incur such incidental expenses as they may deem necessary. Section 8 of the act is as follows: "All such charges and expenses shall be deemed as expenses of said work or improvement, and be a charge only upon the funds devoted to the particular work or improvement as provided hereinafter. All payments, as well for the land and improvements taken or damaged, as for the charges and expenses, shall be paid by the city treasurer, upon warrants drawn upon said fund from time to time, signed by said commissioners, or a majority of them. All such warrants shall state whether they are issued for land or improvements taken or damaged, or for charges and expenses, and that the demand is payable only out of the money in said fund, and in no event shall the city be liable for the failure to collect any assessment made by virtue hereof, nor shall said warrant be payable out of any other fund, nor a claim against the city." Counsel for appellant contends that the decision of the question under consideration depends upon the construction to be given to the phrase, "all such charges and expenses," in section 8, and, as this phrase immediately follows sections 6 and 7. It refers only to the charges and expenses mentioned in those sections, which may be incurred by the commissioners, and does not refer to the expense of advertising authorized to be incurred by the superintendent of streets. Conceding this, yet the subsequent parts of section 8 clearly prohibit the drawing of a warrant for any charge or expense of the improvement on any other than the special fund raised by assessment, and expressly declare, that "in no event shall the city be liable for the failure to collect any assessment" made by virtue of the act, and that no warrant shall be a claim against the city. The decision, therefore, is not solely dependent on the construction of the single phrase above mentioned, but upon the construction of the whole section, of which that phrase is only a small part. Besides, there is no question that the expense of advertising the list of delinquent assessments is one of the necessary expenses of the improvement, and I perceive no reason, and none has been suggested, why its payment should not be restricted to the same fund out of which, alone, the expenses of legal services, rent, stationery, and other incidental expenses are to be paid. I think the court below correctly construed the eighth section of the act, and that its judgment should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

HARBAUGH v. HONEY LAKE VALLEY LAND & WATER CO. (No. 18,366.)
(Supreme Court of California. Sept. 6, 1895.)

DEFAULT—WHEN SET ASIDE—DISCRETION OF COURT.

In a case having 21 causes of action, on November 27th defendant's demurrer was overruled, and it was given 30 days to answer. December 5th it demanded a bill of particulars, which was furnished three days afterwards. December 12th defendant filed and served written objections to such bill, and moved for more specific particulars, and on the 27th such motion was granted. The following day default and judgment were entered against defendant, which, in apt time, moved to set aside the default, filing an affidavit of merits. It appeared that defendant's attorney made the mistake in supposing that the order for further particulars operated to extend the time for answering 10 days. *Held*, that an order setting aside the default was on the border line of the court's discretion, but would not be set aside.

Commissioners' decision. Department 2. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Action by L. A. Harbaugh against the Honey Lake Valley Land & Water Company, in which there was a judgment by default in favor of plaintiff. From an order setting aside the default, and vacating the judgment, plaintiff appeals. **Affirmed.**

Goodwin & Goodwin, for appellant. F. D. Brandon and J. E. Pardee, for respondent.

SEARLS, C. This is an appeal from an order setting aside a default of defendant, and vacating a judgment rendered thereon in favor of plaintiff. The complaint in the action was filed in the superior court in and for the county of Lassen on the 5th day of August, 1893. On the 4th day of September following, defendant (a corporation having its principal place of business at the city and county of San Francisco) filed its written appearance, whereupon it was stipulated by counsel for the respective parties that defendant should have 30 days thereafter to plead. On the 4th day of October defendant filed and served a demurrer to the complaint, and a demand and notice of motion to change the place of trial to San Francisco. On November 6th the motion to change the place of trial was heard and denied. On the 27th day of the same month the demurrer was submitted to the court without argument, and overruled, and 30 days given to the defendant to answer. On December 5th defendant demanded a bill of particulars, which was furnished December 8th. December 20th defendant served and filed written objections to the bill of particulars furnished, and gave notice that on the 26th inst. it would apply to the court for an order for further and more specific particulars. This last motion of defendant was granted December 27th, and on the 28th day of December, no answer having been filed, the default of defendant was entered, and a judgment thereon in favor of plaintiff for

\$6,540.46 and costs. Defendant on the 12th of January, 1894, gave notice of a motion to set aside the default and vacate the judgment, which motion was granted January 18th, upon condition that defendant pay to plaintiff his costs in the action up to that date.

In addition to an affidavit of merits, defendant's affidavits upon the motion showed that defendant, its officers, and its regular attorney, are residents of San Francisco; that it takes two days to communicate by mail with Susanville, where the cause is pending; that defendant's counsel in San Francisco supposed the time to answer had been extended by stipulation, and that the court would grant further time to answer, until defendant could have the benefit of the further bill of particulars to aid it in answering the 21 causes of action which the complaint contained, while the assistant counsel of defendant, who resided at Susanville, where the cause was pending, made the mistake of supposing that the order for further particulars operated to extend the time for answering for 10 days from the date of its entry, until it was too late to interpose an answer within the time allowed. That this was negligence on the part of the defendant is certain. The court below, in the exercise of the discretion confided in it, in view of all the circumstances, deemed it wise to open the default and permit an answer.

We think the action of the court came very near the border line which divides the exercise of discretion from the abuse of such discretion, but, in view of the fact that plaintiff, by his failure in the first instance to furnish a proper bill of particulars, was in some sort the cause of the failure to answer in time, we do not feel called upon to reverse the ruling. It has been said that the power of the court should be freely and liberally exercised, under section 478 of the Code of Civil Procedure, to mold and direct its proceedings so as to dispose of cases upon their substantial merits, and its order will not be reversed unless its power has been exercised in a manner which is calculated to defeat rather than advance the ends of justice. *Buell v. Emerich*, 85 Cal. 116, 24 Pac. 644. A default inadvertently permitted by a party having a substantial defense presents a case in which great latitude should be extended to the discretion of the court by which the default was set aside. *Hitchcock v. McElrath*, 69 Cal. 634, 11 Pac. 487; *Burns v. Scooffy*, 98 Cal. 271, 33 Pac. 86; *Watson v. Railroad Co.*, 41 Cal. 17; *William Wolff & Co. v. Canadian Pac. Ry.*, 89 Cal. 332, 26 Pac. 825. The order appealed from should be affirmed.

We concur: BELOHER, O.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

108 Cal. 107

YORBA v. WARD. (No. 19,437.)

(Supreme Court of California. Sept. 7, 1895.)

In bank.

On petition for rehearing. Denied.

For opinion on appeal, see 38 Pac. 48.

PER CURIAM. After a full consideration of this cause in bank, we are satisfied with the opinion heretofore rendered in department 1, and for the reasons given in that opinion the judgment and order are reversed. 38 Pac. 48.

I dissent: BEATTY, C. J.

108 Cal. 661

In re CURTIS, Supervisor. (No. 18,401.)

(Supreme Court of California. Sept. 4, 1895.)

REMOVAL OF PUBLIC OFFICERS—APPELLATE JURISDICTION.

Pen. Code, § 772, provides for the removal of public officers, by an accusation in writing, presented to the superior court. Const. art. 6, § 4, gives the supreme court appellate jurisdiction in all criminal cases prosecuted by indictment or information. *Held* that, a prosecution under section 772 not being by indictment or information, the supreme court has no appellate jurisdiction thereof.

Department 1. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

An accusation was filed by D. J. McGowan against William Curtis under Pen. Code, § 772, for the removal of the latter from office. The accusation was dismissed, and McGowan appeals. Appeal dismissed.

Holl & Dunn, for appellant. White, Hughes & Seymour and Johnson & Johnson, for respondent.

HARRISON, J. While the respondent held the office of supervisor of the Fourth district of the county of Sacramento, an accusation was filed against him in the superior court for that county by D. J. McGowan, under the provisions of section 772 of the Penal Code, charging him with collecting illegal fees and neglecting to perform his official duties. To this accusation the respondent filed a demurrer upon various grounds, which was sustained by the court, and, the accuser declining to amend his accusation, the court entered a judgment dismissing the proceeding. From this judgment McGowan has appealed. The respondent has moved to dismiss the appeal upon the ground that an appeal from the action of the court under this section of the Penal Code is unauthorized.

The charge against the respondent is of a public offense,—a neglect of official duty, or misdemeanor in office,—and the proceeding against him is a criminal proceeding in the nature of an impeachment. In re Marks, 45 Cal. 199. At the common law an officer guilty of neglect of official duty was liable to indictment and punishment by removal

from office. Throop, Pub. Off. c. 32; Bac. Abr. "Offices & Officers," N. See, also, opinion of Kent, J., in note to *People v. Denton*, 2 Johns. Cas. 275. Article 4, § 18, of the constitution of this state, after providing that certain state officers shall be liable to impeachment for misdemeanor in office, declares: "All other civil officers shall be tried for misdemeanor in office in such manner as the legislature may provide." By section 772 of the Penal Code the legislature has provided a manner for the trial of certain misdemeanors in office, by authorizing an accusation in writing, verified by the oath of any person, to be presented to the superior court, and if, upon a hearing thereon, after a citation to the accused, the charges are sustained, the court is authorized to remove the accused from office. These proceedings are intended to be summary, and, as the legislature has made no provision for a review of the action of the superior court, its judgment is final. See *Appeal of Houghton*, 42 Cal. 35; *Bixler's Appeal*, 59 Cal. 550. By article 6, § 4, of the constitution the supreme court is given appellate jurisdiction "in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone." Section 682 of the Penal Code declares that "every public offense must be prosecuted by indictment or information, except (1) where proceedings are had for the removal of civil officers of the state." The "information" here authorized is that named in the constitution (article 1, § 8) as the equivalent of an indictment, and which is to be prepared by the district attorney under the provisions of section 809 of the Penal Code. The case of *In re Marks*, supra, was prosecuted under the provisions of the act of March 14, 1853 (St. 1853, p. 40), and by the provisions of section 6 of that act either party might appeal to the supreme court as in other cases. The provisions of this section ceased to exist upon the adoption of the codes, and section 1235 of the Penal Code authorizes an appeal to this court only in such criminal actions as amount to a felony. As the appellate jurisdiction of this court in criminal cases given by the constitution extends only to such as are prosecuted by indictment or information, we have no jurisdiction to entertain the present appeal. The appeal is dismissed.

We concur: GAROUTTE, J.; VAN FLEET, J.

109 Cal. 100

COX v. LOS ANGELES TERMINAL RY. CO. (No. 19,559.)

(Supreme Court of California. Sept. 7, 1895.)

CARRIERS—EJECTION OF PASSENGER—LIABILITY FOR DAMAGES—REFUSAL TO PAY FARE—ABSENCE OF CONDUCTOR'S BADGE—EXCESSIVE DAMAGES.

1. Plaintiff, a girl 10 years old, and three others, about the same age, boarded defendant's

train for a station to which the fare was 10 cents each. Plaintiff tendered the conductor 20 cents, as the fare for all. He told her that unless they paid 10 cents each they would have to get off. Plaintiff said, if the others had to get off, she would also. Thereupon the conductor handed the money back, and at the next station they all got off. *Held*, that defendant was not liable to plaintiff for damages.

2. Neither the fact that, at a previous time, another conductor allowed the three girls to ride for 10 cents, or that another passenger said she would pay the fare for the other girls, without tendering it, rendered defendant liable.

3. Civ. Code, § 488, requires every conductor to wear on his cap, or other conspicuous place, a badge indicating his office, and provides that no conductor without such badge is authorized to demand or receive fare from a passenger. *Held*, that where a passenger who refuses to pay fare recognizes the conductor as such, and does not refuse to pay fare because of the absence of such badge, or object to its absence, and the conductor puts him off the train, the company is not liable because such conductor wore no badge.

4. A verdict for \$500 in favor of a girl 10 years old who, with three other girls, was put off a railroad train, at a station, for failure to pay fare, is excessive, in the absence of evidence justifying exemplary damages, or taking the case out of the rule given in Civ. Code, § 3333.

Department 1. Appeal from superior court, Los Angeles county; W. A. Clarke, Judge.

Action by H. L. Cox, a minor, by W. E. Cox, guardian ad litem, against the Los Angeles Terminal Railway Company to recover damages for being ejected from defendant's train, in which there was a verdict for plaintiff. From an order denying a new trial, defendant appeals. Reversed.

T. E. Gibbon, for appellant. W. E. Cox and W. D. Gould, for respondent.

HARRISON, J. This action was brought in behalf of the plaintiff, an infant of the age of 10 years, to recover damages for having been expelled from a train of the defendant, upon which she had taken passage as a passenger. At the close of the testimony on behalf of the plaintiff, the defendant asked for a nonsuit, which was denied, and, after other testimony had been introduced, the cause was submitted to the jury, who rendered a verdict in favor of the plaintiff for \$500. A motion for a new trial was made and denied, and the defendant has appealed.

1. The motion for a nonsuit should have been granted. The plaintiff, in company with two younger sisters, and another girl about her own age, were attending school at Tropic, in the county of Los Angeles, and, on the morning in question, had taken passage upon the cars of the defendant, at Bond station, for the purpose of being carried to Tropic station, about a mile and a quarter distant. The rate of fare between Bond station and Tropic was 10 cents. When the conductor asked for their fare, the plaintiff tendered him 20 cents as the fare for herself and her two sisters. The conductor told her that the fare was 10 cents for each of them, and that unless they paid that amount of fare

they would have to get off. He also told the plaintiff that the 20 cents was enough to pay for two of them, but that the others would have to get off. The plaintiff then told the conductor that she did not like to go on without the others, and that, if they got off, she would get off too. Thereupon the conductor handed the money back to plaintiff, and when the next station was reached he stopped the train, and the plaintiff, with her sisters and the other girl, got off. There was no evidence of the use of any violence or oppression or force towards the plaintiff on the part of the defendant or its employés. On the contrary, the entire evidence shows that the conductor was civil and gentle in his intercourse with the plaintiff.

The plaintiff's right of action is limited to the conductor's treatment of herself alone, and as, instead of accepting the offer of the conductor to ride for the fare tendered by her, she chose to take back the money, and get off the car with her sisters, rather than go on without them, her leaving the car must be regarded as a voluntary act on her part. The fact that, on a previous occasion, another conductor had allowed the three girls to ride for 10 cents, did not render the act of the conductor in demanding the regular fare on this day improper, or place the defendant in the wrong. Nor is the plaintiff entitled to recover from the defendant because another passenger said that she would pay the fare for the other girls. No tender of fare was made by her, and the plaintiff, instead of availing herself of the offer, testifies that she did not hear it made.

2. Section 488, Civ. Code, is as follows: "Every conductor, baggage-master, engineer, brakeman, or other employee of any railroad corporation, employed on a passenger train or at stations for passengers, must wear upon his hat or cap, or in some conspicuous place on the breast of his coat, a badge, indicating his office or station, and the initial letters of the name of the corporation by which he is employed. No collector or conductor, without such badge, is authorized to demand or to receive from any passenger any fare, toll, or ticket, or exercise any of the powers of his office or station; and no other officer or employee, without such badge, has any authority to meddle or interfere with any passenger or property." There was evidence tending to show that the conductor, on this morning, did not wear any badge upon his cap, and the court gave to the jury the following instruction: "Every conductor employed on a passenger train must wear upon his hat or cap, or in some conspicuous place upon the breast of his coat, a badge indicating his office or station, and the initial letters of the name of the corporation by which he is employed; and no conductor without such badge is authorized to demand or receive from any passenger any fare or ticket, or exercise any of the powers of his office, and no conductor without such badge has any authority to meddle or interfere with any passenger or proper-

ty,"—and, further, instructed the jury: "If you find that the conductor in this instance did not have upon his cap or breast such a badge, then he had no right to meddle or interfere with the plaintiff; and if he did interfere, and compelled her to leave the train, such act would be unlawful, and your verdict should be for the plaintiff."

The object of this section is not to limit the power of the corporation in the conduct of its business, but it is for the protection of passengers, by requiring a designation of the person whom they are to recognize as entitled to receive their fare, or to represent the corporation in other respects. The restraint which the section places upon the authority of a conductor is to be limited to the matters specified therein, and is not to be extended to cases not included within the language of the section. Without a badge indicating his office, the conductor is not "authorized" to demand or receive any fare or ticket from the passenger, or to exercise any of the powers of his office or station. The passenger, in such case, would be justified in refusing to pay him the fare, or to surrender to him his ticket, or to comply with his orders; but it does not follow that if the passenger recognizes him as the conductor, and pays his fare, or complies with his directions, he can recover the fare back from the corporation, upon the ground that the conductor was not "authorized" to receive it, or maintain an action against the corporation for complying with the directions of the conductor, on the ground that he was not authorized to give them. The passenger does not become entitled to free transportation upon the railroad by reason of the omission of the conductor to put on this badge, and if, after recognizing him as the conductor, and treating with him as such, when he is without the badge, the passenger would avail himself of the protection intended by this section, he should place his refusal to pay the fare, or to comply with his directions, upon this ground, in order that the conductor might have an opportunity to obviate the objection. The plaintiff herein made no objection to paying the fare to the conductor at the time he demanded it, but recognized him as sufficiently authorized to receive it, irrespective of the absence or presence of a badge. Nor did she, at the time she got off the car, make any objection to so doing upon the ground that the conductor was without his badge. As she was not entitled to ride upon the road without paying her fare, she was deprived of no right by being excluded from the cars for failure to make such payment; and, if there was any reason why she should not have been excluded, she ought then to have stated the reason. After having complied with the order of the conductor, without making this objection, she cannot afterwards be allowed to raise an objection which, if then stated, might have been obviated. The latter clause of the first of the above instructions goes beyond the language

of the Code. The language of the section is that "no other officer or employee without such badge has any authority to meddle or interfere with any passenger or property," whereas the jury were told that "no conductor without such badge has any authority to meddle or interfere with any passenger or property." The use of the term "other officer or employee" expressly excludes the conductor from the limitations of authority contained in this clause, and confines such limitation to the acts specified in the preceding clause of the sentence.

3. We are of the opinion that the verdict was excessive. Without reviewing the evidence, it is sufficient to say that there was no evidence before the jury which justified them in giving punitive or exemplary damages, or to take the case out of the rule given in section 3333 of the Civil Code. See, also, *Tarbell v. Railroad Co.*, 34 Cal. 616; *Gorman v. Southern Pac. Co.*, 97 Cal. 6, 31 Pac. 1112. The judgment and order are reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

5 Cal. Unrep. 149

Ex parte WOODS. (Cr. 62.)

(Supreme Court of California. Sept. 19, 1895.)

BURGLARY—SUFFICIENCY OF JUDGMENT.

Defendant pleaded guilty to a charge of burglary in the first degree, and the judgment recited that, "whereas defendant has been convicted of the crime of burglary in the first degree, * * * it is ordered," etc. *Held*, that the judgment was valid, though the minutes of the court did not show that any evidence was heard to prove the degree of the crime of which defendant was found guilty, there being nothing in the minutes to contradict the recitals of the judgment.

John Woods, convicted of burglary in the first degree, petitioned for a writ of habeas corpus. Petition dismissed.

O. T. Jones, for petitioner. H. F. Carter, Third Deputy, for respondent.

GAROUTTE, J. Petitioner was charged by information with the crime of burglary. A prior conviction for a like offense was also alleged against him. He pleaded guilty, and the judgment under which he is held recites that "whereas the defendant, John Woods, has been convicted of the crime of burglary in the first degree and a prior conviction of felony, it is ordered that he be imprisoned in the state prison for the term of twenty years." The judgment, upon its face, is a valid and legal judgment, and one which the court clearly had power to make; but petitioner insists that the minutes of the court taken at the time defendant pleaded, and also when judgment was pronounced, fail to indicate that any evidence was heard tending to show the degree of the crime of which defendant was found guilty. There is nothing in the point. The judgment itself

recites that the defendant was convicted of burglary of the first degree; and, conceding that the minutes of the court could be introduced upon this hearing for the purpose of contradicting recitals found in the judgment, still we find nothing in those minutes of a contradictory character. They are silent upon the question, and under such circumstances recitals in the judgment that the petitioner was convicted of the crime of burglary in the first degree must control. We see no ground entitling the prisoner to his discharge. The petition is dismissed, and petitioner remanded.

5 Cal. Unrep. 146

MASTERSON v. CLARK, Sheriff. (No. 18,348.)

(Supreme Court of California. Sept. 17, 1895.)

REPLEVIN—COMPLAINT.

A complaint in replevin, which fails to state that plaintiff is the owner or is entitled to the possession of the property at the commencement of the action, is defective.

Department 1. Appeal from superior court, Glenn county; Seth Wellington, Judge.

Action by James Masterson, Jr., against P. H. Clark, sheriff of the county of Glenn, to recover the possession or value of certain personal property. Plaintiff had judgment, and defendant appeals. Reversed.

Ben. F. Gels, for appellant. Charles L. Donohoe, for respondent.

PER CURIAM. The plaintiff brought this action to recover the possession or value of 300 head of sheep. The complaint was filed September 20, 1893, and it avers that on the 8th day of that month plaintiff was the owner and entitled to the possession of said sheep; that on the said 8th day of September defendant, without plaintiff's consent, and wrongfully, came into possession of said property, and still retains possession of the same; that on the 11th day of said month plaintiff demanded of defendant the possession of said sheep, but to deliver the possession thereof the defendant refused, and still refuses; that defendant still unlawfully withholds and detains said sheep from the possession of plaintiff, etc. A general demurrer to the complaint was interposed and overruled. The defendant then answered, denying the plaintiff's ownership or right to the possession of the sheep, and setting up facts to justify his taking possession of the same. The case was tried, and the findings and judgment were in favor of the plaintiff. The defendant appeals from the judgment entered against him, and has brought the case here on the judgment roll alone. The only question presented for decision is, did the complaint state facts sufficient to constitute a cause of action? It is contended for appellant that the complaint was fatally defective, because it entirely failed to state that the plaintiff was the

owner and entitled to the possession of the sheep when the action was commenced. The same question arose in *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750. In that case the complaint was very similar to the complaint in this case, and it was held to be defective, and cause for reversal. On the authority of that case the judgment here appealed from must be reversed, and the cause remanded, with leave to the plaintiff to amend his complaint if so advised. So ordered.

(108 Cal. 684)

BRADFORD v. WOODWORTH (No. 18,342.)

(Supreme Court of California. Sept. 5, 1895.)

SALE—ACTION FOR PRICE—CONTRACT.

In an action to recover the value of lumber sold to defendant, to be used in the construction of a quartz mill on the R. mine, it appeared that defendant was the president of the Y. Mining Company, which owned the mine, and for which defendant was constructing the mill; that he did not inform plaintiff, nor did the latter know, that defendant was acting as agent of the Y. Company, and that the lumber was for such company, but that plaintiff contracted with defendant as the owner of the R. mine, and as the principal in the transaction. *Held*, that defendant was liable.

Department 2. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by S. S. Bradford against F. H. Woodworth to recover the value of lumber alleged to have been sold to defendant. From a judgment for plaintiff, defendant appeals. *Affirmed*.

J. D. Redding and J. F. Rooney, for appellant. F. W. Street, for respondent.

TEMPLE, J. Appeal from the judgment, and from an order denying a new trial. This action was brought to recover the value of lumber alleged to have been sold by plaintiff to defendant, to be used in the construction of a quartz mill on the Rising Sun Mine. The answer denies all the material allegations of the complaint, and avers that the lumber was sold by plaintiff to the Yosemite Mining Company, a corporation incorporated in the state of Illinois.

The court found that the lumber was sold to the defendant, but that at the time the defendant was the president of the Yosemite Mining Company, and, for that company, was in charge of, and engaged in the management of, the Rising Sun Mine. The court further found as follows: "That neither at the time the defendant contracted with plaintiff for the lumber and materials furnished defendant as aforesaid, nor during any of the time plaintiff was furnishing the said lumber and materials, did the defendant inform the plaintiff that he, said defendant, was acting as the president of, or as the agent of, the Yosemite Mining Company; nor did the plaintiff know at or during any portion of the time from September 15, 1883, to and including the 2d day

of April, 1884, that the defendant was the president of, or the agent of, the Yosemite Mining Company; and the defendant did not, at or during any of said time, inform plaintiff that the said Yosemite Mining Company was the owner of said Rising Sun Mine, or that the lumber and materials furnished and delivered to the defendant as aforesaid were for the said Yosemite Mining Company; and plaintiff did not know, during any of said time, that said lumber and materials sold and delivered by him to the defendant as aforesaid were for the said Yosemite Mining Company, or that said company was the owner of said Rising Sun Mine. That plaintiff dealt and contracted with the defendant as the owner of said Rising Sun Mine, and as the principal in the transaction." It is claimed that the evidence does not support this finding, but a careful reading of the transcript convinces me that it is only one of numerous cases presented here where the real claim is that the finding is not supported by the preponderance of the evidence. Certainly the testimony of the plaintiff himself supports the finding in every respect, and the opposing testimony is not very positive upon the most material points. It tends rather to show that plaintiff may have known that defendant was the agent of some company. Under such circumstances, we cannot disturb the finding. The facts being as found, the defendant is liable.

Appellant also complains of certain alleged errors of law in refusing to admit evidence offered by him. But I find no prejudicial error in the rulings. The record does not show a stipulation that the minute book might be used in evidence, and, if it did, the book was not attached to the deposition, or returned with it. It was then incumbent upon defendant to prove its identity, unless that was admitted. The minute order showing authority to purchase the mine was read in connection with the deposition. For all other purposes for which the book was offered, it was clearly incompetent, even if its identity and genuineness had been admitted. The judgments offered were not competent evidence upon any issue in the case. It was proper to permit plaintiff to explain, in rebuttal, the telegram which had been introduced by the defendant to contradict his testimony. The order and judgment are affirmed.

We concur: **McFARLAND, J.; HENSHAW, J.**

(108 Cal. 686)

SPINNEY v. DOWNING et al. (No. 18,346.)
(Supreme Court of California. Sept. 4, 1895.)

CONTRACT OF SALE—WHEN COMPLETE—ESTOPPEL.

1. Where persons agree that a proposed contract shall be made in writing, such contract is not binding on either until reduced to writing, and signed by both.

2. Where persons agree that a proposed contract for the sale of brick shall be made in writing, the fact that the vendor delivered part of the brick, and the vendee has signed a contract, will not estop the vendor from asserting that there was no contract, because it was not reduced to writing, and signed by both of them.

Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by Joseph Spinney against H. W. Downing and others to foreclose a mechanic's lien for brick furnished. Defendants filed a cross complaint for breach of contract to furnish all the brick. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Reversed.

L. L. Cory, for appellant. F. H. Short, for respondents.

VAN FLEET, J. Action to enforce a material man's lien for the value of a quantity of brick furnished and used in the erection of a certain building. By way of cross complaint and ground for affirmative relief, the defendant Downing set up that he and the plaintiff entered into a certain contract whereby plaintiff agreed to furnish and deliver to said defendant all the brick required for the construction of the building, the brick to be of a certain quality, and at a specified price per thousand; that plaintiff delivered a portion, only, of the brick so contracted for, and then neglected and refused to deliver any more, whereby defendant was compelled to procure brick for the completion of the said building elsewhere, and at a higher price per thousand, to defendant's damage, etc., for which he prayed judgment. Judgment went against plaintiff, and from the judgment, and an order denying him a new trial, he appeals.

We think it clear that the alleged contract counted upon by defendant Downing in his cross complaint never became a completed contract. It appears, without conflict, that it was the understanding and agreement between the plaintiff and Downing that the proposed contract should be reduced to writing, and signed by both parties. This fact is made very clear by the evidence. The paper as drawn up was signed by Downing, but, for some reason which does not appear, never was signed by the plaintiff Spinney. It therefore never became a binding or subsisting obligation upon either. It is a general rule, to which this case presents no exception, that, when it is a part of the understanding between the parties that the terms of their compact are to be reduced to writing, and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon, or it does not become a binding obligation upon either. This is essentially true when, as here, the proposed contract contains reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other. *Ambler v. Whipple*, 20 Wall. 546; *Fuller v. Reed*, 38 Cal. 99; *Morrill v. Mining Co.*, 10 Nev. 125.

The case last cited is much in point, the facts not being essentially dissimilar to those of the case at bar. In that case the parties agreed upon the terms of contract for the sale and delivery of a certain quantity of wood by plaintiff to defendant, but it was understood that the contract should be put in writing, and signed by both parties. It was accordingly reduced to writing, and was duly executed by defendant, but was not signed by plaintiff, nor did the latter give a bond, as was required, for the faithful performance of the contract. He did, however, commence at once to deliver the wood, and continued to deliver it until stopped by the defendant. He brought an action for the breach of the contract, and, in passing upon the case on appeal the supreme court of Nevada say: "From the facts thus found, we think, independent of the giving of the bond, that the contract declared on was never completed. It is true, the parties verbally agreed to the terms of the contract as stated in the complaint, but it was to be reduced to writing, and signed by both parties. And it was signed by McDonald, as the agent for defendant, but the plaintiff, for what reason does not appear, failed to sign it at the same time. True, four days afterwards he went to Waters' office for the purpose of signing it, and, failing to find it, proceeded to act under its terms. But the contract thus prepared was to be signed by both parties. It contained mutual obligations, each of which being the consideration of the other, * * * and, as the plaintiff failed thus to sign it, no reciprocal assent thereto can be implied. There is no contract unless the parties thereto assent; and they must assent to the same thing, in the same sense. 1 Pars. Cont. 475. It is essential to the existence of every contract that there should be a reciprocal assent to a definite proposition, and, when the parties to a proposed contract have themselves fixed the manner in which their assent is to be manifested, an assent thereto in any other or different mode will not be presumed. Notwithstanding the instrument declared upon was fully executed on the part of defendant, the contract was still incomplete, and neither party bound thereby."

It is urged, however, by respondent, that the appellant is estopped to deny the binding obligation of the contract because he proceeded, with full knowledge of its terms, to perform it by delivering a portion of the brick to Downing. We do not think the facts bring the case within the doctrine contended for. The case is not distinguishable in that regard from the case of *Morrill v. Mining Co.*, supra. The same point was there made,—that *Morrill*, by proceeding to execute the contract by delivering the wood, thereby ratified it, and made it a valid and binding contract, equally obligatory upon the parties as though he had signed it. But the court held that the doctrine contended for could not apply in such a case; and quote

from *Johnston v. Fessler*, 7 Watts, 48, where it is said: "To render a proposed contract binding, there must be an accession to its terms by both parties. A mere voluntary compliance with its conditions by one who had not previously assented to it does not render the other liable on it." The court also cite *Northam v. Gordon*, 46 Cal. 582, and conclude: "The action is upon the contract. Morrill neglected to sign the agreement, and also neglected to give the required bond. He consequently failed to accept respondent's offer according to its terms, and there was, therefore, no contract such as was declared upon." We think that case decisive of this. Furthermore, estoppels must be mutual, and it is obvious, under the rule above laid down, that Downing could not have been held bound under the proposed contract, which Spinney had failed to sign, but could have repudiated it at any time. In view of this conclusion the other questions do not require notice, since they will not arise upon a new trial.

Judgment and order reversed, and a new trial ordered.

We concur: HARRISON, J.; GAROUTTE, J.

100 Cal. 42

ADLER v. NEWELL et al. (No. 18,415.)

(Supreme Court of California. Sept. 5, 1895.)

MORTGAGE—CONFLICTING ASSIGNMENTS—EFFECT OF TRANSFERRING FORGED NOTE FOR DEBT—FORECLOSURE.

1. A. gave a mortgage to M. to secure a note of the same date, the words "Secured by mortgage" being written on the note. M. subsequently indorsed the note to a bank, and also assigned the mortgage, but did not deliver the mortgage itself, and the assignment was not recorded. Afterwards M. made a copy of the note, forged A.'s name thereto, and indorsed and delivered the same, together with the mortgage itself, and a written assignment thereof, to defendant, who paid the face value of the note. This assignment was recorded, and defendant, who found that the mortgage stood in M.'s name on the records, and had no knowledge of any previous assignment, supposed that the note delivered to him was genuine. The real note, signed by A., remained in possession of the bank as collateral for moneys loaned to M. *Held*, that the mortgage security of the bank was not affected.

2. The assignment of a mortgage is not a "grant of an estate in real property," within Civ. Code, § 1107, which declares that such grants are conclusive, except as against one who in good faith acquires a title or lien "by an instrument that is first duly recorded."

3. A mortgage, being a mere incident to the debt, belongs to the holder of the collateral note, and can be foreclosed only by him.

Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by Moses Adler against Sidney Newell and others to determine to whom the amount due upon a mortgage on plaintiff's premises should be paid. From a judgment for the Bank of Lodi, one of the defendants, defendant R. C. Sargent appeals. *Affirmed*.

Louttit, Woods & Levinsky, for appellant. Frank H. Smith and W. C. Green, for respondent.

McFARLAND, J. The plaintiff, Adler, being the owner of certain premises upon which there was a mortgage executed by a former owner, and being desirous of paying the amount of the mortgage, discovered that there were hostile claimants of the ownership of said mortgage. Thereupon he brought this action to have it determined to whom the amount of money due upon the mortgage should be paid, and deposited said money in court. He made Sidney Newell, R. C. Sargent, Francis Cogswell, and the Bank of Lodi defendants. The action was dismissed as to Newell, and, Cogswell having filed a disclaimer, the contest was between the defendants Sargent and the Bank of Lodi. The court found in favor of the Bank of Lodi, and judgment was rendered that the money be paid to said bank. Sargent appeals from the judgment, and from an order denying his motion for a new trial.

The mortgage in question was executed on October 4, 1890, by A. H. McBride to J. F. Moseley, to secure a promissory note of that date, made by McBride to Moseley or order for \$7,000, payable "one year, with privilege of two years, after date." On the note was written "Secured by mortgage." The other facts found by the court, and necessary to be noticed, are, briefly, these: In December, 1890, the said Moseley indorsed said note in blank, and delivered it to Guy W. Currier, cashier of said Bank of Lodi, "for the use and benefit of said bank, and not otherwise," and also a written assignment of said mortgage; but he did not deliver the said mortgage to the bank until after the commencement of this action. The note and assignment remained in the possession of the bank continuously from that time until the commencement of this action as collateral security for moneys loaned by said bank to said Moseley. During all of that time Moseley was largely indebted to the bank, and at the commencement of the action he was thus indebted in an amount greater than the amount due on said mortgage. But the said assignment was not recorded. In April, 1891, Moseley made a copy of the note, and forged the name of McBride thereto, and indorsed and transferred the same, with an assignment of the mortgage, and the genuine mortgage itself, to said defendant Newell. Afterwards, on August 17, 1891, he made a second copy of said note, and forged the name of McBride thereto, and having, by some means, obtained possession of the mortgage from Newell, he indorsed the second copy, and delivered it, together with the mortgage, and also a written assignment of the mortgage, to the defendant Sargent, who paid Moseley therefor the full amount due upon the note. The assignment of the mortgage had in it this language: "Together with the note therein described, and the mon-

ey due and to grow due thereon, with interest." This assignment was recorded in the recorder's office of the county where the premises are situated on August 19, 1891. Sargent had no knowledge that the note had been transferred or the mortgage assigned to any other person, and supposed that the copy which he received was the genuine note referred to in the mortgage. He also made due inquiries, and found that the mortgage stood in Moseley's name on the records. In December, 1891, Moseley, being indebted to the bank in the sum of \$11,637.31, gave his note for that amount, indorsed by Francis Cogswell; and, the said McBride note not being considered sufficient security, Moseley was requested to furnish more collateral, which he promised to do; and on the following day he sent to Cogswell an assignment of a forged note and mortgage of one Clark for \$23,168. In this assignment he also included an assignment of the McBride note and mortgage which the bank already held, but this was not done at the bank's request, as the bank deemed its title perfect. This last assignment was, however, afterwards recorded on June 30, 1892. Cogswell was cashier of the bank, and took said note and assignment for the bank, and never had any interest in the same.

Appellant contends that some of the findings of fact are not sustained by the evidence, but this contention cannot be sustained. There was a fair amount of evidence tending to prove each fact found. The transcript shows over 40 exceptions to rulings of the court in relation to the admissibility of evidence, but, as these exceptions are not much pressed in the briefs, we will pass this part of the case with the remark that none of said rulings about the correctness of which there can be any doubt are of importance enough to work a reversal of the case. The real question in the case, and one that is elaborately and ably argued, is whether, under the facts found, the court correctly awarded the mortgage money to the bank. It is contended that the title of the bank is invalid, because there was no delivery to it of the mortgage,—that is, the paper on which the contract of mortgage was written. But the bank had the note to secure which the mortgage was executed, and "the assignment of a debt secured by mortgage carries with it the security." Civ. Code, § 2936. Appellant contends that such assignment is good only "as between the parties," and void as to certain third persons,—subsequent purchasers in good faith, etc. But transactions good between the parties thereto are good as against all others, unless there be some law to the contrary. Now, the general law which governs the point in question is that the assignment of the debt carries the mortgage; and, unless there be some other law to the contrary, one in possession of a mere instrument of mortgage, which purports on its face to be security for a certain note, is bound to know that, if the note had been assigned to another, the mortgage is of no

legal value to him. The only other law that can be plausibly invoked is to be found in the recordation laws. These are purely statutory, and whoever founds a right upon them must point out the statutory language which gives him such right. Some of the argument of counsel for appellant would be very forcible if addressed to the question, what ought the law about the recordation of assignments of mortgages to be? It might be well, perhaps, if recording of, or the failure to record, had the same effect upon such assignments as upon grants, mortgages, etc., but such is not the provision of the Code. The contention of appellant is that the so-called assignment to him on August 17, 1891, and recorded two days afterwards, is paramount to the prior indorsement and transfer of the note and assignment of the mortgage to respondent, because the latter was not recorded. But, in the first place, there was no valid assignment to appellant, because the note to which the mortgage was an incident had already been assigned to and was in the possession of the respondent, who had also a written assignment of the mortgage,—if that were necessary to give any further validity to the transaction. And, in the second place, section 1107 of the Civil Code, relied on by appellant, applies only to grants of real estate. The language is, "Every grant of an estate in real property" is conclusive, etc., except as against one who in good faith acquires a title or lien "by an instrument that is first duly recorded." But an assignment of a mortgage is not a "grant of an estate in real property." A mortgage itself is not such a grant although it is specially provided that mortgages of real property may be "recorded in like manner and with like effect as grants thereof." Civ. Code, § 2952. The provision about the recordation of an assignment of a mortgage is in section 2934; and the provision is that "such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor." There is no provision as to prior assignees, or that the recordation should have "like effect" as recordations of grants. Probably the legislature did not intend to hamper too greatly the transfer and exchange of debts and obligations secured by mortgages, which are usually in the shape of negotiable paper; but, whatever the reason, we must observe the language of the Code.

We see nothing in the point that respondent waived all prior rights by receiving the note and assignment made by Moseley on December 30, 1891. The second assignment of the McBride mortgage was, without the request or desire of respondent, included by Moseley in an assignment which he sent of the forged Clark note and mortgage. If this was of any consequence, it was, in law, nothing more than a further assurance; and its acceptance by respondent was in no sense a waiver of its existing title. Neither is it of any importance that appellant got possession of the mortgage, for, being a mere incident to the debt, it be-

longs to the holder of the note, and could be foreclosed only by the latter. In *Ord v. McKee*, 5 Cal. 515, the note had been made to Ord, and the mortgage to secure it had been made to McKee; and the court said: "Nor can his right of action be defeated on the ground that the mortgage to secure the payment of the note was made to McKee, and not to himself. A mortgage is a mere incident to the debt which it secures, and follows the transfer of a note with the full effect of a regular assignment. Ord, having the right to the note, had undoubtedly a right to foreclose the mortgage." We see no reason to disturb the judgment. The appellant, Sargent, has, no doubt, suffered great loss; but that is usually the case where a man, though careful and prudent, has been deceived by a forgery. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

109 Cal. 73

DEERING et al. v. RICHARDSON-KIMBALL CO. et al. (No. 19,471.)

(Supreme Court of California. Sept. 6, 1895.)

APPEALABLE ORDERS—RES JUDICATA—GARNISHMENT—PRIORITY OF LIENS.

1. An order formally directing a garnishee to pay the funds in its possession to plaintiff is appealable, but an order denying a motion to set it aside, not presenting any new features, is not.

2. On an issue as to the priority of various garnishments, plaintiff introduced the judgment in another action, wherein plaintiff and claimant separately intervened, claiming priority over the claims of plaintiff in that action, who had twice garnished the same fund,—once before claimant, and both before plaintiff; that, after plaintiff in said action stated that he claimed nothing under his first garnishment, claimant stated that he would proceed no further with his intervention, he not being further interested. *Held*, that said judgment did not estop claimant from asserting his priority in said fund, as against plaintiff.

3. The court should not unconditionally order a garnishee to pay the money in its possession to the judgment creditor, where there were other and prior claimants to the fund, whose rights were not adjudicated; but the creditor should be directed to bring an action under Code Civ. Proc. § 720, providing that if a person having property of the judgment debtor claims an interest therein adverse to him, or denies the debt, the court may authorize the judgment creditor to institute an action against such person for the recovery of such interest or debt.

4. A note payable to defendant, and deposited with a bank as collateral, is subject to garnishment, and the lien so acquired extends to the amount collected thereon by the garnishee.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Motion by Deering & Co. for an order requiring the Los Angeles National Bank, as garnishee, to apply the moneys in its possession belonging to Richardson-Kimball Company to the payment of its judgment. L. A. Lothian appeared as a claimant of the

fund. From an order granting said motion, and from an order refusing to set aside said order, said garnishee and said claimant appeal. Reversed in part, and affirmed in part.

Walter Bordwell and Allen & Flint, for appellants. S. A. W. Carver and Carver & Preston, for respondents.

VANCLIEF, C. The controversies involved in the four appeals to be considered in the above-entitled cause arose in proceedings supplementary to execution had in the case of *Deering & Co. v. Richardson-Kimball Company*, in which the plaintiff recovered a judgment against the defendant, Richardson-Kimball Company, for the sum of \$1,416.74, on January 16, 1892, upon which execution was issued, and returned wholly unsatisfied, prior to February 24, 1893. On February 24, 1893, the plaintiff, in due form, upon affidavit, applied to the judge of the superior court for an order requiring the Los Angeles National Bank to appear before said judge, and answer concerning certain debts, moneys, effects, credits, and other property in its possession, or under its control, alleged by plaintiff to be the property of said defendant. Thereupon the judge made an order addressed to the bank, and commanding its cashier, F. C. Howes, to appear before said judge on February 27, 1893, to be examined concerning such debts, moneys, credits, and other property in the possession or under the control of said bank, and further commanding the bank not to pay or transfer said debts or other property until duly released, etc. On the day of this application (February 24, 1893), plaintiff caused to be served on George H. Kimball and I. A. Lothian a notice to the effect that on February 27, 1893, and immediately after the examination of Howes, cashier of the bank, the plaintiff would move the court for an order requiring the bank to apply any debts, credits, or other property of the defendant, in its possession or under its control, to the satisfaction of plaintiff's judgment. On the appointed day Howes, the cashier, appeared and was examined; and, in addition to his testimony, certain documentary evidence was admitted against the objection of Lothian, who appeared, and opposed the motion on the ground that a garnishment in his favor had been served on the bank prior to that of the plaintiff, and claimed that a judgment in his favor against the defendant Richardson-Kimball Company, should be first satisfied from the property of defendant in possession of the bank. From the testimony of the cashier of the bank, and other evidence, the court made written findings of facts, and, as conclusions of law, found that all the property of defendant in the possession of the bank, to wit, \$1,356.22, should be applied in payment of plaintiff's judgment, and formally ordered the bank to pay said sum of \$1,356.22 to the plaintiff, Deering & Co., "and that

execution issue therefor." This order was entered and docketed as a judgment on June 30, 1893; and, within 60 days thereafter, Lothian and the bank, separately, appealed from the order on a bill of exceptions as to questions of both law and fact. They also each separately, moved the court to vacate and set aside said order. These motions to vacate the order having been denied, each has appealed from the order denying the motion to vacate the former order. The four appeals are represented here by one transcript, containing only one bill of exceptions. But counsel for all the parties interested have stipulated that such transcript shall constitute the record on each of the four appeals.

1. Counsel for respondent contend that the two appeals from the order denying the motions to vacate the former order should be dismissed, and I think this point is well taken, and should be sustained. The former order was an appealable order (*McCullough v. Clark*, 41 Cal. 298); and an order denying a motion to set it aside, which presents no new features not before the court when it exercised its judgment upon the original matter, is not appealable (*Railroad Co. v. McGrath*, 74 Cal. 49; *Goyhinech v. Goyhinech*, 80 Cal. 409, 22 Pac. 175; *Harper v. Hildreth*, 99 Cal. 285, 33 Pac. 1103).

2. The appeal of Lothian from the former order (applying the funds in possession of the bank to plaintiff's judgment) will be first considered, and to that end a further statement of the material facts of record is necessary:

As to the property of defendant, Richardson-Kimball Company, in possession of the bank, it was found that it consisted of a promissory note made by F. J. Byrne to defendant (whether negotiable or not does not appear), indorsed and deposited in the bank by defendant on June 22, 1888, as collateral security for the payment of defendant's note of that date to the bank. The bank obtained judgment against Byrne on said collateral note on May 14, 1890, for the sum of \$2,393.18, which was paid to the bank's attorneys on August 28, 1891, and by them delivered to the bank on August 31, 1891, from which the bank realized, over expenses of collection, the net sum of \$2,184.55, so much of which as was necessary for that purpose the bank then applied to the full payment of the debt for which Byrne's note had been pledged, after which payment there remained in possession of the bank the sum of \$1,356.22, for which it was responsible to defendant, and no part of which had been paid to defendant at the date of the order appealed from. Garnishments had been served on the bank, in actions against the Richardson-Kimball Company, in the following order: First, in an action by F. A. Carter, on July 8, 1889; second, in an action by George H. Kimball, on August 19, 1891; third, in an action by I. A. Lothian, on August 29, 1891; fourth, in the above-men-

tioned action by George H. Kimball, another garnishment was served on the bank on August 31, 1891; fifth, in this action by William Deering & Co., on September 7, 1891. In each of these actions against the Richardson-Kimball Company a judgment in favor of plaintiff had been rendered, entered, and docketed, before plaintiff commenced the proceeding supplementary to execution in question here. On the hearing of plaintiff's motion supplementary to execution, Lothian contended that, inasmuch as the garnishment in his favor was prior to that of Deering & Co., his judgment for the sum of \$146.56 should be first satisfied from the funds in possession of the bank, and that only the residue thereof could be applied to the judgment of Deering & Co. In answer to this, Deering & Co. contended that Lothian was estopped from claiming priority of his garnishment by a former judgment in the aforesaid action of George H. Kimball *v.* Richardson-Kimball Company, and, to prove the alleged estoppel, offered in evidence the judgment roll in that action, which was admitted against Lothian's objection. In that action, Lothian and Deering & Co. each filed a separate intervention complaint, alleging that the action and the attachment therein were fraudulent, as against the creditors of the Richardson-Kimball Company, for various reasons, the principal one of which was that the defendant therein was not indebted to the plaintiff, Kimball, in any sum whatever, at the time that action was commenced. The intervention complaints were in no wise connected with each other, although each was composed of substantially the same allegations against Kimball. There was no issue between the interveners as to the priority of their respective garnishments. Neither disputed the alleged date or validity of the other's garnishment. Nor does the judgment roll in that case show any trial or decision as to the relative dates or priorities of garnishments. The common object of the interveners was to defeat the garnishments in favor of Kimball, only one of which, however, was prior to that of Lothian, while both were prior to that of Deering & Co. Lothian was interested in defeating only the first. The second did not conflict with his rights. When the causes between the interveners and plaintiff in that action came to trial, the plaintiff therein stated to the court that he claimed nothing by virtue of his first garnishment, served August 19, 1891. This satisfied Lothian, and thereupon his counsel "stated in open court that he would not proceed further upon his intervention." No evidence was introduced by either party, except said statement of Kimball; and thereupon the cause, upon Lothian's intervention, was submitted to the court. The court then proceeded to try the issues on the intervention of Deering & Co.; and the result was a finding by the court that the Richardson-Kimball Company was not indebted to Kimball at the time he commenced his action, but that he was then largely in

debted to that company. After these trials the court made written findings as to each intervention. As to Lothian, it found as follows: "The court finds the following facts: First, upon the intervention of I. A. Lothian, that the plaintiff has no claim of lien upon any money or other property held by the Los Angeles National Bank by virtue of the writ of attachment levied on August 19, 1891; said attachment having been levied, as alleged in the amendment to the complaint in intervention, by I. A. Lothian. As to all other facts in said intervention of Lothian, the findings were waived. As conclusions of law, the court finds that said intervenor, Lothian, has no cause for intervention herein, and that judgment should be entered accordingly against said intervenor." Upon these findings the court adjudged "that the intervenor, Lothian, take nothing by his intervention herein."

This judgment is not in accord with the findings of fact, but, conceding that it is a valid judgment, there is nothing expressed or implied in the findings or judgment touching the relative priorities or dates of the garnishments by Lothian and Deering & Co. Turning to the pleadings, we find no issue as to such dates or priorities. Each intervenor alleged the date of his garnishment. Lothian alleged his to have been served on August 29, 1891, and Deering & Co. alleged its garnishment to have been served on September 7, 1891. Neither of these allegations was denied. As before remarked, the sole object of each intervenor was to gain preference for his attachment over that of Kimball. Yet, in the proceeding supplementary to execution by Deering & Co. against the bank, the court adjudged that Lothian was estopped by the judgment in the case of Kimball v. Richardson-Kimball Company (wherein Lothian and Deering & Co. were intervenors) from claiming priority of his garnishment over that of Deering & Co., and that all money in possession of the bank belonging to the Richardson-Kimball Company be paid to Deering & Co. As above stated, I think the judgment roll in the intervention case appeared upon its face to be irrelevant to the proceeding supplementary to execution, and for that reason should have been rejected; but, however this may be, it seems clear that the court below erred in construing that judgment to be an estoppel of Lothian to claim priority or preference for his attachment, as against that of Deering & Co. "That only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." Code Civ. Proc. § 1911; Black, Judgm. § 599; Lillis v. Ditch Co., 95 Cal. 554, 30 Pac. 1108. This solution of the question as to estoppel necessitates a reversal of the order appealed from, as to Lothian. Other points made by Lothian are also made by the bank on its appeal from

the same order, and, so far as necessary, will be considered on that appeal.

3. On the appeal by the bank, the appellant contends that the court erred in ordering it, unconditionally, to pay the money in its possession to Deering & Co., and that upon the facts disclosed by the testimony of the cashier of the bank, and found by the judge, as hereinabove stated, the judge was authorized only to make an order to the effect that Deering & Co. might bring an action against the bank, as provided by section 720 of the Code of Civil Procedure, to which action other persons claiming liens upon the money by prior attachments might be made or become parties, to the end that all adverse claims might be adjusted and conclusively settled in such action, so that the bank would thereby be protected against them. In thus contending I think the appellant is clearly right, and fully sustained by the adjudged cases in this state, of which the following are more or less directly in point: *Roberts v. Landecker*, 9 Cal. 262; *Parker v. Page*, 38 Cal. 522; *Robinson v. Tevis*, 38 Cal. 614; *Hartman v. Olivera*, 51 Cal. 502; *Ex parte Hollis*, 59 Cal. 414. See, also, *Hagerman v. Tong Lee*, 12 Nev. 332. There is no pretense of bad faith on the part of the bank, according to the testimony of whose cashier the judge found the facts. Indeed, there is no dispute about the facts. It clearly appears that the garnishments of Carter and Lothian were duly served on the bank prior to that of Deering & Co.; and, although Kimball's first garnishment had been decided to be invalid as against Deering & Co. and Lothian, Kimball was not estopped from claiming it valid against Carter. Conceding, but not deciding, the extremely doubtful proposition that in summary proceedings of this kind a judge, referee, or court may try and conclusively settle all adverse claims to the property sought to be applied to the satisfaction of a judgment, yet all known adverse claimants should have an opportunity to be heard; otherwise, they would not be bound by any order made, nor would the garnishee be protected by any such order from their just claims, and might be compelled to satisfy them. Code Civ. Proc. § 544; *Robinson v. Tevis*, 38 Cal. 611; *Wade, Attachm.* § 504. In this case neither Carter, the first garnisher, nor Kimball, the second, had any notice of the supplementary proceeding, and neither of them appeared. It is contended for respondent, however, that the Byrne note, in possession of the bank as a pledge, was not subject to attachment, and that only the money realized therefrom by the bank was attachable, and, therefore, that Carter acquired no lien on the money collected by the bank after the service of his garnishment; and this theory seems to have been adopted by the judge who heard the motion and made the order. But this theory is unsound. All debts and credits of a defendant in possession of another are attach-

able by garnishment. The Byrne note, in possession of the bank as collateral security for a debt of the defendant in attachment, Richardson-Kimball Company, was a "credit," and the defendant's interest in it was attachable by garnishment of the bank (*Gow v. Marshall*, 90 Cal. 565, 27 Pac. 422); and the lien of Carter's attachment not only fastened itself upon the note, but transferred itself to the money, when collected thereon by the garnishee (*Robinson v. Tevis*, 38 Cal. 614). The facts disclosed by the bank through the testimony of its cashier, which the judge found to be true, was equivalent to a denial of the alleged debt of the bank to the Richardson-Kimball Company, in the sense of section 720 of the Code of Civil Procedure. In view of the numerous attachments of that debt, the bank was not obliged to pay it to the defendant in the attachment suits until those attachments should be discharged. Nor was it bound to pay it to either of the plaintiffs in attachment, or to the sheriff for them, until a settlement of their adverse claims thereto by a judicial tribunal whose determination would be conclusive upon all claimants, and afford ample protection to the bank. Conceding that the bank might have interpleaded the adverse claimants, it substantially did so, by fully informing the judge of all the adverse claims and claimants. It was then the duty of the judge to deny the motion for an order on the bank to pay the money to Deering & Co.; but, if moved to do, he might have made an order permitting Deering & Co. to institute an action against the bank as provided in section 720, Code Civ. Proc. In such an action all persons claiming to be interested might and should have been the parties; and, if all such were not made parties by the plaintiff, the bank could have caused them to be brought in, and then paid the money into court, thereby relieving itself of all responsibility.

I think the two appeals from the order denying the motions to vacate the order requiring the bank to pay to plaintiff herein the sum of \$1,356.22 should be dismissed, but that, on the appeal of I. A. Lothian and the Los Angeles National Bank from the last above mentioned order, said last-mentioned order should be reversed, with leave to the respondent to apply for an order permitting it to institute an action against the Los Angeles National Bank, pursuant to section 720 of the Code of Civil Procedure.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal of I. A. Lothian and the appeal of the Los Angeles National Bank from the order denying appellants' motions to vacate a former order requiring said bank to pay to respondent the sum of \$1,356.22 are dismissed. But, on the appeals by said Lothian and said bank from

said former order, that order is reversed, and respondent corporation has leave to apply to the superior court, or to the judge thereof, on the findings of record in the proceeding supplementary to execution, for an order permitting it to institute an action against the Los Angeles National Bank pursuant to section 720 of the Code of Civil Procedure.

5 Cal. Unrep. 129

SIMPSON v. SIMPSON. (No. 19,487.)

(Supreme Court of California. Sept. 7, 1895.)

ABATEMENT—PENDING ACTION—CONTINUANCE.

1. The pendency of an action by the husband to annul the marriage on the ground that it was contracted under duress does not prevent an action by the wife for divorce on the ground of nonsupport.

2. In an action for divorce the affidavit for a continuance stated that defendant, a material witness, was in another state, and too poor to attend the trial, and that his deposition could not be obtained within a month; that the evidence in an action pending in another state by defendant against plaintiff to annul the marriage could not be obtained by the day set for trial. Plaintiff stipulated that the uncertified copy of the evidence in the other action might be used as though duly certified, and waived alimony. *Held*, a continuance was properly refused.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Sarah B. Simpson against B. F. Simpson for a divorce. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Callen & Neale, for appellant. William H. Fuller and Clarence L. Barber, for respondent.

VANCLIEF, C. Action for divorce on the grounds of desertion and willful neglect to provide for plaintiff the common necessities of life, in which the judgment was in favor of plaintiff, dissolving the bonds of matrimony. Defendant has appealed from the judgment and from an order denying his motion for a new trial. The alleged defenses to the action were: First, a general denial of each and every allegation of the complaint; second, that the defendant married the plaintiff under duress, by threats of plaintiff's father and brother-in-law to kill him unless he married plaintiff; third, that there was another action pending in the state of Colorado between the same parties for the same cause.

1. The appellant contends that the findings of fact by the court are not justified by the evidence, but I think the evidence quite sufficient to justify all such findings.

2. It is contended that the court erred in deciding that the action pending in the state of Colorado was not for the same cause as this action. The record of that cause, which was offered in evidence by defendant, shows that it was an action brought by the defend-

ant herein against the plaintiff in this action to annul the alleged marriage of plaintiff and defendant herein, on the ground that the plaintiff in that action submitted to the performance of the marriage ceremony under duress as aforesaid, and was not an action for divorce. Surely, neither that cause of action nor the relief sought thereby was the same as in this action, and the court did not err in so deciding.

3. Appellant contends that the court erred in denying defendant's motion to postpone the trial. The motion was made on the affidavit of one of defendant's attorneys, showing that defendant was a material witness in his own behalf to prove the alleged duress; that he resided in Denver, Colo., and by reason of his poverty was unable to pay the expense of a trip to this state, and therefore his testimony could be procured only by deposition; that affiant knew of no other witness by whom the alleged duress could be proved; that a postponement of one month would be necessary to enable affiant to procure defendant's deposition, but did not state that affiant expected to procure it within that period. The affidavit further stated that the evidence necessary to prove the plea of another action pending in the state of Colorado could not be procured in time for the trial on the day set. Counsel for plaintiff opposed the motion to postpone the trial, and offered to stipulate, as they afterwards did, that the uncertified copy of the record of the action pending in Colorado, then in possession of defendant's attorneys, might be admitted in evidence without objection, and with the same effect as if duly certified, and also waived plaintiff's claim for alimony. Plaintiff also proved that summons was personally served on defendant in Denver, Colo., four months prior to the day set for the trial of the case. Considering all the circumstances, I do not think the denial of the motion to postpone the trial was an abuse of the discretion of the court. But, even if it can be said to have been error, I think it appears that the defendant was not injured thereby. In the first place, it appears by the record of defendant's suit in Colorado that he earnestly desired to free himself from the bonds of matrimony, which were dissolved in this action without costs, except the sum of \$20.15, which he will probably never pay. The only difference, in effect, between the decree of divorce in this action and a decree annulling the marriage in his action in Colorado is that the latter would scandalize the plaintiff (to marry whom he appears to have been under the strongest possible moral obligation), and bastardize his natural son, born after the alleged marriage. In the second place, it appears to be hardly possible that defendant's testimony as to the alleged duress could prevail over the strong evidence to the contrary given at the trial. A new trial should not be granted on the ground of

harmless error. I think the order and judgment appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment appealed from are affirmed.

100 Cal. 123

MOORE v. HAMERSLAG. (No. 18,852.)
(Supreme Court of California. Sept. 12, 1895.)

PUBLIC LANDS—LOCATION IN ANOTHER'S NAME.

1. Under Rev. St. U. S. § 2322, vesting in the locator of a mining claim the exclusive right to its possession, a location of a mining claim may be made by one person in the name of another.

2. Where one, acting under Rev. St. U. S. § 2322, vesting in a locator of the mining claim the exclusive right to its possession, locates and has a mining claim recorded in another's name, the legal title thus vested in the other cannot be defeated by a subsequent parcel agreement that it is to be held by him in trust.

Department 1. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

Action by S. C. Moore against A. Hamerslag for breach of contract to reconvey a mining claim alleged to have been located by agreement in his name. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

J. A. Hannah, for appellant. Sayle & Coldwell, for respondent.

HARRISON, J. The plaintiff located a mining claim under the laws of the United States, February 8, 1888, in the name of the defendant, signed the name of the defendant to the location, and posted and left the notice on the mine. In the following March he left a copy of the notice with the county recorder, to be recorded, unless he should otherwise instruct him within a few days, and paid the fee for recording, but never gave any further instructions to the recorder. Shortly after this, he saw the defendant, and informed him that he had posted notice on the claim in his name; and in his testimony says: "I told him that I had posted a notice on a claim in his name, and that before I had it recorded I came to see him if it was satisfactory with him to have the mine stand in his name, and deed it back to me, as Mr. Stephens had formerly agreed to do; and he said it was agreeable." Soon after this interview with the defendant, the plaintiff conveyed an undivided half of the claim to one Broder, and he and Broder continued in possession of the mine, expending money in working it, taking to themselves all the proceeds. In December, 1890, the defendant, at the request of Broder, conveyed the mining claim to him. In February, 1891, the plaintiff demanded from the defendant a conveyance of the claim, and upon his refusal brought this action to re-

cover damages for the breach of his agreement to make such conveyance. Judgment was rendered in his favor for \$600. The defendant has appealed.

A mining claim is real estate (*Melton v. Lambard*, 51 Cal. 258), and under the provisions of the statute of frauds can be transferred only by operation of law, or an instrument in writing. The provision of section 2322 of the Revised Statutes of the United States conferring upon the locator of a mining claim "the exclusive right of possession and enjoyment" to the claim is in the nature of a legislative grant of interest in the land; and the interest thus conveyed to the locator by the government cannot be transferred by parol, or otherwise than in accordance with the statute of frauds. *Goller v. Fett*, 30 Cal. 481; *Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93. The location may be made in the name of another than the actual locator (*Morton v. Mining Co.*, 26 Cal. 527; *Rush v. French*, 1 Ariz. 105, 25 Pac. 816); and when so made the person in whose name it is made becomes vested with the legal title to the claim (*Van Valkenburg v. Huff*, 1 Nev. 142); and it is not necessary for its validity that it should be recorded (*Thompson v. Spray*, 72 Cal. 533, 14 Pac. 182). By virtue of the acts done by the plaintiff in reference to the mining claim in question, the defendant became vested with the legal title thereto as fully as if the plaintiff had located the claim in his own name, and afterwards, by a conveyance absolute in form, and without any consideration, transferred it to the defendant. The defendant could not, by any oral declarations subsequent to such conveyance, render himself a trustee for the plaintiff, or bind himself to transfer the claim to him. "An absolute conveyance of lands cannot, after its execution, be turned into a trust by any oral declarations of the parties thereto." *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984; *Hasshagen v. Hasshagen*, 80 Cal. 514, 22 Pac. 294; *Sherman v. Sandell* (Cal.) 39 Pac. 797. The plaintiff did not locate the claim in the name of the defendant by reason of any fiduciary relations between them (see *Feeney v. Howard*, supra), nor was it made under any prior agreement on the part of the defendant to hold the same in trust for him. The cases of *Gore v. McBrayer*, 18 Cal. 583, and *Moritz v. Lavelle*, 77 Cal. 10, 18 Pac. 803, do not aid the plaintiff, and are not in contravention of this rule. In both these cases the location was made under a prior agreement between the parties that it should be for the joint interest of both. At the time of the transaction involved in *Gore v. McBrayer* a mining claim could be transferred by parol, the statute requiring it to be in writing having been passed in 1860; and in *Moritz v. Lavelle* the location was made by both parties in the name of the defendant, upon the express agreement between them at the time of the

location that, in consideration of the prior agreement of the plaintiff to furnish the means for its location and working, the defendant would transfer an interest therein. In *Gore v. McBrayer* the location was originally made in the name of both parties, and it was held that the interest thereby vested in the plaintiff could not be defeated by tearing down the notice and making a new location, in which the plaintiff's name was omitted. The court should have excluded the oral evidence of the agreement by the defendant to reconvey the mining claim to the plaintiff, and should have granted the nonsuit asked by the defendant. The judgment and order are reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

108 Cal. 670

TUFFREE et al. v. POLHEMUS et al. (No. 19,499.)

(Supreme Court of California. Sept. 4, 1895.)

ADVERSE POSSESSION—QUIETING TITLE—WHO MAY MAINTAIN ACTION—DETERMINATION OF EQUITABLE RIGHTS—PAROL PARTITION.

1. One who invokes the statute of limitations in his favor in order to establish his title by adverse possession to portions of a Mexican grant has the burden of showing that a "perfect grant" existed prior to the issuance of his patent.

2. Title by adverse possession cannot be successfully asserted by one who has failed to pay the taxes on the property, especially against one who he asserts had agreed to pay them for him.

3. It is too late to attack the sufficiency of a pleading after evidence has been introduced in support of its allegations without objection.

4. The owner of an equitable right may maintain an action to quiet his title and have adverse equities adjudicated therein and determined inferior.

5. Where a tract of land was purchased by five tenants in common, and, at their direction, deeded to a trustee for them, and they entered into a verbal agreement that they would each select a portion of the land for cultivation, and that the selection so made should be owned by the one selecting it in severalty, evidence that one of the five made a parol gift of his selection to his daughter, who cultivated the same, and made considerable improvements thereon, having exclusive possession for more than 15 years, establishes, as between the other cotenants and the daughter, a partition by parol, though such other cotenants may not have known that she was occupying it as a gift from her father.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action to quiet title by Caroline Borromeo Tuffree and J. K. Tuffree, her husband, against C. B. Polhemus, Moses Hopkins, Alfred Robinson, and others. There was judgment for plaintiffs against defendant Polhemus, and for the defendants other than Polhemus against plaintiffs, from which, so far as it is against them, both parties appeal. Modified.

A. M. Stephens and Chapman & Hendrick, for plaintiffs. Stephen M. White and Bricknell & White, for defendants.

GAROUTTE, J. This action was brought to quiet title to a tract of land containing 640 acres. The complaint is in the usual form, and contains the additional allegation that plaintiff Mrs. Tuffree had been in the open, notorious, peaceable, continuous, and adverse possession of the tract for more than 15 years. The answer denied the allegations of the complaint, and alleged that by a tripartite indenture, executed in 1868, between Abel Stearns and his wife of the first part, Alfred Robinson of the second part, and Samuel Brannan, E. F. Northam, Charles B. Polhemus, Edward Martin, and Abel Stearns, parties of the third part, they, Stearns and wife, conveyed to Robinson certain lands, including the lands here involved. The lands so conveyed were several Mexican grants, containing more than 100,000 acres. The deed was made to Robinson, in trust to hold possession, and sell and convey upon such terms and in such quantities as he might see fit, with the consent of the parties of the third part. In the findings of fact the trial court declared "that about the time of the execution of the indenture the beneficiaries (parties of the third part) did enter into a verbal agreement that they would each select a section from among the lands, and that these selections so made should be owned by the persons selecting in severalty; their object being to demonstrate, by planting and cultivating, the productiveness of the soil." The court further found that under such agreement Polhemus made a selection of the land here in dispute; that this selection was made in the year 1872, and Polhemus verbally stated to his daughter, plaintiff Tuffree, that he gave her the land; and she, relying upon such statements and representations, with his consent and approval, took possession thereof, with her husband, cultivated and improved the same, and has been living thereon since that time. The court further found that neither Robinson nor any of the parties of the third part, except Polhemus, knew that Mrs. Tuffree was holding and claiming the land under the gift from Polhemus, nor did they know that Polhemus had selected this particular land under the agreement aforesaid. At this time Polhemus owned one-fourth of all the land conveyed to the trustee, Robinson. During all the time since 1872, plaintiffs have cultivated the land, and have made improvements thereon to the value of \$7,000, with the knowledge of the trustee and the parties of the third part; and during said time plaintiff Mrs. Tuffree has claimed said land, and asserted that she owned the same under an agreement with her said father, Polhemus. The court further found "that the trustee had paid the taxes, and the premises constituted a portion of a Mexican grant, and that a patent therefor had issued on the 21st of May, 1877." As conclusions of law the court declared that there was an executed parol gift from Polhemus to Mrs. Tuffree, and that such gift vested in her all the title to said property held by Polhemus, but

not the title of his cotenants. The court also concluded that there was no executed parol partition of the lands, nor any part of them, and that the plaintiffs were entitled to judgment against Polhemus, and that the defendants other than Polhemus were entitled to judgment against the plaintiffs. Both parties appeal from the judgment so far as it is against them, and also from an order denying their respective motions for a new trial; and cross appeals are now before us upon the one transcript.

1. Did the plaintiff Mrs. Tuffree secure title to this property by adverse possession for the requisite period? Without a consideration of the evidence as to the character of her possession, we are prepared to say that she has not shown herself to be in a position to successfully plead the statute of limitations. This land constituted a portion of a Mexican grant, a patent to which was not issued until May 21, 1877. The statute of limitations did not commence to run until the date of the patent. *Anzar v. Miller*, 90 Cal. 342, 27 Pac. 299. In some of the earlier cases it has been intimated that possibly the statute might run before confirmation and issuance of patent where a "perfect grant" existed; but, when invoking the statute of limitations, it would seem to be somewhat of a misnomer to term any Mexican grant a "perfect grant" until confirmed by commission or court, and a patent issued upon such confirmation. Especially would this seem to be so in view of *Botiller v. Dominguez*, 130 U. S. 238, 9 Sup. Ct. 525, where it is held that every grant, however perfect, must be submitted to and confirmed by the proper authorities before any valid title vests. But in this case, if the principle were otherwise, Mrs. Tuffree would not be benefited, for the burden would still be upon her to show the existence of a "perfect grant" prior to the issuance of the patent, and this she has not attempted to do. Since the issuance of the patent she has not obtained title by adverse possession, for she has paid no taxes upon the land. Neither does it appear that Polhemus paid the taxes for her benefit, or at all; for the court has found that Robinson, the trustee, paid the taxes. As an element in the creation of her title, it was all-important that she should have paid the taxes. This she has not done. Nor does the fact that Polhemus promised to pay them for her extricate her from the difficulty. Polhemus is one of the parties against whom she is invoking the statute, and she certainly should not have relied upon his promises. We conclude that Mrs. Tuffree has no title by virtue of the statute of limitations.

2. Defendants insist that, inasmuch as plaintiff's title is purely equitable, her remedy is an action for specific performance, and that an action to quiet title cannot be maintained; and further contend that, if this conclusion be erroneous, still, under any circumstances, the facts showing her equitable title should be set out by her complaint. We do not deem

It necessary to determine whether or not the allegations of the complaint are sufficiently broad to justify proof of an equitable title in Mrs. Tuffree, for the evidence showing her equitable title was admitted without objection, and it is now too late to attack the sufficiency of the pleading in this particular.

3. There are cases in this state holding that the possessor of an equitable title cannot bring an action to quiet such title against the holder of the legal title (*Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518; *Nidever v. Ayers*, 83 Cal. 30, 23 Pac. 192; *Bryan v. Tormey*, 84 Cal. 126, 24 Pac. 319; *Harrigan v. Mowry*, 84 Cal. 456, 22 Pac. 658); and this is the general doctrine (*Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129). But, as this court in the past has had occasion to remark, section 738 of the Code of Civil Procedure is broad in its terms. It possesses no limitations or restrictions, and we see no reason why it does not vest in the holder of an equitable title the right to come before the court, and have his equities declared superior to any and all opposing equities. If there are outstanding and antagonistic equities, we know of no sound policy which would deny claimants thereunder an adjudication upon them by virtue of the provisions of this section of the Code. In *Watson v. Sutro*, 86 Cal. 500, 24 Pac. 172, it was held that the owner of an equitable interest was entitled to have his interest set aside in partition, and we repeat with approval what is there said as to this class of estates: "In fact, in most cases in this state the difference between equitable and legal estates is of no practical importance. They are both estates originating by law, and held under law, and in that sense are legal estates; and where a court is at liberty to rely upon the rule of equity of considering that as done which ought to be done, the difference between an estate so regarded and an estate at law is not worthy of consideration." It is apparent at a glance that, if an action for partition will lie in such a case, then an action by the holder of an equitable title against parties claiming adverse equities should be recognized and countenanced under the foregoing section of the Code. For these reasons we think the action maintainable against all the defendants except Robinson, the holder of the legal title.

4 Many findings of the court have been attacked by the opposing appellants as unsupported in the evidence. It would subserve no useful purpose in this opinion to enter into an examination of the record in this regard in detail. We have carefully gone over it, and are fully satisfied that all of the material findings of fact are supported by the evidence. Upon those findings we entirely agree with the trial court in its conclusion of law that the parol gift of this land by Polhemus to his daughter, Tuffree, vested in her his interest therein, for that there was an executed parol gift to her cannot be questioned by the evidence or findings.

5. Upon the remaining branch of the case we are compelled to arrive at a contrary conclusion from that of the trial court. The findings of fact establish an executed parol partition; and that land may be partitioned by parol in this state is well settled. *Long v. Dollarhide*, 24 Cal. 218. We have here a tract of land containing more than 100,000 acres, owned by five tenants in common. The land appears to have been wild and uncultivated. The title was placed in the name of one Robinson, who appears to be a mere naked trustee. The cotenants evidently were desirous of renting and selling; and with the object of demonstrating, by planting and cultivating, the productiveness of the soil, they entered into a verbal agreement that they would each select a section from among the lands comprising this immense tract, and that such selection, so made, should be owned by the person selecting in severalty. Under this agreement Polhemus selected a section which he gave to his daughter, the plaintiff herein. She entered into the possession thereof, claiming the same; has had the exclusive possession for more than 15 years; has cultivated the same, and made improvements thereon to the value of \$7,000; and said cultivation and making of improvements were known to Robinson and all the cotenants. This is a strong showing, and clearly indicates an example of an executed, parol partition, for Mrs. Tuffree certainly stands in as good a position with reference to this case as Polhemus himself would if he had done these things and was now seeking to quiet his title against his cotenants. There is nothing in the findings to nullify the conclusion we have arrived at upon the foregoing facts, unless it be the following: "That none of said beneficiaries, except the said C. B. Polhemus had any knowledge that said named plaintiffs were occupying or improving said land under any gift from said Polhemus; nor did said beneficiaries, or either of them, except said Polhemus know that said land had been selected as aforesaid; nor did they agree that said land, so selected, should be owned by the said Polhemus, or by his donee, Caroline B. Tuffree, in severalty." We do not see how this finding could have any weight if, as previously suggested, Polhemus were the party plaintiff; and likewise we think it avails nothing against Mrs. Tuffree. This finding of fact discloses nothing violative of the original agreement of partition. We do not see how it is material upon this question that Polhemus' cotenants should have had knowledge that Mrs. Tuffree based her rights upon a gift from her father; nor how it becomes material that the cotenants should have been informed that Polhemus had selected this particular tract of land under the agreement; nor that they should have agreed after the selection that the land so selected should be owned by the said Polhemus, or his donee in severalty. That whatever selection was made by any

of these cotenants should belong to them in severalty was the original agreement in the first instance, and we see no necessity for a ratification thereof after the selection was made. This tract of land covered an immense territory, and Polhemus' right of selection of any particular tract was as broad as the territory itself. It is evident the owners did not reside upon this body of land, and their lack of knowledge as to Polhemus' selection, or the claims of Mrs. Tuffree thereto, may well be accounted for upon this theory; but, be that as it may, we think none of the facts declared by this finding of the court defeat plaintiff's claims that her acts, taken in connection with those of Polhemus, constituted an executed parol partition under the original agreement. For the foregoing reasons, the judgment in favor of the plaintiffs and against the defendant Polhemus is affirmed; the judgment in favor of the defendants, other than the defendant Robinson, is reversed, and the superior court is directed to enter judgment upon the findings of fact in favor of the plaintiff and against the said defendants other than the defendant Robinson. The order denying a new trial to the defendant Polhemus and to the plaintiffs is affirmed. The costs of this appeal are to be taxed against the defendants other than Robinson.

We concur: HARRISON, J.; VAN FLEET, J.

On Motion for Rehearing.

(Oct. 2, 1895.)

PER CURIAM. The judgment in favor of the defendant Robinson is affirmed.

109 Cal. 1

STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS v. HOUSER. (No. 19,409.)

(Supreme Court of California. Sept. 5, 1895.)

CORPORATIONS — LIABILITY OF STOCKHOLDERS — SALE OF SHARES — NOTICE.

1. Defendant sold a manufacturing plant to plaintiff corporation, taking in part payment thereof 400 shares of its corporate stock, at \$50 per share. There was no indorsement on the certificate that it was for fully-paid or non-assessable stock, nor was there any such understanding between the parties. At the time of this transaction each of plaintiff's stockholders had paid \$50 per share on his stock. *Held*, that defendant's stock was subject to the same conditions and liabilities that it would have been subject to had he been an original subscriber.

2. Under Civ. Code, § 337, which provides that, if any portion of the assessment levied against the capital stock of a corporation shall remain unpaid on the day specified in the assessment notice, the secretary must, unless otherwise ordered by the board of directors, cause to be published "in the same papers" in which the notice of assessment was published a notice of sale, etc., the board may order such notice of sale to be published in a paper other than that in which the notice of assessment appeared.

3. The secretary of a corporation, on the order of the president, sent by mail to each of the seven directors a written notice of a special meeting, properly addressed and postpaid, three days before the time fixed for the meeting. *Held*, that notice was given as required by Civ. Code, § 320, and the acts of the five directors present were valid.

4. Notice to the directors of a corporation of a special meeting will be presumed, in the absence of proof to the contrary, though not recited in the record of the meeting.

5. Where written notices of a special meeting were properly addressed, and sent by mail, postpaid, to each of the directors of a corporation, the presumption is that the notices were received.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the Stockton Combined Harvester & Agricultural Works against Daniel Houser to recover an assessment on shares of stock. From a judgment for defendant, plaintiff appeals. Reversed.

Nichol & Orr and J. L. Murphey, for appellant. Anderson & Anderson and S. L. Carter, for respondent.

BELCHER, C. The plaintiff is a manufacturing corporation organized under the laws of this state, and having its principal place of business in the city of Stockton. Its capital stock is \$300,000, divided into 3,000 shares, of the par value of \$100 each. On October 14, 1885, defendant became the owner of 400 shares of plaintiff's capital stock, and at that time more than one-fourth of its entire capital stock had been subscribed for and taken. On the day named there was issued to and accepted by defendant a certificate for the said shares of stock, and ever since he has continued to be, and now is, the owner and holder thereof. On October 4, 1892, one-half of the par value of the subscribed capital stock of plaintiff had been paid, and no more. At that time plaintiff was indebted to divers creditors in sums aggregating about \$150,000, and was unable to meet its liabilities and satisfy the claims of its creditors, and for such purpose it was necessary that an assessment of \$25 per share on the subscribed capital stock of plaintiff—the same being one-half of the amount then unpaid on such capital stock—should be levied and assessed by the directors of plaintiff. On October 4, 1892, at a regular meeting of the board of directors, there was duly adopted a resolution levying an assessment on the subscribed capital stock of the corporation in the sum of \$25 per share, and upon the adoption of such resolution the plaintiff's secretary caused to be published in a newspaper printed and published in the city of Stockton, for the time and in the manner required by law, a notice of such assessment; and on the same day copies of said notice were mailed to the several stockholders of plaintiff, at their several places of residence. By the resolution levying the assessment, November 7, 1892, was fixed as the time when

the stock on which the assessment should remain unpaid should become delinquent, and November 26, 1892, as the day for the sale of delinquent stock. No part of defendant's assessment was paid, and on November 22d a resolution was adopted by the board of directors of plaintiff waiving further proceedings for the collection of said assessment by sale, and electing to proceed by action at law to recover the amount of the assessment, as provided in section 349 of the Civil Code. Pursuant to the resolution last above referred to, plaintiff commenced this action to recover from defendant the sum of \$10,000,—the amount of such assessment. The defendant answered, denying that he ever subscribed for any of the capital stock of the plaintiff; and alleging that in 1885 he purchased from the plaintiff 400 shares of its capital stock at the price of \$50 per share,—that being the price agreed upon between plaintiff and defendant as the full purchase price of said stock,—and then and there paid to plaintiff \$20,000 in full for said shares of stock; and further denying that there is due or owing or unpaid to the plaintiff by the defendant any sum on account of said assessment, or on any account. The case was tried by the court without a jury, and the findings and judgment were in favor of the defendant. The plaintiff appeals from the judgment, and brings the case here on the judgment roll and a bill of exceptions.

The third and fifth findings of the court are as follows: (3) "The defendant did not subscribe for any of the capital stock of plaintiff at any time, or at all. In the year 1885 the defendant purchased and received from the plaintiff 400 shares of the capital stock of plaintiff, at the price of fifty dollars per share. That was the price agreed upon between plaintiff and defendant as the full purchase price of said stock, and defendant then and there paid to plaintiff said full purchase price, by conveying to the plaintiff certain property belonging to defendant, which was accepted by said plaintiff as the full purchase price of said 400 shares of stock, in lieu of the twenty thousand dollars in cash." (5) "There was not on October 4, 1892, or at any time since defendant purchased said 400 shares of stock, any amount or part of the value or purchase price of said 400 shares remaining unpaid." It is claimed for appellant that these findings were not justified by the evidence; and whether they were justified, or not, is the principal question presented for decision.

It was proved that the plaintiff was organized as a corporation in 1883, and that at the time of the transaction with the defendant each of its stockholders had paid to the corporation \$50 per share on their several shares of stock. It was also proved that in October, 1885, the defendant was the owner of a manufacturing plant in Stockton, consisting of a block of land, the buildings thereon, machinery, tools, materials, etc.,

which he offered to sell to plaintiff for \$100,000, to be paid as follows: Plaintiff to assume a mortgage on the property amounting to the sum of \$25,000, and to pay in cash \$30,000 in 30 days from date, and \$25,000 in 12 months from date, and to pay \$20,000 by the issuance to defendant of 400 shares of its capital stock at \$50 per share. This offer was accepted by plaintiff, and the trade was consummated on October 14th by the delivery to defendant of plaintiff's promissory notes for the two cash payments, and a certificate for 400 shares of its stock, and by the delivery to plaintiff of defendant's deed of his said property. The certificate was in the usual form, and was accepted and receipted for by the defendant in the usual manner. There was no indorsement on the certificate that it was for fully-paid or non-assessable stock, and no evidence was introduced that it was agreed or understood by the parties at the time of its issuance, or at any time, that the stock should be non-assessable. Under these circumstances, it must be presumed that the stock so received was taken and held by defendant subject to the same conditions and liabilities that it would have been subject to if he had been an original subscriber for it, or had purchased it from an original subscriber. In *Upton v. Tribilcock*, 91 U. S. 45, an actual subscriber to the stock of an insurance company, upon which he agreed to pay 20 per cent., was held responsible for the balance, and could not escape liability therefor because of representations by the agent, at the time of the subscription, that he would be only responsible for that amount, or by proving a subsequent arrangement with the company canceling the subscription, and accepting, as in full payment, his note for the 20 per cent. agreed to be paid. In *Webster v. Upton*, 91 U. S. 65, a person holding certificates of stock by transfer from the original subscriber, and standing upon the books of the corporation as a stockholder, was held liable for the balance due upon the stock, without proof of an express promise on his part to pay. In *Pullman v. Upton*, 96 U. S. 328, a transferee of stock, who caused the transfer to be made to himself on the books of the corporation, as security for a debt of the transferor, was held liable for the balance due on such stock. And see *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 463, where the foregoing cases are cited, and their import stated. See, also, *Green v. Abletine Medical Co.*, 96 Cal. 322, 31 Pac. 100. Without following the able arguments of counsel further, or noticing the numerous authorities cited, it seems enough to say that in our opinion the appellant's contention that the findings above quoted were not justified by the evidence must be sustained. But, conceding this to be so, respondent still insists that there are two other points which are fatal to appellant's cause of action:

1. At the meeting of the board of directors held October 4th, at which the assessment

was levied, the board duly adopted a resolution directing the secretary of plaintiff to publish the notice of the assessment in the *Stockton Independent*, and to publish the notice of delinquent sale in the *Evening Mail*; both being newspapers of general circulation, printed and published in the city of Stockton. This resolution was not entered in the minutes of the board, but the notices were published in the papers as directed for the time and in the manner required by law. Section 337 of the Civil Code provides that, "if any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the secretary must, unless otherwise ordered by the board of directors, cause to be published in the same papers in which the notice hereinbefore provided for shall have been published, a notice" of sale substantially in a form specified. It is argued that the meaning of this section is that the secretary must "publish," unless directed not to publish, but that, if he publish the notice at all, it must be in the same paper that the notice of assessment was published in, and that the result of the failure to publish the notice of delinquent sale in the manner required by the statute is to make all the proceedings void, except the levy of the assessment (citing section 346, Civ. Code), and hence the defendant's stock never became delinquent, and the action cannot be maintained. We do not understand section 337 to have the meaning imputed to it. As we read the section, it means that the notice of sale must be published in the same paper as the notice of assessment, unless otherwise ordered by the board; but the board may order the notices to be published in different papers, and if they are regularly so published the requirements of the statute are complied with. It must be held, therefore, that the publication in the *Evening Mail* was authorized and sufficient.

2. It is also argued that the meeting of the board of directors on November 22d was a special meeting, at which only five of the seven directors were in attendance, and that no sufficient notice of the meeting was given to the directors, and hence the members present were not authorized to transact any business, and the action taken to waive further proceedings for the collection of defendant's assessment by sale, and to proceed by action at law to collect the amount of the assessment, was unauthorized and void. Section 320 of the Civil Code provides: "When no provision is made in the by-laws for regular meetings of the directors and the mode of calling special meetings, all meetings must be called by special notice in writing, to be given to each director by the secretary, on the order of the president, or, if there be none, on the order of two directors." The only provision of the by-laws of plaintiff as to the notice of special meetings is, that "notice thereof of at least two days shall be given to the

directors, and shall be in writing, signed by either the secretary, president, or the directors making such call." It was proved that notice in writing of the special meeting of November 22d, signed by the secretary, was sent by him by mail, properly addressed and postpaid, to each of the directors, about three days before the day named for the meeting; that the notices were sent in accordance with the direction of the president; and that five of the directors were present at the meeting, and took part in its proceedings. The presumption is that all of the notices thus sent were received, and there was no evidence that any one of them was not received. The question then is, was notice of the meeting given to each director as required by the Code and by-law? In *Granger v. Mining Co.*, 59 Cal. 678, it was held that, in the absence of proof to the contrary, notice to the directors of a meeting will be presumed, though not recited in the record of the meeting. The court said: "It is contended that there was no authority to execute the instruments in question vested in the president and secretary by the above resolution, because the meeting at which it was passed was a special one, and there was no evidence that such a notice of the meeting as was required by law (Civ. Code, § 320) was served on the directors. This question was presented in *Sargent v. Webster*, 13 Metc. (Mass.) 497. In that case the board of directors at a meeting passed a vote authorizing an assignment of all its property to one of the creditors of the corporation, who bound himself, by a counter bond, to apply the proceeds of the property so assigned to the payment of the debts and obligations to him, and to pay over to the corporation any balance that remained. There were five directors, and three only were present at the meeting which passed the resolution authorizing the assignment. It was contended that the assignment was not binding on the corporation because it did not appear that notice of the meeting was given to all the directors. The court, per Shaw, C. J., thus disposed of the point: 'Another objection of this same kind is that it does not appear that notice of the meeting was given to all the directors. But the contrary does not appear, and it would be hazardous to decide that every vote passed by an aggregate body is void if it do not appear by the record that all were notified. We believe it is not usual, in corporate records, to state how members were notified. The presumption "omnia rite acta" covers multitudes of defects in such cases, and throws the burden upon those who would deny the regularity of a meeting, for want of due notice, to establish it by proof.'" In *Younglove v. Steinman*, 80 Cal. 375, 22 Pac. 189, a question similar to that now under consideration was presented. The court said: "It is contended, in support of the appeal from the judgment and order denying a new trial, that the evidence shows that the meeting of the board of direct-

ors at which the assessment was levied was not a legal meeting, for the reason that no notice of the meeting was given. But the court below found that the meeting was 'duly and regularly convened,' and that the assessment was 'lawfully and rightfully' levied. This included a finding that the necessary notice was given, and the finding is supported by sufficient evidence." The record in that case shows that written notices of the meeting were sent to all of the directors, and that the notice to the plaintiff, who was one of the directors, was sent to him by mail. The case of *Harding v. Vandewater*, 40 Cal. 77, cited and relied upon by respondent, is not in point. In that case there was no proof that any notice of the meeting had been given to the two absent trustees. In view of the authorities, we conclude that the notice of the meeting of November 22d, as given to the directors, was sufficient, and that the board was authorized to take action as it did. The judgment should be reversed, and the cause remanded.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded.

§ Cal. Unrep. 142

MCDONALD v. SOUTHERN CALIFORNIA RY. CO. (No. 19,534.)

(Supreme Court of California. Sept. 11, 1895.)
CONVEYANCE OF RIGHT OF WAY—CONSTRUCTION AND EFFECT.

A conveyance to a railroad company of the right of way for its road, as located, constructed, and operated on the highway in front of the grantor's premises, to wit, on Third street, "for the full length and frontage of lots 23 and 24 in block 25," of a certain survey, and also the right to use "such street" for railroad purposes, with an acknowledgment of payment for "all damages sustained by me by reason of the construction of said railroad upon said street, and by reason of the operation thereof, and particularly * * * for damages for any injury caused by the construction of said railroad in front of my property hereinbefore described," is a grant only of the right of way in front of the two lots; and the damages for which satisfaction is acknowledged are limited to those which had been sustained by construction and operation of the road in front of such lots, and do not apply to damages afterwards sustained by reason of a defective bridge on the road, not in front of the lots.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by William McDonald against the Southern California Railway Company for damages to plaintiff's premises, caused by a defectively constructed bridge. Judgment for plaintiff, and defendant appeals. Affirmed.

W. J. Hunsaker, for appellant. Paris & Allison and Goodcell & Leonard, for respondent.

HARRISON, J. When this case was here upon the former appeal (101 Cal. 206, 35 Pac.

643, 646) it appeared from the findings that "said bridge and all approaches thereto are located within the right of way in said deed described, and constitute part of the premises thereby granted to the California Central Railway Company"; and it was held that, by virtue of the conveyance from the plaintiff to the predecessor of the defendant, he had given a license for the maintenance of the bridge in the condition it was at the time of the conveyance. The cause was remanded for a new trial, and the superior court has now found "that, at the time said deed was executed, the bridge described in plaintiff's complaint, and referred to in the evidence, was not, nor was any part thereof, situated upon the lands of the plaintiff described in his complaint, or upon the extension of Third street in front of his lands, but that the eastern abutment of said bridge was situated upon the land of Third street extended westerly about 150 feet west of the westerly line of plaintiff's lands." The other facts found by the court being substantially the same as upon the former appeal, judgment was rendered in favor of the plaintiff, and the defendant has appealed.

The appellant still contends that, by reason of the conveyance above referred to, the plaintiff is estopped from a recovery for any damage sustained by reason of the defective construction of the bridge. By that conveyance, the plaintiff, in consideration of the sum of \$750, granted "the right of way for the main track of said railroad, as the same is now located, constructed, and operated in and upon the highway in front of grantor's premises, to wit, in and upon Third street, as extended west from the limits of the city of San Bernardino, for the full length and frontage of lots 23 and 24 in block 25 of the five-acre survey of the Rancho San Bernardino," and also "the right to exercise the right to use such street for railroad purposes, as it is now doing for its main track." To this grant was added the following clause: "I do hereby acknowledge full and entire satisfaction or payment of any and all damages sustained by me by reason of construction of said railroad upon said street, and by reason of the operation thereof; and particularly do I acknowledge payment for damages for any injury caused by the construction of such railroad in front of my property hereinbefore described." The right of way which is thus granted is by its terms limited to "the full length and frontage of lots 23 and 24 in block 25 of the five-acre survey of the Rancho San Bernardino," upon Third street, as extended west from the limits of the city of San Bernardino; and the following clause, granting the right to use "such street" for railroad purposes, has the same limitation. As the plaintiff could not grant a right of way over property that he did not own, and could not grant the right to use a street, except in front of his own property, it is not to be assumed that it was intended that his grant should have reference to any other

property than that which he owned, or to any other street than "the highway in front of grantor's premises," which is described therein. The clause upon which the appellant relies in support of its claim is that in which the plaintiff acknowledges satisfaction of "all damages sustained by me by reason of the construction of said railroad upon said street, and by reason of the operation thereof." We are of the opinion, however, that the "said street" designated in this clause is that portion of Third street which had been previously named in the instrument, and that the damages for which satisfaction was acknowledged were limited to those which had been sustained by the construction and operation of the railroad in front of the plaintiff's property, and which are "particularly" designated in the last clause of the instrument. It would require explicit language to justify the conclusion that it was the intention of the parties that the instrument should apply to damages that the plaintiff might afterwards sustain by reason of a defective structure upon the road at a point remote from his land; and for this purpose it is immaterial whether the structure was 150 feet or a mile away. It is more reasonable to conclude that the negotiation and compensation were limited to the property respecting which he had the right to bargain, and which is particularly described in the instrument. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

109 Cal. 111

CENTERVILLE & K. IRRIGATION
DITCH CO. v. BACH-
TOLD. (Sac. 21.)

(Supreme Court of California. Sept. 11, 1895.)

BOND ON SEPARATE APPEALS—MOTION TO DISMISS

1. Where a single bond is executed on appeal from a judgment and orders other than one denying a new trial, and the bond states that it is executed "on such appeal," without designating the particular appeal on which it is executed, all the appeals will be dismissed.

2. A motion to dismiss an appeal on the ground that the order appealed from is not appealable cannot be sustained pending a motion to dismiss the appeal on the ground that the appeal has not been perfected.

3. The filing of a proper bond in the appellate court in lieu of one void for ambiguity will not confer jurisdiction on such court to hear the appeal.

Department 1. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Action by the Centerville & Kingsburg Irrigation Ditch Company against one Bachtold. From a judgment for defendant, an order denying a new trial, and one denying a motion to dismiss the action, plaintiff appeals. On motion by defendant to dismiss appeal. Granted.

Frank H. Short, for appellant. Horace Harves, Stanton L. Carter, and W. B. Good, for respondent.

HARRISON, J. The plaintiff gave notice to the defendant February 7, 1895, that he appealed to this court "from the decision entered in said action in said superior court, on the 8th day of July, 1893, in favor of the defendant in said action and against the plaintiff, and from the whole thereof, and also from the order denying plaintiff's motion for a new trial, made and entered in the minutes of said court on the 10th day of December, 1894, and also from the order of the court made and entered in the minutes of the court on the 7th day of February, 1895, denying plaintiff's motion to dismiss said action"; and on the same day filed with the clerk of the superior court an undertaking on the said appeals from the three orders, in which the sureties, "in consideration of such appeal," entered into one \$300 undertaking for costs on the appeal. The respondent has moved to dismiss the appeals upon the ground that the undertaking is defective, in that there should have been a separate undertaking for each of the three appeals from the orders named in the notice of appeal.

It is the settled rule of practice in this court that when an appeal is taken from two or more orders, or from a judgment and an order, whether the notice of such appeal is given by separate notices or in one instrument, the appellant must file the jurisdictional undertaking for \$300 for the appeal from the judgment and from each of the orders appealed from, except in the single instance of an appeal from a judgment and an order denying a new trial. If a single undertaking for \$300 is given, and refers to only one of the orders appealed from, or to the judgment alone, this court will have jurisdiction of only the matter so referred to in the undertaking, and the other appeals will be dismissed. *Horn v. Water Co.*, 18 Cal. 141; *Bornheimer v. Baldwin*, 38 Cal. 671; *Bernlaud v. Beecher*, 74 Cal. 617, 16 Pac. 510; *Wood v. Pendola*, 77 Cal. 82, 19 Pac. 183; *Schurtz v. Romer*, 81 Cal. 244, 22 Pac. 657; *Crew v. Diller*, 86 Cal. 554, 25 Pac. 66; *Paving Co. v. Bolton*, 89 Cal. 154, 26 Pac. 650. If the undertaking has no special reference to either matter appealed from, but it is conditioned generally upon "such appeal" (*People v. Center*, 61 Cal. 191; *Corcoran v. Desmond*, 71 Cal. 100, 11 Pac. 815), or "said appeals" (*McCormick v. Belvin*, 96 Cal. 182, 31 Pac. 16), all the appeals will be dismissed upon the ground that by reason of its ambiguity it cannot be determined for which appeal it was given.

It is urged by the respondent that only one of the orders named in the notice of appeal is an appealable order, and that, as the appeal from that order is the only legal consideration for the undertaking, it must be referred to that appeal alone; and, consequently, that the foregoing rule is not applicable to the present case. We are of the opinion, however, that, although this sug-

gestion is not without force, it is not sufficient to take the case out of the rule aforesaid. There are two classes of cases in which an appeal may be dismissed,—one, where the order appealed from is not an appealable order; the other, when the appeal has not been perfected as prescribed by the legislature. Although the action of the court is the same in each class of cases, it is effected for different reasons, and is governed by a consideration of different principles. Formerly it was the practice, if the appeal had not been perfected, to decline to hear the appellant (*Blagi v. Howes*, 63 Cal. 384); but the present practice is to grant a motion to dismiss, and thus remove an apparent appeal from the records in the case. A motion to dismiss an appeal upon the ground that the order is not appealable assumes that the appeal has been perfected, and that there is a properly authenticated record before this court of the action of the superior court. Whether the order appealed from is an appealable order is a question of law, which can be determined only by a judicial comparison of the record containing the order, with the statutes prescribing the orders from which appeals may be taken; and, as this court has no jurisdiction of an appeal until after it has been perfected, we cannot, upon a motion to dismiss an appeal upon the ground that it has not been perfected, look into the record, either for the purpose of determining whether the order appealed from is appealable, or whether the appeal is without merit, or whether the court below has committed error in its rulings. On the other hand, whether an appeal has been perfected is a question of fact depending upon proceedings subsequent to the entry of the order in the court below. When a motion to dismiss an appeal is made upon this ground, the character or nature of the order appealed from is not involved, and the action of the court is limited to determining whether the steps taken for the appeal are in compliance with the statute prescribing the mode of taking an appeal. The two motions proceed upon different records,—the one upon a record of the action of the court below culminating in and including the order appealed from, while the other is to be determined upon a record of proceedings taken by the appellant subsequent to and independent of the order appealed from. We do not mean to be understood as holding that the respondent may not waive any defects on the part of the appellant in perfecting his appeal, and ask for a dismissal of the appeal from a nonappealable order, but that, when a motion to dismiss an appeal is made upon the ground that the appeal has not been perfected, the appellant cannot ask the court to look into the record for the purpose of determining whether the order he has appealed from is appealable. The appellant cannot protect himself against a defective ap-

peal by saying that he had no right to appeal.

The subsequent filing of an undertaking in this court, approved by one of the justices, does not obviate the objection to the appeal, or confer any jurisdiction upon this court to hear the appeal. The undertaking filed in the superior court "is so ambiguous that it must be regarded as if it had never been filed." *Home & Loan Associates v. Wilkins*, 71 Cal. 626, 12 Pac. 799. It was held in that case that to allow a new undertaking to be filed under such circumstances would, in effect, permit an appeal to be perfected after the time fixed by law. The motion to dismiss the appeals is granted.

We concur: GAROUTTE, J.; VAN FLEET, J.

109 Cal. 19

LANGDON v. BLACKBURN et al. (No. 19,583.)

(Supreme Court of California. Sept. 5, 1895.)

EQUITY—VACATING PROBATE OF WILL.

1. Equity has no jurisdiction to set aside the probate of a will on the ground of fraud, mistake, or forgery, this being within the exclusive jurisdiction of the probate court.

2. Equity will not give relief by charging the executor of a will or the legatee thereunder with a trust in favor of a third person, alleged to be defrauded by the forged or fraudulent will, where the probate court could afford relief by refusing probate of the will in whole or in part.

3. In an action against the legatees under a will, brought four years after its probate, it was alleged that K., plaintiff's intestate, was the surviving sister of testator; that defendants, to defraud K., forged a will in which all of testator's estate was left to them, and had it admitted to probate; that K. lived 400 miles from the place where her brother resided in his lifetime, and that at the time he died she was 65 years old, and ignorant of legal and business matters; that, shortly after testator's death, defendants sent K.'s son to her, who told her that her entire interest in the will was \$3,000; that K., believing this, accepted that amount. There was no allegation that K. had not received notice of probate, as required by law. Plaintiff prayed that defendants be adjudged to hold in trust for K.'s estate the amount K. would have been entitled to as decedent's surviving sister had there been no will. *Held*, that equity would not grant such relief, there being no fraud collateral to, and extrinsic of, the procedure which culminated in the decree of the probate court.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; *V. A. Gregg*, Judge.

Action by Maria M. Langdon, administratrix of the estate of Maria Kirshner, deceased, against Cecelia Blackburn and another, to enforce an alleged trust. From a judgment for defendants, plaintiff appeals. Affirmed.

Thompson & Thompson, for appellant. Graves & Graves, for respondents.

BELCHER, C. This is an action to enforce an alleged trust. The averments of

the complaint are mostly upon information and belief, and are in substance as follows: James H. Blackburn died in the county of San Luis Obispo on January 27, 1888, leaving a large estate, and, as his only heirs at law, two brothers, one sister, and the children of a deceased sister. The defendant Daniel D. Blackburn, who was and is the husband of the other defendant, Cecelia Blackburn, was one of the surviving brothers, and Maria Kirshner, the plaintiff's intestate, who died May 5, 1893, was the surviving sister. Long prior to January 13, 1888, the said James H. Blackburn became weak physically and mentally, and wholly subject to the will and control of defendants. He had no volition, mind, or will of his own, and he so continued until he died. While he was in this condition, the defendants conspired together to defraud the said Maria Kirshner, and to cheat her out of her one-fourth interest in the estate of her brother, and to get the whole estate for themselves. To that end, they procured and caused to be drawn up, in legal form, a paper which purported to be the will of said James H. Blackburn, giving his property to them, and omitting all mention of his said sister. On the said 13th day of January they caused him "to be raised up in his bed (to which he was then confined in mortal sickness), a pen placed in his hand by a person other than himself, and who was in defendants' employ, and, upon defendants' order, direction, and procurement, and not otherwise, without the will, volition, or knowledge of said James H. Blackburn, the said other person moved the pen, and caused it to write the name of said James H. Blackburn, as being his signature to said purported will." At the time when his signature was so written upon said purported will, "the said James H. Blackburn was unconscious. He knew nothing whatever of what was being done. He had neither will, purpose, nor volition in said matter. He did not, and he never did, sign said purported will." He never directed or authorized its preparation, and "he never in any wise dictated or suggested its terms, or any of them, or knew anything about it or of its existence." Defendants thereupon took the said forged will, and kept it until after Blackburn died. On February 6, 1888, they caused the same to be presented to the superior court of San Luis Obispo county for probate, and thereafter such proceedings were had that on the 28th of that month an order was made admitting it to probate as and for the last will of said deceased. Afterwards, by procurement of defendants, the property of the estate, of the value of about \$1,000,000, was distributed to and taken and held by them. Plaintiff's intestate was entitled to one-fourth of the property of the estate, but was awarded no part of it. Plaintiff's intestate was about 65 years of age, and quite ignorant as to legal and business matters. She resided in Yuba county, more than 400 miles from San

Luis Obispo county; and as to all of the before recited facts in regard to the said pretended will she was by the said defendants purposely, willfully, and carefully kept in ignorance, until about seven months before she died, when she first learned of the existence of said facts, and that she had been robbed by said proceedings. Shortly after the death of Blackburn, the defendants, to carry out and effectuate their scheme to deprive Mrs. Kirshner of her share in the estate of her brother, and to prevent her from making inquiries in the matter, employed and hired one Henry Findley (her son by her first marriage) to visit her, and tell her that her entire interest in the estate of her deceased brother was the sum of \$3,000 only. By their procurement and under their employment, Findley did visit his mother at her home in Yuba county, and did tell her that her interest in her brother's estate was \$3,000, and no more. She believed the statements of her son, and relied upon them as true. Thereupon, as a part of their scheme to defraud Mrs. Kirshner and to cheat her out of her share of the estate, defendants paid over to her the said sum of \$3,000, which was all she ever received from the said estate. "In their said fraudulent purpose defendants succeeded. Misled by her said son and his false statement aforesaid, she, the said Maria Kirshner, did believe that the \$3,000 by defendants paid her was her full share of the estate, and accordingly she made no inquiry in the premises, and knew nothing of said probate proceedings. But for said false statement, her reliance thereon, and the payment of said money to her, she, the said Maria Kirshner, would have had her suspicions aroused, would have made inquiries in the premises, have discovered that said purported will was a forgery, and would have opposed the probate thereof." By this fraudulent scheme and its accomplishment, defendants received and converted to their own use property of the value of about \$250,000, which should and otherwise would have come to said Maria Kirshner during her life, and now properly belongs to her estate. Immediately on the discovery of the frauds above detailed, as to the forging of said will and the deception practiced upon her in inducing her to believe that \$3,000 was her full share of the estate of her brother, and within a year before the commencement of this action, said Maria Kirshner demanded of defendants that they account for and turn over to her the one-fourth part of said estate so as aforesaid taken and held by them; but so to do defendants refused, and they still refuse. Said James H. Blackburn, when he died, left no will, or purported will, other than the one above mentioned. The prayer is that defendants be adjudged to hold one-fourth part of the property of the estate so received by them in trust for the estate of Maria Kirshner, and for an accounting. A general and special demur-

rer to the complaint was interposed and sustained, and the appeal is from the judgment thereupon entered.

The case in all of its main features, is in no way distinguishable from that of the Broderick Will Case, decided by the supreme court of the United States, and reported in 21 Wall. 503. In that case the relief sought was that the will be declared a forgery, and the probate and all subsequent proceedings be annulled and set aside, or that the defendants be charged as trustees, etc. It was held that a court of equity has no jurisdiction to avoid a will or to set aside the probate thereof on the ground of fraud, mistake, or forgery, this being within the exclusive jurisdiction of the courts of probate, and also that a court of equity will not give relief by charging the executor of a will or a legatee with a trust in favor of a third person, alleged to be defrauded by the forged or fraudulent will, where the court of probate could afford relief by refusing probate of the will in whole or in part. The opinion was delivered by Mr. Justice Bradley, and in speaking of the exclusive jurisdiction of the probate court of California in probate cases, and the questions which can be tried in probate proceedings, he, on page 516, said: "Incompetency, restraint, undue influence, fraudulent representations, and any other cause affecting the validity of the will, are specially mentioned as questions upon which issues might thus be framed. Various provisions were added calculated to secure a thorough investigation on the merits.

* * * In view of these provisions, it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth. The question recurs, do the facts stated in the present bill lay sufficient ground for equitable interference with the probate of Broderick's will, or for establishing a trust against the purchasers of his estate in favor of the complainants? It needs no argument to show, as it is perfectly apparent, that every objection to the will or the probate thereof could have been raised, if it was not raised, during the proceedings instituted for proving the will, or at any time within a year after probate was granted, and that the relief sought by declaring the purchasers trustees for the benefit of the complainants would have been fully compassed by denying probate of the will. On the establishment or non-establishment of the will depended the entire rights of the parties, and that was a question entirely and exclusively within the jurisdiction of the probate court. In such a case a court of equity will not interfere, for it has no jurisdiction to do so. The probate court was fully competent to afford adequate relief." And in *State v. McGlynn*, 20 Cal. 234, in which it was sought to have the probate of the Broderick will vacated and set aside, on the ground that the alleged will was a forged

paper, and to have the property of the estate adjudged to have escheated to the state of California, Norton, J., delivered the opinion of the court, and, after a review of the authorities (on page 274), said: "The court of chancery has no capacity, as the authorities have settled, to judge or decide whether a will is or is not a forgery; and hence there would be an incongruity in its assuming to set aside a probate decree establishing a will, on the ground that the decree was procured by fraud, when it can only arrive at the fact of such fraud by first deciding that the will was a forgery. There seems, therefore, to be a substantial reason, so long as a court of chancery is not allowed to judge of the validity of a will, except as shown by the probate, for the exception of probate decrees from the jurisdiction which courts of chancery exercise in setting aside other judgments obtained by fraud. But whether the exception be founded in good reason or otherwise, it has become too firmly established to be disregarded. At the present day it would not be a greater assumption to deny the general rule that courts of chancery may set aside judgments procured by fraud than to deny the exception to that rule in the case of probate decrees. We must acquiesce in the principle established by the authorities, if we are unable to approve of the reason. Judge Story was a staunch advocate for the most enlarged jurisdiction of courts of chancery, and was reluctant to allow the exception in cases of wills, but was compelled to yield to the weight of authority,"—citing 1 Story, Eq. Jur. § 440. And see, also, *McDaniel v. Pattison*, 98 Cal. 86, 32 Pac. 805, and *Fealey v. Fealey*, 104 Cal. 354, 38 Pac. 49.

The cases in which a court of equity is authorized to interfere and set aside a former judgment on the ground of fraud are those only where the fraud was extrinsic or collateral to the matter tried. *U. S. v. Throckmorton*, 98 U. S. 61; *Estate of Griffith*, 84 Cal. 107, 23 Pac. 528, and 24 Pac. 381; *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, and 27 Pac. 537. In the case last cited it is said: "That a former judgment or decree may be set aside and annulled for some frauds there can be no question; but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party,

by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest."

Conceding, then, without deciding, that the rule as to extrinsic or collateral frauds applies to judgments or decrees of probate courts, the question is, are the allegations here sufficient to bring this case within the rule? It is claimed for appellant that the voluntary action of defendants in sending to Mrs. Kirshner "her son to assure her that \$3,000 was coming to her, that this was all which she was entitled to, and defendants' payment of that money to her as her entire interest, in view of existing conditions, were an outside fraud collateral to and extrinsic of the procedure that culminated in the decree." Mrs. Kirshner must have known of the death of her brother, and that she was one of his heirs, and presumably must have known that he left a large estate. The law required that when a petition for the probate of a will is filed, and the will produced, the time for the hearing must be fixed, and notice of the hearing published in a newspaper for a certain length of time (Code Civ. Proc. § 1303), and that copies of the notice of the time appointed for the probate of the will must be sent by mail to the heirs of the testator residing in this state (Id. § 1304). It must be presumed, therefore, there being no allegation to the contrary, that a proper notice of the application to probate the will in controversy was published and sent out as required by law, and that Mrs. Kirshner received the notice sent to her; and, being thus notified, it became her duty, within a year at least after its probate, to make inquiry as to the validity and contents of the will. But counsel say: "She might have attended court,—been present all the time,—and seen nothing to cause suspicion." If that be so, it furnishes no excuse for her remaining quiet and making no inquiry as to any of the transactions for nearly four years. It will be observed that it is not alleged in the complaint that young Findley said anything to his mother about the will or its terms, or the probate thereof, or that he advised or even suggested that it was unnecessary for her to be present at the hearing, or to employ counsel to represent her thereat, or to make any inquiries about the will or the estate. He simply told her that her interest in the estate was only \$3,000, and, the money being afterwards paid, she quietly rested on that assurance until after the time to institute a contest had elapsed. Id. § 1327. This

did not, in our opinion, constitute such an extrinsic or collateral fraud as will enable the representative of her estate to now claim the relief asked for. The demurrer was properly sustained, and the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

109 Cal. 63

McGAHEY v. FORREST et al. (No. 18,425.)
(Supreme Court of California. Sept. 6, 1895.)

MORTGAGE ON HOMESTEAD—FORECLOSURE AFTER
DEATH OF MORTGAGOR—PRESENTATION OF
CLAIM—WHEN NECESSARY.

Code Civ. Proc. § 1500, provides that mortgages may be foreclosed on the property of a decedent without previous presentation to the administrator for allowance, where all recourse against any other property is expressly waived, but no attorney's fee is recoverable. Section 1475, as amended in 1880, provides that where a homestead has been selected from community property and recorded prior to the death of the husband or wife, and, after his or her death, is returned in the inventory appraised at not exceeding \$5,000, the superior court must set it off to the survivor, and that if there be liens or incumbrances on it the claims secured thereby must be presented and allowed as other claims. *Held* that, where a homestead is set off to the surviving husband or wife out of community property mortgaged by them, the mortgage may be foreclosed thereon without presenting it to the administrator for allowance, if plaintiff expressly waives all recourse against other property of the estate, and his claim to attorney's fees.

Commissioners' decision. Department 2.
Appeal from superior court, Modoc county;
C. L. Clafin, Judge.

Action by John McGahey against Nellie Forrest, administratrix of the estate of John M. Forrest, deceased, and others, to foreclose a mortgage. From a decree for plaintiff, defendants other than Nellie Forrest, Jr., appeal. Affirmed.

Goodwin & Stewart, and D. W. Jenks, for appellants. G. F. Harris, for respondent.

SEARLS, C. This is an appeal by the defendants Nellie Forrest (administratrix of the estate of John M. Forrest, deceased), Nellie Forrest, Sr. (widow), and Mary Forrest and John Shannahan Forrest (infant children of said deceased and of said Nellie Forrest, Sr.), from a judgment in favor of plaintiff foreclosing a certain mortgage executed by John M. Forrest, deceased, during his lifetime, upon two certain parcels of land situate at Alturas, county of Modoc, to secure the payment of a promissory note dated September 14, 1891, made by said Forrest, deceased, for \$2,400, and interest at 1 per cent. per month, payable one year after date. The mortgage was duly recorded. After the death of John M. Forrest, and the appoint-

ment of his administratrix, one of the parcels of land covered by the mortgage, which was of the community property of deceased and his wife, Nellie Forrest, Sr., was set apart by the court as a homestead for the family of deceased. Subsequently the plaintiff presented the following creditor's claim to the administratrix:

"The undersigned, creditor of John M. Forrest, deceased, presents his claim against the estate of said deceased, with the necessary vouchers, for approval, as follows:

Estate of John M. Forrest, Deceased, 1893.	
To John McGahey, Dr.	
June 13th. To amount of promissory note executed by John M. Forrest, for the sum of \$2,400, on the 14th day of September, 1891, with interest at 1 per cent. per month, payable annually, secured by mortgage of even date, as of record upon the record book of Mortgages, No. 6, pages 463-4-5, Modoc County Records,—copy of said note herewith attached.....	\$2,400
Interest for one year to September 14th, 1892 (Indorsed).....	288
Interest for one year to date, June 14th, 1893	216
Total	\$2,904
1892. Cr.	
September 14th, by amount paid as interest due.....	288
	\$2,616"

Then follows a copy of the promissory note, and the usual affidavit, verifying the claim, which was duly allowed by the administratrix, approved by the judge in probate, and filed with the clerk, and by him duly registered. The complaint in foreclosure waives all recourse against other property of the estate than the mortgaged premises; waives counsel fees, etc. Copies of the mortgage and of the claim, as presented to the administratrix, were attached to the complaint, and made a part thereof.

A demurrer was interposed by defendants to the complaint upon the grounds: (1) That it does not state facts sufficient to constitute a cause of action. (2) That it is ambiguous, in this: It cannot be determined therefrom whether the mortgage described in the complaint was ever presented to the administratrix of the estate of John M. Forrest, deceased, as a claim against said estate. (3) That it is uncertain; and specifying the same reason as that given for its ambiguity. The demurrer was overruled, an answer filed, and the facts agreed to by the parties, as above stated.

The question presented here involves two propositions, viz.: (1) Was any presentation of the claim of the plaintiff necessary? (2) If so, was the description of the mortgage in the claim, as presented to the administratrix, sufficient?

The argument of appellant is that, as to so much of the mortgaged property as is covered by the homestead, the mortgage, as such, should have been presented to the administratrix, and the claim secured there-

by allowed as other claims, and that this was not done for the reason that the claim, as presented and allowed, contained no sufficient description. Section 1493 of the Code of Civil Procedure requires "all claims arising upon contracts, whether the same be due or not due or contingent," to be presented to the executor or administrator for allowance, and if not presented within the time limited they are barred forever, etc. There is an exception to the general rule in the case of mortgages, which, under section 1500, Code Civ. Proc., may be foreclosed upon the property of the decedent without a previous presentation, where all recourse against any other property of the estate is expressly waived in the complaint, but in such cases no counsel fees shall be recovered. This right to maintain an action upon a claim secured by a mortgage upon the property of the decedent is, in turn, limited by section 1475 of the same Code, as amended in 1880, which section provides, in substance, that where a homestead has been selected and recorded, prior to the death of the decedent, and is returned in the inventory appraised at not exceeding \$5,000, etc., the superior court must set it off to the persons in whom the title is vested by the preceding section; that is to say, in cases where it was selected from the community property, to the survivor. In such cases, if there be subsisting liens or incumbrances upon the homestead, the claims secured thereby must be presented and allowed as other claims against the estate, and are to be paid out of the funds of the estate, if sufficient, and can only be enforced against the homestead for the deficiency after exhausting the other funds of the estate. The necessity of presenting a claim secured by mortgage upon a homestead to the administrator was upheld in *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. 375, and in *Camp v. Grider*, 62 Cal. 20. In the case last cited it was said that section 1475 creates an exception, in case of homesteads declared in the lifetime of the decedent, to the general rule in cases of mortgages and other liens provided for in section 1500, and that the reason of the rule is to preserve the homestead, if possible. In *Perkins v. Onyett*, 86 Cal. 348, 24 Pac. 1024, the necessity of presenting a claim to the administrator, where secured by a mortgage upon the homestead, was again upheld. There can be no question of the necessity of presenting for allowance a claim secured by mortgage upon a homestead, within the cases provided for in section 1475. But that section, in express terms, only applies to "the homestead selected and recorded prior to the death of the decedent." The homestead in this case did not exist at the time of the death of the deceased, but was set apart subsequently by the superior court in probate, and is what is known as a "probate homestead." Here, then, we have a general rule, provided by section 1500, that the

holder of a mortgage or lien upon real property of a decedent may enforce such mortgage or lien without presentation, provided he is willing to waive any claim against decedent's estate over and beyond that upon the property to which the lien attaches. This rule under section 1475 does not apply to cases in which such mortgage or other lien exists upon a "homestead selected and recorded prior to the death of the decedent," but in such cases the claim must be presented to the administrator. To hold that the exception extends to probate homesteads is to enlarge its scope, and apply it to a class of cases not included by the language of the statute within its provisions, and to enlarge the exception beyond the expressed intention of the lawmakers. There appear some reasons for not so enlarging the statute, founded upon the fact that so to do would, in many cases, result in shrouding the rights of lien holders in uncertainty. A. holds a mortgage upon the property of a decedent. He is not required to present it to the administrator for allowance, as a predicate to his right to enforce his lien as against the specific property. If, when the time to present claims has run in part, a probate homestead is declared and set apart, he must present his claim, he will be deprived, pro tanto, of the time for presentation allowed to other creditors; and if the time for presentation of claims has expired, as it may well do, and a homestead is then set apart by the court, including the mortgaged property, one of two things must follow: Either his lien is cut off entirely, and his right to foreclose without presentation of his claim for allowance is extinguished, or it must be held that in such a case the exception mentioned in section 1475 has no application. "Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others. There is then a natural inference that its application is not intended to be general." *Suth. Stat. Const.* § 327. Section 1475 enumerates the things to be affected by its provisions, viz. homesteads "selected and recorded prior to the death of the decedent," and, by implication, excludes all others. It follows that homesteads set apart by the order of the superior court during the pendency of probate proceedings, and which had no existence prior to the death of the decedent, are not included in section 1475, but are left to the control of section 1500 of the same Code, and that a prior lien thereon may be enforced without the necessity of presenting the claim secured thereby to the executor or administrator, provided the holder is willing to expressly waive in his complaint, and does waive, all recourse against any other property of the estate.

This conclusion renders it unnecessary to discuss the sufficiency of the description of the plaintiff's mortgage in his claim, as presented to and allowed by the administra-

trix. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; VANOLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

109 Cal. 53

HENEY v. PESOLI et al. (S. F. 32.)

(Supreme Court of California. Sept. 6, 1895.)

QUIETING TITLE—PLAINTIFF'S TITLE—SEPARATE PROPERTY OF MARRIED WOMAN.

1. One has title to maintain an action to quiet title, though she has sold the land, and given a deed in escrow, to be delivered when the last payment of purchase money is made, and the purchaser has gone into possession, the last payment not having been made, and possession, by provision of Code Civ. Proc. § 738, not being necessary for maintenance of the action.

2. Under Civ. Code, § 162, providing that all property owned by the wife before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property; and section 164 (as amended by St. 1889, p. 328), providing that when property is conveyed to a married woman the presumption is that title is thereby vested in her as her separate property,—the presumption arising from a deed to a married woman, strengthened by the fact that the first payment was with her separate property, and that at the time of the purchase, when her husband was solvent, they both declared that she was buying it for herself, with her own money, and was going to pay for it, is not rebutted by the fact that the remaining payments thereon were made with money obtained by their joint note and secured by their joint mortgage on said land and other separate property of hers, he never having paid anything on the note, but it having been reduced by payments by her from her separate property, and the balance having been assumed by a purchaser of the property from her.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. O. B. Hebbard, Judge.

Action by Anna A. Heney against Charles F. Pesoli and others. Judgment for plaintiff. Defendants appeal. Affirmed.

H. W. Bradley and Dorzel Stoney, for appellants. Ash & Mathews, for respondent.

SEARLS, C. This is an action to quiet the title of plaintiff to a city lot upon the easterly side of Gough street, city and county of San Francisco. Plaintiff had judgment quieting her title as prayed in her complaint, from which judgment defendant Charles E. Pesoli appeals. The appeal was taken within 60 days next after the rendition of judgment, and the record contains a bill of exceptions setting out evidence introduced at the trial. Anna Heney was at all the times herein mentioned up to November, 1894, a married woman, the wife of W. J. Heney, who departed this life in said month of November, 1894. Defendant Pesoli was a creditor of W. J. Heney, and on the 3d day of November, 1893, he brought suit in the superior court in and

for the city and county of San Francisco against said W. J. Heney, to recover the sum of \$1,000 and interest thereon, and at the same time caused a writ of attachment against the property of said W. J. Heney to issue, which writ was levied upon the lot of land in dispute in this action. Such proceedings were had in the action of *Pesoli v. W. J. Heney* that on the 23d day of May, 1894, the superior court aforesaid duly rendered and entered a judgment in said cause in favor of said Charles E. Pesoli and against said W. J. Heney for \$1,090.78, together with costs, etc., which judgment, and the lien thereof, and the lien of said attachment as merged in the judgment, constitute, so far as appears, the only claim or interest of the defendant and appellant herein in and to the property in dispute. The theory of defendant was and is that the land in question was the community property of W. J. Heney and Anna, his wife, and that as such it was subject to the payment of the debts of W. J. Heney, the husband, and to the lien of defendant's judgment, which is still in full force and vigor. Plaintiff, on the other hand, claims that the property in question was purchased by her on the 28th day of May, 1889, and the title thereto taken in her own name, and as her separate property and estate, and paid for with her separate means. The court found that on the 8d day of November, 1893, and for a long time prior thereto, plaintiff was the owner of and in possession of the land and premises, and that at the time of the commencement of the action she was the owner and holder of the legal title thereto; that said land, premises, and the improvements thereon were purchased and acquired by plaintiff on May 28, 1889, in her own name, and as her separate property and estate, with her separate means; that it was and is her separate property and estate, and that her husband, W. J. Heney, never acquired or had any interest or estate therein, and that it was not the community property of plaintiff and her husband, was not purchased or acquired with community funds, and that her husband, W. J. Heney, never had any community interest therein, and that it was not subject or liable at any time to attachment or lien or judgment or execution as the property of W. J. Heney, and that the defendant has no lien thereon.

There was testimony tending to show that in May, 1889, the plaintiff, Anna J. Heney, purchased the property from one Lyman C. Park for \$15,000, and paid \$4,000 in cash from her separate funds, was to pay some \$3,000 and interest at the end of one year, and assumed the payment of a mortgage thereon for \$7,500, and received a deed from said Park to her and in her name under date of May 28, 1889, which was duly acknowledged and recorded May 28, 1890. Plaintiff went into possession of the property at the date of her purchase in 1889. There was evidence tending to show that on the 28th day of May, 1890, plaintiff and her husband

mortgaged the property to the Vallejo Commercial Bank to secure the payment of their joint and several promissory note for \$11,000 and interest. This last mortgage covered some two or three other lots of land in San Francisco owned by plaintiff, and standing in her name, and which she testified was her separate property. The existing mortgage upon the lot here in dispute seems to have been taken up when this \$11,000 mortgage was given. The evidence tended to show that at the date of the purchase of the lot in dispute W. J. Heney declared it was as and for his wife's separate property that the purchase was made, and that her money was to pay for it. It was also shown that prior thereto, and at the date of such purchase, W. J. Heney was solvent. On the part of defendant there was evidence tending to show that on or about March 18, 1894, plaintiff and her husband entered into a written agreement with one William H. Jordan for the sale of the premises in dispute to the latter for \$15,800, to be paid in installments, the purchaser to assume the mortgage to the Vallejo Bank, which had been reduced by plaintiff to \$10,000. A deed of conveyance was executed by plaintiff and her husband, and deposited in escrow, to be delivered to Jordan when the last payment of purchase money was made. The purchase money had not all been paid at the date of the trial, and the deed had not been delivered. Jordan went into possession when the agreement was executed. The written agreement was objected to by plaintiff, and ruled out as evidence by the court, but its contents were substantially proven by parol without objection.

Defendant introduced his judgment roll in his action against W. J. Heney, showing his lien upon the property, provided said Heney had any interest therein subject to such lien. Counsel for appellant make three points upon which they urge a reversal of the judgment, viz.: (1) That plaintiff failed to show title in herself; (2) that plaintiff's title had passed to W. H. Jordan; (3) that the property was community property, having been purchased with community funds, and therefore W. J. Heney had a leviable interest in said premises.

The first and second points really involve the same proposition, and may be put in the form of an interrogatory, thus: Had plaintiff title to the land at the date of suit brought? We do not doubt but that in an action to quiet title the burden rests upon the plaintiff to show title in himself, and if he fails to make out a case he is not entitled to recover. *Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407; *San Francisco v. Ellis*, 54 Cal. 72. Possession was also formerly necessary to enable a party to maintain an action to quiet title, but, under section 738 of the Code of Civil Procedure, is not now required. Plaintiff, according to the evidence, received a deed to the land in her own name from Park, dated in May, 1889, but which was

probably not delivered until the date of her last payment, in May, 1890. This (waiving for the present the question as to whom the title inured) vested the legal title to the premises in her, and, as the agreement to convey to Jordan, and the execution and placing in escrow of a deed to him, to be delivered upon making payment of the purchase price, did not have the effect of vesting title in him until payment was made, and the deed delivered, it must be held that at the date of suit brought, and at the date of the trial, as payment in full had not yet been made, and no delivery of the deed had been had, the title remained in the plaintiff.

The more important question for consideration in the case is as to whether the premises, upon being conveyed to plaintiff, became and were the community property of said plaintiff and her husband, and hence subject to the lien of defendant's judgment. "All property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues and profits thereof, is her separate property." Civ. Code, § 162. Section 163 contains a like provision in regard to the separate property of the husband. Section 164 was amended March 18, 1889, which amendment took effect May 19, 1889 (St. 1889, p. 328), and reads as follows: "All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her as tenant in common, unless a different intention is expressed in the instrument, and the presumption in this section is conclusive in favor of a purchaser or incumbrancer in good faith and for a valuable consideration." Prior to this amendment, property conveyed to the wife during coverture was presumptively community property, yet the wife might show by extrinsic evidence either that it was paid for out of her separate property, or that it was intended as a deed of gift; and in either event it became her separate property. *Higgins v. Higgins*, 46 Cal. 259; *Rico v. Brandenstein*, 98 Cal. 469, 33 Pac. 480. So, too, it was held that a husband free from debt could purchase property with community funds, and direct a conveyance to his wife, with intent to make it her separate estate, and the deed would take effect as a gift; and, if the deed was one of bargain and sale, reciting a valuable consideration, it was competent to show by parol the real facts, in order to rebut the presumption that it was common property. *Woods v. Whitney*, 42 Cal. 358. Again, where property is acquired partly with separate funds and partly with community funds, it becomes in part community property, in pro-

portion to the separate and community funds invested in it. In the case at bar the plaintiff purchased the property during coverture, and took a deed in her own name, reciting a valuable consideration. Such deed so taken was, under section 164 of the Civil Code, as amended in 1889, prima facie evidence that the premises so purchased became and are the separate property of the plaintiff. This presumption is strengthened by testimony showing that of the \$15,000 purchase money plaintiff advanced and paid \$4,000 from her separate estate or funds. To this extent, then, plaintiff, irrespective of the presumption arising from her deed, under the doctrine of *Estate of Bauer* (Cal.) 21 Pac. 759, became the owner of a separate estate in the property. There is also her own testimony and the declarations of her husband, made at the time of purchase, that his wife was purchasing it for herself, and was going to pay for it; that she was buying it with her own money; that she had been without a home a good while, and he was glad she had selected it, so that she could have it, etc. This was sufficient to show that it was the intent of the parties that plaintiff should take and hold the property as her separate property, and to authorize the court below in finding that it was her separate property, and that her husband, W. J. Heney, had no estate or interest therein, unless such conclusion is negatived by the fact that in 1890 the husband, W. J. Heney, joined with her in executing a promissory note for \$11,000, and a mortgage upon the premises in question and other lots of land, the separate property of plaintiff, to secure the payment of such promissory note. Had W. J. Heney advanced any part of the purchase price of the property from community funds, it would have become pro tanto community property; but he did not do so. The purchase price was \$15,000. Of this sum plaintiff paid \$4,000, assumed a mortgage for \$7,500, and was to pay the residue at the end of one year. Not having funds in hand, she borrowed \$11,000, paid off the existing mortgage, made the final payment, and gave a new mortgage, in which her husband joined. She sold some separate property, and reduced the mortgage to \$10,000, which has been assumed by Jordan in his contract to purchase the premises. Assuming, then, that the property was purchased by the plaintiff as and for her separate property, and that her husband paid no part of the purchase price, we do not find in the mere fact that her husband joined with her in a note and mortgage to secure a part of the purchase price, but paid nothing on account thereof, anything to rebut the deduction that it was and is the separate property of the plaintiff. In *Flournoy v. Flournoy*, 86 Cal. 286, 24 Pac. 1012, real estate had been conveyed to the wife as her separate property. She joined with her husband in a note and mortgage upon the land to raise money to pay off a prior mortgage thereon, and it

was held that the money thus realized upon such joint mortgage was her separate property. Applying the doctrine of that case to the present one, and it follows that the money secured by the joint note and mortgage of plaintiff and her husband, and which went to pay for the land, was the separate property of the plaintiff, and inured to her sole benefit.

The case of *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. 719, which seems scarcely in line with *Flournoy v. Flournoy*, supra, was doubted, though not overruled in the latter case. We think *Schuyler v. Broughton* may be differentiated from the present case. There the land was conveyed to the wife in her own name, by a deed which upon its face showed a consideration paid by the wife, and did not show that the land was conveyed to her to hold as her separate property. She paid a portion, viz. \$200 of the purchase price from her separate property. Thus far the case is parallel with the one at bar, but here the parallel ceases. In that case, so far as appears, there was no showing by extrinsic evidence that it was the intention of the spouses that the wife should purchase and take the title and enjoyment as her separate estate, and hence the court held that, as to the purchase money borrowed by the wife, but not secured by any lien or mortgage upon the property, the money so borrowed, and the estate so far as paid for therewith, became the community property of the spouses. In the present case, the extrinsic evidence tended to show the intent to purchase the property by plaintiff as her separate estate, which intent was acquiesced in by her husband. That being so, the money borrowed and secured by a mortgage upon her separate property became also her separate property, and when it went to pay the residue of the purchase price of the land the whole estate vested in the plaintiff as her separate property. It is rational to conclude that money borrowed upon the security of the separate real estate of one of the spouses will, in the absence of any showing to the contrary, be treated as the separate property of the party owning such real estate. A like rule is applicable to funds raised upon the security of community property.

The agreement of plaintiff to convey to Jordan was properly excluded as evidence. It provided for a deed from plaintiff to be executed and placed in escrow, to be delivered upon final payment of the purchase price. The only object of the evidence was to serve as a link in a chain showing that title had passed from plaintiff, and therefore that she could not maintain the action. But before the agreement was offered in evidence it had appeared, as it did again later, that the final payment had not yet been made, and that the deed still remained in escrow. This being so, the agreement became unimportant as evidence. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

BREWER v. McCAIN.¹

(Supreme Court of Colorado. July 1, 1895.)

PLEADING—AMENDMENT—OBJECTION—PAROL EVIDENCE—HARMLESS ERROR.

1. An objection that separate causes of action are improperly joined in one count of the complaint, unless taken by motion, is waived.

2. Where a partnership agreement was partly oral and partly in writing, one of the partners may, in one action, sue for breach of the written agreement, for an accounting of the profits arising from the sale of partnership property not mentioned therein, and for specific performance of an agreement by defendant to convey to him an undivided one-half of certain property purchased by the firm, title to which was taken in defendant's name.

3. "Articles of special partnership," containing no provision for the capital of the firm, nor any clause specifying what either person has contributed or shall contribute as capital, and providing chiefly for the future conduct of the business, may be construed with the aid of parol evidence.

4. Error, if any, in refusing to allow a witness to relate a conversation held by him with one of the parties, is rendered harmless by the fact that the witness afterwards testifies, from another conversation, to circumstances of a similar import.

5. By the terms of their special articles of partnership, defendant was to take certain property in his own name, and deliver deeds to an undivided one-half interest therein to a bank, in escrow for plaintiff; the latter depositing with the bank notes for his share of the purchase price, upon the payment of which, from plaintiff's share of the profits of the business, the deeds were to be delivered. The partnership was to continue until dissolved by mutual consent. Held, that time was not of the essence of the contract.

6. Where property was taken in the name of one of the members of a firm, and deeds were executed by him to his partner for a one-half interest therein, to be held in escrow until the payment out of such partner's share of the profits of notes for his share of the purchase money, the partner in whose name the lands were taken being the financial member of the firm, and having the duty imposed on him of ascertaining its profits by accountings at stated intervals, his failure to do so was a waiver of the violation of any time element in the contract by the failure of the other member to pay his notes when due.

7. Where it is in evidence that one of the members of a firm has executed deeds in favor of the other for an undivided one-half of the firm property held in the former's name; that he, in turn, has executed notes, in favor of his partner, evidencing his share of the purchase price; and that these papers have been placed in escrow, the deeds to be delivered upon the payment of the notes, reference to the transaction being made in their articles of partnership,—there is no prejudicial error in admitting parol testimony to establish an agreement by which the grantee partner was to have an interest in the lands.

Appeal from district court, Arapahoe county.

¹ Rehearing denied September 30, 1895.

Action by John McCain against Benn Brewer for breach of an alleged partnership agreement, for an accounting, and for specific performance of a part thereof. From a judgment and decree for plaintiff, defendant appeals. Affirmed.

The original complaint alleged the formation of a partnership by the plaintiff, McCain, and the defendant, Brewer, on the 1st day of January, 1887, the purpose of which was the manufacture and sale of brick in the city of Denver, and that such firm, as Brewer & McCain, carried on said business for about two years. It was alleged that just prior to, and contemporaneous with, the execution of the written agreement of partnership, the defendant agreed to deed to the plaintiff an undivided half interest in certain lands, and this agreement to convey was one of the inducements which led the plaintiff to form the partnership. In pursuance of this agreement touching the sale of real estate, Brewer executed his deeds for the interest to which plaintiff was entitled, for which the plaintiff, in turn, executed his promissory notes for the price agreed upon, and the deeds and the notes were placed in escrow in the German National Bank of Denver, the deeds to be delivered when the notes were paid; and as, by their arrangement, Brewer had charge of the books and the management of the business of the firm, an accounting was to be made in December of each year, and McCain's share of the profits was to be applied by Brewer on the payment of the notes. There are other allegations of the complaint, not necessary to mention; but it is sufficient to say that the complaint charged a violation by the defendant of the terms of the partnership, and prayed for a dissolution, and distribution of the assets in accordance with the rights of the parties. Issues were finally joined, and trial begun, and after proceeding for some time—either induced thereby by a ruling of the court that certain testimony offered by the plaintiff was inadmissible, as the complaint then was, or from information developed on the trial, or possibly for both reasons—the plaintiff asked, and, against the defendant's objection, was granted, leave to file an amended complaint to correspond to the facts. This amended complaint, and a subsequent amendment thereto, alleged that negotiations looking to the partnership were begun by these parties prior to September, 1886, and that, as the result of repeated conferences, the partnership agreement was consummated some time during the latter part of that year. The partners selected as a site for their brickyard a tract of land known as the "Kate Clark Tract," but after its purchase the partners concluded to change the site. They accordingly sold this tract, and purchased from the Hallack Lumber Company two other certain tracts of land, aggregating about 20 acres, together with certain chat-

tels and appurtenances to the yard, for the manufacture of brick, the titles to which were taken in the name of Brewer, as the plaintiff alleges, for the joint benefit of himself and the plaintiff. In pursuance thereof, and as further evidence of the same, Brewer executed his deed for the undivided half of the Hallack lands to McCain, as grantee, and McCain gave his notes therefor, as averred in the original complaint. The amended complaint then proceeds by alleging that contemporaneous with, and just after, the making of these deeds and notes, what are called "Articles of Special Partnership," in writing (which were the same as those set up in the original complaint), were signed by the partners, relating particularly to the future conduct of the business, by the terms of which Brewer was constituted the manager of the financial affairs of the partnership, with power to receive and take charge of all its moneys and assets, while McCain's duties consisted in the superintendence of the manufacture of brick, and the delivery of the same as ordered. In addition thereto is a provision relating to these deeds and notes in escrow, which is as follows: "It is further agreed that, on the first Monday in December of each and every year, there shall be made and had a settlement and accounting of all the said partnership business, and, after deducting all the actual expenses of said partnership, the net profits thereof shall be divided between the said parties; the profits or share of said John McCain to be retained by said Benn Brewer to pay the notes of said John McCain, now in escrow, with deeds, in German National Bank of Denver, and, after said notes and interest are fully paid the profits thereafter to be equally divided." A breach of this agreement by defendant was charged,—the failure of Brewer to give McCain all his share of the profits realized from the sale of the Kate Clark tract, the refusal of Brewer to apply McCain's profits to the payment of the escrow notes, and his failure to deliver the escrow deeds. A prayer for dissolution of the partnership follows, and for equitable relief, etc. To this amended complaint a demurrer was filed by the defendant upon the ground, among others, that several distinct causes of action were improperly united in one count of the complaint. It was overruled by the court, whereupon the defendant filed his answer, denying the material allegations of the amended complaint. Thereafter other slight amendments were made to the amended complaint and to the answer, and a replication was filed. After the suit was begun, by agreement of parties, all personal property of the firm was converted into money, and the same held subject to the decree to be rendered. Upon a trial to the court without a jury, findings of fact were made, and the equities declared to be with the plaintiff. An accounting was taken, upon which the court determined that the

plaintiff's share in the profits of the copartnership at the time of the trial amounted to the sum of \$6,133.47, and that the plaintiff was entitled to a deed of conveyance for an undivided one-half interest in the two Hallack tracts of land described in the escrow deeds, upon the payment by the plaintiff to the defendant of the residue of the notes after deducting therefrom plaintiff's said profits. A finding was made to the effect that, while the Kate Clark tract of land was intended by the parties to be a part of the partnership property, the defendant, when he sold the same, had accounted to the plaintiff for the latter's share of the profits realized from the sale. Upon this appeal, therefore, this branch of the case is entirely eliminated. From this judgment and decree the defendant appeals, and assigns 71 grounds of error.

C. J. Hughes, Jr., for appellant. Benedict & Phelps, for appellee.

CAMPBELL, J. (after stating the facts). In view of our conclusion, it would be unprofitable, and, within the limits of an opinion, practically impossible, to notice in detail these various assignments; but they may be grouped for discussion, as they have been by counsel in their argument, under several different heads.

1. The first objection urged is to the ruling of the court permitting the plaintiff to file the amended complaint. The granting of this permission was justifiable, as the exercise of a reasonable discretion by the court, unless the cause of action in the amended complaint was a departure from that in the original. The objection taken, first by demurrer, afterwards by answer, that three separate and distinct causes of action are improperly joined in one count of the complaint, might be summarily disposed of by saying that this objection should be taken by motion, otherwise it is waived. Bliss, Code Pl. (3d Ed.) § 423. But, upon more substantial grounds, neither of these objections is tenable. There was no change of the cause of action. It is said that the first of the three causes of action blended in one statement is based upon the breach of a written agreement of partnership; the second is for profits arising from the sale of the Kate Clark tract of land; and the third, for the specific performance of an agreement by Brewer to sell and convey to the plaintiff an undivided half interest in the Hallack tracts of land. The objection, it will be observed, is not that several causes of action have been improperly united in the same complaint, but that there is not a separate statement in the complaint of the three causes of action which are tacitly recognized as proper to be joined in one suit, but in separate statements of the complaint. The argument of the defendant proceeds upon a misconception or misstatement of the

real nature of plaintiff's cause of action. The action is based upon an agreement of partnership formed by the parties to this suit, and the cause of action is the breach of the terms of that partnership by the defendant. In the original complaint the time of the formation of this partnership is designated as January 1, 1887, and the evidence of the agreement is alleged to be in writing. In the amended complaint the time, though not definitely fixed, is placed at some time in the year 1886, and the general agreement therefor rested in parol, and as the result of repeated negotiations between the parties. But after its formation, and shortly after the 1st of January, 1887, a portion, or the concluding part, of said agreement was reduced to writing and signed by the parties, which written agreement was that set up in the original complaint. This writing relates chiefly, if not wholly, to the manner of conducting the partnership affairs from that time forward,—the previous portions of the partnership agreement resting in parol having been substantially executed,—and it contains the additional reference to the payment of the escrow notes and the delivery of the escrow deeds. It is clear that the divisions of the complaint thus sought to be made by the defendant are not separate and distinct matters, each of which necessarily constitutes a separate and distinct cause of action, but they are parts and parcels only of one general transaction, arising out of one general and complete agreement of partnership. Merely because this agreement relates to a number of different items is no reason for holding that for a breach of each the injured party must bring a separate suit; but, however numerous are the different matters which pertain to the partnership and grow out of this agreement, everything relating thereto, and arising out of the one general agreement, may be properly litigated and determined in one suit, and as one cause of action. It would be impossible properly to adjust the partnership affairs and make division of the assets between the partners without determining all of the matters set up in this complaint, and there can be no valid reason for requiring the plaintiff to proceed by separate suits upon each one of these alleged causes of action.

2. Many of the assignments of error relate to the admission of improper evidence offered by the plaintiff. The questions of law, as is so often the case, are not so seriously controverted as is the application of the law to the facts of the case. The defendant contends that the court violated an elementary rule of law, by admitting oral evidence of a partnership agreement in violation of the express terms of the written agreement of partnership. Upon the face of this writing, however, it is apparent that it was not intended to constitute the entire agreement. It assumed the existence of a partnership

theretofore created. It contains no provision for the capital of the firm, nor is there any clause specifying what either partner has contributed as capital, or shall contribute, thereto. It purports to provide chiefly, if not wholly, for the future conduct of the business, and, besides this, contains a clause relating to the deeds to the Hallack tracts of land. The use of the appellation, "Articles of Special Partnership," certainly in connection with the other evidence, is significant. It implies, we think, the existence of a general partnership, while the writing itself related only to a special part, or a particular feature, of the general agreement. Upon the evidence the court found that the partnership had been entered into in September, 1886, for the manufacture and sale of brick, and therein the finding is abundantly supported. The rule, which undoubtedly exists, was not violated by the admission of this class of evidence, because, among other satisfactory reasons, this writing clearly did not purport to embrace the entire agreement of the parties, and did not sufficiently manifest their intention. There is, moreover, no difficulty, from the evidence, in reconciling this writing with the previous oral agreement of the parties, and considering it, as we think it was, as the closing portion, or last clause, of the one general agreement.

3. Another objection is that parol evidence was introduced to establish a partnership in real estate, and that in this the statute of frauds was violated. This class of evidence related chiefly to the Kate Clark tract of land, which feature of the case, as we have said, is not now properly before us, and most of the objections to the evidence fall with it; so that it is unnecessary to determine whether the agreement of the parties constituted a partnership in real estate, and equally useless to determine the law applicable to the facts of this branch of the case. What we might say thereupon would be obiter, and the defendant, having received the benefit of a finding that he had already paid to the plaintiff his share of the profits arising from the sale of this Kate Clark tract, is not in a position to ask for our decision upon such ruling of the court.

4. One special objection, however, was made to the ruling of the court in refusing to permit the defendant to interrogate the witness Hammond as to a conversation between himself and the plaintiff. This conversation was objected to by the counsel for the plaintiff upon the ground that its effect tended to impeach the credibility of the plaintiff, and was inadmissible without first having laid a foundation therefor, and that the evidence was wholly immaterial to any issue in the case. The abstract of the testimony does not sufficiently disclose the real point at issue, but the bill of exceptions clearly shows that the ruling of the court was proper. The issue to which it was claimed this evi-

dence was material was as to the manner of payment of the escrow notes. By Hammond it was attempted to show that in a conversation with McCain the latter had said that he wished to sell certain property in order to get the money with which to pay these notes. The court ruled that the witness McCain, being a party to the suit, might be impeached without having first laid the foundation therefor, but that alleged inconsistent statements of his could not be admitted, in any event, unless they related to some material issue in the case, and that the mere statement by the plaintiff that he was endeavoring to get money with which to pay these notes was not material for the purpose of negating his claim that the notes were to be paid, as the articles of special partnership provided, from his share of the profits of the business. But, even if this ruling of the court was wrong, the witness Hammond was subsequently allowed to testify, without any objection by the plaintiff, that in another conversation with the plaintiff the latter had made a statement to the effect that he was trying to borrow money for the purpose of paying these notes; so that we fail to see wherein the defendant was prejudiced by the ruling of the court.

5. Another objection urged is that, by the escrow agreement, time was made the essence of the contract, and, the plaintiff not having paid the notes at their maturity, all his rights to the conveyance terminated. When these escrow deeds were drawn, and the notes executed, Brewer and McCain took them to the German National Bank, and left them with the cashier, Cooper; and from information which he swears was given to him either by McCain or by Brewer, and possibly by both,—but as to this Mr. Cooper is not certain,—he indorsed upon the envelope inclosing these papers the following: "The inclosed deeds from Benn Brewer & John A. Witter are left in escrow with the German National Bank, to be delivered to John McCain only on payment in full of inclosed notes. If not promptly paid at maturity, said deeds to be returned to Benn Brewer. January 4, 1887. Benn Brewer & John A. Witter to John McCain." This was not signed by either party. Brewer claims that it correctly expressed their agreement. On the contrary McCain (who was very deaf) says that it does not, and that time was not made the essence of the contract, but that Brewer told him that the documents were left at the bank for safe-keeping. Upon the conflicting testimony, the court apparently believed McCain. Unquestionably, time may be made the essence of a contract, but, even if the agreement was as written by Cooper, still we think time was not intended to be made the essence of this contract; for, by the so-called "Special Articles of Partnership" signed by the parties to this suit, the notes were to be paid from McCain's share of the profits of the business. The partner-

ship was to continue until dissolved by mutual consent. When the notes matured there might not be profits sufficient to pay them, and this recognition of such a contingency is inconsistent with the position that if the notes were not paid when due the contract was at an end, and plaintiff's rights became forfeited. But if the writing indorsed by Cooper correctly evidenced the agreement of the parties, and if thereby time was made the essence of the contract, the defendant is not in a position to assert this claim. By the terms of special partnership, which must be taken in connection with this indorsement, the defendant became the financial manager of the firm, kept or superintended its books, and should have ascertained the profits, if any, in December of each year. This he did not do. When the first note became due the defendant neither asked the plaintiff for its payment, nor claimed that the failure to pay was a violation of the contract. Neither did he make any such claim when the other notes matured. It was not until after differences arose between the parties that any such contention was made. Then it was that the defendant withdrew from the bank these papers, and retained the deeds, while at the same time he had under his control all the assets of the firm, and refused to make an accounting to determine what amount the plaintiff should pay. He therefore has waived the claim that time was the essence of the contract, and that plaintiff's failure strictly to comply therewith forfeits his rights to this conveyance.

6. Another contention is that the court erred in admitting oral testimony to prove an agreement for the sale and conveyance of the Hallack lands, and that such evidence, if admissible, is insufficient to support the findings and the decree of the court that the plaintiff was entitled to any interest in such property. We are at a loss to conceive how the defendant was prejudiced by the admission of any oral testimony admitted in this case to establish any such agreement, even if such evidence was offered, because the execution of the deeds by the grantor, the making of the notes evidencing the purchase price to be paid by the grantee, and the delivery of these papers in escrow, together with the reference to this transaction found in the articles of special partnership, are writings sufficient to establish this agreement, without reliance upon any oral testimony. The court found that the plaintiff's profits from the business should be applied to the payment of the escrow notes. It also found that the defendant was entitled to a deed of conveyance for an undivided one-half interest in these two Hallack tracts when the escrow notes were paid. There is no specific reason given for these findings. Whether it was because of the proof of the written agreement for the conveyance, entirely disconnected and irrespective of the question as to whether or not

such agreement was a part of the general agreement for the partnership, or whether this finding was because the plaintiff was entitled to the property as a portion of his assets of the partnership, is immaterial. A fair deduction from all the evidence is that this finding can be sustained upon either or both of these hypotheses, and we think the finding and decree of the court in respect thereto were right.

We are aware that the foregoing discussion does not, in detail, dispose of every assignment of error, but we think it covers the substantial grounds of the controverted questions in the case. It would be quite remarkable if some slight errors were not found in a record so voluminous as this, in a case so ably and strenuously contested from the inception to the close. We have read with great care the entire record,—not only the abstract and the supplemental abstract, but the original record, including the bill of exceptions,—in every case where additional light could be thrown upon the disputed propositions. Possibly some rulings by the court, when subjected to close analysis, are questionable; but our examination satisfies us that the rulings upon the questions of pleading are right, and that abundant evidence, competent and admissible under sound rules of evidence, was produced to support the findings and decree, and, what is of greater importance, that justice was done, as between the parties to the action, and that the decree of the court was right. The judgment should therefore be affirmed. Affirmed.

DENVER CITY RY. CO. v. CITY OF DENVER.¹

(Supreme Court of Colorado. July 1, 1895.)

MUNICIPAL CORPORATIONS—TAXATION—LICENSE—ENFORCEMENT BY PENALTY.

1. Const. art. 10, § 3, providing that "all taxes shall be uniform," and that they shall be levied and collected under "such regulations as shall secure a just valuation for taxation of all property real and personal," does not prohibit a city whose charter confers on it the right to tax street cars, by license, for police purposes, from taxing the cars, by license, for purposes of municipal revenue. 30 Pac. 1048, reversed.

2. Under Denver City Charter, art. 2, § 21, conferring upon the city council power to make all ordinances necessary for carrying into execution the powers conferred on it, an ordinance levying a valid tax, by way of license, on street cars, may be enforced by exacting a penalty for failure to pay the license.

Error to court of appeals.

Action by the Denver City Railway Company against the city of Denver and its officers to restrain the latter from prosecuting actions instituted by them against plaintiff to recover penalties provided by ordinance for the operation of street cars without a li-

¹ Rehearing denied September 30, 1895.

cense. To a judgment dissolving a temporary injunction dismissing the action, both parties prosecuted writs of error from the court of appeals. 2 Colo. App. 34, 30 Pac. 1048. From the decision therein both parties again bring error. Affirmed.

Wolcott & Valle and H. F. May, for plaintiff. F. A. Williams, G. W. Whitford, and A. B. Seaman, for defendant.

GODDARD, J. On the 3d day of October, 1889, the Denver City Railway Company instituted this action to restrain the city of Denver and its officers from prosecuting cases against it and its employes for operating its horse cars in violation of a certain ordinance of the city, adopted in 1886 and amended in 1888, which provides, *inter alia*, as follows:

"Section 1. It shall be unlawful for any person or persons to hire out, keep or use for hire, or cause to be kept or used for hire, for the carrying or conveying of persons, or run on established lines within the city limits of the city of Denver, any hackney coach, cab, omnibus, express wagon, herdic coach, street car, vehicle or vehicles, carriage or carriages of any description or name whatsoever, without a license first had and obtained so to do."

"Sec. 14. There shall be charged and paid to the city treasurer for the use of the city of Denver, on issuing the said licenses, by the parties to whom they may be granted, the following sums: * * * Second. For all omnibuses and accommodation coaches, herdic coaches and street cars running upon established lines and at stated periods, from place to place within the city, shall be charged for license, each, the sum of ten dollars per annum."

By section 14, as amended in 1888, the license fee for each car was increased from \$10 to \$25 per annum. The company averred its willingness to pay a fee of \$10, as it had theretofore done, but refused to pay the sum of \$25, on the ground that the latter is unreasonable, and in excess of the amount necessary to pay the expenses of police regulation, and is in fact a tax upon its property, and hence unlawful and void. The evidence introduced upon the trial of the cause is not preserved by a bill of exceptions, but the court below made the following findings: "(1) That the license for police regulation does not, under the testimony offered, justify a greater license than \$17.50 per car, as heretofore found, but that the wording of the city charter gives the city the right to tax, as well as to license, for police regulation, and that the charter of the plaintiff company, approved January 10, 1867, in no way exempts it from paying such tax. (2) That the city council having the power to assess said tax at the sum of \$25 per car, and having elected to do so, that the same is legal. (3) That the temporary injunction

heretofore issued in this cause should be dissolved, at the cost of the plaintiff." To the judgment dissolving the temporary injunction and dismissing the action the company and the city prosecuted writs of error from the court of appeals. That court, in an elaborate opinion, reported in 2 Colo. App. 34, 30 Pac. 1048, reversed the court below upon its finding that the city was empowered to tax, as well as to license for police regulation, but affirmed its judgment of dismissal upon the ground that the record was devoid of any showing that the sum of \$25 was an unreasonable charge for police regulation. Both parties, being dissatisfied with this judgment, bring the case here for review. The company insists that the finding of the court below that the testimony offered did not justify a charge of \$25 for police regulation is conclusive as to its right to maintain the action, under the doctrine announced by the court of appeals,—that the city is not authorized to assess a license tax. The city, on the contrary, contends that the court of appeals erred in holding that the ordinance could not be upheld as a legitimate exercise of its power to tax the business of running street-railway cars.

In the view we take of these respective contentions, it becomes unnecessary to discuss the validity of the ordinance as a police regulation, or to determine whether, upon the record, the finding of the court below is conclusive upon the fact that \$25 exceeds the necessary and legitimate expense of issuing the license and providing police supervision. And in this regard, if the court of appeals was correct in holding that the finding of the court below was not an authoritative finding of fact, based upon the evidence, but the result of personal observation only, and hence not conclusive upon this review, we fully concur in the conclusions reached by the learned writer of that opinion,—that "this court cannot interpose its opinion, and guess at a cost of administration, nor take the judgment of the court below, as against the judgment of the city council," and, without sufficient data or evidence, pronounce the ordinance unreasonable as a police regulation.

But upon the more important, and, as we regard it, the decisive, question in the case,—“whether the city, under its charter, has the power to tax, as well as to license and regulate, the business of the railway company,—we are unable to concur with either the reasoning or the conclusion of the court of appeals. That taxation is clearly a legislative prerogative, and may be conferred upon a municipality, by that branch of the government, in such measure and for such purpose as it may deem expedient, so long as it observes the limitations and restraints of the organic law, is not questioned or denied. Nor do we understand that the language of the charter of 1885, which, in express terms, confers upon the city of Denver power, “exclusively, to license, regulate and

tax any or all lawful occupations," etc., is held to be insufficient to authorize the city to impose the tax in question, if such grant of power is not inhibited by our state constitution. But it is asserted that the charter provision, in so far as it attempts to confer the power to tax, is in conflict with section 3, art. 10, which provides: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal." In this we think the court of appeals is in error. It seems to be almost universally accepted that this and like constitutional provisions refer to the levy of ad valorem taxes upon property, and do not apply to taxation imposed on privileges and occupations. Sedg. St. & Const. Law (2d Ed.) 504-507, referring to similar provisions contained in the constitutions of various states, says: "In construing these provisions it has been held, in many of the states, that the words 'equal and uniform' apply only to a direct tax on property, and that the clause in regard to uniformity of taxation does not limit the power of the legislature as to the objects of taxation, but is only intended to prevent an arbitrary taxation of property, according to kind or quality, without regard to value. Specific taxes have therefore been sustained, as a valid exercise of the legislative power." Burroughs, Tax'n, § 54, referring to the same subject, says, "These provisions, as a general rule, are held to apply to property alone, and not to include taxation on privileges or occupations." Among the numerous decisions to the same effect, see *City of Newton v. Atchison*, 31 Kan. 151, 1 Pac. 288; *Ex parte Robinson*, 12 Nev. 263; *Walcott v. People*, 17 Mich. 68; 1 *Desty, Tax'n*, p. 191, § 36; *City of San José v. San José & S. C. R. Co.*, 53 Cal. 475; *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888; *Sawyer v. City of Alton*, 3 Scam. 129; *Marmet v. State*, 45 Ohio St. 63, 12 N. E. 463; *Com. v. Moore*, 25 Grat. 951; *American Union Exp. Co. v. City of St. Joseph*, 66 Mo. 675; *City of St. Louis v. Green*, 7 Mo. App. 468; *Davis v. Mayor, etc.*, 64 Ga. 128. In the latter case the court had under consideration an ordinance enacted by the city of Macon providing that, among others, retail butchers should pay a license of \$50 per annum, and that further imposed a tax of \$25 upon each wagon used in their business. The contention there was that the ordinance was violative of the constitutional requirement that all taxes shall be uniform, and upon this point Justice Bleckley, speaking for the court, says: "It is insisted, further, that by the tax upon the wagon, the ad valorem principle of the constitution is violated. This objection proceeds upon the theory that the wagon is mere property, and subject only to state and county taxes, * * * which taxes have been

duly assessed and paid. The complainants contend that having paid all taxes on the value of the wagon, as property, with which they are chargeable, they cannot be required to pay an additional specific tax to the city upon the same property. But, as already stated, the tax now in question is not a property tax, but a business tax. The wagon is treated as an instrument used in carrying on the business of the complainants within the city; and it has been ruled, and, no doubt, rightly ruled, that the number and kind of vehicles may be regarded, in measuring a tax of this description. That the complainants are in no default to the state and county in respect to taxes upon the value of the wagon, as property, is no protection to them against the business tax now demanded." We quote thus fully because of the similarity of that case in principle with the one at bar, and because the language of the learned justice is pertinent to the contention of counsel for the company in this case. In the case of *City of St. Louis v. Green*, supra, the court had under consideration the validity of an ordinance imposing a tax upon wagons used in the streets of St. Louis for purposes of traffic and for private purposes. The validity of the ordinance was attacked upon the ground that it was in derogation of a like provision of the constitution of Missouri; and, in an elaborate argument upholding the validity of the ordinance, Judge Bakewell, who delivered the opinion of the court, used this language: "The constitutional provision that all property subject to taxation in the state shall be taxed according to its value is undoubtedly binding upon the legislative body when it exercises the taxing power; but this provision is not violated when, as in the case at bar, the tax is not a tax precisely upon the object itself, but rather upon the exercise of the civil right of using that object. * * * And though imposed for revenue, and not for police purposes at all, it is a tax of the nature of a license, because it is a permission to do that which, after the passage of the ordinance, it became unlawful to do without having obtained the permission." The pertinency of this decision to the question we have under consideration is found in the fact that the tax therein upheld was imposed upon vehicles subject also to taxation as property, and in the further fact that the grant of power in the charter of the city of St. Louis was identical with that in the charter of the city of Denver, to wit, "to license, regulate and tax," etc. This case, on appeal to the supreme court, was affirmed in all particulars, except the holding of the court of appeals to the effect that the ordinance was invalid in so far as it authorized the conviction for a misdemeanor, and punishment by fine. The case of *Palmer v. Way*, 6 Colo. 106, is relied on by the learned writer of the opinion of the court of appeals as announcing a different doctrine; and the case

of *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901, accepting the doctrine therein laid down as *stare decisis*, is cited therewith in support of the conclusion reached in that opinion. But since its rendition those cases have been expressly overruled by this court in the case of *City of Denver v. Knowles*, 17 Colo. 204, 30 Pac. 1041, as being "against the strong current of authority." And the rule announced in the latter case, in so far as it has any application to the question before us, is in conformity with the views herein expressed. It is clear from the foregoing that the imposition of a tax upon occupations is not governed by the rule of uniformity prescribed in article 10, § 3, of the state constitution, and neither expressly nor by implication is the legislature inhibited thereby from conferring upon the city the power to exact such a tax. And our conclusion is that the legislature having, in express terms, conferred upon the city the power to tax, as well as to license and regulate, the enactment of the ordinance under consideration was a legitimate exercise of that power, and the charge for license therein provided may be enforced as a valid tax.

It is further contended by counsel for plaintiff in error that, if the tax be valid, the ordinance cannot be enforced in the manner provided; that it must be collected as other taxes, and not by enforcing a penalty for failure to pay for the license. We cannot give our assent to this proposition. Section 21, art. 2, of the city charter provides, "The city council shall have power to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in this act, * * * and to enforce the same by appropriate fines, imprisonment or other penalties." In *City of St. Louis v. Sternberg*, 60 Mo. 289, Norton, J., speaking to this point, said, "Such ordinances have been uniformly upheld, when brought to the attention of this court." In support of the power of municipal corporations to recover fines and penalties against persons not complying with similar ordinances, he cites *Cincinnati v. Buckingham*, 10 Ohio, 257; *Shelton v. Mayor*, 30 Ala. 540; *In re Vandine*, 6 Pick. 187; *Chilvers v. People*, 11 Mich. 43,—and adds: "This is not a proceeding on the part of the city to collect the amount of license required by the ordinance, but it is instituted to recover a fine for breach of it committed by defendant, in practicing law without such license; and, although he may be subjected to the payment of the fine, he would not thereby be entitled to the license."

We are therefore of the opinion that the trial court was correct in holding that the city had the right to exact the sum claimed as a license tax, under the terms of its charter, and upon this ground its judgment should be sustained; and the judgment of the court of appeals, affirming the dismissal of the action, is affirmed.

GANN v. CRIBBS et al.

(Court of Appeals of Colorado. Sept. 9, 1895.)

COUNTIES—LIABILITY TO GARNISHMENT.

A county is not subject to garnishment. *Stermer v. Board of Com'rs* (Colo. App.) 38 Pac. 839, followed.

Appeal from district court, Mineral county.

Action by G. L. L. Gann against T. J. Cribbs and the board of county commissioners of Mineral county, garnishee. From a judgment quashing the writ of garnishment and discharging the garnishee, plaintiff appeals. Affirmed.

G. C. Wells and Dixon & Dixon, for appellant. Albert L. Moses, for appellees.

BISSELL, J. This action is based on a promissory note executed by Cribbs to the order of P. T. McGwire, who indorsed it for a valuable consideration, before the beginning of the suit, to Gann, the present plaintiff. The suit was begun early in 1894, and an attachment sued out in its aid. Under the statute process of garnishment was served on the board of county commissioners, who afterwards moved to quash the writ. On the hearing the writ was quashed, the county discharged, and from the order made in the premises the attaching creditor prosecutes this appeal. The case has been quite elaborately argued by counsel, and numerous cases cited in support of his position that in this state a county is subject to garnishment. The whole question has recently received very much attention in this court, and was exhaustively examined by Judge Thomson, who prepared both the original opinion and that rendered on the petition for rehearing in *Stermer v. Board of Com'rs*, 38 Pac. 839. In that case the court had the benefit of the briefs presented on that appeal and those prepared in the present suit. Under these circumstances it is scarcely necessary to review the authorities, and the case may be affirmed by a reference to that opinion. The judgment will accordingly be affirmed. Affirmed.

WEST v. HANSON PRODUCE CO.

(Court of Appeals of Colorado. Sept. 9, 1895.)

FRAUDULENT CONVEYANCES—TRUST DEED—PREFERENCES—GARNISHMENT.

1. The preference given in a trust deed by an insolvent corporation to a bona fide creditor is valid.

2. The fact that, by a preference given by a corporation, its officers are relieved of their individual liability on the preferred debt, does not render the preference invalid.

3. One who, as trustee, holds property of an insolvent to pay a preferred debt, cannot be held as garnishee in a suit against the insolvent by another creditor, if the trust property is not more than enough to pay the preferred debt.

Appeal from district court, La Plata county.

Action, by attachment, by the Hanson Produce Company against the Durango Meat &

Produce Company (George E. West, assignee in insolvency of defendant, garnishee). From a judgment against defendant and garnishee, the garnishee appeals. Reversed.

The Hanson Produce Company brought suit by attachment against the Durango Meat & Produce Company. Judgment by default was taken. In the attachment proceedings, appellant was garnished, and answered each interrogatory in the negative. The answer was traversed by the plaintiff, and trial had to the court, without a jury, on the following agreed statement of facts: "First. That the Durango Meat & Produce Company, on and prior to the 5th day of July, 1893, was a corporation existing under the laws of the state of Colorado; and the same as to the plaintiff, the Hanson Produce Company. That on and prior to the 5th day of July, 1893, the Durango Meat & Produce Company was carrying on a business in the town of Durango, and that on the 5th day of July it was in an insolvent condition. That prior to July 5, 1893, Frank Wingate, Robert A. Ambold, and Lisle Wainwright were directors, or trustees, rather, of the said corporation, and that Lisle Wainwright was president, Frank Wingate was secretary, and Robert A. Ambold was general manager of the business. That, prior to July 5th, Frank Wingate, Lisle Wainwright, and Robert A. Ambold had signed and given to the First National Bank of Durango two promissory notes, amounting to \$5,500. That the money was borrowed by the company, and these parties became security for it, but the bank would not take the company's paper, and these three parties named gave their notes, direct to the bank, for the payment of the said money. When these notes became due, in the bank, the Durango Meat & Produce Company was unable to pay them, and they turned what stock of goods they had on hand, fixtures, tools used in their business, and book accounts, over to John Harper, Lisle Wainwright, and Robert A. Ambold, as security to pay the amount due on those two notes in the bank. These three parties, in a day or two afterwards, by and with the consent of all parties, except the plaintiff in this action, turned the same over to George West, the garnishee in this action, under contract and understanding that he was to proceed to sell the goods, and pay the money in, direct, to the bank, and have it credited on these notes, and he did sell the goods, and turn the money in, and had it credited on the notes; and George West had possession of the goods and accounts at and before the garnishment in this action was served upon him, and afterwards continued to sell as theretofore, and apply the proceeds on the notes. That the value of the property and accounts was sufficient to pay the amount of plaintiff's judgment and costs in this action, but would not be sufficient to pay the said two notes given to the bank. That John Harper, mentioned herein, acted as agent of

Frank Wingate. At the time the transfer was made, Messrs. Wainwright, Wingate, Ambold, and West all knew that the company was insolvent. At the time of this transfer, and previous thereto, and from thence hitherto, the Durango Meat & Produce Company was indebted to the Hanson Produce Company in the sum of \$376.90. That the Hanson Produce Company has recovered judgment in this case against the Durango Meat & Produce Company for the sum of \$376.90 and costs. That this transfer included all the personal property, of every kind and description, owned by the Durango Meat & Produce Company. That at the time that that company made this transfer to Harper, Wainwright, and Ambold, it was carrying on business in the city of Durango, La Plata county, Colorado." Upon which the court made the following finding, and caused judgment to be entered: "And it being shown to the court that the Hanson Produce Company is plaintiff in attachment against the Durango Meat & Produce Company, and that the said George E. West was garnished to secure the claim of the said the Hanson Produce Company against the said the Durango Meat & Produce Company, and that judgment was heretofore rendered in favor of the said the Hanson Produce Company against the said the Durango Meat & Produce Company for the sum of \$376.90 and costs, amounting to \$7.77½, and the court further finding the facts to be as stated in said stipulation, it is hereupon ordered, adjudged, and decreed that the said transfer of personal property by the said the Durango Meat & Produce Company to the said George E. West be held fraudulent and void as to the said the Hanson Produce Company, and the said the Durango Meat & Produce Company, for the use of the said the Hanson Produce Company, do have and recover of the said George E. West, garnishee, the sum of \$376.90 and the costs of said garnishment proceedings, to be taxed at \$7.77½, and hereof let execution issue. To which finding and order and judgment of the court the said garnishee then and there excepts, and prays an appeal to the court of appeals of the state of Colorado, which appeal is granted by the court, and appeal bond fixed in the sum of \$650, to be given within thirty days, and to be approved by the clerk of this court, and sixty days given for presentation of bill of exceptions, they having been first presented to counsel for plaintiff." From which an appeal was prosecuted to this court

Russell & Ritter, for appellant. Miller & Reese, for appellee.

REED, P. J. (after stating the facts). The facts being conceded and fully stated, the questions presented are purely legal. The errors assigned, and, under the circumstances, all that could be assigned, although six in

number, may be consolidated into one,—that the court erred in applying the law to the facts, and in consequence the judgment was erroneous. It having been conceded and agreed that the two promissory notes executed by the officers of the meat and produce company (Wingate, Ambold, and Walnwright) were given for a corporate debt, and that the money was borrowed by the corporation, and that the individuals named "became security for it," the case is very much simplified. The only questions to be determined are (1) whether, under the facts, as stated, the company could legally turn over the entire assets in payment of the bank debt, to the exclusion of other creditors; (2) the relation appellant, West, bore to the respective parties. For upon the determination of the latter question depends the correctness of his answer as garnishee.

1. Counsel for appellee ably contends that the assets of a corporation are a trust fund in the hands of the corporation for the payment of its debts, when the corporation is insolvent, and many authorities are cited in support of it. There is no question in regard to the correctness of the legal proposition. The only question is what it means. Although aggregate, and made up of many individuals, it materially simplifies its legal status by regarding it, for all business purposes, as a person, subject to the same laws and disabilities. While the officers, as trustees, manage its affairs, supposedly, for the benefit of its stockholders, if solvent, the interest of stockholders is the surplus remaining after payment of the corporate debts. What is meant by the principle, although enunciated in many different shapes, is that primarily the assets are to be devoted to the payment of its debts, and until such debts are paid neither the assets nor funds of a corporation can be distributed in dividends or otherwise, for the benefit of stockholders. In other words, the property of shareholders is the balance remaining after the debts are paid. It is the same with an individual in business. His property is primarily liable for the payment of his debts. And with the corporation, as with the person, the law will not permit the property to be diverted and dissipated while the debts are unpaid. It is conceded that the corporation was insolvent at the time of the transfer of its assets to appellant. Although such was the fact, it was continuing in business, administering its own affairs, in the possession of its property. The property was not "in custodia legis." Such being the fact, its right to dispose of the property, or transfer it to a bona fide creditor in payment of its debts, has been clearly established in this state, by the decisions of both the supreme court and this court, so frequently that a citation of the cases is unnecessary; and the same has been declared to be the law in all states where, as in this, there is no statute restricting the right. It is legally a matter of no importance whether it is the disposition of a part or all of the assets; whether for the ben-

efit of all, pro rata, or discriminating against all save the creditor favored and preferred. The debt being honest, and the transfer being made in good faith, for payment, without collusion, and with no secret trust for the benefit of the grantors, the transaction is valid. It is stipulated that the entire property transferred to appellant was insufficient to pay the bank. Consequently, the question of a resulting trust for the benefit of the grantors is not involved.

After having stipulated "that the money was borrowed by the company, and these parties became security for it," counsel for appellee, in argument, fall into error by regarding the debt as that of the indorsers or sureties. They say, "But we fail to find in appellant's brief authorities sustaining preferences made by directors of an insolvent corporation in favor of themselves." Again, "Any attempt on the part of the directors of an insolvent corporation to prefer themselves is a fraud upon the creditors." This mistaken theory of the case is ably argued at length, and authorities are cited, supposed to favor the contention, but the question is not involved. The fact is that they were sureties for the payment of the debt, and made the note; and although the payment of the note would relieve them of their liability, and may have prompted them to prefer the bank, the debt remained the debt of the corporation, and did not become that of the individual officers. The great weight of modern authority is to the effect that, as individuals, the officers of a corporation can loan it money, or legally, in any other proper way, become its creditors, and deal with it in the same manner as with an outsider. If such is the law,—and it seems to be, where there is no statutory prohibition,—it logically follows that the right to become a creditor carries with it all the rights of a creditor, and authorizes the corporation to prefer the officer, if it sees fit.

2. The assets of the debtor being personal property, to be converted into money to pay the bank debt, appellant was selected, as trustee, to take the property and the title to it, convert it into money, and pay the proceeds to the bank. It was a trust for a specific purpose. The only duty he owed the assignor was to realize all he could by the sale, and pay it to the bank. The duty he owed the bank was to account for and pay the money by him received. And it being conceded that the property was insufficient to discharge the debt,—consequently, that there would be no surplus or balance to be returned to the assignor,—he was fully justified, and legally right, in his answers to the interrogatories in the process of garnishment. It is well settled law that unless the debtor has funds in the hands of the garnishee, or some demand he could enforce against him, the creditor cannot succeed by a process of garnishment. The creditor can only be subrogated to the rights of the debtor, and if he has nothing the creditor takes nothing. In this case it will readily be seen that the

debtor had nothing in the hands of appellant. It is evident that the court misconceived the law controlling the case, and held the assignment void. Otherwise there could have been no judgment. The judgment must be reversed, and cause remanded. Reversed.

McCLAIR et al. v. HUDDART.

(Court of Appeals of Colorado. Sept. 9, 1895.)
ACTION TO FORECLOSE LIEN—NECESSARY PARTIES
—JUDGMENT—REVERSAL IN PART.

1. In an action to foreclose a mechanic's lien the beneficiary under a trust deed of the property is a necessary party.

2. A judgment rightfully adjudicating certain matters involved in the action will not be reversed in toto on appeal for error as to one matter, where the error can be remedied by amendment of the decree, or by subsequent proceedings in the case.

Error to district court, Arapahoe county.

Action by John J. Huddart against Samuel McClair and others to foreclose a lien for services as architect. Judgment for plaintiff. Defendants bring error. Reversed.

Brinton Gregory, for plaintiffs in error.
Collier & Stevick, for defendant in error.

BISSELL, J. Samuel McClair was the owner of six lots in block 19, Arlington Heights addition to Denver, in Arapahoe county. He entered into a contract with Huddart & Jacobson to prepare plans and specifications for some buildings to be erected on the lots. The employment contemplated not only the preparation of the plans, but also the general supervision of the construction of the buildings, and the performance of those duties which generally devolve on architects under such circumstances. Jacobson died, and Huddart rendered the balance of the services, and claimed to have earned the fee which McClair agreed to pay for the work. Part of the sum was paid, and Huddart sued for a balance of \$385. Some dispute arose between the parties concerning the engagement, and the amount of compensation to be paid, and Huddart filed a lien under the statute, and brought the present suit to foreclose it. The action was brought against the owner and divers other parties who were named as defendants, and who were alleged to claim some lien on the property. One of the defendants was Roswell W. Holmes, named as trustee. The rights and interests of McClair and the other parties need neither be stated nor considered. We are not advised by the record as to the terms of the trust laid on Holmes otherwise than as appears from a motion to set aside the judgment and decree filed by the North America Loan & Trust Company, which claimed to be the owner of the note secured by the deed which McClair made to Holmes. This note was for \$31,225, payable five years from date, and given on the 1st of February, 1892. Holmes denied all the allegations of the complaint, and the statement as to the inferiority

of the lien which he represented. All these denials were statutory as to want of sufficient knowledge or information on which to base a belief. Holmes did not set up by way of cross complaint or by way of defense the existence of his trust deed, or the nonpayment of the note, or its existence as an outstanding obligation in the hands of the trust company or the original payee, Campbell. When the case was tried it was tried solely on the issues tendered by the owner as to the terms of the contract, and the amount which was due under it. As to the last item the contest respected both the value of the services and the character of the performance. The case was tried to the court, who found with the plaintiff, and entered a decree for its foreclosure. The lien was adjudged to have priority over any interest of the other parties and over the deed of trust and incumbrance. There was no finding in respect to Campbell, who was named as the original payee of the note, but who would seem not to have been served or to have been brought in. The form of the decree was erroneous. The error, however, only relates to so much of it as adjudges the mechanic's lien to be prior to the lien of the trust deed. It will be observed from the statement that the cestui que trust, who was the holder of the note, was not made a party, nor were his rights in any wise adjudicated, except as they may be taken to be affected by the decree against the trustee. It is pretty clearly settled by the authorities that in cases of this sort the cestui que trust is an indispensable party, where the plaintiff seeks a decree establishing the priority of his right as against the title represented by the trust deed. 2 Jones, Liens, § 1580; Phil. Liens, § 394; Clark v. Manning, 95 Ill. 580; Gaytes v. Bank, 85 Ill. 256; Scanlan v. Cobb, Id. 296; McGraw v. Bayard, 96 Ill. 146; Roman v. Thorn, 83 Ala. 443, 3 South. 759; Bennitt v. Mining Co., 119 Ill. 9, 7 N. E. 498; Paddock v. Stout, 121 Ill. 571, 13 N. E. 182. Since the original payee was not a party, and the transferee was not brought in, there could be no foreclosure of the mechanic's lien as against the trust deed, and no adjudication that the lien was prior in time and in right to that security. There is nothing in the record which will enable us to determine as a matter of fact what the rights and equities of these parties may be. It is quite possible, if Campbell or the trust company or both had been brought into the suit, and the question of priority had been presented and litigated, a decree could have been entered establishing the priority of the plaintiff's claim. In the absence of those parties no such adjudication was possible. This difficulty, however, does not compel the reversal of the decree as an entirety. As between the owner and the plaintiff and all the other parties in interest, the legality and justness of the plaintiff's claim has been adjudicated, and its amount determined, and those defendants cannot relitigate these matters. It is not always necessary to

set aside the entire judgment and give parties another opportunity to retry a question which has been fairly investigated and fairly determined. We conclude that, as between the plaintiff and the owner and all parties in interest save the cestui que trust, the matter of the terms of the contract and its performance and the sum due have been entirely and correctly settled by the trial court. Under such circumstances those parties should not be permitted to relitigate these questions. Of course the decree cannot be taken to conclude the present holders of the note. It stands, however, as a cloud upon the title, and those parties should have their day in court. The judgment must therefore be reversed as to so much of it as adjudges the mechanic's lien to be prior in right and time to the lien of the trust deed, and valid as against the holders of the note. To this extent, therefore, the judgment will be reversed, and remanded to the court below, with directions either to modify the decree, or, if the parties are so advised, the plaintiff should be permitted to amend his complaint, and make the holders of the note parties to the suit. They will then be permitted to file such answer and cross bill for the maintenance and protection of their rights as they may be advised. To this extent the judgment below will be set aside, and opened for further proceedings in conformity with these conclusions. If the plaintiff should conclude not to take this course, the decree will simply be amended by the court below, and the judgment establishing the priority of the lien over the trust deed eliminated from the entry. This proceeding seems to be in accord with the general rule which prevails in such cases. Elliott, App. Proc. § 580. This course has been recently pursued by the supreme court under somewhat analogous circumstances, though no opinion was delivered on the subject. It accords, however, with what ought to be the law. Where a record involves several matters, and a part has been rightfully adjudicated, the reversal should only extend to what will include the error committed, if it be remediable either by amendment of the decree or by subsequent proceedings in the case. The course suggested will protect the rights of all the parties, and leave the unaffected portion of the judgment to stand. The judgment of the court below will therefore be reversed, and the case sent back for further proceedings in conformity with this opinion. Reversed.

KELLY v. CANON.

(Court of Appeals of Colorado. Sept. 9, 1895.)

NOTE OF MARRIED MAN—EXPENSES OF FAMILY—LIABILITY OF WIFE—EFFECT OF STATUTE.

1. Sess. Laws 1891, p. 238, making the expenses of the family chargeable on both husband and wife, is not retroactive, and does not affect liability for such expenses contracted before its enactment.

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2. Though husband and wife are made liable by Sess. Laws 1891, p. 238, for expenses of the family, the acceptance of the husband's note therefor merges the original cause of action, and the wife is not liable on the note.

Error to Mesa county court.

Action by Benton Canon against W. S. Kelly and Jennie Kelly, his wife. Judgment for plaintiff. Defendant Jennie Kelly brings error. Reversed.

Frank De Lamar, for plaintiff in error. Bucklin, Staley & Safely, for defendant in error.

REED, P. J. Benton Canon, as plaintiff, on the 27th day of April, 1893, brought suit against W. S. and Jennie Kelly to collect the amount of two promissory notes made by W. S. Kelly alone,—one bearing date February 23, 1889, for \$318.05, with interest at 1½ per cent. per month, and 10 per cent. attorney's fees, upon which, the 15th day of May, 1889, a payment was made of \$33.50; the second note, for \$33.48, bearing date February 1, 1890, interest and attorney's fees same as in the former. Both notes were long overdue. In regard to each note the following allegation is made in the complaint: "That the indebtedness for which said note was made and delivered was for the expenses of the family of said defendants, who were then, and now are, husband and wife." Service was had upon the defendants, who did not appear and defend. A default was taken against both, and judgment entered against both for the sum of \$625, which included interest at 1½ per cent. per month, and attorney's fees. Jennie Kelly brings the case here for review by writ of error.

The judgment against plaintiff in error must be reversed. She was not a party to the notes upon which the suit was brought, and the allegation in the complaint that the notes were given for goods for the family states no legal liability. The statute making the expenses of the family and education of children chargeable to both husband and wife, or either of them, did not become a law until the summer of 1891. See Sess. Laws 1891, p. 238. At the time the indebtedness was contracted, and of the making of the notes, there was no such statute. No retroactive effect can be given to the statute, to cover contracts made before its passage, hence the allegation in the complaint was of no importance.

Had there been such a statute, the original causes of action were merged in the individual notes of W. S. Kelly, upon which the action was brought, and upon which judgment for 1½ per cent. and attorney's fees was given. The wife, under the statute, could only be held for the original consideration on proof that the goods were furnished for the family. Reversed.

COLORADO FUEL & IRON CO. v. LENHART et al.

(Court of Appeals of Colorado. Sept. 9, 1895.)

CORPORATIONS—DIRECTORS' LIABILITY—FAILURE TO FILE STATEMENTS—ESTOPPEL—LIMITATIONS.

1. A corporate creditor cannot, to avoid the running of limitations against his claim, waive a default by the directors to file the statement required by Gen. St. § 252, and avail himself of a similar default in the following year.

2. In the absence of facts showing that the creditor has been led to take steps altering his legal rights in consequence of the filing of an insufficient statement as in compliance with Gen. St. § 252, requiring an annual statement of the condition of a corporation, the directors, in an action against them to enforce the penalty therein provided for, are not estopped to question the validity of such statement.

3. Gen. St. § 252, requiring that a corporation shall annually file a report of its condition with the recorder of deeds of the county where its business is carried on, and providing that if it fails to do so all its directors shall be liable for the debts contracted by it during the year preceding, and subsequently, unless its capital stock has been fully paid in, is penal in its nature, and is therefore to be strictly construed.

Error to district court, Arapahoe county.

Action by the Colorado Fuel & Iron Company against Michael Lenhart and others, as directors of the Trinidad Rolling-Mills & Iron Company, a corporation, to recover an indebtedness owing to it by the corporation. From a judgment for defendants, plaintiff appeals. Affirmed.

D. C. Beaman, for plaintiff in error. R. D. Thompson and Ben B. Lindsey, for defendants in error.

THOMSON, J. On the 21st day of June, 1889, the Trinidad Rolling-Mills & Iron Company became indebted to the Colorado Fuel & Iron Company, for coal sold and delivered, in the sum of \$623.75. The latter company brought this suit to recover the amount against the defendants in error, alleging that they were directors of the rolling-mills company from the 20th day of May, 1889, to the 1st day of May, 1890; that the capital stock of the company had not been fully paid in, and that it did not within 60 days from the 1st day of January, 1890, or at any time since the 20th day of May, 1889, make, and file in the office of the recorder of the county where the business of the company was carried on, any report, as required by section 252 of the General Statutes of Colorado; and that by reason of its failure in that respect the defendants became liable jointly and severally to the plaintiff for the amount of the indebtedness to it of the rolling-mills company. The complaint was filed August 7, 1890. The defendants answered, averring that they were directors of the rolling-mills company from the 1st day of April, 1888, to the 1st day of May, 1890; that the company filed no report within 60 days from the 1st day of January, 1889, as required by section 252; and that this ac-

tion was not brought within one year after June 21, 1889. The replication denied that the defendants were directors prior to May 20, 1889, and denied that the required report was not filed within 60 days from January 1, 1889. The evidence was that the defendants were directors from April 10, 1888, to May 1, 1890. The plaintiff offered in evidence the following paper, filed on the 23d day of February, 1889, as being the report of the company for that year, which, upon objection by the defendants, the court excluded:

"Annual statement of the Trinidad Rolling-Mills and Iron Company, January 1, 1889:

Amount paid in on stock.....	\$64,841 00
Donations	5,000 00
Indebtedness	\$14,465 10
	1,500 00
	250 00
	333 33
	16,548 43
	\$36,389 43

"I hereby certify the above statement to be correct, to the best of my knowledge and belief. M. Lenhart, President. [Corporate Seal.] Attest: E. J. Adams, Secretary."

The following is section 252 of the General Statutes: "Every such corporation shall annually, within sixty days from the first day of January, make a report, which shall state the amount of its capital and the proportion actually paid in, and the amount of existing debts; which report shall be signed by the president, and shall be verified by the oath of the president or secretary of said company, under its corporate seal, and filed in the office of the recorder of deeds of the county where the business of the company shall be carried on. And if any such corporation shall fail so to do, unless the capital stock of such corporation has been fully paid in and a certificate made and filed as provided in section twelve (12) of this act, all the directors or trustees of the company shall be jointly and severally liable for all the debts of the company that shall be contracted during the year next preceding the time when such report should by this section have been made and filed, and until such report shall be made." This section is mandatory. A corporation must file its reports, executed and verified as required, and the liability of the directors for the company's debts is in the nature of a penalty for a neglect to comply with the law. The liability covers all debts contracted by the company during the year preceding the time when the report should be made, and all debts contracted afterwards, until the making of the proper report. Suit for the recovery of a penalty must be commenced within one year after the cause of action accrues. Section 2170, Gen. St.; *Larsen v. James*, 1 Colo. App. 313, 29 Pac. 183. If the report due within 60 days from January 1, 1889, was not made when this debt was contracted, the liability of the directors attached at the instant it was contracted, and the statute

then commenced to run. The document which was filed as a report did not comply with the law. The lack of verification invalidated it, and it was not a report.

It is contended, however, that because of the failure of the directors in office during the first 60 days of 1890 to make the statutory report, a cause of action then arose against them for the debt, it having been contracted during the year preceding the time when that report should have been made, and that, therefore, this action, having been commenced within one year from that time, was not barred. If this reasoning is sound, the logical conclusion is that it is at the option of a creditor of a corporation to determine when the statute shall commence to run against the penalty recoverable from the directors. If plaintiff could waive the default in 1889, and avail itself of the default in 1890, as the commencement of the directors' liability, it might in like manner waive the latter default, and consider the liability as commencing with a failure to report the following year; and its waiver of defaults might continue indefinitely, as long as the corporation had an existence. This is not the law. The statute determines how and when the liability arises. Directors in default are liable, not only for corporate debts made during the preceding year, but for those made afterwards, during the continuance of the default. The ground of their liability for prior debts is the failure to comply with the law, and the ground of their liability for subsequent debts is the act of contracting them after neglect of the statutory duty. When the liability to the penalty is incurred, the creditor's cause of action for its recovery accrues, and the statute is set in motion, and does not stop until the action is commenced or barred. *Rector v. Vanderbilt*, 98 N. Y. 175; *Larsen v. James*, supra. In this case the liability was incurred, and the cause of action accrued, on June 21, 1889; and this action, not having been commenced until August, 1890, must fail, unless the circumstances require us to hold that the defendants are bound by the report of February 23, 1889, and cannot be heard to deny that it fulfilled the requirements of the law. If, as is contended by the plaintiff, they are estopped to question the validity of that report, judgment must go against them; for their only defense is the failure of the plaintiff to commence this action in time, and the action was commenced in time, if that was a good report. The effect of the argument is that, having made a report which binds them, as being sufficient, then, if the plaintiff so elected, there was no liability against them on account of the debt until their failure to report in 1890. Counsel does not set forth very clearly the grounds of the estoppel claimed. It is simply assert-

ed, as a legal proposition, that the defendants cannot take advantage of their own dereliction of official duty. But a general statement of this kind throws no light upon the question. If there is an estoppel here at all, it is an estoppel by conduct. But conduct alone does not create an estoppel. If no rights have been affected by the conduct, there is no one in whose behalf the doctrine of estoppel can be invoked. To create the estoppel, some other person must have changed his position on the faith of the conduct. The foundation upon which the doctrine rests is that it would be a fraud for one who, by his conduct, has induced others to accept something as a fact, to deny that such was the fact, after they had acted upon their belief. But there can be no estoppel in favor of one who has not been misled, or to whom the assertion of the truth would do no injury. There is not here the slightest pretense that by any act of the defendants the plaintiff was induced to believe that the rolling-mills company had filed the report required by the statute, or that its transaction with the latter company was in any degree influenced by belief or disbelief upon the subject. So far as appears, it was not spoken or thought of, or deemed of any importance, by either side; and if the plaintiff did not have actual, it had constructive, notice of what had in fact been done in that regard. The record discloses no reason why the defendant should not be permitted to say that what was attempted to be done was an utter failure of compliance with the law; that, therefore, the moment the indebtedness was contracted, they became individually liable for the amount; and that the statutory bar had interposed in their favor.

But there is another light in which the question may be considered. The statute which is invoked is penal in its character. The debt was owing by the rolling-mills company, and not by the defendants. Its amount was recoverable from them as a penalty, and not as an indebtedness. They are therefore entitled to a strict construction of the statute. There are no equities in the plaintiff's favor, as against them. It is entitled to what the letter of the law gives it, and no more. On account of the failure to make the required report, the defendants' liability attached, and was absolute, immediately upon the contraction of the debt. The records were open to the plaintiff's inspection, and, if it was without knowledge of what had been done, its ignorance is chargeable to its own negligence. To enable it to recover, it must bring itself strictly within the law, and for its failure to do so it alone is responsible. *Larsen v. James*, supra. We find nothing in the record to authorize a reversal of the judgment, and it will therefore be affirmed. Affirmed.

(6 Colo. A. 461)

McPHEE et al. v. GOMER.

(Court of Appeals of Colorado. Sept. 9, 1895.)

GARNISHMENT—PAYMENT OF JUDGMENT AGAINST GARNISHEE.

Under Civ. Code, § 118, declaring that garnishment is for the security of any judgment plaintiff may recover against defendant, and section 132, providing that the judgment against a garnishee shall acquit him from all demands by the defendant for anything paid by the garnishee by force of such judgment, the garnishee, notwithstanding payment under a judgment against him, is liable to defendant, jurisdiction of him not having been obtained, and judgment not having been rendered against him.

Appeal from Arapahoe county court.

Action by P. P. Gomer against Charles D. McPhee and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Thomas, Hartzell, Bryant & Lee, for appellants. J. W. Horner, for appellee.

REED, P. J. On the 11th day of November, 1887, appellants were indebted for lumber to M. C. Jackson in the sum of \$955. One Samuel J. Levy brought suit by attachment against Jackson before a justice of the peace, and garnished appellants, who answered they were not indebted. The answer was traversed, and it would seem that a trial was had, resulting in a judgment for the garnishees. An appeal was taken to the county court, and a trial had as to the liability of the garnishees; a finding against them, and judgment for the sum of \$192.40, which, together with the costs, amounted to \$215.95, was fully paid by appellants March 14, 1888. Jackson assigned his claim of \$955 against appellants to appellee, who, on May 9, 1888, brought suit for the same against the appellants, who upon the trial made proof of the judgment and the payment of the same as garnishees in the case of Levy v. Jackson. By the record of the last-named case it was shown that Jackson was never served with process, and that no judgment was obtained or entered against him. The court in the present case held, in effect, that, no judgment having been obtained against Jackson, no valid judgment could have been had against appellants as garnishees; that the payment of the judgment by them was voluntary; and refused to allow the sum as a set-off against the claim of appellee, and gave him judgment for the entire sum found to have been due from appellants to Jackson. The regularity of that judgment is unquestioned, except in so far as the court refused to allow the set-off. The only question presented upon this appeal is whether the judgment of the court in refusing the set-off was erroneous. The only authority cited by counsel for appellants in support of their contention is section 132, Civ. Code, which is, "The judgment against a garnishee shall acquit him from all demands by the defendant for all goods, effects, and credits paid, delivered or accounted for by

the garnishee by force of such judgment"; and it is regarded as conclusive. If we could so regard it, and thus summarily dispose of the case, it would save some labor. By section 118, Id., providing for the proceedings by garnishment, it is said that such proceeding is "for the security of any judgment the plaintiff may recover in such action against the defendant." It is a self-evident proposition that there can be no security without a principal, and no second judgment as security for the payment of a judgment that has no existence. Consequently, giving both sections of the Code full consideration, the second and only question is whether it was the duty of the garnishee to ascertain whether or not there was a judgment against the defendant before submitting to judgment and paying the money, and in this solution we are not aided by counsel for appellee, who contents himself with citing only the opinion of the court in support of itself when it is said "that, until a judgment was rendered against the defendant, none could be rendered against the garnishee, when the judgment against the garnishee and its satisfaction was of record in the same court." As there was no judgment against the defendant, the money could not have been paid over, and must have remained in the court. What garnishees required was a credit of the amount paid on the judgment obtained by appellee. The same court could not consistently say it had entered up and collected a void judgment, but, it having been void, the court would retain the money, and require garnishee to pay it the second time. Section 132 of the Civil Code, taken in connection with section 118, can only be construed as an acquittance to the garnishee when the judgment against him is valid. The proceeding by garnishment, though an independent suit, is auxiliary to the main suit, and the judgment hypothetical when taken in advance of a judgment in the main suit. It is dependent upon a judgment subsequently obtained; and, when the principal judgment has been obtained, the validity of the judgment against the garnishee depends upon the validity of the judgment against the defendant. In the language of section 118, Civ. Code, the judgment against the garnishee is only "security of any judgment the plaintiff may recover in such action against the defendant." "As the whole object of garnishment is to reach effects or credits in the garnishee's hands, so as to subject them to the payment of such judgment as the plaintiff may recover against the defendant, it results necessarily that there can be no judgment against the garnishee until judgment against the defendant shall have been recovered." Drake, *Attachm.* § 460; *Washburn v. Mining Co.*, 41 Vt. 50; *Withers v. Fuller*, 30 Gr. 547; *Railroad Co. v. Todd*, 11 Heisk. 549. "He [the garnishee] is held chargeable if the plaintiff should make out his main case. The decree, though literally

positive, and free from all contingency, is qualified by law so as to render it dependent upon the principal judgment." "The plaintiff's right of action, the effectiveness of the judgment, and the protection of the garnishee from subsequent attack after payment under judgment, depend upon the principal action; its rightful institution, rightful judgment thereon, and rightful execution of the judgment." Wap. Attachm. 344-347; Lovejoy v. Albee, 33 Me. 414; Greene v. Tripp, 11 R. I. 424; Pierce v. Carleton, 12 Ill. 358. See, also, Wap. Attachm. 382. "The judgment against the defendant must be a valid and valid one. If it be void, the judgment against the garnishee is also void." Drake, Attachm. §§ 450, 606; Railroad Co. v. Todd, supra; Woodfolk v. Whitworth, 5 Cold. 561; Melloy v. Burtis, 124 Pa. St. 161, 16 Atl. 747. "It is of the first importance, therefore, for the garnishee to see that the judgment against defendant was not only by a court with jurisdiction of the subject-matter, but that jurisdiction of the defendant, or of the property or credit, was obtained in the manner pointed out by the statute. Against a judgment sought against himself, which is based upon a void judgment against the defendant, he must defend to the last, and is ordinarily compelled to defend alone." Wade, Attachm. § 399; Laidlaw v. Morrow, 44 Mich. 547, 7 N. W. 191; Noble v. Oil Co., 79 Pa. St. 354. "When the garnishee pays a judgment against himself, which is based upon a judgment against defendant, rendered without jurisdiction, he is not protected by such payment against a subsequent action brought by the principal defendant or other creditor." Wade, Attachm. 399; Laidlaw v. Morrow, supra. When there is no judgment against the defendant, or a judgment that is void for want of jurisdiction, and the court erroneously render judgment against the garnishee, it will not be binding on the defendant, who was not a party to the proceedings. Wade, Attachm. § 399; Roy v. Baucus, 43 Barb. 310; Shaver v. Brainard, 29 Barb. 25.

After a careful review of the authorities, it seems clear that the law casts upon the garnishee the duty of knowing or ascertaining that there is a valid judgment against the defendants; not that he can intervene and defend in the principal suit, but so far as is necessary to protect himself in the auxiliary suit in which he is defendant. It follows that, without jurisdiction of the defendant and a judgment against him, the judgment against the garnishees was void, and that its payment would not protect them against the assignee of Jackson. A court that would enter such a judgment and collect and retain the money and compel a litigation in regard to it cannot be too severely criticised. The amount paid was not technically and legally a set-off against the claim of appellee, as the court correctly held, and the judgment must be affirmed. Affirmed.

MAJESTIC MANUF'G CO. v. PUEBLO
HARDWARE CO.

(Court of Appeals of Colorado, Sept. 9, 1895.)

REVIEW—SUFFICIENCY OF EVIDENCE.

A verdict dependent on the existence of a contract cannot be sustained, though a witness testifies that there was such a contract, where he also details all the conversation claimed to constitute the contract, and it does not justify his inference that there was a contract.

Appeal from district court, Pueblo county.

Action by the Majestic Manufacturing Company against the Pueblo Hardware Company. Judgment for defendant. Plaintiff appeals. Reversed.

D. McCaskill, for appellant. E. E. Hubbell, for appellee.

THOMSON, J. Action by the Majestic Manufacturing Company against the Pueblo Hardware Company to recover \$173.50, the value of goods, wares, and merchandise sold by the plaintiff to the defendant. Defense, a contract between plaintiff and defendant that the defendant should have the exclusive building and sale in the city of Pueblo, Colo., of the plaintiff's stoves and ranges for one year, and that plaintiff would not sell stoves and ranges to any other dealer in Pueblo during that time,—which contract the plaintiff violated by selling and delivering, within the year, large numbers of stoves and ranges to other dealers in Pueblo, so that defendant's trade was injured, and its business damaged, in the sum of \$150; also a sale by plaintiff to defendant of a range warranted to be perfect, but which was imperfect and useless, to the defendant's further damage in the sum of \$60; also a sale to defendant of a defective water front, to its damage \$10. There was a replication, denying the averments of the answer. The cause was submitted to a jury. It was admitted that the plaintiff had sold the defendant goods and ranges of the value of \$173.50, which had not been paid for. The defendant made some proof of the damage sustained on account of the defective range and water front. There was also evidence concerning the loss of trade sustained by the defendant on account of sales by the plaintiff to other dealers. The jury returned a verdict for the defendant of \$192. The plaintiff moved for a new trial, on the ground, among others, of the insufficiency of the evidence to justify a verdict. The motion was overruled, and the court proceeded to render judgment as follows: It computed interest on the verdict from November 11, 1892, at 8 per cent. per annum, making the amount \$213.69. It also added interest at the same rate, for the same period, to the \$173.50, admitted to be due the plaintiff, making the total \$193.03. It then deducted the latter amount from the former, and gave the defendant judgment for \$20.66, the difference. The case is here on appeal from this judgment.

The singular action of the court in construct-

ing a judgment upon the verdict we do not find it necessary to comment upon. Defendant's counsel says that the jury, in addition to their general verdict, made special findings that the damage on account of the imperfect range was \$34, and of the defective water front \$8; and that the defendant had been damaged \$150 by the plaintiff's breach of its contract giving the defendant the exclusive sale of its goods. These findings are not in the record, but we shall accept counsel's statement, and assume that the general verdict was composed of the items he mentioned. Possibly there was enough of evidence to sustain the finding of damages on account of the defective range and water front, and therefore that finding will not be noticed. It was in the proof necessary to entitle it to the other damages that the defendant failed. There was no sufficient evidence that any such contract concerning the exclusive sale by the defendant of the plaintiff's goods, as is alleged in the answer, was ever made. The principal witness for the defendant was G. T. Nash, defendant's general manager. He testified that there was a verbal contract between him, as manager, and Mr. Oder, the plaintiff's agent, that the defendant should have the exclusive right to sell the plaintiff's goods in Pueblo for a year; but the conversation which he detailed between himself and Mr. Oder, as constituting the contract, made no mention of any exclusive right of any kind to be given to his company. He was closely pressed for the entire conversation, and said that he had given it all; that to enable him to state anything further concerning it his memory must be refreshed. His memory was not refreshed. In saying that he had a contract, he merely stated an inference of his own. The facts from which he inferred the contract did not justify the inference. Whether there was a contract or not was a question of law, to be determined upon the facts in evidence; and as those facts did not show a contract, the conclusion which the witness deduced from them is not to be regarded. Mr. Gibbs, the defendant's bookkeeper, was also a witness, and his testimony was of exactly the same character as that of Mr. Nash. The verdict was not supported by the evidence, and the judgment must be reversed. Reversed.

SWINK v. BOHN.

(Court of Appeals of Colorado. Sept. 9, 1895.)

DISCHARGE OF JURY—FOUNDATION FOR SECONDARY EVIDENCE.

1. It is reversible error for the court, without any sufficient reason therefor, but merely because a case was to be adjourned, to discharge a jury duly impaneled and sworn, and to call another when the case is again called for trial.

2. On trial of a case in the county court on appeal from a justice it is error to allow the justice to testify as to the contents of a letter, merely on the testimony of the justice that

the letter had been introduced in evidence before him, and by him transmitted to the county court, and of the deputy clerk of the county court that he had been unable to discover any letter among his files.

Appeal from Otero county court.

Action by Matt Bohn against L. C. Swink. Judgment for plaintiff. Defendant appeals. Reversed.

A. F. Thompson and Waldron & Devine, for appellant.

BISSELL, J. Bohn and Hamilton were employed by the appellant, Swink, to do work and furnish materials for the repair of certain farming machinery which he owned. The doing of some work by Bohn and Hamilton is conceded. The dispute arose over the character of the materials furnished and the kind of work which the machinist did. The defense was based entirely on the alleged use of defective materials and an unskillful performance. Hamilton's interest was assigned to Bohn, who brought suit to recover \$85. We are wholly unconcerned with the sufficiency of the testimony, or the right of Bohn to recover. The errors for which the case must be reversed proceed from sundry rulings of the court, made during the progress of the trial. The trial of the case was commenced on the 17th of January, 1894. It progressed to the conclusion of the testimony of two witnesses, and was adjourned until the ensuing 18th. On the 18th the case was continued by consent until the 29th of January. When the adjournment was ordered, the court, over the defendant's objection, proceeded to discharge the jury from further consideration of the case. No reason was assigned, nor is there anything in the record to disclose the basis for this order. The jury was in no wise attacked, nor was any member of it shown to be disqualified, nor was anything brought to the attention of the court which would entitle him to exercise his discretion respecting the retention or discharge of the jury. The case was originally tried before a justice, an appeal was taken, and the papers were then sent up to the county court. On the trial before the justice a letter of Swink's was offered in evidence, which, according to the testimony of the justice, given in the county court, contained a damaging admission as to the labor, and a sentence which permitted an inference of its satisfactory performance. It seems this letter had been used before the justice, and was transmitted with the papers to the county court. When the plaintiff desired to produce it, and called on the clerk of the county court for its production, it was not forthcoming. To establish the loss and lay a basis for the introduction of secondary testimony concerning its contents, the plaintiff produced the justice, who swore that a letter purporting to have been written by Swink had been produced in evidence on

the trial before him, and had been by him transmitted to the county court. The clerk of the county court was not produced, but the deputy was offered, who testified that he had been unable to discover any letter among his files. Whether, in point of fact, the document had ever reached the county court was not shown, nor was any search among the files or records of the county court proven. On this basis the justice was permitted to give testimony as to the contents of the letter. On the 29th of January, when the case was again called for trial, a new jury was impaneled. The court instructed this jury respecting the burden of proof. This will be commented on later in the opinion.

The court undoubtedly committed an error in discharging the jury after they had been duly impaneled and sworn to try it. Code 1887, § 189, gives the court power to discharge a jury under certain circumstances. The existence of this authority as a common-law right is recognized by most of the authorities. *Thomp. Trials*, c. 4, § 90. We need not decide whether this general common-law right to discharge a jury which has been impaneled is still possessed by Colorado courts, notwithstanding the legislation which, under exceptional circumstances, confers it. We need not determine whether the provisions of section 189 must be taken to exclude all other basis for the court's action, because, under no rule of law that we have been able to discover, or to which our attention has been called, has the court any arbitrary power to discharge a jury after it has been impaneled and sworn. The parties are entitled to have their case heard by the jury which has been selected, and they cannot be deprived of that right unless some sufficient reason exists for the exercise of the court's power in the premises. This case discloses none. The court simply discharged the jury, and called another. This he manifestly had no right to do. Of itself, this would operate to reverse the case.

The court was equally at fault when it permitted secondary testimony concerning the contents of the letter said to have been written by Swink. It was a most important piece of testimony bearing upon the only issue in the case, to wit, the character of the materials used, and the kind of work which had been done. If the jury were satisfied Swink had admitted that the materials were good, and the labor workmanlike, they would naturally conclude Bohn was entitled to his money. The plaintiff could have laid a sufficient foundation for the introduction of the evidence, and when he failed the court erred in admitting it.

The instruction which the court gave respecting the burden of proof was objectionable, because of the absence of certain limitations which were essential to the exact and careful expression of the law on the subject. The dividing line between what

the plaintiff must prove in a case of this sort and what the defendant must show when he alleges the materials were defective and the work unskillfully done is a very narrow one, and ought to be carefully guarded by the court. Of course, the plaintiff may not recover without showing performance, which, in a measure, compels him to establish that he properly performed the labor which he was hired to do. On the other hand, when the defendant alleges that the work was unskillfully done, and the materials defective, he must maintain the issue which he has tendered. In giving instructions on this subject, the court should fairly indicate the dividing line between the two burdens, and aptly inform the jury as to what the plaintiff must establish, as contradistinguished from what must be proven by the defendant. The court's instruction on this subject possibly was not so inexact that it would have compelled the reversal of the case, but the attention of the court is drawn to it that more care may be used on the subsequent trial in outlining the duty which must be discharged by the respective parties in this particular. For the errors committed by the trial court, this case must be reversed, and remanded for a new trial in conformity with this opinion. Reversed.

MATTHEWS v. PEOPLE.

(Court of Appeals of Colorado. Sept. 9, 1895.)
FAILURE OF DEFENDANT TO TESTIFY—INSTRUCTION AS TO INFERENCE.

Failure to instruct that inference was not to be drawn against defendant because he did not testify is not error, no request for the instruction having been made.

Error to district court, Arapahoe county.

Frank O. Matthews was convicted of obtaining money by false pretenses, and brings error. Affirmed.

James B. Belford and Thomas Ward, Jr., for plaintiff in error. Eugene Engley, Atty. Gen. (H. T. Sale, of counsel), for the People.

BISSELL, J. The almost universal practice, to pursue the defense of a criminal case to the "last ditch," will probably take this case to the supreme court for ultimate determination. This circumstance removes all necessity to give other than the briefest expression to our conclusions respecting this record. Matthews, the plaintiff in error, was prosecuted for obtaining money from Mrs. Boyle by false pretenses, which is a crime, under the statute. Mrs. Boyle had been the owner of some realty, in Washington, which had been sold under foreclosure proceedings which were alleged to have been illegal, and therefore assailable. She likewise had a supposed claim against the government for pension money due her for services and disabilities rendered and sustained by her husband in the late war. Matthews

was, in some manner, an assumed teacher and exponent of spiritualistic doctrines, or those of an analogous character, and apparently had become acquainted with Mrs. Boyle by reason of her attendance upon his ministrations. In some way which is undisclosed, Matthews learned of Mrs. Boyle's claims, and of her desire to prosecute them for her benefit. During the trial evidence was offered which tended to show a statement by Mrs. Boyle to him of her claims and desires, and of representations by Matthews that he was in communication with an eminent lawyer in Washington, who would undertake the institution of legal proceedings with reference to the foreclosure, and likewise prosecute her claim before the pension department, upon the payment of a fee of \$150. This was a greater amount than Mrs. Boyle had, but she possessed \$120, as she informed Matthews, who agreed to take that money and lend her the balance, and remit the fee to the attorney in Washington, who would commence and prosecute the necessary proceedings in both matters. Of necessity, the whole case turned on the proof as to whether he represented his connection with the lawyer to be as stated by Mrs. Boyle, and whether he falsely told her that he was in communication with the attorney, and had received advices from him, and an agreement to do the work specified for the sum named, and obtained the money on the strength of these false representations. On the conclusion of the case the court instructed the jury with reference to the statutory offense, and defined its various elements. The defendants requested some instructions which were given, and some which were refused. None, however, were asked with reference to the right of the defendant to testify in his own behalf; nor was the jury told that the defendant was not to be prejudiced, and that no inference was to be drawn against him, by reason of his failure to testify.

But two matters are urged upon our attention as constituting error. The principal one is that there was no evidence to show the making of a false representation by the defendant which would make it a statutory crime. On this point the case is argued at considerable length, and we are urged to set aside the verdict of the jury, which found Matthews guilty, because it was not justified by the testimony. We decline to interfere, for we find enough in the record to sustain the verdict of the jury; and, according to the general practice in such cases, it will not be disturbed.

The error laid as to the failure of the instructions to properly define the crime seems not to be well alleged. Taking the instructions as a whole, they seem to fairly define the crime, and to state its various elements with sufficient accuracy to advise the jury as to the law. A point is attempted to be made on the omission of the court to in-

struct the jury respecting the defendant's failure to testify. It is not well taken, for the defendant asked no instruction on the subject. If the defendant desired an instruction respecting this matter, it was his duty to request it; and, having failed to present one, he cannot be heard to complain of the court's neglect to give it, when no reference whatever was made to the matter, either in the evidence, or in the arguments of counsel. We perceive no error in the record which necessitates the reversal of the judgment, and it will accordingly be affirmed. Affirmed.

SULLIVAN v. PEOPLE.

(Court of Appeals of Colorado. Sept. 9, 1895.)

LARCENY—EVIDENCE—OWNERSHIP OF PROPERTY—ALLEGATION AND PROOF—VARIANCE.

1. An information charged S. and another with stealing \$418 from J., who testified that the money consisted of four \$100 bills, and silver, and was taken in a wine room. There was evidence that there was in the room, besides J. and defendants, one D. Held, that it was prejudicial error to permit a witness to testify that a short time after the alleged loss of the money, while he was playing poker, D. came to him with a \$100 bill, to get it changed.

2. Where an information charges the larceny of money, the property of "Michael J.," and the evidence shows it belonged to "Mike J.," the variance is fatal.

Error to district court, Arapahoe county.

Maud Sullivan was convicted of larceny, and appeals. Reversed.

Thomas Ward, Jr., and H. L. Emerson, for plaintiff in error. Eugene Engley, Atty. Gen., and H. T. Sale, for the People.

THOMSON, J. The information charges that on the 29th day of January, 1894, Maud Sullivan and Timothy Drew feloniously stole, took, and carried away \$418 in money, the property of Michael Johnson. The prosecuting witness, who claimed the ownership of the money, testified that his name was Mike Johnson, and that the money was taken from him in the wine room of Drew's saloon, and consisted of four \$100 bills and \$18 in silver. There was no direct proof that the defendant Maud took the money, or participated in any way in taking it, or ever had any portion of it. The only evidence that it was taken at all was the statement of Johnson that when he went into the wine room it was in his possession, and when he was preparing to leave it was gone. The evidence tended to show that there were in the room, besides Johnson and the defendants, Maud and Drew, one Esau Davis and a man named Burns. A witness (Daniel Carr) was permitted to testify, against defendants' objection, that a short time after the alleged loss of the money, while he was engaged in a game of poker at the Arcade Saloon, Davis came to him

with a \$100 bill, and asked him to have it changed, saying that he got it from Drew. Neither of the defendants was present when this took place. Afterwards the court ordered the statement of what Davis said as to where he got the bill stricken out. The jury, however, were not instructed to disregard it. The court instructed the jury to return a verdict of not guilty, as to Drew, and counsel for Maud requested a like instruction in her behalf, which was denied. This ruling, and that admitting the testimony of Carr, are assigned for error.

The theory of the prosecution is that there was a conspiracy on the part of Maud, Drew, Davis, and Burns to rob Johnson, and that, in pursuance of this, Maud took the money, and transferred it to Drew, who gave it to Davis. But all this is pure supposition. There is nothing whatever in the evidence to authorize it. There was the coincidence that Johnson said his money was in \$100 bills, and that the bill Davis had was a \$100 bill, and there was also the evidence that Davis was in the room when the money is alleged to have been stolen; but these facts fall considerably short of establishing a conspiracy, or a larceny by Maud, or that the bill Davis had was not his own money. Whether the action of the court in striking out of Carr's testimony the statement of Davis as to where he got the bill was sufficient to cure the error of its admission, we shall not stop to discuss. The rest of the testimony was permitted to stand, and it does not need the citation of authorities to prove that it was incompetent, and its admission error. And it was probably not harmless. The far-fetched argument drawn from the presence of Davis in the room at the time of the alleged larceny, and his subsequent possession of a bill of the same denomination with Johnson's bills, may have had an influence in persuading the jury to adopt the prosecution's theory.

Furthermore, the instruction to acquit Maud should have been given because the proof of the ownership of the money did not sustain the charge in the information. The allegation was that the money was the property of Michael Johnson, whereas the evidence was that it belonged to Mike Johnson. It was essential that the information should set forth the name, if known, of the owner of the money alleged to have been stolen, and, the name having been set forth, that it should be proved precisely as laid. The law gives the accused the right to know exactly what he is required to meet, to the full extent of the ability of the prosecution to inform him; and he cannot be confronted with one charge, and convicted upon another. *Moynahan v. People*, 3 Colo. 367; *Sault v. People*, 3 Colo. App. 502, 34 Pac. 263. Michael Johnson is not Mike Johnson, and the variance between the allegation and the proof was fatal. The judgment will be reversed. Reversed.

(6 Colo. A. 43)

SPENCER v. MURPHY.

(Court of Appeals of Colorado. Sept. 9, 1895.)

ACTION FOR BURNING PRAIRIE—ELEMENTS OF DAMAGES—HARMLESS ERROR.

1. In an action under Gen. St. § 1036, allowing one to recover from another setting a prairie on fire the damages sustained by the fire, voluntary service by plaintiff in putting out the fire is not an element of damages.

2. Nor are attorney's fees, not being specifically allowed by the statute, an element of damages.

3. Exemplary damages are not allowable in an action under Gen. St. § 1036, to recover for injuries resulting from the wrongful setting of prairie fires.

4. An instruction erroneously allowing exemplary damages is not reversible error, where it appears that such damages were not allowed.

Appeal from Arapahoe county court.

Action by Timothy Murphy against A. W. Spencer. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

L. K. Pratt and Z. L. Finley, for appellant. George C. Norris, for appellee.

REED, P. J. Appellant set out fire along an irrigating ditch on his own premises, to burn weeds that had accumulated in the ditch. The fire caught on the prairie, got beyond his control, or was not properly attended to, to prevent its spreading, and was thought to have been exhausted or harmless. The next day, with increased wind and a change of direction, it reached the premises of appellee, and destroyed some personal property and winter pasture or grass,—about 50 acres in extent. The suit was brought for \$129.35, before a justice of the peace. Among the items going to make up the amount was: Labor of plaintiff, two nights, fighting fire, \$10; attorney's fees, \$20. There was a verdict for the plaintiff for \$151.60,—\$22.25 in excess of the amount claimed by the plaintiff. An appeal was taken to the county court, a trial had to a jury, a verdict for the plaintiff for \$120.50, judgment upon the verdict, and an appeal taken to this court. The action was brought under section 1036, Gen. St., which is: "If any person shall set on fire any woods or prairies so as to damage any other person, such person shall make satisfaction for the damage to the party injured to be recovered in an action before any court of competent jurisdiction." There were no questions in regard to the facts.

Several errors are assigned that I do not find it necessary to discuss. The whole amount claimed by the bill of particulars filed was \$129.35, of which \$10 was for services of plaintiff in fighting fire, and \$20 for attorney's fees; leaving the claim, without those items \$99.35. Neither of those items was a proper element of damage. The first was voluntary. There was no employment by the defendant. The damage must be confined to loss by fire, and could not include compensation for services. In regard to the second, attorney's fees are no part of the damage. There is no law

for such allowance. They are only given when provided for by statute, and courts are averse to extending the rule, even if legally permissible. See *Joslin v. McGee* (not yet officially reported) 39 Pac. 349, where this court said: "The allowance of attorney's fees is not discretionary with the court. It must be under a statute, or by virtue of a contract."

The court, among others, gave the jury the following instruction: "The jury are instructed that if they believe from the evidence that the injury complained of was caused by a fire started by the defendant or his employes, and that the conduct of the defendant in relation to said fire showed a wanton and reckless disregard of the plaintiff's rights in the premises, then, in addition to actual damages sustained by the plaintiff, you may award him reasonable exemplary damages." This instruction was erroneous. In cases of this character, exemplary or punitive damages have no place. Recovery can only be had for damages actually sustained. If exemplary damages had been awarded a reversal would be necessary, but the record shows that the defendant was not prejudiced by the instruction. The actual loss by fire, as shown by the bill of particulars filed, was \$99.35; charge for services, \$10; attorney's fees, \$20; making \$129.35. There was a verdict and judgment for \$120.50. Deducting the items of service and fees leaves, for actual loss, \$90.50, —a sum less than shown by the bill filed, by \$8.85. The amount of actual damages sustained was not questioned, but admitted, upon the trial. Consequently no exemplary damages could have been included.

The judgment must be affirmed on the common-law ground of negligence, regardless of the construction of the special statute. The use of fire was shown to have been for convenience, not necessity. In the use, for convenience, of an agent so dangerous, it must be such as to render damage to others not only improbable, but impossible. High winds and change of wind will not exonerate, if loss occurs. They and other climatic changes are to be anticipated. After the fire had gone beyond his control, instead of making efforts to extinguish it, he abandoned it, and left his neighbors to suffer the consequences, while he went on a business trip to a town some 40 miles distant, evincing perfect indifference to the results. The actual damage having been conceded to have been \$90.35, the judgment must be affirmed for that amount, and the \$21.15 in excess, for labor and attorney's fees, disallowed. The judgment will be modified by reducing it to \$99.35, and, so modified, will be affirmed. Modified and affirmed.

BONNEY v. ROBERTSON et al.

(Court of Appeals of Colorado. Sept. 9, 1895.)

BOND—LIABILITY OF SURETIES.

In 1891, R., proprietor of a bank, executed to B., who was county treasurer, a bond

to secure B., as such treasurer, against the loss of any funds deposited or to be deposited in such bank. B.'s term expired July 7, 1892, but about such date a change was made in treasurers' terms, and B. was appointed by the county board to serve until January, 1893, and he gave a new bond. In 1892, B. was elected for another term, commencing in January, 1893, but he did not qualify until August. The bank failed July 1, 1893. *Held*, that the sureties on R.'s bond were not liable for the money on deposit in the bank when it failed.

Error to district court, Chaffee county.

Action by Josiah M. Bonney against William E. Robertson and others on a bond executed by Robertson as principal and the other defendants as sureties. There was a judgment in favor of the sureties, and plaintiff brings error. Affirmed.

In January, 1891, Josiah M. Bonney was the treasurer of Chaffee county, charged with the duty of collecting the taxes due the county and state as provided by statute. William E. Robertson was at that time proprietor of the Chaffee County Bank, doing a general banking business at Salda, where the treasurer's office was located. Bonney deposited the various public moneys which he collected from time to time in the Chaffee County Bank; and, to secure him against loss, Robertson, with divers other persons, who signed the bond as sureties, executed a bond in the sum of \$50,000, which contained the following condition: "The conditions of the foregoing obligation are such that, whereas J. M. Bonney, as treasurer of Chaffee county, has and does deposit certain sums of money belonging to the county and state with William E. Robertson, as proprietor of the Chaffee County Bank, from time to time, and for the purposes of securing said J. M. Bonney, as treasurer of said county, against the loss of any funds which he may have now or at any future time on deposit in the Chaffee County Bank: Now, therefore, if the said William E. Robertson shall in all respects well and truly perform and pay over, when called upon, all moneys so deposited, then this obligation shall be void; otherwise it shall be and remain in full force and virtue." The treasurer deposited money from time to time, amounting in the aggregate to a very considerable sum. The deposits were continued until the 1st day of July, 1893, when the bank failed, and Robertson made a general assignment for the benefit of his creditors. It is important to notice the dates and circumstances under which the money was placed in Robertson's keeping, and the position which Robertson held when these deposits were made. Bonney had been elected treasurer prior to the time the bond was given. The term of office, which is regulated by statute, for which he had been elected, expired on the 7th of July, 1892. About this time some change was made in the term of office of county treasurers, and the board of county commissioners, who had authority for the purpose, appointed Bonney as treasurer to serve until the ensuing January of 1893. Under this appointment, Bonney, on the 21st

of July, 1892, qualified, and gave a bond in the sum of \$50,000 for the faithful performance of his duties. His antecedent bond had been for \$100,000. There was no new contract between Robertson and his sureties and Bonney after the appointment, and Bonney continued to deposit as before. In the ensuing fall, at the general election, Bonney was re-elected to the office of treasurer for the term commencing in January, 1893. He did not qualify, however, under the election, until the ensuing August. He continued to discharge the duties of the office, and still kept his deposits in the bank as before, and at the date of the failure, in 1893, had on deposit upward of \$18,000. All these various facts were set up in the answers filed by the sureties, to which the plaintiff in error demurred. The demurrer was overruled, and judgment entered for the sureties. The treasurer brings the case here by error.

C. S. Libby and G. K. Hartenstein, for plaintiff in error. Thomas, Hartzell, Bryant & Lee, for defendants in error.

BISSELL, J. (after stating the facts). The judgment is right, and the sureties are not liable on their undertaking. No principle is more firmly settled than that a surety cannot be held beyond the express term of his contract. Unless he be obligated by the specific terms of his engagement, his liability cannot be extended by implication. The rule is universally applied both in actions at law and in suits at equity, and rests upon the most salutary principles. Where the terms of the undertaking are at all ambiguous, the courts are always at liberty to look both to the recitals of the instrument and all the circumstances surrounding the parties when the contract was entered into, and may likewise consider the subject-matter of the instrument, and therefrom determine the scope and object of the intended guaranty. *Le Roy v. Servis*, Caines, Cas. 1; *French v. Carhart*, 1 N. Y. 96; *Bank v. Myles*, 73 N. Y. 335. A like principle is expressed in other cases. In many of them, where the courts have undertaken to determine whether the sureties of a treasurer or deputy should be held liable for defaults occurring after the term for which he had been elected or appointed, whether by public, municipal, or private corporations, they have resorted to the acts of parliament, the statutes, and the proceedings of the boards of directors of private corporations, to ascertain the nature of the office held by the principal, the term for which he was elected or appointed, and therefrom deduced the conclusion that, even though the duration of the term was not expressed in the instrument, it was to be taken by the court as within the contemplation of the parties, and therefore presumably was regarded by them as the limit of their security. It is therefore entirely proper for the court to consider the situation and circumstances of these parties as they existed when this bond was given. The instrument

perhaps lacks an exact recital, which in some of the decisions has been regarded as the key for the proper interpretation of the instrument, but it contains what will indicate the purpose and intention of the parties as clearly as a definite recital of the term for which Bonney had been elected. The condition recites that Bonney, as treasurer, has and does deposit money belonging to the county and state with the bank; and the bond was given, therefore, for the purpose of securing him as treasurer against the loss of any funds which he might deposit. By the demurrer, the plaintiff admits Bonney was treasurer when the bond was given, acting as such under a statute by virtue of which his term of office expired on the 7th of July, 1892. We may therefore rightfully conclude that the bond was executed for the purpose of securing Bonney against loss during the time for which, as treasurer, he should receive and deposit money in the Chaffee County Bank. The recital and the situation of the parties fully warrant this conclusion. The expiration of the term on the 7th of July, 1892, is conceded. The legal effect of this appointment seems to be thoroughly established. All agree, if the bond was an official one, it would only be a guaranty against defaults happening during the term for which the bond was given. The principle would be totally unaffected by the circumstance of a re-election of the same incumbent to the same office for another term. Under such circumstances, the election would be regarded as one to another office. Though the individual might be the same, he would in law with reference to his bond and his sureties and his defaults, stand in the same light and occupy the same legal position as though he had been another, and elected as a successor to the first. *Bank v. Root*, 2 Metc. (Mass.) 522.

It only remains, then, to determine whether, by the terms of the engagement into which the parties entered, they so expressly and precisely contracted as that the sureties must be held liable for Robertson's subsequent default. We do not so conclude. There is nothing in the express language of the instrument which compels any such deduction. The contract undoubtedly guaranties Bonney, "as treasurer of said county, against the loss of any funds which he may have now or at any future time on deposit in the Chaffee County Bank." We are not at liberty, however, to infer any intention on the part of the sureties to give or continue an indefeasible guaranty to protect the treasurer for all time against the loss of any money which, as treasurer, he might deposit in the Chaffee County Bank. No such absolute agreement was entered into and there is no language in the instrument which compels this construction. Such bonds are given because of the necessities springing from the official positions which individuals hold, and the absolute liability which they are under for the public moneys which may come into their hands. These bonds are executed

partly because of the exigencies of public business, partly from personal considerations, and from the many diverse but persuasive motives which influence human conduct under such circumstances. An intention to become a guarantor for all time may not be inferred. It is totally contrary to the well-known general purpose and intentions of sureties on this class of obligations, and it may not be presumed that a re-election was in contemplation or in the minds of the parties when they signed the bond. Re-elections or re-appointments are far from being certainties in public affairs, and the changed conditions which result in this Western country in very short periods of time rebut any such expectation. Wherever the question has been discussed, the courts have always given great weight to the consideration of the time for which the party may be bound, and the estimate which he is liable to put on the liability likely to devolve on him during that period, and his inability to know what may be cast on him at some future and later date. If any other rule were adopted, there would seem to be no necessity for an absolute continuity of the term; but a re-election after an interregnum, and a resumption of deposits, followed by a default, would apparently revive the liability of the sureties, and make them guarantors for the later deposits, contrary to any actual or apparent intention of the parties. Taking the principle on which the cases rest, we think it may be safely said that the general construction of the courts is against this doctrine. *Hassell v. Long*, 2 Maule & S. 363; *Mayor v. Dennis*, EL, Bl. & EL 660; *Peppin v. Cooper*, 2 Barn. & Ald. 431; *Insurance Co. v. Clark*, 33 Barb. 196; *Association v. Nugent*, 40 N. J. Law, 215; *Hubert v. Mendheim*, 64 Cal. 213, 30 Pac. 633; *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Thomas v. Summey*, 1 Jones (N. C.) 554; *Banner v. McMurray*, 1 Dev. 219.

The facts pleaded by the defendants constituted a good defense, and, if established, would relieve the sureties from any liability to respond for the default of the bank happening after the expiration of the term of office which the treasurer was filling when the undertaking was given. The demurrer was properly overruled, and final judgment must be entered in favor of the defendants in error. The judgment will be affirmed. Affirmed.

(6 Colo. A. 541)

SAYRE-NEWTON LUMBER CO. et al. v.
UNION BANK OF DENVER et al.

(Court of Appeals of Colorado. Sept. 9, 1895.)

MECHANICS' LIENS—CONSTRUCTION OF CONTRACT—
SUBCONTRACTORS.

1. By agreement between a contractor and one for whom, and on whose land, he was to erect buildings, \$5,000 was deposited in a bank as an escrow, to be held until the time for filing liens by subcontractors should expire, when the money was to be paid to the contractor, unless there should then be pending and unsettled me-

chanics' liens against the buildings, in which case the bank should retain the amount of such liens from the fund, and pay over the balance to the contractor as the liens should be discharged. *Held*, that lien claimants could not reach such fund; their sole remedy being against the property.

2. A contractor turned over to claimants certain building contracts which he was unable to complete, among them a contract with W., claimants to manage the work, collect the money as it became due, and disburse the same for materials and labor. W. paid the full contract price to claimants, who applied it to an indebtedness to them from the contractor on other contracts, and subsequently filed liens against W.'s premises for materials. *Held*, that under *Sess. Laws 1889*, p. 247, providing that claims of subcontractors shall not be a lien on the property to any greater extent than the indebtedness of the owner to the contractor, claimants were not entitled to any lien.

3. In the absence of a statutory provision therefor, a subcontractor in the third degree is not entitled to a mechanic's lien.

Error to district court, Arapahoe county.

Action by the Union Bank of Denver against Wimbush & Powell and the Denver Land & Security Company, praying that a certain fund in the hands of the latter be applied on notes due plaintiff. The Sayre-Newton Lumber Company and other lien claimants were made defendants, and original proceedings were thereafter filed by the Sayre-Newton Lumber Company for the enforcement of mechanics' liens, in which answers and cross complaints were filed by the various defendants. The several actions were consolidated, and from the decree all the lien claimants bring error. Affirmed.

Reginald Heber Smith, for plaintiff in error Sayre-Newton Lumber Co. J. Warner Mills, for plaintiffs in error Hallack Paint, Oil & Glass Co., and West Side Planing Mill Co. S. D. Walling, for defendants in error.

THOMSON, J. On May 18, 1889, W. E. Sweet contracted with Wimbush & Powell to construct for them fifteen houses and one stable upon lots situated in Berkeley, for which they were to pay him \$39,506. Afterwards, on September 28, 1889, the parties entered into a supplemental agreement concerning the same subject-matter, as follows: "This agreement, made between William E. Sweet of the first part, and Henry A. Wimbush and Arthur W. Powell, partners under the firm name of Wimbush & Powell, of the second part, supplemental to their agreement dated May 18, 1889, witnesseth: In order to provide an assurance to the second party against mechanics' liens, it is agreed that the first party, at the time of receiving payment upon any building, shall procure and deliver to the second party a waiver by the material and labor men of their lien, and all right to lien thereon except as to laborers or mechanics working by the piece or by the day, and as to them he will exhibit his book, showing the payment of wages. As a further assurance it is agreed that the \$5,000 last falling due

under said agreement of May 18th shall, when due, be paid over to the Denver National Bank as an escrow to be held until the time provided by the law for filing liens by subcontractors of all degrees shall have expired. At the end of said period the same shall be paid over by said bank to the said party of the first part, unless there shall at that time be pending and unsettled mechanics' liens against one or more of the buildings mentioned in said agreement. In case there shall be such unsettled liens, said Denver National Bank shall retain the amount of all such liens and 50 per cent. additional from said \$5,000, and pay over the remainder to said Sweet; and the moneys so retained by said check shall be paid over to said Sweet as such lien and liens are settled and discharged." On July 5, 1889, Sweet borrowed from the Union Bank of Denver \$4,000, and on August 2, 1889, \$2,000, to be used in the construction of the buildings; for each of which sums, at the time of receiving it, he made his note to the bank, due in 90 days, with interest from date at 10 per cent. On October 17, 1889, there had been paid on these notes sums aggregating \$2,104.44. On November 7, 1889, for the purpose of securing the balance due, Sweet executed to the bank the following instrument: "Whereas I am indebted to the Union Bank of Denver upon two promissory notes, both past due, to the amount of four thousand dollars, with interest, and desire to secure the payment thereof, now I, William E. Sweet, hereby sell, assign, transfer, and set over to said Union Bank five thousand dollars, which is to become due to me from Wimbush & Powell, under my building contract with them, dated May 18, 1889, and set aside as an escrow to be held and paid out by the Denver National Bank pursuant to my supplemental agreement with said Wimbush & Powell, dated September 28, 1889, and this shall be taken and considered as my order to said Wimbush & Powell and to the Denver National Bank to pay over the said moneys when payable according to the terms of said supplemental agreement, to the said Union Bank. Wm. E. Sweet." On November 11, 1889, Sweet's health having failed, so that he was unable to give his personal attention to the work, he entered into an agreement with the Sayre-Newton Lumber Company, by the terms of which he turned over to the lumber company, for completion, certain uncompleted contracts, among which was that with Wimbush & Powell; the company to control and manage the work, collect the moneys due and to become due on account of it, and disburse the same in payment for such material and labor as had been furnished and might be necessary for the completion of the contracts, including the payment of Sweet's notes to the Union Bank. Wimbush & Powell had some kind of an agreement with the Denver Land & Security Company,

whereby it was to advance the money for the erection of these buildings; and the money which was to be paid into the Denver National Bank in pursuance of the supplemental agreement between Sweet and Wimbush & Powell was to be retained and held by the security company. It is not very material what the arrangement was by which this company became the custodian of the \$5,000, instead of the bank, because it is entirely clear that it was the same fund which was assigned by Sweet to the Union Bank. On the 17th day of January, 1890, the Sayre-Newton Lumber Company filed in the office of the recorder of Arapahoe county two mechanic's lien statements, one against lots 12, 18, and 14, block 38, and the other against lots 12, 13, and 14, block 8, both in Berkley, and upon which two of the houses provided for in Sweet's contract with Wimbush & Powell were erected. On the 20th day of January, 1890, the Hallack Paint, Oil & Glass Company filed in the same office its mechanic's lien statement against the 15 tracts upon which were the 15 houses mentioned in the contract. On the 8d day of February, 1890, the West Side Planing Mill Company filed its lien statement against two of these tracts. The claim of this company was subsequently assigned to the Hallack Paint, Oil & Glass Company. On the 8th of February, 1890, the Union Bank of Denver filed its complaint against Wimbush & Powell and the Denver Land & Security Company, praying for a decree that the amount due upon Sweet's notes be paid to it out of the \$5,000 which had been assigned to it, and which was in the hands of the security company. The Sayre-Newton Lumber Company, the Hallack Paint, Oil & Glass Company, the West Side Planing Mill Company, and other lien claimants, were made parties defendant to the proceeding. The Sayre-Newton Lumber Company answered the complaint. The paint, oil and glass company and the planing mill company joined in a cross complaint setting forth their respective lien claims, alleging the assignment by the latter company of its claim to the former, and praying appropriate relief. The other lien claimants filed answers and cross complaints. On the 7th day of March, 1890, the Sayre-Newton Lumber Company commenced original proceedings for the enforcement of its liens, in which answers and cross complaints were filed by the various parties defendant. All these several causes were united, and the consolidated case was, pursuant to a stipulation among the parties, referred to E. P. Harman, Esq., to try the issues of fact and law, and report a finding and judgment. A trial was accordingly had, and from the evidence adduced the referee found that there was due from Wimbush & Powell \$41.50, and from the Denver Land & Security Company \$5,000; that the Sayre-Newton Lumber Company was not entitled to a mechanic's lien on either of the tracts

embraced in its statement; and that neither the West Side Planing Mill Company nor the Hallack Paint, Oil & Glass Company was entitled to a mechanic's lien. The referee also found that none of the other claimants was entitled to a lien. The referee's judgment was that the \$5,000 and the \$41.50 be paid into court, out of which should be paid the costs of reference, the amount due the Union Bank and its costs, and the costs of the Denver Land & Security Company; that the lien claimants pay the costs incurred by them respectively, and that the Sayre-Newton Lumber Company pay the residue of the costs. The judgment of the referee was made the judgment of the court. From this judgment the Sayre-Newton Lumber Company and the Hallack Paint, Oil & Glass Company have prosecuted error to this court.

The first objection which is made goes to the judgment in favor of the Union Bank. The source from which this objection comes precludes its consideration. The fund out of which the bank's claim was adjudged was set apart for the protection of Wimbush & Powell against a possible default of Sweet in the discharge of his obligation to material men and laborers, the consequence of which might be the incumbrance of the buildings and grounds with mechanics' liens. The agreement for the withholding of this money was made after an amendment to the mechanic's lien law, which we shall notice again, had gone into effect, and which provided that payments made by the owner to the principal contractor before the expiration of the time within which subcontractors might file their liens should be at his own risk, and should not be a set-off against the claim of a subcontractor who might perfect a lien in compliance with the act. By the terms of the agreement, if, when the time had elapsed, no liens were on file, Sweet was entitled to the money. If liens were then on file, Sweet was entitled only to any surplus which might remain after deducting the amount of the liens and 50 per cent. in addition. The intention of the parties to the agreement appears upon its face. It was to save Wimbush & Powell harmless in case any failure of Sweet in his payments should result in mechanics' liens upon their property. The lien claimants had no interest in this fund. Their rights were fixed by the statute, and that provides but one kind of lien available to them, and but one manner of enforcing it. The lien is against the real estate, and it is enforced by a sale of the real estate. There is no way by which a party, in a proceeding to enforce a mechanic's lien, can reach a fund. His sole remedy is against the property. The assignment to the bank was, except as to Wimbush & Powell, an absolute transfer of the fund. It was subject to a right in them to apply the money in discharge of mechanics' liens, but it was subject to nothing else. If the fund was improperly subjected to the payment of the debt due the bank, Wimbush & Powell were the only

parties having the right to complain; and, as they are not complaining, we cannot inquire into the judgment.

The ruling of the referee in rejecting the several mechanics' liens of the plaintiffs in error is next assailed. The two liens of the Sayre-Newton Lumber Company will be first looked into. On April 18, 1889, the mechanic's lien law of 1883 was in force. Gen. St. 1883, p. 682. On that day an act of the legislature, amending this law, was approved, and went into effect 90 days later. Sess. Laws 1889, p. 247. It made important changes in the law as it then stood. It repealed all acts and parts of acts in conflict with it, but provided that it should not be construed to affect existing rights. The law of 1883 was available for the purpose of protecting rights which had accrued prior to the taking effect of the act of 1889, but rights subsequently acquired could be preserved and enforced only in conformity with the provisions of the new law. By the law as amended, whoever should do work or furnish materials for the construction of an improvement upon land, by contract with the owner, or with the principal contractor or a contractor under him, was entitled to a lien. The evidence showed that there had been paid to Sweet, before he relinquished the contract, about \$17,000, and to the lumber company, after it took charge, \$17,211.34, and that the total amount of its disbursements on account of material and labor was \$13,955.70, leaving an overplus in its hands of \$3,255.64, out of which, however, it was entitled to \$2,905.79, on account of material furnished in the construction of four of the houses, including the two against which it asserted liens. But, after making this deduction, it still had \$349.85 more than was due. Upon the face of these figures the claims for which the liens were filed had been fully paid, and there was nothing to support a lien. The argument by which it is sought to avoid this conclusion is deserving of notice. It is, in effect, as follows: The agreement between the lumber company and Sweet, in pursuance of which it completed the contract, constituted it Sweet's agent. By contract with Sweet, or with itself as Sweet's agent, it had furnished material for the construction of the buildings. It was therefore acting in the double capacity of agent for Sweet and contractor under him. As Sweet's agent, it collected the money from Wimbush & Powell, and paid for labor and material elsewhere obtained; and as Sweet's agent it settled with itself as subcontractor, and paid itself out of the money collected. It had contracts with Sweet to furnish material for buildings other than those in which Wimbush & Powell were interested, and upon which Sweet owed it money; and it collected from itself, as Sweet's agent, the money which had been received from Wimbush & Powell upon their contract, and paid it to itself upon these other contracts, leaving its claims against the four houses of Wimbush & Powell undischarged.

It would have the right to collect the money due upon these outside contracts from Sweet himself, notwithstanding he received it from Wimbush & Powell; and, as it was Sweet's agent, and stood in his shoes, it had the same right to collect the money from itself, and apply it in the same way, without reference to the source from which it was derived. The reason why it was entirely regular and proper to proceed in this way is given thus: "Under the lien statute the owner pays the contractor at his peril, for where the money passes into the contractor's hands it is his. If honest, he will pay his subcontractors. If he don't, the owner must still settle with them, for he took this risk under the law when he paid him contrary to the statute. * * * The rights of this lumber company were very different, as his agent under the assignment, from its rights as a subcontractor. Any money coming into its hands as agent must be disbursed by it as he directed. The proof shows that the company did receive from the Berkley contract the sum of \$3,255.64 in excess of disbursements on same contracts, but it is shown, too, that Sweet, being indebted to it on the other six contracts, directed it to apply said excess as a credit on the amount owed by him to the company under the other contracts. By this application, which he certainly had a right to make of his own money, the lumber company was not paid the sum of \$2,905.17, due on four of said houses." Whatever we may think of this argument as an exposition of the law, it is certainly lucid enough. We can readily see how it was that Wimbush & Powell, although they fully paid for all material used in these houses, received no credit for their payments, but were subjected to process to compel them to pay the amount over again. The assumption of special directions from Sweet is not sustained by the evidence. Without inquiring how closely a court of equity will scrutinize a transaction between a party as principal and himself as agent, where the rights of others are involved; and considering this as if it had taken place between Sweet himself and the company, we shall proceed to inquire what foundation there is in the statute for its claims. It is plain from counsel's language that he takes it for granted that whatever rights the lumber company had were governed by the amendatory act of 1889. He assumes, as a proposition which is not subject to question, that Wimbush & Powell paid the principal contractor, Sweet, or his agent, the lumber company, at their own peril; and that when they did so they took the risk of being compelled to pay the money again at the suit of some unpaid subcontractor. This idea is evidently derived from the amendment of 1889. The law of 1883 is otherwise. It is not clear from the evidence whether these lien claims should have been asserted under the amendatory or the amended act, but it is entirely certain that the statements before us do not conform to the requirements of the former. By

the terms of the act of 1889 the lien statement must set forth the name or names of the owner or owners of the property. Compliance with this, as with any other, requirement of the law, is essential. Without it, there is no lien. Neither of these statements contains, or purports to contain, the names of the owners of the property. The amendment also provides that, in order to preserve a lien for work performed or materials furnished by a subcontractor, there must be served upon the owner of the property, his agent or trustee, at or before the time of filing the statement with the recorder, a copy of such statement; or, if neither the owner nor an agent can be found in the county, an affidavit to that effect must be filed with the statement. There is no allegation or pretense that anything of that kind was done in this case. The act of 1889 was therefore not complied with in the making of these statements, and if, as counsel seems to understand, the rights of the lumber company were governed by that act, the statements are worthless, and no lien was acquired by them. In form, however, they are in substantial conformity with the provisions of the act of 1883; and, if the rights of the lumber company accrued in time to entitle it to avail itself of that act, it is by its terms that the relief to which the company is entitled must be measured. That law expressly provided that claims of subcontractors should not, in any event, be a lien upon the property to any greater extent than the indebtedness of the owner to the contractor. Therefore, whatever the owner might, in good faith, pay to the contractor, he was entitled to credit for as against any subcontractor who might afterwards assert a lien. The money paid could not be diverted into some other channel to the prejudice of the owner. When the lumber company, as the agent of Sweet, received full payment from Wimbush & Powell for all the material furnished to their buildings, they were to that extent discharged from liability; and if it used the money received in payment of an indebtedness from Sweet to it on account of other buildings, and thereby lost its right to liens upon them, it must take the consequences.

The evidence showed that Wimbush & Powell had paid the full contract price for the construction of their buildings, unless it might be the sum of \$41.50. What this debt arose out of, whether it was part of the originally agreed amount, or was incurred on account of something not provided for by the contract, is not clear. In the assignment of errors and in the argument it seems to be conceded that the contract price was fully paid. The right of the lumber company to a judgment is throughout based upon grounds entirely different from any failure of Wimbush & Powell to pay the contractor, and no objection is anywhere suggested to the disposition made of the \$41.50 by the referee. We shall therefore treat the case as the parties have treated it, and, concluding with

them, that there was no indebtedness from Wimbush & Powell to the contractor by virtue of the contract, we are bound to hold that, pursuant to the provisions of the law of 1883, the lumber company was not entitled to a lien, and, being entitled to none under the act of 1880, the decision of the referee must be upheld.

The lien statement of the Hallack Paint, Oil & Glass Company is void upon its face. It sets forth that the lien is claimed on account of material furnished for the buildings on the ground it describes at the request of Hoffman & Millis, subcontractors. It also states that Hoffman & Millis' contract was with William T. Straughn, who was a contractor under Sweet, the principal contractor. The grade of the paint company's contract was, therefore, three removes from the principal contract. The statute provides for the acquiring of mechanics' liens by three classes of persons: First, the original contractor; second, the contractor under him; and, third, the contractor with the subcontractor. The contractor with the principal contractor is designated as a subcontractor in the first degree, and the contractor with this subcontractor is a subcontractor in the second degree. The statute allows a lien in favor of a subcontractor in either of these degrees, but there it stops. The subcontractor in the second degree is at the bottom of the descending scale. A mechanic's lien is a creation of the statute. Without a statute, there is none; and those persons only, in whose favor the right to liens is given, can acquire them. As shown by this lien statement, the principal contractor was Sweet, the subcontractor in the first degree was Straughn, and the subcontractors in the second degree were Hoffman & Millis. The paint company was a grade lower. It was just one grade below the last grade in which the law allows a mechanic's lien. At the hearing, counsel for the paint company asked leave to amend its cross complaint, so as to make it appear that the company was the owner of the claim as assignee of Hoffman & Millis, and not as contractor with them. This leave was refused, and error is assigned upon the refusal. Amendments of pleadings to conform to the proofs are permissible, after the evidence is heard, upon a proper showing made; but the amendment asked here, instead of conforming the cross complaint to the proofs, would have directly contradicted them. It would have contradicted the lien statements, and it would have contradicted the witnesses. The

sworn testimony was that Hoffman & Millis had a contract with Straughn to paint the houses, and that they procured the painting material from the Hallack Paint, Oil & Glass Company. Furthermore, the only claim which Hoffman & Millis could have had was a claim for the work of applying the paint to the buildings; and an amendment showing the assignment of that claim would have been the introduction into the cross complaint of a matter entirely foreign to the cross complainant's case. There are other objections to this lien statement,—notably one that it embraces 15 distinct and entirely separate tracts of land,—but, as it was invalid for the reason stated, it is unnecessary to discuss it further.

The West Side Planing Mill Company also undertook to cover distinct tracts with one lien, but we shall place our disposition of that lien upon other obvious grounds. Waiving certain defects in the cross complaint, by reason of which there was a failure to state a cause of action, there was no proof that any of the material alleged to have been sold was used in the houses built upon the land covered by the lien, or in either of them. The material was sold for 15 houses, and the amount charged against the houses in question was simply the unpaid balance of the entire bill. Where the material sold was actually used was not shown. It does not appear that any of it went into these particular houses. The company released its right of lien upon all the houses except these, and, for all that was shown, the houses released were the only ones against which a lien could have been asserted. No right whatever to this lien was made to appear.

The only remaining question arises upon the disposition made of the costs. The costs of the Denver Land & Security Company, Wimbush & Powell, the Union Bank, and the costs of reference were adjudged to be paid out of the \$5,041.50 deposited in court. There was judgment against the several lien claimants for the costs incurred by them, and against the Sayre-Newton Lumber Company for all the residue. The latter company complains of this judgment. The only residue was the costs occasioned by the company's resistance to the action of the bank, and its proceeding to enforce its mechanics' liens, in both of which judgment went against it, and the costs, of course, followed the judgment. There is no error discoverable in the proceedings below, and the judgment will be affirmed. Affirmed.

**BOARD OF TRUSTEES OF SCHOOL DIST.
NO. 1 v. WHALEN et al.**

(Supreme Court of Montana. Oct. 7, 1895.)

RES JUDICATA—ASSIGNMENT OF CONTRACT—VALIDITY—RECORDING.

1. A firm of contractors brought suit on a building contract to recover the amount due thereon, and made a bank party defendant, alleging that they had assigned the moneys to become due under the contract to the bank, as collateral security for a loan. The bank did not appear in that action, nor were its rights adjudicated therein. *Held*, that the bank was not a necessary or proper party to that action, and was therefore not precluded from asserting its lien in a subsequent action to determine the rights of the contractors' creditors in the fund recovered.

2. A building contract providing that it should not be assigned by the contractors without the consent of the other party did not prevent its assignment as collateral security for a loan to complete the building, and especially will the creditors of said contractors not be heard to question the validity of said assignment.

3. The law in relation to the acknowledgment and registration of chattel mortgages is not applicable to the assignment of the moneys to become due under a building contract.

Appeal from district court, Lewis and Clarke county; William H. Hunt, Judge.

Action by the board of trustees of school district No. 1 against Stephen S. Whalen and others to determine the respective rights of defendants in a certain fund. From the judgment rendered, certain defendants appeal. Affirmed.

It appears from the record in this case that on the 28th day of August, 1893, the defendants Whalen & Grant recovered judgment in the district court of Lewis and Clarke county against the plaintiff herein for the sum of \$24,939.63 and costs, upon a contract theretofore entered into between Whalen & Grant and the plaintiff in this suit for the erection of a schoolhouse in school district No. 1. In said suit Whalen & Grant made the respondent the Montana National Bank a party defendant. Service of summons against the bank in that suit was had by serving the same upon the assistant cashier of the bank. The bank made no appearance in said suit. The default of the bank was entered in said suit. In the complaint filed in that suit the plaintiffs Whalen & Grant alleged "that the said defendant, the Montana National Bank, is, and was at the times hereinafter mentioned, a corporation, organized and existing under the laws of the United States for banking purposes." The complaint was afterwards amended, and in their amended complaint Whalen & Grant alleged: "And that these plaintiffs having heretofore assigned as collateral security only to the defendant bank any and all moneys that might be payable to them under the terms of said contract or under modifications thereof or extras, of which said assignment the said defendant trustees had received notice from the defendant bank prior to the

date in this paragraph last above stated, also demanded and requested of the defendant board of trustees that they pay all moneys or any moneys then due and owing plaintiffs, whether by reason of the contract or extras, or by way of modification to the defendant bank or to these plaintiffs, but that the defendant board of trustees failed, neglected, and refused to pay any part or portion of the moneys so due and owing either to said bank or to the plaintiffs." In the prayer of the complaint this language is found: "And plaintiffs further say that said defendant, the Montana National Bank, claims some interest in the said moneys sought to be recovered in this action from the said board of school trustees; and said bank is made a defendant hereto, and is required to allege whatever interest it may have therein, if any, in order that the same may be settled or determined in this action." These are the only references in the complaint to the defendant bank or to any interest it has in the said suit. Prior to the rendition of the judgment in said suit, some of the defendants in this case had attached Whalen & Grant for moneys claimed to be due them, and garnished the plaintiff board of trustees. Defendants Atkinson & Miller and Toole & Wallace, attorneys for Whalen & Grant in said suit when said judgment was obtained therein, filed liens upon the judgment so obtained to secure the moneys due them as attorneys in that case. After said judgment was obtained, defendant Marlow, as receiver of the said bank, commenced an action against Whalen & Grant to recover the sum of \$12,000, claimed to be due him as such receiver on account of the moneys advanced by said bank to them to enable them to carry out their contract with said trustees for the building of said schoolhouse, claiming that said Whalen & Grant had assigned part of the moneys coming to them from said board of school trustees for the building of said schoolhouse to secure the moneys so advanced by said bank. Thereupon this plaintiff commenced this suit for the purpose of determining the rights of the several claimants to the moneys due and owing by it to Whalen & Grant, making all the defendants parties to this suit, having, by leave of court, paid the amount of said judgment into court, to the end that the court might order it paid to the parties entitled thereto. The defendants all filed answers, setting up their respective claims to said moneys, and pleading, all except Marlow, the judgment roll in the case of Whalen & Grant against this plaintiff for the purpose of showing that Marlow, as receiver of said bank, was concluded by the judgment in said suit of Whalen & Grant against the trustees. The defendant Marlow claimed to have the first lien upon said moneys, under and by reason of the assignments made to the bank by Whalen & Grant to secure the sums of mon-

ey advanced, as stated above, to aid them in the erection of said building. The defendants other than Marlow set up in defense to Marlow's claim, in their respective pleadings: (a) That the bank was made a party to the suit of Whalen & Grant against the board of school trustees for the purpose of determining any claim it might have in and to the moneys claimed to be due by Whalen & Grant from the board of school trustees, and was personally served with summons, and its default was duly entered, and the judgment was rendered against it, and that it was estopped thereby from asserting any claim to the moneys involved in this action. (b) That the pretended conveyances of Whalen & Grant to the Montana National Bank were to secure future advances, without any limitation as to the amount or purpose, and that no delivery was had or possession taken of the property sought to be assigned; that no affidavits of bona fides of the transaction were attached to the conveyances, or acknowledgment of execution thereof; and that said conveyances, or certified copies thereof, were not filed in the office of the clerk and recorder of the county where Whalen & Grant resided. (c) That, under subdivision 8 of the contract between Whalen & Grant and the board of school trustees, no interest in the contract could be assigned without the written consent of the trustees or the architect, Paulson, and that Paulson or the board of trustees did not consent to the pretended assignment. That thereafter defendant Marlow moved the court to strike from the other defendants' pleadings all allegations relating to the matters set forth in the foregoing subdivisions a, b, and c, which motion was by the court granted, and to which ruling the defendants other than Marlow excepted. The court decreed that defendant Marlow, as receiver of said bank, had, and was entitled to, the first lien on the moneys, for the sum of \$13,981.10, and the other parties to the various sums set up in the findings, and in the order named. From this order and decree, the defendants other than Marlow appeal.

Walsh & Newman, Toole & Wallace, M. Bullard, A. J. Craven, and T. C. Bach, for appellants. H. G. McIntire, for respondents.

PEMBERTON, C. J. (after stating the facts). The appellants contend that there was error in the action of the court in striking from their pleadings the allegations therein contained, and as set out in subdivisions a, b, and c in the statement, relative to Marlow's having been a party to the suit of Whalen & Grant against the plaintiff in this suit, the entry of default against him, and his being estopped from claiming any interest in the moneys in dispute herein by reason of the proceedings and default therein. This we regard as the main question involved in this

appeal. We think the bank was not a necessary or proper party in the suit of Whalen & Grant against the plaintiff herein. That was a suit at law to collect the amount Whalen & Grant claimed to be due and owing them from the board of trustees upon a contract to build a schoolhouse in district No. 1. While the amended complaint in that case stated that Whalen & Grant had assigned the moneys due and to become due to them on the contract with said trustees, and that the trustees refused to pay any part of said sum, either to them or to the bank, and the prayer of said complaint stated that the bank claimed an interest in the matter, and asked that the bank be required to assert its interest, still we think the complaint stated no facts that required the bank to appear and claim an adjudication of any rights it had to the moneys claimed to be due from the trustees to Whalen & Grant. Whalen & Grant, in their complaint, disclosed the interest or claim the bank had in the moneys claimed to be due from the trustees to them. They stated that they had assigned this money to the bank. This was not disputed by the trustees in that suit. No issue was made that demanded the appearance of the bank to defend any right involved in that controversy. No adjudication was had or attempted in that suit as to any right of the bank to any moneys coming to Whalen & Grant from the trustees. The suit was tried and determined as if the bank had never been mentioned in the pleadings. Nor are we able to see that there was any issue in that case that involved or could have involved any right of the bank. Whatever right the bank had was dependent upon the recovery of Whalen & Grant. Whalen & Grant had assigned to the bank the right to collect of the trustees, of the moneys due and to become due on the building contract, an amount equal to the amount advanced by the bank to them to enable them to build the schoolhouse. Whalen & Grant allege this in their complaint. They could not deny it. The trustees did not controvert it. Then there was no controversy into which the bank could be drawn. There was no controversy to which it could become a party. There was no controversy as to this matter adjudicated or determined in that suit by the court, or attempted to be adjudicated or determined. We think, therefore, that the allegations of the pleadings of the appellants which were stricken therefrom by the court, as shown above, constituted no defense to the bank's claim to the moneys in dispute, and that there was no error in the action of the court in this respect. It is not contended in that suit that the bank was a real party in interest to the extent that it should have been a party thereto.

The judgment entered in the case of Whalen & Grant against the school board contained this recital: "The default of the defendant bank having been duly entered." There is no other reference to the bank in the judg-

ment. Counsel for the appellants contend that, by virtue of the above recital in the judgment, the rights of the bank to the moneys in the present suit were adjudicated, and that it is now estopped from asserting any claim to any part thereof. But the rights of the bank to the moneys owing to Whalen & Grant from the trustees were never even attempted to be adjudicated in that suit. No issue was made as to their rights in that suit. The entry of the default of the bank was not a final judgment from which the bank could have appealed, even if any rights it had had been adjudicated in the suit. To successfully invoke the doctrine of *res adjudicata*, and assert that the bank is estopped by the judgment in that case from claiming any right to the moneys now in dispute, it must be shown that such judgment was final and certain as to what was adjudicated and determined by the judgment. *Freem. Judgm.* § 251; *Herm. Estop.* §§ 47, 252; *Ricketson v. Compton*, 23 Cal. 650; *Scotland v. East Branch Min. Co.*, 56 Cal. 625; *Russell v. Place*, 94 U. S. 610. In *Russell v. Place* the court says: "An estoppel must be certain to every intent, and if, upon the face of the record, anything is left to conjecture as to what was necessarily involved and determined, there is no estoppel." But the suit of Whalen & Grant being purely an action at law, it is not certain by any means that the bank was obliged to appear therein because it was made a party, and set up a purely equitable defense. *Hought v. Waters*, 30 Cal. 810; *Ayres v. Bensley*, 32 Cal. 620; *McCreary v. Casey*, 45 Cal. 128; *Hills v. Sherwood*, 48 Cal. 386.

The appellants contend that the bank acquired nothing by virtue of the assignments to it by Whalen & Grant of the moneys coming to them under the contract with the trustees, for the reason that the contract itself provided that they should not assign any interest therein without the written consent of the trustees or the architect. We think the clause in the contract under discussion did not prevent, and was not intended to prevent, the giving of orders by Whalen & Grant on the trustees for money due thereunder. It was evidently intended by this clause to prevent Whalen & Grant from subletting the contract, or any part thereof, without the consent of the trustees or the architect. This clause was inserted for the protection of the trustees. They have interposed no objection to these assignments. It does not now lie in the mouths of Whalen & Grant to repudiate these assignments after having obtained thereby the bank's money, to enable them to carry out their contract with the trustees; and, as the appellants stand in the shoes of Whalen & Grant, it is difficult to see how they can assert rights and defenses against the bank that are not allowable to Whalen & Grant.

Appellants contend that the assignments made by Whalen & Grant were void as to

them, because they were not acknowledged; that they contained no affidavit as to the bona fides of the parties, and were not filed with the clerk and recorder of the county wherein Whalen & Grant resided. This contention is based upon the theory that the law in relation to chattel mortgages is applicable to the execution of these assignments. Whalen & Grant assigned to the bank sufficient of the money coming to them from the trustees to pay the amount advanced by the bank to Whalen & Grant to enable them to carry out their contract with the trustees, and, in the assignments, authorized the bank to collect and receipt for the same. At the same time they delivered the building contract between themselves and the trustees to the bank, as collateral security. The most they did by these assignments was to assign to the bank the right to recover that amount of money from the trustees. They assigned a chose in action which was defeasible and conditional. It was not such personal property as was capable of delivery, or of any other delivery than was made. We do not think this was such personal property as is contemplated by our statutes relating to chattel mortgages of personal property. *Jones, Chat. Mortg.* § 278, and authorities cited; *Howe v. Jones*, 57 Iowa, 138, 8 N. W. 451, and 10 N. W. 299; *Lawrence v. McKenzie* (Iowa) 55 N. W. 505.

There are other errors assigned, but we think the treatment above renders it unnecessary to discuss them. With the treatment above, they become immaterial. The judgment and order appealed from are affirmed.

DE WITT, J., concurs. HUNT, J., having tried the case in the court below, did not sit in the hearing of this appeal.

(16 Mont. 395)

MERCHANTS' NAT. BANK v. GREENHOOD et al.

(Supreme Court of Montana. Sept. 30, 1895.)

REHEARING—OBJECTIONS NOT RAISED ON FIRST HEARING.

A rehearing to present error in the entry of the judgment will be denied where such error is urged for the first time on the motion for rehearing, and the record was on file for 17 months; and the remittitur had been sent to the lower court.

On motion for rehearing. Denied.
For former opinion, see 41 Pac. 250.

PER CURIAM. In this case a motion for rehearing has been filed and submitted. The appellants ask for a rehearing, in order that they may argue an objection to the judgment as entered in the lower court. The objection which they suggest to the judgment is only as to a portion of the same. This objection is now made for the first time. The record in this case was on file in this court for 17 months before the appeal was heard. The counsel filed briefs covering nearly 400 print-

ed pages. On the argument we extended the time, and gave counsel more than twice as much time for argument than the rule prescribes. With all this time which counsel had to prepare the case, and with the extraordinarily voluminous briefs that were filed, and with the unusual time given to the arguments, counsel never suggested that there was the slightest error in the entry of the judgment below. We are not prepared to say that we would never grant a rehearing upon a point that was presented for the first time on the motion for such rehearing, but, under the extraordinary circumstances of this case, we do not feel that we are called upon to entertain the motion. The point presented now is wholly new, and we do not know that it is of great importance. There has been the amplest and the fairest opportunity for counsel to present everything upon which they relied. The remittitur even was sent to the lower court, under rule 15 (36 Pac. lx.), and was recalled to await the determination of this motion. As to such matters this court said, in *Mining Co. v. Holter*, 1 Mont. 429: "A rehearing will not be granted in an equity cause after it has been remitted to the court below to carry into effect the decree of the court above according to its mandate." Again, the court said in *Davis v. Clark*, 2 Mont. 394: "This case is before us upon motion of appellant for a rehearing. In considering the questions which have been submitted, we must be governed by the rule established in *Mining Co. v. Holter*, 1 Mont. 432. The decisions of this court will not be reversed unless they are in conflict with a statute or controlling decision, to which the attention of the court has not been directed, or it appears that some question which is decisive of the case has been submitted by counsel, and been overruled by the court." In the case of *Beck v. Thompson* (Nev.) 41 Pac. 1, the court said: "All the points raised in the petition, except as to the rent, are new matters, and, under the decisions of a long line of authorities, they should not be considered on petition for rehearing. 'A rehearing in the supreme court will not be granted in order to consider points not made in the argument upon which the case was originally submitted.' *Kellogg v. Cochran*, 87 Cal. 192, 25 Pac. 677. 'The supreme court will not consider a petition for rehearing that attempts to discuss the case upon grounds which were not presented in the original argument or discussed in its opinion.' *San Francisco v. Pacific Bank*, 89 Cal. 23, 26 Pac. 615. 'New questions cannot be raised for the first time on motion for rehearing.' 2 Enc. Pl. & Prac. 386, and authorities cited in note 1. 'Counsel are presumed to have presented on their original argument all the grounds upon which they rely for the affirmance or reversal of the judgment appealed from.' *Id.*, and note 2. We fully concur with the above-named authorities. A rehearing is denied."

In the note to 2 Enc. Pl. & Prac., cited by the Nevada court, the author cites the following cases: *Robinson v. Allison* (Ala.) 12 South. 604; *Bank v. Ashmead*, 23 Fla. 391, 2 South. 657, 665; *Jacksonville, etc., Ry. Co. v. Peninsular Land, etc., Co.*, 27 Fla. 1, 157, 9 South. 661; *Funk v. Rentchler*, 134 Ind. 68, 33 N. E. 364, 898; *Martin v. Martin*, 74 Ind. 207; *Lawrence Co. v. Hall*, 70 Ind. 477; *Yates v. Mullen*, 24 Ind. 277; *Graeter v. Williams*, 55 Ind. 461; *Rikhooff v. Machine Co.*, 68 Ind. 388; *Heavenridge v. Mondy*, 34 Ind. 28; *Brooks v. Harris*, 42 Ind. 177; *Cramer v. City of Burlington*, 45 Iowa, 630; *McDermott v. Railway Co.*, 85 Iowa, 180, 52 N. W. 181; *Dietlin v. Egan* (Com. Pl.) 2 Misc. Rep. 52, 21 N. Y. Supp. 6; *Moore v. Beaman*, 112 N. C. 558, 17 S. E. 676; *Hudson v. Jordan*, 110 N. C. 250, 14 S. E. 741; *Weld v. Manufacturing Co.*, 84 Wis. 537, 54 N. W. 335; *State v. Coulter*, 40 Kan. 673, 20 Pac. 525; *Weathersbee v. Farrar*, 98 N. C. 255, 3 S. E. 482; *Lovenberg v. Bank* (Tex. Sup.) 5 S. W. 816; *Schrichte v. Stite's Estate*, 127 Ind. 472, 26 N. E. 77; *Lawrence Co. v. Hall*, 70 Ind. 469; *Bitting v. Ten Eyck*, 82 Ind. 421; *Coleman v. Keels*, 31 S. C. 601, 9 S. E. 735; *Underwood v. Sample*, 70 Ind. 450; *Porter v. Choen*, 60 Ind. 388; *Railroad Co. v. Huff*, 19 Ind. 315; *Kellogg v. Cochran*, 87 Cal. 192, 25 Pac. 677; *San Francisco v. Pacific Bank*, 89 Cal. 23, 26 Pac. 615; *Farrell v. Pingree*, 5 Utah, 530, 17 Pac. 453; *Rogers v. Laytin*, 81 N. Y. 642; *News Co. v. Wilmarth*, 34 Kan. 254, 8 Pac. 104; *Knoth v. Barclay*, 8 Colo. 305, 6 Pac. 924; *Whitehead v. Tulane*, 11 La. Ann. 302; *Broom's Succession*, 14 La. Ann. 67. We feel that it is the proper practice to deny this motion for rehearing. With all the diligence and labor in preparing and arguing this appeal, there is nothing whatever to indicate to us any excuse for counsel not having fully presented their points. We heard counsel at length, we studied their briefs at length, and deliberated over their case for many weeks; and, under all these circumstances, we are now of opinion that as to this case "*Interest reipublicæ ut finis litium sit.*" A rehearing is denied.

STATE v. WHALEY. (No. 661.)
(Supreme Court of Montana. Sept. 30, 1895.)
CRIMINAL LAW—MOTION FOR NEW TRIAL—NOTICE
—REVIEW.

1. Cr. Prac. Act 1887, § 356, provides that a notice of motion for a new trial must state particularly the error upon which the party making the application relies. *Hed*, that a notice of intention to move for a new trial, not specifying the alleged errors, was not cured by the contemporaneous service and filing of a motion for a new trial, specifying said errors.

2. A stipulation that the bill of exceptions and papers used on a motion for a new trial should be allowed as a bill of exceptions on appeal, will not have the effect of curing a defective notice of motion for a new trial.

3. Irregularities appearing on the face of a notice of motion for a new trial are not waived.

ed by a motion to strike it out for other reasons.

4. Cr. Prac. Act 1887, § 394, provides that upon appeal any decision of the court made in the progress of the case may be reviewed. *Held*, that errors enumerated as grounds for a new trial (section 354) cannot be considered unless they were first called to the attention of the trial court by proper motion for a new trial.

5. Under Cr. Prac. Act 1887, § 345, subd. 6, providing for new trials when there has been any abuse of discretion, errors in refusing to order a change of venue, and overruling challenges to jurors, must be first considered on a motion for a new trial before they will be reviewed on appeal.

Appeal from district court, Ravalli county; Frank H. Woody, Judge.

David J. Whaley was convicted of grand larceny, and appeals. Affirmed.

Marshall & Corbett, Webster & Wood, and Toole & Wallace, for appellant. H. J. Haskell and E. L. Knowles, for the State.

DE WITT, J. This is an appeal from a judgment convicting the defendant of the crime of grand larceny. A notice of motion for new trial was served February 10, 1894, and filed February 12, 1894. Another notice of intention to move for new trial was served June 1, 1894, and filed on the same day. Neither of these notices of intention stated particularly the errors upon which the party making the application relied. Cr. Prac. Act 1887, § 356; *State v. Black*, 15 Mont. 143, 38 Pac. 674; *State v. Fry*, 10 Mont. 407, 25 Pac. 1055. It is conceded by the appellant's counsel that these notices do not contain such particular specification. Contemporaneously with filing the second notice of intention to move for a new trial, the defendant served and filed a written motion for new trial. While it is conceded by counsel that the notices of motion are insufficient in not specifying the particulars, they contend with great earnestness that the motion for new trial should be construed to be a notice of intention to move. But it is perfectly apparent to us, from the record, that this motion was not intended to be a notice of motion, for the sufficient reason that a notice of motion was filed at the same time that the motion was. It certainly never was the intention of counsel to consider their motion as a notice, when in fact they filed an independent notice upon the very same day. We cannot distinguish this case from that of *State v. Fry*, *supra*. In the last-named case the defendant gave a notice of intention, without specifying the particular errors, but stating that the motion was to be made upon the grounds to be set forth in the motion. Afterwards the defendant served and filed his motion for new trial, which specified every error that was relied upon by him. The motion was denied by the district court on the ground that no notice had been served. Page 408, 10 Mont., and page 1056, 25 Pac. After citing the statute (sections 355, 356, Cr. Prac. Act), the supreme court, in the *Fry* Case, said: "The

statutes have designated the acts which are essential to the notice of the intention to move for a new trial. The court, in *Burton v. Todd*, 68 Cal. 485, 9 Pac. 663, has said: 'We conclude, therefore, (1) that, as the right to move for a new trial is statutory, it must be pursued in the manner pointed out by the statute.' The appellant could not lawfully embody in his motion for a new trial the particulars which should be stated in his notice of intention. The appellant has not filed or served a proper notice of his intention to move for a new trial, and the judgment is affirmed, and will be executed as directed in the court below." It has often been said in other decisions in this court that appeals are matters of statutory regulation, and that there must be a substantial compliance with the statute in order to confer jurisdiction upon this court. *Courtright v. Perkins*, 2 Mont. 404; *Territory v. Hanna*, 5 Mont. 247, 5 Pac. 250; *State v. Gibbs*, 10 Mont. 210, 25 Pac. 288; *State v. Northrup*, 13 Mont. 584, 35 Pac. 228. While the facts in the case of *State v. Black* are not wholly the same as in the case at bar, and while *State v. Fry*, above cited, is more direct authority on the matter now before us, still the following remarks from the *Black* Case are of general application. In that case we said: "We can see only two courses for this court to pursue in this case,—either to follow the statute, and disregard the defendant's objection, now made in his argument for the first time, that the instruction as to alibi was error, or to disregard the statute, and establish a rule of practice in contravention thereto. But, as quoted from a decision in the learned brief of defendant's counsel, 'Judex est custos non conditor juris, judicia exercere potuit, facere leges non potest.' And in the case at bar the law is as we have quoted it from the statute; and if we are the custodians, and not the framers, of the law, there is no course before us but to follow the mandate of the statute, and to hold that the alleged objectionable instruction is not now a subject for review." We cannot do otherwise than follow the authority of the *Fry* Case, and hold that the foundation for a motion for a new trial was not laid, owing to the fact that a proper notice of intention was not served and filed.

It is contended that there is a stipulation made between counsel which cures the absence of a proper notice of intention. We are of opinion that the stipulation does not aid the appellant, for the reason that it is simply to the effect that the bill of exceptions and papers considered by the court and used on motion for new trial, be settled, allowed, and considered as a bill of exceptions on appeal. Whatever effect this stipulation may have, it cannot be greater than to simply present to this court what the district court acted upon, and cannot in any way be considered as a waiver of the absence of a notice of intention to move.

Again, it is contended that the state's at

torney waived the notice of intention to move, as to some parts of the same, for the reason that he appeared and moved to strike out the notice and the motion on certain grounds. It is contended by appellant that the motion to strike out was directed at the notice of intention only as to the first four subdivisions of section 354, Cr. Prac. Act 1887, and was not directed at the three last grounds mentioned in said section. We are of opinion that this action by the state's attorney was not a waiver of the absence of a sufficient notice. As said in *Gregg v. Garrett*, 13 Mont. 13, 31 Pac. 721: "The defect taken advantage of is apparent in the notice itself, and requires no other matter inserted in the record to show this fact. This irregularity in presenting the motion, without stipulation or other action amounting to a waiver of proper notice, may have been the very ground upon which the trial court denied the motion. *White v. Superior Court*, 72 Cal. 475, 14 Pac. 87; *Hayne*, New Trial & App. §§ 14, 145. And we think, in the absence of anything in the record showing a waiver, the objection by respondent should be sustained." It has been held, on settlement of statements on motion for new trial or bills of exceptions, that when a party comes in, and by amendment or otherwise assists in making up the record, that he thereby waives certain defects, unless he objects to the same, and makes his objection part of the record. *Sweeney v. Railroad Co.*, 11 Mont. 34, 27 Pac. 347. But in the matter before us, as above noted, the defect in the notice is perfectly apparent on the face of it. The notice of intention informed neither the counsel nor the court of the particular errors relied upon.

Counsel further contends that, if this court concludes that it will not examine the motion for new trial, still there were errors upon the trial which may be reviewed at this time without any motion for new trial made. He cites us to sections 394 and 404 of the Criminal Practice Act of 1887, which are as follows:

"Sec. 394. An appeal to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him, and, upon appeal, any decision of the court, or intermediate order, made in the progress of the case, may be reviewed."

"Sec. 404. The appellate court may reverse, affirm or modify the judgment appealed from, and may, if necessary, or proper, order a new trial. In either case the cause must be remanded to the court below, with proper instructions and the opinion of the court, within the time, and in the manner, to be prescribed by rule of court."

It is true that, on appeal from the judgment, the supreme court, in reviewing an intermediate order or decision, has always held that an order denying a new trial was such an order, and the same was reviewed on appeal from the judgment. But we are

of opinion that it is the intention of the criminal practice act that the errors enumerated in section 354 shall be called to the attention of the district court on motion for new trial, and that that court shall thereby first have an opportunity to correct its own errors.

Appellant's counsel now claim that we should review the alleged error of the district court in denying the motion for change of venue, and the alleged error in overruling challenges to jurors. But these are matters which we think the district court should review on motion for new trial. It has long, if not always, been the practice in this state and territory that such errors were so reviewed first by the district court, and that they were then brought to the supreme court on appeal from the judgment, and thereby was had a review of the order denying the new trial. The sixth subdivision of section 354 provides that a new trial may be granted "when the court has either admitted illegal, or excluded legal, evidence; or there has been any abuse of discretion by which the party was prevented from having a fair trial." A party is prevented from having a fair trial if the district court abuses its discretion in denying him a change of venue on the ground of the existence of undue influence of the prosecutors, or prejudice of the inhabitants of the county against the defendants. These questions which the district court passed upon in denying the motion for change of venue were purely questions of fact. The court passed upon these questions as they were raised by affidavits. Its decision was a matter of discretion. If it were abused, it could be reviewed on motion for new trial.

We are of opinion that the same principle obtains in reviewing the action of the court in overruling challenges to jurors in this case. The challenges were interposed on the ground of the jurors having formed and expressed opinions upon the guilt or innocence of the defendant. These were questions of fact, to be determined by the district court upon examination. The court was the trier of this question of fact. Cr. Prac. Act 1887, § 288. If the court erred in determining these questions of fact, it was an abuse of discretion, which could be reviewed on a motion for a new trial, under subdivision 6 of section 354.

As this record is before us, we are constrained to affirm the judgment. It is one of the cases which is affirmed with reluctance, for the reason that we are of opinion that there were errors upon the trial of the case which prevented the defendant from having a fair trial, and which should have been properly presented to us for review. We dislike to animadvert upon the preparation of appeals by counsel, but the fact is that this record, and the method of proceeding to bring this case before this court, is subject to the gravest criticism. If errors occur in the trial of a criminal case, involving the liberty of a citizen, as long as the statute gives him the

right of appeal by conforming to its provisions it is a great misfortune that such a defendant should be deprived of a hearing by reason of neglect to properly present his case. These are matters, however, which we can regret, but not remedy. The defendant's only recourse now is to another department of the government, to which department we commend a consideration of the case. The appeal must be dismissed, which is an affirmation of the judgment (*State v. Blesman*, 12 Mont. 11, 29 Pac. 534), and the same is accordingly affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(16 Mont. 580)

STATE v. WHALEY. (No. 663.)

(Supreme Court of Montana. Sept. 30, 1895.)

Appeal from district court, Ravalli county; Frank H. Woody, Judge.

Clement P. Whaley was convicted of larceny, and appeals. Affirmed.

Marshall & Corbett, Webster & Wood, and Toole & Wallace, for appellant. H. J. Haskell and E. L. Knowles, for the State.

PER CURIAM. This is an appeal by the defendant from a judgment convicting him of the crime of grand larceny. As stated by appellant's counsel, precisely the same questions of procedure are involved in this case as in the case of *State v. Whaley* (just decided) 41 Pac. 852. Therefore, on the authority of the last-mentioned case, the judgment of the district court is affirmed.

(16 Mont. 581)

STATE v. WHALEY. (No. 662.)

(Supreme Court of Montana. Sept. 30, 1895.)

Appeal from district court, Ravalli county; Frank H. Woody, Judge.

Matthew L. Whaley was convicted of larceny, and appeals. Affirmed.

Marshall & Corbett, Webster & Wood, and Toole & Wallace, for appellant. H. J. Haskell and E. L. Knowles, for the State.

PER CURIAM. This is an appeal by the defendant from a judgment convicting him of the crime of grand larceny. As stated by appellant's counsel, precisely the same questions of procedure are involved in this case as in the case of *State v. Whaley* (just decided) 41 Pac. 852. Therefore, on the authority of the last-mentioned case, the judgment of the district court is affirmed.

(109 Cal. 160)

BATES v. CORONADO BEACH CO. (No. 19,570.)

(Supreme Court of California. Sept. 23, 1895.)

CORPORATIONS—CONTRACTS—PARTNERSHIP AGREEMENT—ULTRA VIRES.

1. A finding that plaintiff and defendant entered into a contract to deal in lands, and divide the profits and losses, is not overcome by evidence that defendant's agents refused to have it reduced to writing till he obtained a certain release, it not being one of the terms of the contract that it should be reduced to writing, and plaintiff having paid to defendant his contribution to the venture, and transferred land to the person designated by defendant, and defendant having used the money to discharge obligations on the land, and afterwards disposed of the land.

2. It is not ultra vires for a corporation to enter into a contract with an individual to engage in a certain venture, profits and losses to be divided equally among them, where all the management of the enterprise is intrusted to the corporation.

3. The entering into a contract by a corporation, within the apparent scope of its business, is a determination on its part, conclusive against it, that the contract was "essential," within Civ. Code, § 854, empowering a corporation to enter into contracts essential to the transaction of its ordinary affairs.

4. Though plaintiff, in entering into a partnership agreement with defendant, violated his obligations to a third person, defendant cannot for this reason avoid liability for its share of the losses, the contract having been fully executed without objection of such third person.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Frank E. Bates against the Coronado Beach Company for an accounting on a partnership agreement. Judgment for plaintiff. Defendant appeals. Affirmed.

Gibson & Titus, for appellant. O. L. Barber and Conklin & Hughes, for respondent.

HARRISON, J. The facts upon which the plaintiff seeks to recover are stated in the opinion upon the former appeal herein. *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605. Upon a retrial of the cause after it had been remanded, a nonsuit was granted as to the defendant Babcock, and judgment was rendered in favor of the plaintiff and against the appellant. The court found that the plaintiff and the appellant entered into a contract February 23, 1888, by which it was agreed that they should purchase certain lands and other property from the Millers, sell the same, pay certain debts and incumbrances thereon, and divide the profits and losses arising therefrom equally between them. This was the main issue upon the trial in the superior court; and, as the evidence on behalf of the plaintiff was ample to sustain the finding, the conclusion of the court must be accepted as determinative of the issue. The conclusion of the court is not overcome by the evidence to the effect that Babcock, who acted in behalf of the appellant, refused to have the contract put in writing until the plaintiff should obtain a certain release from the Millers. It was not one of the terms of the contract between the plaintiff and the appellant that it should be reduced to writing and signed by them; but, after they had made the contract and agreed upon its terms, Slaughter, an attorney, who was present at the negotiation offered to put it in writing, but Babcock replied that he did not want a written contract at that time. Both of the parties to the agreement immediately entered upon its performance, and carried it out according to its terms. The plaintiff gave to the defendant the \$15,000 which was his contribution to the venture, and transferred the title to the land then held by him to the person designated by the

defendant; and the defendant disposed of the money in discharging obligations upon the land, and afterwards disposed of the land. Under these circumstances, it cannot be held that it was the intention of the parties that the agreement should not be operative until it had been reduced to writing, or that the omission to have it formally executed deprived the plaintiff of the rights acquired thereby.

The court was justified in finding that Babcock was authorized to make the contract on behalf of the appellant. It was alleged in the complaint, and not denied, that Babcock was the president and general manager of the appellant corporation; and it fully appeared from the evidence that he had assumed the management and control of the general business of the appellant with full knowledge and acquiescence of its officers, and that at a meeting of its stockholders, held subsequent to the making of this contract, all of his acts were ratified and confirmed by them. Irrespective of the estoppel upon the appellant arising from the advantage derived by it from the full performance of the contract on the part of the plaintiff, these facts make the acts of Babcock in entering into the contract binding upon the appellant. *Crowley v. Mining Co.*, 55 Cal. 273; *McKiernan v. Lenzen*, 56 Cal. 61; *Seeley v. Lumber Co.*, 59 Cal. 22.

It was not ultra vires for the appellant to enter into the agreement with the plaintiff. The power of a corporation to enter into a general partnership with an individual or with another corporation is not here involved. The ground upon which this power is sometimes denied is that a partnership implies the power of each partner, under his authority as a general agent for all the purposes of the partnership, to bind the others by his individual acts, whereas the statutes under which a corporation exists require its powers to be exercised by a board of directors, and preclude it from becoming bound by the act of the one who may be only its partner. There is, however, in the present case, no question of agency in the management of the affairs of the corporation. The plaintiff paid the money to the appellant, and transferred to its appointee the title to the land, so that the entire management of the business contemplated by the contract was intrusted to the corporation itself. There is no rule of law that will preclude a corporation from entering into a contract with an individual which will have the effect to carry out directly or indirectly the object of its incorporation, and to provide in that agreement that the gains or losses of the venture shall be borne equally by both parties. Section 354 of the Civil Code provides: "Every corporation, as such, has the power: * * * (8) To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation."

Whether a contract is "essential" to the transaction of its ordinary affairs, or for the purposes of the corporation, is to be determined by the corporation or those to whom the management of its affairs is intrusted. If it is within the apparent scope of its organization, the fact that the contract has been entered into by it, or by its representative, is a determination on the part of the corporation that it is essential, and the corporation will not be permitted thereafter to question its effect. The appellant was incorporated for the purpose, among others, of selling or otherwise disposing of the lands upon Coronado Beach, in blocks or lots. It had conveyed the lots in question to the Millers, and held mortgages thereon to a large amount. The property was incumbered with other liens. There was a possibility that insolvency proceedings would be commenced, either by or against the Millers, by which the securities held by the appellant would be impaired. The real-estate market was inactive, and, as was soon ascertained, was in a falling condition. Creditors were pressing their claims against some of the property, and the appellant was anxious to have the property disposed of, in order that it might be freed from these obligations. Under these circumstances, it must be held that the contract was not only within the scope of its organization, and essential to the transaction of its ordinary affairs, but that it was a prudent step on the part of the appellant for preserving the value of the securities which it had taken upon its sale of the lands.

The relation existing between the plaintiff and the Millers at the time of entering into the agreement cannot be made by the appellant a ground for repudiating its contract with the plaintiff. If it be assumed that in making the contract with the appellant the plaintiff violated his obligation to the Millers, that was a matter for which he was liable to them alone, and from which he could be released by them. After the contract between the plaintiff and the appellant has been fully executed, without any objection on the part of the Millers, the appellant cannot allege the possibility of an objection on their part as a defense to its liability for its share of the losses, any more than it could have alleged such matter as a defense to the plaintiff's claim for his share of the profits, if there had been any profits realized from the venture.

Several rulings of the court during the progress of the trial are assigned as error, but none of them seem entitled to any extended consideration, nor could a different ruling upon the respective matters have changed the conclusion of the court. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

109 Cal. 125

GARBERINO v. ROBERTS. (No. 18,326.)
(Supreme Court of California. Sept. 12, 1905.)

CONTRACT TO CONVEY LAND—BREACH.

A conveyance of land to a third person by one bound by an executory contract to convey it to another at a future date is not a breach of such contract, and does not entitle such other to treat the contract as abandoned before the time of performance arrives.

Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by G. B. Garberino against James Roberts for breach of contract to convey land. From a judgment for defendant, plaintiff appeals. Affirmed.

W. D. Grady and James Gallagher, for appellant. Frank H. Short, for respondent.

VAN FLEET, J. A general demurrer was sustained to the complaint, and, plaintiff electing not to amend, judgment was entered dismissing his action, from which he appeals.

The action was to recover back the first installment paid under an executory contract for the sale of land, and damages for the breach of said contract by defendant. The material averments of the complaint are that plaintiff and defendant, on the 9th day of November, 1891, entered into a contract, whereby, in consideration of the payment by plaintiff of \$200 down and \$400 to be paid in one and two years thereafter, with interest, defendant sold and agreed to convey to plaintiff a certain lot in the town of Fresno. That at the time of the execution of the contract defendant was the owner of the title in fee of the lot to be conveyed, but thereafter, on the 25th day of January, 1892, and before the date at which said contract was to be performed, defendant, without the knowledge and against the will and consent of the plaintiff, conveyed the said lot by grant to a third party; and did thereby, as it is alleged, "place without and beyond his, the said defendant's, power the fulfillment and performance of the covenants, conditions, and agreements on his part to be observed and performed," by reason of which plaintiff "elects to rescind said agreement." The only question, of course, is whether the complaint states a cause of action, and this question depends upon the further one whether the facts plead show a breach of the alleged contract of sale by defendant. The sole ground relied upon as constituting such breach is the conveyance of the lot by the defendant to a third party pending his contract with the plaintiff to convey to the latter, the plaintiff's contention being that the defendant, by conveying away his title, put it absolutely without his power to fulfill his contract with plaintiff, and thereby gave plaintiff an immediate right of action for rescission. There is no question but that, where a party, having contracted to do a thing upon a given day, before the day of

performance arrives repudiates his contract, or voluntarily puts it out of his power to perform, the other party to the contract may treat it as rescinded, and bring his action for the breach immediately and without awaiting the stipulated day. But the question here is whether the mere fact that defendant conveyed the lot under the circumstances alleged had the effect to put it without his power to perform at the future date agreed upon, since it is not alleged that defendant has repudiated his contract, or refused to carry it out, unless the fact of conveying the lot to another is the legal equivalent of such repudiation. In *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320,—a case of precisely the same character as the present,—it was held that the conveyance by the vendor of the land contracted for to a third party before the time for performance of the contract of sale is not a breach of that contract, and does not entitle the purchaser to treat the contract as abandoned or rescinded before the time of performance arrives. "One may sell land," say the court in that case, "which he does not own, and yet be able, when the time of performance arrives, to furnish a good title. In the meantime the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would be incumbent upon him to offer to perform, or to show that at the time of performance the vendor could not furnish the title." And in *Shively v. Water Co.*, 99 Cal. 259, 33 Pac. 848,—another action of like character and purpose,—it is said: "Rescission or abandonment of the contract by defendant gives plaintiff his cause of action, but a transfer of the land to third parties of itself does not constitute such abandonment or rescission. It does not necessarily follow from such transfer that defendant has placed it out of his power to comply with the terms of the contract. Such transfer creates no breach of the contract. Non constat but plaintiff's rights were expressly reserved by its terms. Defendant, as yet, has not defaulted, and might not suffer default when the balance of the purchase price was tendered and a deed demanded; and the plaintiff is not entitled to recover the money paid until he shows the default of the defendant. This question was directly presented in *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320, and it was there held that a conveyance by the vendor was not a breach of the contract, and a demurrer was sustained to the complaint for that reason. We are entirely satisfied with the principle laid down in that case."

The facts alleged in the case at bar make a case not distinguishable in principle from the foregoing. It is true that in this case the plaintiff alleges that the act of the defendant in conveying the lot put it absolutely out of his power to perform his contract, but that is a mere legal conclusion,

drawn from the antecedent facts, and in no way strengthens or adds to the facts upon which it is predicated, and which we have seen do not warrant such conclusion. Nor does the fact that in both *Joyce v. Shafer* and in *Shively v. Water Co.*, supra, the plaintiff himself was in default in his payment for the land essentially distinguish those cases from the one at bar as to the point here involved. Although the plaintiff here is not himself in default, he cannot recover unless he shows a state of facts putting the defendant in default; and this the facts alleged do not do. Plaintiff treated the defendant's conveyance as a rescission of the contract, and brought his action at once, without waiting for the day of performance provided, whereas, in order to put defendant in the wrong, it was incumbent upon him to await the time of performance provided in his contract, and thereupon make his tender of performance and demand his deed. We think the demurrer was properly sustained, and the judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

5 Cal. Unrep. 150

WELLS v. SNOW et al. (No. 18,419.)

(Supreme Court of California. Sept. 20, 1895.)

NONSUIT—REVIEW OF EVIDENCE—NEW TRIAL.

1. Where there is evidence to sustain a material issue for plaintiff, a motion for a nonsuit is properly denied.

2. A finding of fact by the court will not be disturbed where there is a substantial conflict in the evidence.

3. Newly-discovered evidence, merely cumulative in character, is not ground for a new trial.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by B. C. Wells against W. N. Snow and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

G. C. Freeman and F. H. Short, for appellants. George B. Graham, for respondent.

SEARLS, C. This action is brought to recover \$400, for so much money alleged to have been had and received by the defendants for the use of plaintiff. Plaintiff had judgment for \$350, interest, and costs, from which judgment, and from an order denying their motion for a new trial, defendants appeal. On the 2d day of September, 1892, W. N. Snow and Mrs. W. N. Snow, his wife, as parties of the first part, entered into a written agreement with B. C. Wells, the plaintiff and respondent herein, by the terms of which, in consideration of \$13,000, they agreed to sell to said Wells a certain tract of land and certain personal property thereon situate, in Fresno county, Cal., payments to be made by said Wells as follows: \$400 down, the receipt of which is acknowledged;

\$4,000 on or before January 1, 1893,—possession to be given to Wells upon said payment of \$4,000. The residue of the payments were to be made as follows: \$2,600, January 1, 1894; \$3,000, January 1, 1895, and \$3,000 on January 1, 1896,—with interest on all deferred payments, except that of January 1, 1893, at 8 per cent. per annum. B. C. Wells failed to pay the sum of \$4,000 on the 1st of January, 1893, and has never paid or offered to pay any portion of the purchase price of the land except said sum of \$400 paid at the date of the contract.

This action is brought upon the theory that the contract was rescinded by agreement of the parties, and hence that the action will lie against defendants for money had and received by them for the use of plaintiff. The answer denied all the allegations of the complaint; set up the agreement to convey, the failure of plaintiff to make payment or to comply with the terms of the contract, and averred their willingness and readiness to comply with all the terms and conditions thereof; set up a counterclaim for \$400 on account of goods, wares, and merchandise sold and delivered to plaintiff by the defendants; and, by way of cross complaint, set out the contract, averred the breach thereof by plaintiff, averred their readiness to comply, and averred damages in the sum of \$2,000, etc. The cause was tried before the court, without the intervention of a jury. At the trial the only question of any importance litigated related to the issue of the rescission of the contract; and, upon the close of plaintiff's testimony, defendants moved for a judgment of nonsuit, which was denied, and the ruling is assigned as error.

There is no claim of the failure of title, of fraud or mistake, or any other cause entitling plaintiff without the concurrence of defendants to rescind the contract. That the plaintiff was unable to make and failed to make the payment of \$4,000 due in January, 1893, is admitted by all the testimony, and that the defendants were in no wise in default is equally clear. The whole case, therefore, turns upon the question as to whether or not there was an agreement or consent on the part of the defendants that the contract should be rescinded. The finding of the court is "that on the 2d day of January, 1893, said plaintiff and said defendants did mutually agree to abandon and rescind said contract, and all of said parties have from hence hitherto treated said contract as abandoned and rescinded; but said \$400, nor any part thereof, has ever been returned or repaid to plaintiff by said defendants or any other person." There was some evidence on the part of plaintiff going to sustain the issue as to rescission of the contract. The motion for a nonsuit was therefore properly denied.

The evidence, taken as a whole, upon the question of rescission, is not altogether satisfactory; but, as it involved a substantial conflict, we are not at liberty to interfere

with the action of the court below by setting aside the finding.

The newly-discovered evidence, as disclosed by the affidavit of L. E. Walker, is contradicted by the affidavit of the plaintiff, and, if not so contradicted, is cumulative to the testimony adduced at the trial, and hence does not call for a reversal.

The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

109 Cal. 130

BREMNER v. LEAVITT et al. (No. 18,427.)

(Supreme Court of California. Sept. 17, 1895.)

ACCOUNTING BY PARTNERSHIP — PLEADING — DEMURRER.

1. A complaint in an action for a partnership accounting, alleging the nonpayment to the plaintiff of \$1,000 which it was agreed the firm should pay him, profits made by defendants by devoting, in violation of their agreement, a large part of their time to other business, and the consequent loss to the firm, money and property advanced by plaintiff personally for use of the firm for which he has not been reimbursed, states a single cause of action.

2. Immaterial matter alleged in a pleading cannot be reached by demurrer.

Department 1. Appeal from Superior court, Lassen county; W. T. Masten, Judge.

Action by C. T. Bremner against B. H. Leavitt, William Bremner, and V. B. Woodson for an accounting and winding up of a copartnership. From a judgment for defendants, plaintiff appeals. Reversed.

Spencer & Raker, for appellant. F. C. Spencer, Goodwin & Goodwin, and Shinn & Shinn, for respondents.

VAN FLEET, J. Defendants Bremner and Woodson demurred to the complaint, and their demurrers were sustained. Plaintiff refused to amend, and a judgment of dismissal was entered against him, from which he appeals.

The demurrers were improperly sustained. The action is for an accounting and winding up of the affairs of a copartnership. The demurrers were upon several grounds, but the only ones that seemed to be insisted upon are that the complaint is uncertain; that several causes of action are improperly united; and that the complaint contains several causes of action, not separately stated; and it was upon the latter ground, as evidenced by the order of the court below, that the complaint was held bad. But the complaint is not amenable to either of the objections made. In our judgment, it states but one cause of action, and is free from uncertainty. It states various different matters and transactions between the several members of the partnership as to which an accounting

is asked, but they are all matters relating to and growing out of the partnership relation of the parties, and, taken together, constitute but a single cause of action. While they are separate and independent matters in the sense that they are varied and different in character, they are not separate causes of action, but integral parts of one and the same cause. Respondents have very evidently fallen into confusion as to what constitutes a separate cause of action in such a case. It is alleged, for instance, among other matters for which an accounting is prayed, that at the time of the formation of the partnership it was agreed that the firm should pay to plaintiff the sum of \$1,000, with interest, etc., which has not been paid; that the defendants Leavitt & Woodson have failed to devote their time and services to said partnership business as agreed, by reason of which the business of said partnership has suffered loss and damage, and that said defendants have devoted all their time and energies to other enterprises, in which they have made large profits, for which they should be required to account to said partnership; that plaintiff has personally paid debts of said partnership, for which he has not been reimbursed; and that he has furnished personal property to said partnership, for which he has not been paid. These matters, and others of a like nature, are regarded and characterized by respondents as "a complete jumble of causes of action." It is perfectly obvious that they do not constitute separate and distinct causes of action. They are proper matters to be alleged as grounds for an accounting between the partners, but they are all parts of the same general subject-matter, and constitute but one general cause of complaint. It was perfectly competent for the partnership to assume and promise to pay to plaintiff the indebtedness of a thousand dollars, alleged, and in that event it became an obligation of the partnership, for which plaintiff is entitled to an accounting. *Herman v. Paris*, 81 Cal. 626, 22 Pac. 971. The Code provides that a general partner, who agrees to give his personal attention to the business of the partnership, may not engage in a business which gives him an interest adverse to that of the partnership, or prevents him from giving to the business of the partnership the degree of attention which would be advantageous to it, and that a partner violating this obligation may be called upon to account to the partnership for the profits of such adverse business. Civ. Code, §§ 2435-2438. It was, therefore, proper for plaintiff to allege the violation by defendants of their obligations in this regard as one of the grounds of his action, and upon which he desired an accounting; and the fact that the breach of this obligation by the defendants resulted in damages to the plaintiff does not constitute it a separate cause of action at law for damages.

as contended by respondents. Such damages are but an incident of the general cause of action assigned. Partners cannot sue one another at law for any breach of the duties or obligations arising from that relation. This can only be done in chancery by asking a dissolution and accounting, and, if damages accrue from any cause in such proceeding, they must be adjusted by some appropriate method in that tribunal. *Stone v. Fouse*, 2 Cal. 292. Equity does nothing by halves, but gives full relief in such cases. When it undertakes to adjust the differences between partners, it adjusts them all. "The whole subject-matter in controversy between the parties, which includes all the partnership transactions of each and all the partners, is the subject of the adjudication; and the account and decree must include all these matters, and leave nothing open for future litigation or controversy. Equity will not adjudicate causes piecemeal." *Griggs v. Clark*, 23 Cal. 427. The same general considerations apply to the other matters alleged. It is not only proper, but necessary, to set forth in such an action all the transactions of the firm and its members sought to be included in the accounting, however varied in their nature, and, taken as a whole, they go to make up and constitute the plaintiff's cause of action. It may be that some of the matters alleged are not relevant or material to the cause of action stated, and do not tend to constitute proper subject-matter for an accounting between the parties. Such matter, however, should be made the subject of a motion to strike out. It does not affect the sufficiency of the complaint, and cannot be reached by demurrer. If it exists, it will not impede the administration of proper relief, since it may be eliminated on the trial, as evidence will not be received upon immaterial matters. The judgment is reversed, and the cause remanded, with directions to the lower court to overrule the demurrers, and permit defendants to answer.

We concur: HARRISON, J.; GAROUTTE, J.

5 Cal. Unrep. 155

SHARP v. FRANK. (No. 18,359.)

(Supreme Court of California. Sept. 21, 1895.)

FINDINGS BY COURT—INDEFINITENESS.

Where, in an action to quiet title, involving the question whether a conveyance to plaintiff was with intent to delay or defraud creditors (declared in such case by Civ. Code, § 3439, to be void), the jury returned answers to interrogatories, which the court adopted, subject to its findings of fact, such findings to govern in case of conflict with the answers, and the jury found that plaintiff's husband conveyed the property to her to prevent defendant from satisfying his claim against him, that plaintiff knew her husband was insolvent, and that he made the deed to plaintiff with intent to hinder and delay, but not to defraud, defendant; and the court found that the deed to plaintiff

was not executed "with a view to conceal his property from defendant or his other creditors, nor improperly to hinder or delay them,"—the findings will be held too indefinite to support a judgment for plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; W. M. Conley, Judge.

Action by Francis W. Sharp against F. A. Frank. Judgment for plaintiff. Defendant appeals. Reversed.

Sayle & Coldwell, for appellant. F. H. Short and W. H. Larew, for respondent.

SEARLS, C. This is an action to quiet the title of plaintiff to an undivided third interest in and to lots 8, 9, and 10, in block 40, situate in the town of Madera, county of Madera, state of California. The cause was tried before a jury, and written answers returned to certain special issues and interrogatories propounded to them, which the court approved and adopted, and, in addition thereto, made and filed certain other findings of fact and its conclusions of law thereupon, upon which a decree was entered quieting the title of plaintiff, and decreeing the defendant to have no right, title, estate, or interest in or to the said lots of land and premises, or in or to any part thereof. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

The plaintiff, a married woman, claims title by deed executed to her by her husband, L. O. Sharp, on the 18th day of October, 1892. Defendant claims title as a judgment creditor of the said L. O. Sharp, and under an execution, levy, sale, certificate of sale, and sheriff's deed of said property, and asserts that the deed executed by L. O. Sharp to his wife, the plaintiff here, was and is void as to him, because the same was made with intent to hinder, delay, and defraud him of his claim as a creditor against L. O. Sharp. Some 40 interrogatories were propounded to the jury, to which answers were returned. The court, having considered the special verdict as rendered by the jury, entered an order that it "does hereby adopt the same, and approve the same, and the same are hereby made the findings of the court, subject only to the findings of fact and conclusions of law hereinafter set forth and specified; and wherein, if in any particular, said answers of said jury vary or differ from findings of the court, the findings of the court shall govern, and said answers are hereby modified to that extent, and to that extent only." The court then proceeded to make additional findings, some of which are in accord with those already found by the jury, others of which conflict to an uncertain extent with those of the jury, and still others are antagonistic to those of the jury. The result of all this constitutes a jumbled mass of uncertainties from which no intelligent legal conclusions can be drawn. To illustrate: The jury found, in substance, that L. O. Sharp conveyed the property to the plaintiff for the purpose of preventing the defendant

from satisfying his claim against him; that plaintiff knew her husband was insolvent, and unable to pay his debts; that the deed from L. O. Sharp to the plaintiff was made with intent to hinder and delay, but not to defraud defendant. Upon this question the court found that the deed to plaintiff was not executed by L. O. Sharp "with a view to conceal his property from defendant or his other creditors, nor improperly to hinder or delay them." Every transfer of property "with intent to delay or defraud any creditor or other person of his demands is void against all creditors," etc. Civ. Code, § 3439. What the court below meant by the term "improperly to hinder or delay" is not clear. The findings, taken together, are as indefinite as those held insufficient in *Warren v. Robinson*, 71 Cal. 380, 12 Pac. 265; *Ladd v. Tully*, 51 Cal. 277; and *Hardenberg v. Hardenberg*, 54 Cal. 591. We have no means of determining what the court deemed an improper hindrance or delay of creditors, and hence cannot say how far it tended to modify the finding of the jury that the deed was executed to hinder and delay such creditors. The proper course would have been to set aside and annul such of the findings of the jury as failed to meet the approbation of the court, and then to find upon the issues thus left at large. The judgment and order appealed from should be reversed, and a new trial ordered.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

5 Cal. Unrep. 153

McCARTY v. OWENS et al. (No. 18,451.)
(Supreme Court of California. Sept. 20, 1895.)

ASSIGNMENT OF CONTRACT — ACTION AGAINST ASSIGNEE.

In an action against the assignee of a paving contract for material furnished, it appeared that the assignment was absolute on its face; that, after the assignment, the assignees kept no account with the assignor; that they furnished all other materials not furnished by plaintiff, paid the bills, and received pay for the work, and stated in a verified complaint to collect an assessment for the work that they became and were, by assignment, contractors to perform the work. *Held*, that plaintiff could recover.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; J. K. Law, Judge.

Action by M. McCarty against F. J. Owens and his assignees for the purchase price of materials furnished. From a judgment for plaintiff, and an order denying them a new trial, defendant assignees appeal. Affirmed.

James A. Loutitt, for appellants. F. H. Gould and James H. & J. E. Budd, for respondent.

BELCHER, C. On September 12, 1892, the defendant F. J. Owens entered into a contract with the superintendent of streets of the city of Stockton to pave a portion of Channel street in that city with bitumen and basalt blocks. On September 22, 1892, Owens assigned his said contract to the defendants Girvin, Baldwin, and Eyre, and the assignment appeared on its face to be absolute. The work under the contract was performed, and Owens superintended it, but Girvin, Baldwin, and Eyre kept the books, furnished the materials, paid the bills, and received the moneys paid on account of the work. They also instituted suits against property owners to collect assessments alleged to be due them for work done under the contract. Plaintiff furnished basalt blocks, bitumen, curbing, tools, labor, etc., used in performing the contract, and in December, 1892, he commenced this action against Owens to recover the value of the same, alleged to be \$1,371.63. In April, 1893, by leave of the court, he filed an amended complaint, making Girvin, Baldwin, and Eyre parties defendant, and alleging joint liability on the part of the defendants. The complaint contained eight separate causes of action, briefly stated as follows: (1) For basalt blocks sold to defendants, \$365.04; (2) for money loaned to defendants, \$118; (3) for money paid for use of defendants, \$114.89; (4) for services rendered by plaintiff, \$95; (5) for balance on assigned claim for services, \$113; (6) for curbing and corners sold to defendants, \$369.60; (7) for bitumen sold to defendants, \$99.75; (8) for planking and use of tools furnished defendants, \$96.35. Judgment was asked against the defendants for the aggregate sum of \$1,371.63. Defendant Owens did not appear. The other defendants answered, denying their liability for each and all of the claims set up in the complaint. The case was tried before a jury, and a verdict was returned in favor of plaintiff for \$400, on which judgment was entered. The defendants Girvin, Baldwin, and Eyre moved for a new trial, which was denied, and then appealed from the judgment and order.

Appellants contend that the verdict was not justified by the evidence, and hence their motion should have been granted. This contention is based upon the assumed fact that Owens assigned his contract to them merely as security for advances made and to be made by them to him, and that all materials, etc., furnished by plaintiff were furnished to Owens solely on his individual account and responsibility; and in support of their claim that, under such circumstances, they cannot be held liable, they cite the case of *Stone v. Owens*, 105 Cal. 292, 38 Pac. 726. In the case cited the assignments were expressly made as security for advances made and to be made by the assignee to the assignors, and the parol evidence was positive, without conflict, that the assignee had nothing to do with the work performed under the contracts;

that he neither directly nor indirectly employed or discharged any laborer, or paid for any part of such labor. He paid orders or checks drawn on him by the assignors, but charged the amount so paid to them. That case is not in point here unless the theory of appellants as to the character of the assignment to them is sustained by the evidence, and whether it is or not is the principal question to be considered. As before stated, the assignment to appellants was absolute in form, and it was proved that, after the assignment, they kept no account with Owens. The account appeared on their books as the "Channel Street Contract." They furnished all the materials except that furnished by the plaintiff, paid all the bills, and received all the monies paid on account of the work. And, in one of the suits instituted by them to collect an assessment for work done under the contract, they stated, in their verified complaint, "that on the 22d day of September, 1892, the said F. J. Owens, in writing and for value, transferred and assigned the aforesaid contract, and all his rights and claims thereunder, to these plaintiffs, who then became, hence hitherto have been, and now are, the assignees of said F. J. Owens, and contractors for the doing and performing of said work by assignment, as aforesaid." The facts proved, as above stated, were clearly sufficient to distinguish this case from that of *Stone v. Owens*, supra; and, while there was a conflict in the evidence, it was, in our opinion, quite sufficient to justify the jury in finding that appellants were liable to the plaintiff for at least as large a sum as that named in the verdict. The judgment should, therefore, not be reversed for want of evidence to support the verdict. Objection is made to some of the instructions given to the jury, but it is based upon the theory that appellants held the contract only as security, and therefore the instructions were misleading and erroneous. As we view the case, we see no error in the instructions complained of. They seem to have stated the law applicable to the questions before the jury very fully and fairly. The judgment and order should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(5 Cal. Unrep. 158)

PEOPLE v. SHORT. (No. 21,196.)
(Supreme Court of California. Sept. 23, 1895.)

CRIMINAL LAW—REVIEW.

Where no brief is filed, a conviction will be affirmed if it appears that the evidence sustains the verdict, and no exception was taken to any ruling of the court.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Orville B. Short was convicted of forgery, and appeals. Affirmed.

Geo. Hayford, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

BELCHER, C. The defendant was charged with the crime of forgery, and on his arraignment pleaded guilty as charged. That plea was subsequently withdrawn, and a plea of not guilty entered. The case was tried, and the only defense interposed was that of insanity. The verdict was: "We, the jury, find the defendant guilty as charged, and so say we all." A motion for new trial was made and denied, and thereupon judgment was entered that the defendant be punished by imprisonment in the state prison for the term of six years. From that judgment the defendant appeals, but no brief has been filed in his behalf or on behalf of the people. We have examined the record, and find in it no ground for a reversal. The evidence was amply sufficient to justify the verdict, and the instructions of the court to the jury were full and fair, and stated the law applicable to the case correctly. It does not appear that any exception was taken to any of the rulings of the court. The judgment should be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(109 Cal. 156)

BROWN v. CLINE. (No. 19,571.)
(Supreme Court of California. Sept. 23, 1895.)

ATTACHMENT—JUSTIFICATION—NEW TRIAL.

1. To justify the taking, on an attachment against C., of property transferred by him to plaintiff, by transfer good except as against creditors of C., it must be shown that at the time of the attachment plaintiff in attachment was a creditor of C.; and the papers in the attachment suit are not enough to show this.

2. Defendant not having been granted a new trial on condition that he pay plaintiff's costs within five days, otherwise his motion to be denied, the court cannot, after expiration of such time, payment not having been made, make a final order granting his motion.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by J. Alexander Brown against J. O. Cline. Judgment for plaintiff, and new trial granted to defendant. Plaintiff appeals. Reversed.

O. W. Pendleton and Edison A. Meserve, for appellant. Walter F. Haas and A. O. Brodersen, for respondent.

BELCHER, C. This action was brought to recover the possession or value of certain personal property, with damages, alleged to have been owned by the plaintiff, and to have been wrongfully taken from his posses-

sion by the defendant in October, 1893. The answer denied that plaintiff was the owner or in possession of the property described in the complaint, or any part thereof, and alleged that the said property was owned by and in the possession of one W. H. Cooper. The answer further alleged that defendant was the sheriff of Los Angeles county, and that, as such sheriff, he took the said property into his possession as the property of said W. H. Cooper, on October 11, 1893, under a writ of attachment duly issued out of the superior court of Los Angeles county, and to him directed and delivered, in an action commenced in said court against said Cooper; and that he held the said property as such officer under said writ, and not otherwise, up to October 17, 1893, when the same was taken from him by the coroner of the county, in his official capacity, under and in pursuance of the demand of plaintiff, and upon the proceedings had; and that the said coroner and the plaintiff ever since the date last mentioned have been, and now are, in possession of all of said property. And the prayer was for judgment that the plaintiff be compelled to return the said property to defendant, or, if the same could not be returned, then for the value thereof and damages. The case was tried by the court without a jury, and the findings were that on the 11th day of October, 1893, plaintiff was the owner and in possession of the personal property described in the complaint, and that on that day defendant, without plaintiff's consent, and wrongfully, took said personal property from the possession of plaintiff; that defendant was the sheriff of Los Angeles county, and took the property under and by virtue of a writ of attachment, as stated in the answer; and that upon the commencement of this action, and upon proper proceedings had, the coroner of the county took said property from defendant, and held the same until the 20th of October, when he delivered the same to the plaintiff; and that by reason of the loss during such time of the use thereof plaintiff had been damaged in the sum of \$123. Judgment was accordingly entered in favor of the plaintiff for the sum of \$125 as damages, together with his costs, amounting to \$85.55. The judgment was entered March 2, 1894, and on March 10th defendant filed his notice of intention to move for a new trial upon the grounds: First, that the evidence was insufficient to justify the decision of the court; second, that the decision was contrary to law; and, third, error in law occurring at the trial and excepted to by the defendant. The motion was made on a statement of the case, and on June 15, 1894, the court made the following order: "It is ordered that defendant's motion for new trial be, and the same hereby is, granted upon the payment by defendant to plaintiff or his attorneys of the costs taxed herein, to wit, \$85.55, within five days after notice hereof. It is ordered that, if said con-

dition be complied with, that thereupon the judgment entered herein shall be vacated, and said cause placed upon the calendar of this court for a new trial; and that, if said condition be not complied with within said five days, then, at the expiration of that time, said motion for a new trial shall be denied." On September 17, 1894, the defendant moved the court "for a final order granting his motion for a new trial," and the same was thereupon granted. From this last order the plaintiff appeals.

1. It was clearly proved at the trial that the plaintiff purchased the property in question of W. H. Cooper in good faith, and paid for it its full value; and the principal question was as to whether or not the transfer was accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, as required by section 3440 of the Civil Code. There was some little conflict in the evidence, but that introduced by the plaintiff was amply sufficient to sustain his theory as to the transaction and to establish his right to recover.

2. The transfer was unquestionably good as against all the world except creditors or a bona fide purchaser; and to justify the taking of the property by defendant it was necessary for him to prove that Maclay, the plaintiff in the attachment suit, was a creditor of Cooper at the time of the attachment. The rule is that, when property is found in the possession of a stranger to the suit, claiming title thereto, it is necessary to show a judgment or prove the debt for which judgment is demanded. And to accomplish that end the papers in the attachment suit are not sufficient. *Sexey v. Adkinson*, 34 Cal. 346; *Banning v. Marleau*, 101 Cal. 238, 35 Pac. 772. Here there was no sufficient evidence that Maclay was a creditor of Cooper, and, if a finding that he was such had been made, it would not have been justified by the evidence.

3. The rulings of the court specified in the statement as errors of law are not urged by respondent, and, in our opinion, they were proper, and furnish no ground of complaint.

4. The order of June 15, 1894, granting the defendant's motion for a new trial upon condition that he pay to the plaintiff or his attorneys within five days the sum of \$85.55, taxed as costs in the action, was never complied with by defendant. The money was not paid to the plaintiff or to either of his attorneys within five days, or at all. It is claimed, however, that four days after the order was made one of defendant's attorneys paid the money to the county clerk for the use of the plaintiff, and that he was justified in so doing. But the affidavits read at the hearing of the motion for a "final order" on September 17th do not, in our opinion, show that the payment to the county clerk was authorized, or a compliance with the order of June 15th. The case must be treated, there-

fore, as if no payment or attempted payment had been made, and as if at the end of the five days the motion for new trial had been denied. *Garoutte v. Haley* (Cal.) 38 Pac. 194. This being so, the court had no power to make the order of September 17th. *Bank v. Deuprey*, 66 Cal. 168, 4 Pac. 1173; *Dorland v. Cunningham*, 66 Cal. 484, 6 Pac. 135; *Greehn v. Marker*, 67 Cal. 304, 7 Pac. 783. The order appealed from should be reversed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

109 Cal. 152

HOWLAND v. BOARD OF SUP'RS OF SAN JOAQUIN COUNTY. (No. 18,332.)

(Supreme Court of California. Sept. 23, 1895.)
ISSUE OF COUNTY BONDS — ELECTORS — PROVISION FOR INTEREST AND SINKING FUND.

1. Under Const. art. 11, § 18, providing that no county shall incur liability exceeding a certain amount without the assent of two-thirds of the electors thereof voting at an election to be held for that purpose, it is necessary only that two-thirds of those voting on the question vote to incur the liability, and not that two-thirds of all those voting at the general election, held at the same time, vote for it.

2. Const. art. 11, § 18, providing that a county shall not incur an indebtedness exceeding in any year the income and revenue provided for it for such year, unless before or at the time of incurring it provision be made for collection of an annual tax to pay the interest as it falls due, and to constitute a sinking fund to pay the principal within 20 years, does not require that, at the time of incurring the debt, the tax be levied, but only that it be provided for, and it is enough that the bonds be expressly issued under St. 1891, p. 295, providing for the interest and sinking fund.

Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Proceeding by C. F. Howland against the board of supervisors of San Joaquin county. Judgment for defendant. Petitioner appeals. Affirmed.

Nicol & Orr, for appellant. W. B. Nutter and Marlon De Vries, Dist. Atty., for respondent.

GAROUTTE, J. This is an appeal from a judgment of the superior court of San Joaquin county against petitioner, in a proceeding to review the action of the board of supervisors of that county in the matter of contracting a bonded indebtedness of said county, and of issuing the bonds thereof for the purpose of creating a fund for the purchase of land and the erection thereon of suitable buildings and improvements for a county hospital, poor-house, and farm. Petitioner claims that the board of supervisors exceeded its power, in directing the issuance of said bonds and in contracting said indebtedness, for two reasons:

1. It is insisted that two-thirds of the qualified electors of the county of San Joaquin, voting at the general election, November 8, 1892, did not vote in favor of the issuance of these bonds, and for that reason the proposition to issue was defeated. The returns of the general election show that 6,500 votes were cast thereat; that 3,880 electors voted in favor of the issuance of bonds, and 1,006 voted against their issuance; and it thus clearly appears that, if two-thirds of all the votes cast were necessary to legally justify the board of supervisors in the issuance of the bonds, then the proposition was defeated. But does the law so declare? The foundation of the entire proceeding may be found in article 11, § 18, of the constitution of this state, which provides: "No county * * * shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose." If there had been no general election held at the same time this bond election was held, there would be no question but that two-thirds of the qualified electors of the county voting assented thereto, and the fact that the county, by its board of supervisors, embraced the privilege extended to it by the legislature, by the act of 1891, and held the election upon the day and at the same place as the general election, we think wholly immaterial. The constitution provides that the voting upon the proposition must be done at an election held for that purpose, and, if there was not an election held upon this day for the purpose of allowing the qualified electors of San Joaquin county an opportunity to express their opinions upon this proposition, then it would be impossible to submit the question to the electors at a general election. This cannot be true, and it is quite evident that there was an election held for the purpose of submitting the proposition to the qualified electors of San Joaquin county. At that election 3,880 votes were cast in favor of the issuance of the bonds, and 1,006 votes against such issuance. It follows that two-thirds of the qualified electors of the county, voting at an election held for the purpose, assented to the incurring of the indebtedness and the issuance of the bonds, and that the constitutional provision in this regard is satisfied. If additional argument were necessary to sustain a construction already quite plain, it may be suggested that the election held upon this day, as far as the bond question is concerned, was a special election. The election was called by proclamation of the board of supervisors of San Joaquin county, for a single, definite purpose, and, ex necessitate, was a special election, and the votes cast for and against the issuance of bonds were all the votes cast at that election. As already suggested, the fact that the legislature granted the county the right to use the machinery of the state in conducting the election

if it so desired, and that it embraced the right granted, in no way changes the legal aspect of the case. There is no authority cited, and we know of none, opposed to this conclusion.

2. It is insisted that the entire proceeding is void, upon the ground that the board of supervisors, neither at the time of incurring said indebtedness, nor at any time prior thereto, made any provision for the collection of an annual tax sufficient to pay the interest on said indebtedness as it falls due, or to constitute a sinking fund for the payment of the principal within 20 years from the time when the indebtedness was contracted. The section of the constitution, a part of which we have already quoted in speaking as to this question of indebtedness, provides: "Nor unless before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void." This provision of the constitution does not require that, at the time of the sale or issuance of bonds or the incurring of the bonded indebtedness, a sinking fund or interest tax be levied. It only requires that before or at such time provision must be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal. These bonds were issued by express terms under the provisions of the act of the legislature found in St. 1891, p. 295. The notices so prescribed, and the bonds themselves upon their face so recite. That statute fully and completely provides for the payment of the interest upon these bonds, and also for the creation of a sinking fund to extinguish the original indebtedness. See *Id.*, pp. 303, 304, subds. c-e. We conclude there is nothing in this point.

For the foregoing reasons the judgment is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

(109 Cal. 170)

MILLET v. BRADBURY et al. (No. 19,563.)
(Supreme Court of California. Sept. 25, 1895.)

MUTUAL ACCOUNT—LIMITATIONS.

Within Code Civ. Proc. § 344, declaring that in an action to recover a balance due on a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall accrue from the time of the last item, there is not a mutual account where defendant's testator owed plaintiff for services, and testator had intrusted to plaintiff money to be expended for testator at his direction, some of which was still in plaintiff's hands at testator's death, as plaintiff could not apply it on testator's debt to him, and plaintiff was not indebted on account thereof, but merely held it in trust.

v.41p.no.8—55

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Mrs. N. M. Millet against Simona M. Bradbury and others, executors of Lewis L. Bradbury, deceased. From a judgment for plaintiff for part only of her claim, she appeals. Affirmed.

Davis & Hill and Thos. R. Owen, for appellant. Bicknell & Trask, for respondents.

HARRISON, J. The plaintiff presented to the defendants, as the executors of the last will and testament of L. L. Bradbury, deceased, a claim in the following form: "To balance due this claimant upon an open, mutual, current, and unsettled account, and upon reciprocal demands existing between the decedent and this claimant up to the time of the death of said decedent, the same having arisen out of and being upon said account and reciprocal demands, and on this claimant's side particularly for and on account of work, labor, and personal services of a domestic, confidential, and fiduciary character, of the greatest difficulty, importance, and value to the decedent, his family, property, and estate, the last item of said open and mutual account, and of said reciprocal demands, having accrued and become due and payable on the 14th day of July, A. D. 1892; said balance being \$36,000." Upon their refusal to allow her claim she brought this action to establish the same. The defendants, in their answer, denied the allegations of her complaint, and also pleaded the statute of limitations. Prior to the trial of the cause the plaintiff, upon the demand of the defendants, furnished them with a bill of particulars, or copy of the account sued upon, from which it appeared that her claim consisted of items for work, labor, and services rendered the deceased in each year from 1873 until his death, in July, 1892; that no compensation had been agreed upon between them for said services, but that the reasonable value thereof amounted to \$47,000; that during that period the deceased had made various payments upon said claim, the last of which was made in the year 1887, and that the aggregate amount of the said payments was \$10,900. In the copy of the account furnished the defendants by the plaintiff was the statement that during the time covered thereby "the decedent delivered to and intrusted with plaintiff various sums of money, to be by her expended for his use and benefit from time to time, and as directed by him, in connection therewith, at or after the intrusting thereof by him with her; all of which moneys were from time to time, prior to the death of said decedent, laid out and expended by plaintiff for his use and benefit, under his directions, save and except \$130." At the trial the court, upon the objection of the defendants, excluded any evidence of services rendered by the plaintiff at any time prior to two years before the death of Bradbury. Judgment was rendered

in favor of the plaintiff for \$1,000, from which she has appealed.

The bill of particulars which was furnished to the defendants is to be regarded as an amplification of the complaint, and for the purpose of determining the plaintiff's right of recovery, or the admissibility of evidence that may be offered in support of her claim, is to be regarded as if it had been incorporated into the complaint as originally filed. It is claimed by the appellant that the account of the moneys that had been deposited with her by Bradbury to be disbursed by her according to his directions, of which there remained \$130 in her hands at the time of his death, had the effect, by virtue of the provisions of section 344, Code Civ. Proc., to take her claim out of the statute of limitations. That section is as follows: "In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item approved in the account on either side." The reference in the section to "an action brought to recover a balance due upon a mutual, open and current account" contemplates that the transactions between the parties are susceptible of being reduced to a single account, in which all the items on one side may be grouped in opposition to those on the other side, and treated as payments or offsets, and a recovery had for the balance. "A balance due upon an account" implies an account between the two parties, in which the amount of the items upon one side of the account are deducted from the amount of the items upon the other side, and the balance thus ascertained. The term "account" involves the idea of debit and credit, and the balance of an account is the result of the debit and credit sides of the account which constitutes a debt or claim, for which the party in whose favor it exists has the right of recovery. "It has uniformly been held that distinct and different items of charge in an open and mutual account do not constitute separate claims, but that the claim or debt is found in the balance of the account, and that it is the balance only that constitutes the claim of the party to whom it is due." *Hodge v. Manley*, 25 Vt. 210. It is immaterial whether the account of these transactions is kept by one or by both of the parties, nor is the form in which the account is kept material. "The particular mode of keeping the account, whether on book or loose scraps of paper, or without any written charges, or whether it is all kept in one shape or in different forms, as in the present case, is unimportant. If all the items in the expectation of the parties have reference to and are to be adjusted in one accounting, it may be considered as one transaction, so far as the statute of limitations is concerned." *Abbott v. Keith*, 11 Vt. 525. It is, however, essential that the items upon the two sides of the account shall have

resulted from mutual dealings between the parties, and constitute reciprocal demands between them. The "reciprocal demands" named in the section is only a synonym or equivalent of the "mutual account" named in the first part of the section. *Green v. Disbrow*, 79 N. Y. 1. "Mutual accounts are made up of matters of set-off. There must be a mutual credit, founded on a subsisting debt on the other side, or an implied agreement for a set-off of mutual debts." *Norton v. Larco*, 30 Cal. 130. The account is not mutual unless the parties have dealt with each other in the same relation, and unless the items upon the different sides of the account are capable of being set off against each other. The demands must be reciprocal; that is, they must be of such a character that each party has an immediate right of action against the other. "Where there are mutual accounts between two persons, it is always the understanding that the account upon one side shall offset that upon the other; and in law the debt due from one to the other is only the balance left after the application in reduction of the accounts on the opposite side. In any form of action the recovery can only be for the balance. The very theory upon which this statute is based is that the credits are mutual, and that the account is permitted to run with the view of ultimate adjustment by a settlement and payment of the balance; and this theory is recognized in the statute, as it mentions an action 'brought to recover a balance due' upon an account." *Green v. Disbrow*, *supra*. This limitation of the right of recovery to the balance of the account implies the right of the plaintiff to apply the items upon the defendant's side of the account in reduction or extinguishment of the amount upon his own side; and such application can be made only when the transactions between the parties have been had in the same capacity. If the accounts between them do not affect them in the same relation,—as, for example, if upon one side of the account the party is individually liable, while the transactions upon the other side of the account have been had in his representative capacity, as executor, guardian, or trustee,—the demands are not reciprocal. The theory upon which a "mutual account" is taken out of the statute is that the obligations on the one side are in law applied as payments or offsets to those on the other; but, if a transaction between the parties does not create a debt or claim which may be so applied, such transaction cannot be regarded as a payment or offset to a debt, or be the foundation of a mutual account or reciprocal demand. The right to demand an article of property that has been deposited with another, and the right to demand a debt due from the depositor, are not reciprocal. If the depositor has the right to demand the property itself, the other is merely a bailee or depositary, and the foundation of an account is wanting. There can be no

debt unless the consideration for which the debt is claimed to exist has ceased to be the property of the claimant, and has become that of the other. Unless the one with whom property has been deposited has thereby become its proprietor, there is no debt for the property so deposited, whether the same be money or merchandise. One cannot be a creditor for money which is his own, and of which he still retains the right of disposal. By section 20 of the bankrupt act of the United States (14 Stat. 526), providing for proving claims in bankruptcy, it is declared that "in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid." In *Libby v. Hopkins*, 104 U. S. 303, *Hopkins*, at the time of going into bankruptcy, was indebted to the plaintiffs upon an open account for merchandise, and also upon a mortgage debt. He was also accustomed to deposit moneys with the plaintiffs, against which he would draw in favor of his creditors. Prior to going into bankruptcy, *Hopkins* had transmitted to the plaintiffs a certain sum of money, with directions to apply it upon his mortgage debt. But instead of doing so, they, without any authority from him, applied it to his credit upon their open merchandise account against him. In an action between the plaintiffs and the assignee of the bankrupt concerning their respective rights to the money thus remitted to the plaintiffs, and applied by them, the court held that the merchandise account of the plaintiffs against *Hopkins*, and the moneys remitted to them by *Hopkins*, were not mutual debts which could be set off against each other under the foregoing section of the bankrupt act; saying: "To authorize a set-off, there must be mutual credits or mutual debts. The remitting of certain money assets by *Hopkins* to the plaintiffs, to be applied by them according to his directions, did not make them his debtors, but his trustees; so that there were in the case no mutual credits or debts. The indebtedness was all on the side of *Hopkins*. The plaintiffs owed him nothing. They held his money in trust, to apply it as directed by him."

In view of these principles, it must be held that the respective claims of the plaintiff and *Bradbury* did not constitute a mutual account, and that the respective demands or claims of the one against the other were not reciprocal. *Bradbury* was her debtor for the services rendered by her, and was at all times liable to an action by her for the amount of her claim. On the other hand, she was at no time his debtor, or liable to an action by him for the money which he had deposited with her, until after a previous demand by him and refusal on her part. *Schroeder v. Jahns*, 27 Cal. 274. The money was deposited by him upon an express trust, and the terms of the trust constituted a contract

between them, which measured the extent of their relative liability. Either party could have terminated the trust at any time; but, so long as the trust continued, *Bradbury* had exclusive power to direct the disposition of the money, and her power over the same was limited to following his directions. The rules applicable in the case of an involuntary trust, or where money has come into the hands of one who, by his own agreement, or by operation of law, has become liable to pay it to another, have no application here. In such a case an action may be brought without any previous demand. It is otherwise, however, where money is held under a trust created by an agreement between the parties. *Bradbury* could at any time have demanded that the plaintiff pay over to him the money in her hands, and her refusal to do so would have been a conversion, for which he could have sued her in tort, or he could have elected to treat her as liable in contract for the money. But this right of election was never available to her. She never had the right to apply the money deposited with her in payment of her claim against him (Civ. Code, § 2229), and, if she had done so, it would have constituted a tort or conversion by her, for which he would have had an immediate right of action; and in such action it would have been no defense that he was indebted to her for services. For the purpose of determining whether the account was mutual, it is immaterial that at the death of *Bradbury* she had in her hands any of this money that had been deposited by him. If the account was mutual, it was so by reason of its own nature, rather than by the fact of *Bradbury's* death. If the plaintiff had died, the money in her hands would not have constituted a part of her estate, and *Bradbury* could have recovered it in a direct action against her executor, without the necessity of presenting a claim against her estate. *Lathrop v. Bampton*, 31 Cal. 25. If *Bradbury* had died insolvent, the money in her hands would have formed a part of his estate, irrespective of her claim against the estate. The death of *Bradbury* did not give to the plaintiff any rights in regard to the money that she did not have prior thereto. As she did not in his lifetime have the right to apply the money in payment of her claim for services, she did not upon his death become entitled to make such application, and the demand against her which passed to his executors is the same in character as was held by *Bradbury* in his lifetime, and is not a demand reciprocal to that of the plaintiff.

The court did not err in refusing to allow the plaintiff to amend the bill of particulars. The amendment proposed was not in any material respect different from that which had already been given to the defendants, and the plaintiff's attorney stated at the time of making the motion that under the proposed amendment he expected to show that the money, when placed in her possession, was

understood between Bradbury and her to be his money, and that it was to be expended for his use and benefit. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

109 Cal. 133

HOPKINS et al. v. WARNER et al. (No. 18,321.)

(Supreme Court of California. Sept. 17, 1895.)
ASSUMPTION OF MORTGAGE DEBT BY SUBSEQUENT GRANTOR—DEFICIENCY JUDGMENT—FINDINGS.

1. Under Civ. Code, § 2854, giving a creditor the right, on maturity of the debt, to the benefit of any security given to a surety of the debt, a deficiency judgment may be rendered against a mortgagor's grantee who agreed "to hold the grantor harmless" against the mortgage.

2. Where findings covering all the issues in a cause are made, an additional finding that all the allegations in the complaint are true and denials of the answer untrue, except as "herein otherwise found," is surplusage.

3. A judgment and findings may be incorporated in the same instrument.

Department 1. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by Sarah Hopkins and others against H. C. Warner and others, mortgagors, and J. T. Bonestell and others, their grantees, for foreclosure of the mortgage and a deficiency judgment. From a judgment for plaintiffs, the grantees appeal. Affirmed.

Fox, Kellogg & Gray, for appellants. Frank H. Shortt, for respondents.

HARRISON, J. The defendant Warner executed to the plaintiffs a mortgage upon certain lands in the county of Fresno, to secure his promissory note for the sum of \$4,500, and subsequently conveyed the mortgaged lands to the appellants. In their complaint for the foreclosure of this mortgage the plaintiffs allege that the appellants, in consideration of the conveyance to them, assumed and agreed to pay the mortgage debt, and ask for judgment against them, as well as Warner, for any deficiency in the proceeds of sale. Judgment was rendered in their favor in accordance with the prayer of their complaint, and the grantees of Warner have appealed.

At the trial the following instrument, executed by the appellants to Warner, was introduced in evidence: "In consideration of the transfer this day made to us by H. C. Warner, of Fresno, California, of certain real estate, * * * we agree to hold the said Warner harmless as against any and all the mortgages existing upon the real estate this day transferred to us, which mortgages are four in number, one of \$4,500 to the Hopkins; * * * and the mortgages are to be settled at such time and in such manner as the undersigned or their survivors or survivor may determine, provided that the said Warner shall at all times be held harmless as to the

same." It was admitted that the mortgage under foreclosure is the one specified above in the instrument. The plaintiffs are not seeking by an action at law, or under the provisions of section 1559, Civ. Code, to recover judgment against the appellants upon the promise made by them to Warner; and the cases cited by the appellants to the effect that an action at law cannot be maintained by a third party upon a promise made by one person to another, from which such third person may derive a benefit, are inapplicable. The right of the plaintiffs to maintain this action against the appellants springs from the well-known rule in equity that a creditor is entitled to the benefit of any obligations or securities given by his debtor to one who has become a surety of such debtor for the payment of the debt. *Sheld. Subr.* § 85; *Jones, Mortg.* § 755; *Pom. Eq. Jur.* § 1206; *Keller v. Ashford*, 133 U. S. 622, 10 Sup. Ct. 494; *Crowell v. Currier*, 27 N. J. Eq. 154; *Williams v. Naftzger*, 103 Cal. 438, 37 Pac. 411. This rule in equity does not depend upon the character of the liability of the principal debtor to the creditor, or upon the existence of any relation between the creditor and the surety for the principal debtor, but is founded wholly upon the right of the creditor to avail himself of whatever rights the surety has as against the principal debtor. It has been formulated in section 2854 of the Civil Code, as follows: "A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction." It is under the application of this principle that in the foreclosure of a mortgage a judgment for a deficiency may be rendered against a grantee of the mortgagor who has assumed the payment of the mortgage debt. *Williams v. Naftzger*, supra. By the purchase of the mortgaged premises and the agreement on the part of the purchaser to discharge the mortgage debt, there results as between the mortgagor and his grantee a substitution of the liability to the mortgagee, by which the grantee becomes the principal debtor to the mortgagee, and the liability of the mortgagor is merely that of a surety for his grantee. This agreement of the grantee to discharge the mortgage debt is an obligation in the hands of the mortgagor, which the mortgagee may enforce for his own benefit when he seeks to obtain satisfaction of the mortgage debt, to the same extent that it could be enforced by the mortgagor. The mortgagee, in his action to foreclose the mortgage, may proceed against the mortgagor alone for any deficiency in the proceeds of sale, or he may avail himself of his right to proceed against the mortgagor and his grantee in the same action. If he proceeds against the mortgagor alone, and a judgment is docketed against him for any deficiency, the latter has

a right of action over against his grantee upon his agreement to assume the mortgage debt. Under the rule for the foreclosure of mortgages in this state, there can be no personal liability upon the mortgage debt, except for a deficiency therein after the sale of the mortgaged premises, and prior to such sale the mortgagor will have no right of action upon this agreement of his grantee; but to avoid circuity of action, and to protect the mortgagor, as the intermediate party, from being compelled to pay the debt, and then to seek redress from his grantee who has assumed the mortgage debt, equity permits the mortgagee to bring all the parties who are liable for the debt, whether principally or ultimately, before the court, and have their rights adjusted in a single suit. In such an action the mortgagee represents the mortgagor for the purpose of enforcing this obligation of the purchaser to him, and his right to enforce this obligation has the same extent and is subject to the same limitations as would be that of the mortgagor in a separate action against his grantee. It is not necessary that there should be a formal promise on the part of the grantee to pay the mortgage debt, in order to render him liable therefor, if his intention to assume the debt appears from a consideration of the entire instrument. The obligation may be made orally or in a separate instrument. It may be implied from the transaction of the parties, or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the agreement. *Jones, Mortg.* § 748; *Canfield v. Shear*, 49 Mich. 313, 13 N. W. 605; *Held v. Vreeland*, 30 N. J. Eq. 591.

The terms used by the parties to the agreement in the present case indicate clearly an intention on the part of the appellants to assume the mortgage debt to the plaintiffs. The provision in the agreement that "the mortgages are to be settled at such time and in such manner" as the appellants might determine is to be read in connection with the subsequent proviso, and cannot be construed as giving to the appellants the right to determine the manner and select the time at which they will settle the plaintiffs' mortgage, irrespective of their agreement that "the said Warner shall at all times be held harmless as to the same." The word "settled," as used in this instrument, is equivalent to "paid" (*Pinkerton v. Bailey*, 8 Wend. 600; *Stilwell v. Coope*, 4 Denio, 225; *Moore v. Hyman*, 13 Ired. 272), and, while the appellants might not be required to pay the mortgage debt until it should be demanded by the plaintiffs, yet, by delaying to settle the debt until after the commencement of the action to foreclose the mortgage, they lost the right to select the time and manner of its settlement, which they had reserved in their agreement with Warner, and their liability to pay the debt became equal to that of Warner. The commencement of the ac-

tion to foreclose the mortgage rendered their agreement to save him harmless a binding obligation, which the plaintiffs, as his representatives, and for their own benefit, are entitled to enforce. It must be borne in mind that, unless there shall be a deficiency in the proceeds of sale, there will be no liability on the part of Warner, and consequently none on the part of the appellants, and that this cannot be known until after a sale under the judgment. If there shall be a deficiency, it will then be docketed against the appellants as well as against Warner, and the appellants will not hold him harmless against it unless they can at that time be compelled to release him from its effect. The docketing of a judgment for this deficiency against them at that time is the protection which is given to Warner by the above rule in equity, and affords an opportunity to the appellants to discharge their obligation to Warner without increasing its burden upon them.

The appellants object to the sufficiency of the findings to support the judgment, upon the ground that, after making findings upon all the issues in the case, the court has also found "that each and all the allegations and averments in plaintiffs' complaint contained are true and correct, except as hereinbefore otherwise found, and that all the denials of the answer of the defendants who have appeared herein are untrue, except as hereinbefore otherwise found." The appellants have not, however, pointed out any issue upon which the court has failed to make a finding, nor do they contend that the findings do not cover all the issues in the case. This additional finding does not render the other findings defective, but is to be regarded merely as surplusage.

The judgment is not rendered ineffective by reason of being contained in the same document with the findings. There is no rule which requires the findings and the judgment to be incorporated in separate documents. The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

109 Cal. 140

CAPITAL GAS CO. v. YOUNG, City Auditor.
(No. 18,380.)

(Supreme Court of California. Sept. 18, 1895.)

CONTRACTS OF CITY—GAS SUPPLY.

Gas companies, under Civ. Code, § 629, are required, under penalty, to furnish gas upon demand. The city charter of Sacramento (section 211) provides that no officer of the city shall be interested in the sale of any article to the city, and declares that such sales shall be void. *Held*, that a city whose mayor was president of the gas company was liable for the value of gas supplied under an implied contract.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Application for writ of mandamus by the Capital Gas Company against J. D. Young, auditor of the city of Sacramento. From a judgment awarding the writ, the respondent below appeals. Affirmed.

J. Frank Brown and Clinton L. White, for appellant. A. L. Hart, for respondent.

SEARLS, C. The Capital Gas Company, a corporation organized and existing under the laws of the state of California, is, and for more than 12 years last past has been, engaged in the business of furnishing gas to the residents of the city of Sacramento (a municipal corporation), and to consumers generally, for profit, and has had shares of stock issued to and held by divers persons; and C. H. Cummings is, and for more than one year last past has been, the duly-appointed and acting secretary of said corporation. The said corporation has during a period of more than 12 years last past been engaged in said business, under and pursuant to certain franchises duly granted to it by said city of Sacramento. On the 11th day of January, 1882, the board of trustees of said Capital Gas Company, by resolution regularly passed, fixed the price to be paid by consumers thereof at \$3 for each 1,000 cubic feet. J. D. Young, the appellant herein, is, and for more than three years last past has been, the duly elected and qualified auditor of said city of Sacramento; and under the provisions of the charter thereof, duly adopted, it is the duty of said auditor to draw and sign all warrants upon the treasury for claims against said city which have been allowed by the board of trustees thereof. The fire department is, and for more than one year prior to 1894 was, one of the departments of the municipal government of the city of Sacramento. At all the times herein mentioned, B. U. Steinman was, and still is, the holder and owner of stock in said Capital Gas Company, and was, and still is, the president of said company, and since the first Monday in January, 1894, has been, and still is, the duly-elected and acting mayor of said city of Sacramento. Between the 1st day of February, 1894, and the 1st day of March, 1894, the fire department of the city of Sacramento used and consumed 8,600 cubic feet of gas, furnished and distributed by the Capital Gas Company, which gas, according to the rate fixed as aforesaid, was of the value of \$25.80; and thereafter, and on the 1st of March, 1894, the said gas company presented its bill therefor in said amount, duly itemized and verified, to the board of trustees of said city, which bill was allowed by said board for said sum of \$25.80, and presented to the auditor aforesaid, who rejected the same, and returned it to the board as provided by the charter. Thereafter the same bill was again allowed and approved by the board of trustees and by B. U. Steinman, the mayor, in due form, and

was again presented to the auditor, who refused to audit the same or to draw his warrant therefor on the treasurer of said city in favor of the said gas company. Said sum of \$25.80 is still due and owing from the said city to said gas company. The gas so furnished was not furnished under any express contract, nor was it furnished pursuant to any contract entered into before the election of said mayor, except that it was so furnished pursuant to the franchises of the said gas company and the law applicable to said gas company.

Section 211 of the charter of the city of Sacramento provides as follows: "No member of the board of trustees, and no officer of or employee of the city, shall be or become directly or indirectly interested in or with the performance of any contract, work or business, or in the sale of any article, the expense, price or consideration of which is payable from the city treasury, or in the purchase or lease of any real estate or property belonging to or taken by the city, or which shall be sold for taxes or assessments, or by virtue of legal process at the suit of the city. Any member of the board or any officer or employee of this city violating the provisions of this section, or who shall be directly or indirectly interested in any franchise, right or privilege granted by the city while he is such member, officer or employee, unless the same shall devolve upon him by law, shall forfeit his office, and be forever disqualified from holding any position in the service of the city; and all contracts made, or rights or franchises granted, in violation of this section shall be absolutely void."

Upon the facts as found by the court, of which the foregoing is a condensed statement, the court below adjudged that an alternative writ of mandate theretofore issued in the cause be made peremptory, requiring the appellant herein, as auditor, to issue his warrant upon the treasury of the city of Sacramento, and upon the proper fund therein, for the amount of the demand, viz. for \$25.80. The defendant, auditor as aforesaid, appeals from the judgment, and the cause comes up on the judgment roll.

The officers of a municipal corporation, like those of private corporations, are agents of the corporate body. It is a cardinal doctrine of the law of agency that, "whenever an agent is invested with authority to use any discretion in the exercise of the powers conferred upon him, it is an implied condition that this discretion shall be used in good faith for the benefit of the principal, and in accordance with the true purpose of the agent's appointment. To this extent every agency which is not a purely ministerial one involves a fiduciary relation between the parties." Mor. Priv. Corp. § 516. It is in consonance with this principle that officers of a corporation may not, under any circumstances, use their official position for their own benefit, or for the benefit of any one ex-

cept the corporation itself, and they may not represent the corporation in any contract or transaction in which they are personally interested in obtaining an advantage at the expense of the corporation. In such cases it is said the corporation would not have the benefit of their unbiased judgment, as self-interest would prompt them to prefer their own advantage to that of the company. *San Diego v. San Diego & L. A. R. Co.*, 44 Cal. 106; *Shakespear v. Smith*, 77 Cal. 638, 20 Pac. 294; *Finch v. Railway Co.*, 87 Cal. 597, 25 Pac. 765; *Wickersham v. Crittenden*, 93 Cal. 29, 28 Pac. 788; *Capron v. Hitchcock*, 98 Cal. 427, 33 Pac. 431; *Dill. Mun. Corp.* § 444. The rule embodied in the foregoing decisions, and which has the support of a host of others which might be mentioned, is not an arbitrary one. In other words, it is founded in reason, and is not to be indiscriminately applied irrespective of the circumstances of the case. *Mor. Priv. Corp.* § 521.

It would seem that the circumstances of the present case bring it within the exceptions for the following reasons: (1) The authority to transact the business of the municipal corporation of the city of Sacramento, to procure supplies therefor, and to audit and allow claims against the city, is vested in the board of trustees; and B. U. Steinman, as mayor of the city, has not, so far as appears from the record, any authority in the premises. (2) The gas furnished to the city was not supplied under or pursuant to any express contract with the respondent corporation, of which Steinman is president, and the right to recover the reasonable value thereof is based upon the implied promise which the law raises. (3) Under section 629 of the Civil Code, the respondent was bound, upon proper demand, to furnish gas to the city, and, upon refusal so to do, was liable to a penalty of \$50 as liquidated damages, and \$5 a day as liquidated damages for each day such refusal or neglect continues thereafter. Under the operation of this law, the gas company was not a free agent with power to contract or refuse to do so, but it became its duty upon demand to furnish gas to the city, irrespective of the status of its president. This duty to furnish gas to the city devolved upon the respondent, not by virtue of any contract, but by operation of law; and hence the laws governing ordinary contracts resting in the volition of the parties thereto has no application. Where the law affixes a penalty for the nonperformance of an act, its performance should not be adjudged illegal, or subject the party performing to the implication of having violated a duty. Had the city of Sacramento been in need of the land of its mayor pursuant to some public use, and had it, by proceedings for the condemnation thereof, under the law of eminent domain, succeeded to the title, the proceeding would have been so far an adversary one that there would have been no liability on the part of such mayor for a vio-

lation of section 211 of the city charter, hereinbefore quoted. The case at bar does not differ essentially in principle from the one supposed. Section 211 of the city charter, which inhibits its officers from being interested in any contracts or sales to the city involving the payment of money from its treasury, or from being interested in any franchise, right, or privilege granted by the city while they are in office, is, except as to the penalty imposed thereby, in substance a declaration of the common law as it previously existed, and is founded in wisdom and justice. It is intended as a shield to the city against the selfishness and greed of officials, but was not intended and may not be used as a medium by which the city can take the property of others without their consent, under the form of law, and then refuse to pay therefor its reasonable worth, because an officer of the city is interested in such property. We hold that section 211 of the city charter has no application to a case like the present, where the gas company is required by positive law to furnish gas to the city upon demand, and, having furnished the commodity, has presented its bill for the reasonable value thereof, although the mayor of the city owns stock in the gas company and is president thereof. The city, having received and used the gas pursuant to a right which it enjoyed independent of the volition of respondent, is, in equity and conscience, bound to pay the reasonable value thereof. The judgment appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

100 Cal. 146

KELLER v. HEWITT et al. (No. 13,325.)

(Supreme Court of California. Sept. 19, 1895.)

TEACHERS' CERTIFICATES — MANDAMUS TO BOARD OF EDUCATION.

1. Pol. Code, § 1771, provides that the board of education shall prescribe rules for the examination of teachers, and examine applicants, and prescribe a standard of proficiency. *Held* that, after the board has determined that the applicant is in every way competent to teach, it has no right to refuse to issue a certificate.

2. By Pol. Code, § 1768, the county superintendent of schools is made a member of the board of education. *Held*, that it was not necessary to make said superintendent a separate party defendant to a petition for mandamus to compel the board to issue a teacher's certificate.

Department 1. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Petition by Augustine Keller for writ of mandamus to compel A. H. Hewitt and others, constituting the board of education of Sutter county, to issue to him a teacher's certificate. A demurrer to the petition was sustained, and petitioner appeals. Reversed.

W. H. Carlin and M. E. Sanborn, for appellant. W. T. Phipps, for respondents.

VAN FLEET, J. Appellant made application to respondents, as the county board of education of Sutter county, for a grammar grade certificate as a teacher in the public schools of the county, and upon examination by said board for the purpose, in accordance with its rules, was awarded a percentage of proficiency upon all of the studies, subjects, and matters included in his examination above that required by law and the rules of the board to entitle him to a certificate of the grade applied for; and the board found and decided that petitioner was of good moral character, and in every way fit and competent to receive such certificate. But, notwithstanding this finding and that nothing further remained to be performed by appellant to entitle him thereto, the board arbitrarily and without cause refused to issue such certificate to appellant. After a formal demand for the issuance of the certificate, and its continued refusal, appellant applied to the superior court of the county for a writ of mandate against the board, requiring the issuance to him of such certificate, setting forth with great fullness and detail in his affidavit or petition the facts of which the foregoing is a brief summary. The superior court sustained a demurrer to the petition, and, upon a failure to amend, entered judgment against the petitioner, from which he appeals.

We think the ruling of the court below was clearly erroneous. The theory upon which that court proceeded in sustaining the demurrer, and that now contended for by respondents, is that the law vests in the board of education the absolute power and discretion to determine in any instance whether a certificate shall issue to an applicant, irrespective of the question of his fitness as shown by his examination, and that its determination in the premises is final, and not subject to review by the courts. This view of the law cannot in our judgment be sustained. It was never intended to vest in the board of education any such absolute power in the premises. The law gives the board large discretionary powers unquestionably, but there are limits beyond which their discretion does not go, and where rights arise which it is not within their discretion to refuse. They have power to prescribe and enforce rules for the examination of teachers, and to examine applicants, and prescribe a standard of proficiency which the person examined must reach to entitle him to a certificate (Pol. Code, § 1771); and, no doubt, in the exercise of these functions, the board is vested with such discretionary judgment that their action could not be reviewed, as, for instance, in determining the degree of proficiency and fitness shown by an applicant upon any matter involved in his examination, and perhaps in prescribing the standard of proficiency and subjects of examination. In such matters it may be safely

assumed that their function being largely, if not wholly, discretionary, and involving an exercise of judgment, their determination would be held final. But, having established such rules and fixed such standard, and having examined an applicant under those rules, and determined that they have been complied with, and in all respects the prescribed standard of proficiency reached, it was not intended that they should, nevertheless, have the arbitrary power to say that in such a case a certificate shall not issue. When, under the law and their rules, the question of an applicant's fitness to receive a certificate has been determined in his favor, the limit of the board's discretionary functions in the premises has been reached, and a plain legal duty results. The applicant thereupon becomes entitled to a certificate, and the board rests under a corresponding obligation to grant it. It is such a case that is made by the petition. All of the prescribed requirements of the board have been met and complied with by petitioner, and the possession of all the necessary qualifications determined in his favor. Taking the facts alleged to be true, as we must, the petition, in our judgment, clearly states a case for relief which can be reached by mandate. And this view in no sense trenches upon the general doctrine contended for by respondents, that mandamus will not lie to control or direct mere discretion or judgment. Respondents devote much space and cite many authorities in support of that rule. Its discussion was a work of supererogation. There is no question of its general correctness, although it has its limitations and exceptions (Wood v. Strother, 76 Cal. 545, 18 Pac. 766; Ralsch v. Board of Ed., 81 Cal. 542, 22 Pac. 800); but it is wholly beside the question, since the act here sought to be compelled is not a discretionary act, but a purely ministerial duty, resulting from the antecedent acts of the board. It is a case not distinguishable from that which would arise should a superior court, which is given the power to examine and admit applicants to the bar, proceed to examine an applicant, and as a result determine and announce that it found the applicant possessed of the requisite age, character, and fitness under the law to entitle him to admission, yet should refuse without cause to admit him. Would it be contended for a moment that such refusal was within the discretion of the court, and that the admission of the applicant could not be enforced by mandate? We apprehend not, and yet that is exactly this case. The court in the case supposed would have exhausted its discretionary powers, and have reached a point where nothing remained but to grant the right to which the party had shown himself entitled. The principle involved is aptly illustrated by the case of Sansom v. Mercer, 68 Tex. 488, 5 S. W. 62. That was a case arising under a statute of Texas providing that the territorial limits of a city could be diminished by a vote of the people at an election to be called

by the mayor, upon application made to him by petition, signed by a certain number of electors. Before making a call for such election, the mayor was required to determine two things: First, that there was an excess of territory over the limit prescribed by the act; and, second, that at least 50 electors had signed the petition. Application was made to the mayor under the act to call an election, which he refused, and mandamus was sought to compel him to make the call. It was urged that, his function involving the exercise of judgment upon his part in passing upon the matters submitted to him, he could not be required to act in a particular way. It is said by the court: "It is well settled that, if the duty an officer is called upon to perform requires the exercise of an act of judgment on his part, his decision is not subject to be reviewed by a proceeding for a writ of mandamus. *Ewing v. Cohen*, 63 Tex. 483; *Bledsoe v. Railroad Co.*, 40 Tex. 554; *Arberry v. Beavers*, 6 Tex. 457; *Commissioners v. Smith*, 5 Tex. 471; *Cullem v. Latimer*, 4 Tex. 329. And it is apparent that, in a proceeding to procure an order for an election under the statute before cited, the mayor is required to determine two facts in order to justify him in making the order for the election: (1) That there is a surplus of territory over the limit prescribed by the statute; and (2) that at least 50 qualified voters of that territory have signed the petition. If there be any controversy as to the existence of these facts, his function is discretionary, and he cannot be compelled to order the election. But taking the facts of the petition to be true, as the demurrer admits, the surplus territory exists, and more than the requisite number of voters have signed the application. In such a case the discretion of the mayor ceases. The act to be done is purely ministerial. His duty becomes absolute, and he can be compelled to perform it. The fact that preliminary to his action he must know that there is an excess of territory beyond the statutory requirements, and that the requisite number of voters have signed the petition, does not invest him with the discretion to refuse to order the election when, as a matter of fact, there is no controversy as to the excess, or as to the number and qualifications of the signers." Many other cases support a like view, but we deem it unnecessary to multiply them. The case of *Bailey v. Ewart*, 52 Iowa, 111, 2 N. W. 1000, largely relied upon by respondents as supporting their view, we do not regard as in point or as in any way in conflict with the principles above announced. It is apparent from the reading of that case that the certificate was there refused because the applicant was not found qualified; and it was properly held, under the general rule above stated, that this question was a discretionary one, and could not be reviewed. A very different question would have been presented had the applicant been found competent, and the certificate then refused. Had the court reached the conclusion it did

under such a state of facts, the case would have presented some analogy to the one before us. For these reasons the general demurrer should have been overruled.

Nor do we think there is anything in the special ground of demurrer that there is a defect of parties defendant, in that the county superintendent, in his official capacity as such, should have been made a party defendant. Under the statute, the county superintendent is made a member of the board of education (Pol. Code, § 1768); and it is only in the latter capacity that he has any function to perform in the premises counted upon. It was only by reason of his being a constituent part of the board, therefore, that it was necessary to make him a party at all, and, as such, he is made a defendant. It is true that the constitution commits to county superintendents and county boards of education control of the examination of teachers, and the granting of certificates within their respective jurisdictions; but it has left it to the legislature to provide the machinery for putting this power in motion, and prescribe the mode and manner of its exercise and the limitations of the power vested. This the legislature has done, and has seen fit to prescribe that the functions of the superintendent in this regard, except in certain respects not here involved, are to be performed as a member of the board of education. In his separate capacity of superintendent, therefore, the latter was neither a necessary nor a proper party to the proceeding.

It follows that the judgment should be reversed, and the cause remanded, with directions to the lower court to overrule the demurrer. It is so ordered.

We concur: GAROUTTE, J.; HARRISON, J.

109 Cal. 178
CORBETT et al. v. CHAMBERS et al.
(No. 19,417.)

(Supreme Court of California. Sept. 25, 1895.)
MECHANIC'S LIEN CLAIM — SUFFICIENCY — FILING.

1. The provision in Code Civ. Proc. § 1187, requiring the claim filed by a mechanic's lien claimant to state "the name of the owner or reputed owner, if known," means the owner or reputed owner at time the claim is filed.

2. Objections to a mechanic's lien claim that the verification states that the facts stated therein are true, instead of that the claim is true, and that a certain person is the owner of the "premises" instead of the "building," are frivolous.

3. An objection that a mechanic's lien claim was not made or filed by the claimant should be overruled when it appears that the claimant signed the claim, and gave it to another to file, and it was indorsed by the recorder as filed by the claimant.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by W. C. Corbett and others against W. D. Chambers and others for foreclosure of mechanic's lien. From a judgment for defendants, plaintiffs appeal. Reversed.

J. W. Goodwin and Henry J. Stevens, for appellants. Z. Montgomery & Son and F. W. Ewing, for respondents.

HARRISON, J. Action for the foreclosure of four mechanics' liens upon certain property in the county of San Diego. When the notices of lien were offered in evidence the defendants objected to their sufficiency, and they were excluded by the court, and judgment rendered in favor of the defendants. Plaintiffs have appealed.

The complaint alleges "that from about the 1st day of January, 1892, to about the 1st day of May, 1892, W. D. Chambers was the owner of the real property hereinafter described; that, as these plaintiffs are informed and believed, ever since about the 1st day of May, 1892, said property has stood in the name of F. W. Ewing, and that said F. W. Ewing has been the owner thereof." The notices of lien are substantially in the same form, and contain the following statements: "That F. W. Ewing is the name of the owner or reputed owner of said premises; that W. D. Chambers is the name of the person by whom this claimant was employed to work on said premises." One of the objections which the defendants made to the introduction of these notices, and the one which has been chiefly argued in their brief, is that the notices should state the name of the owner at the time the claimant made his contract with Chambers, and should also state that the person for whom the labor was performed had some contractual relation with the person named in the notice as the owner of the building, whereas the notices herein merely state the name of the owner at the time of filing the claim of lien, and do not purport to state the name of the owner at the time the contract was made, and that they fail to show any contractual or other relation between the owner and Chambers. The steps which are requisite to the enforcement of a mechanic's lien are entirely of statutory creation, and the same rule which makes it essential that all statutory requirements be complied with in order to perfect the lien renders it unnecessary to take any other step than is thus required. In order, therefore, to determine whether a notice of lien is sufficient, it is only necessary to compare its terms with the terms of the statute which provide for the notice. Section 1187, Code Civ. Proc., requires the claimant to file for record with the county recorder "a claim containing a statement of his demand, after deducting all just credits and off sets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials." The requirements that are made by the statutes in many other states differ from those required in this state, and, as it is only necessary to consider the requirements of the above section, it is unprofitable to consider what decisions may

have been made under different statutes. In the absence of any qualifying term, a statute must be interpreted according to the natural import of its language. There is no limitation upon the term "owner," as used in the above section of the Code, nor does it refer to the owner with whom the contract for the improvement was made, or to the owner at any other time than at the date of filing the claim. To hold that the notice must state the name of the "owner" who originally entered into the contract under which the work was done would be to require something of the claimant which the statute has not required; and to hold that a statement of the name of the owner at the time of filing his claim is insufficient would be to deprive him of a lien when he has fully complied with the requirements of the statute. The object of requiring the claim to be filed in order to perfect the lien is to give notice of the lien to those interested in the property upon which it is claimed; and, as the owner at the time of filing the claim is the party to be affected thereby, rather than one who has parted with the property subsequent to the making of the original contract, it is reasonable to suppose that the legislature intended the name of the owner at the time the claim is filed, rather than that of any previous owner.

The present mechanic's lien law is an evolution from prior statutes upon the same subject, resulting from the desire of the legislature to adjust the respective rights of lien claimants with those of the owners of property improved by their labor and material. An examination of these statutes confirms the conclusion that the "owner" whose name is to be given in the claim of lien is the owner at the time of filing the claim. The act of 1850, § 2 (St. 1850, p. 212), required the claimant to give a notice in writing to the "owner" of the building on which his labor or materials had been expended. By the act of 1855, § 3 (St. 1855, p. 157), the claimant was required to file his claim in the recorder's office, and within five days thereafter serve a copy thereof on the owner of the building, or his agent in case the owner resided out of the county; and, if he had no agent, to post it on the building charged with the lien. In 1858 (St. 1858, p. 225) this act was amended by authorizing the copy of the notice to be left at the residence of the owner, or deposited in the post office, directed to him, instead of being posted upon the building. In the act of 1862, § 5 (St. 1862, p. 385), the claimant was required to give a notice of the nature and extent of his claim to the "employer" of the original contractor. The statute was again revised in 1868, and the act of that year (St. 1868, p. 589) contains substantially the present provisions of the Code on this subject. Instead of requiring the notice to be given to the "employer" of the original contractor, as was required by the act of 1862, this act brings the "owner" into connec-

tion with the claimant, as did the statutes prior to 1862, and, instead of requiring that the notice of claim be personally served upon him, authorizes it to be filed for record with the county recorder. By the act of 1862 the notice was to be given to the "employer" of the original contractor, irrespective of any interest he might then have in the property; and the restoration of the term "owner" in 1868 indicates that the legislature deemed that notice to the employer might not be sufficient if such employer was not also the owner. As the main object of giving personal notice of the claim to the owner of the building is to affect him with notice of the lien, and afford him an opportunity of protecting himself against the same in his dealings with the original contractor, it must be assumed that when the legislature substituted the recording of the claim, with the name of the owner therein, for the personal notice previously required to be given to him, it intended the owner of the property who would be affected by the lien, rather than a prior owner, who had authorized the improvement, and who, by an intervening sale, had ceased to have any interest in the property, or in any lien thereon. Another object of having the notice made a matter of public record is for the protection of those who may deal with the owner of the property. By Pol. Code, § 4236 (16), the county recorder is required to keep "an index of notices of mechanics' liens, labelled 'Mechanics' Liens,' each page divided into three columns, headed, respectively, 'Parties Claiming Liens,' 'Against Whom Claimed,' 'Notices When and Where Recorded.'" The same provision is found in section 125 of the several county government acts that have been passed. It is by this index that a subsequent dealer with the property is to be guided in ascertaining whether there are any incumbrances upon the owner's title, and it is apparent that this index would afford no notice to subsequent purchasers or incumbrancers if the owner whose name is to be stated in the claim is one who at some previous time had been the owner, but who had, long prior to filing the claim, parted with all interest in the property. As the claim of lien which is to be filed with the county recorder is not the enforcement of the lien, or any step for its enforcement, but merely one of the acts to be performed in perfecting the lien, it is apparent that it is not essential that this notice shall contain a statement of all the facts essential to establishing the lien, or anything more than is required by the statute. The office of filing the statement is to give notice of the claim, and not to serve as evidence of the lien. The statute does not require the claimant to state in his notice that the person to whom he furnished the materials, or for whom he performed labor upon the building, had any contract with the owner, or with the person whose name is given as the owner. The only notice that the claimant is required to give

is the name of the person with whom he dealt or contracted. He may not know the name of the owner, and if he is ignorant of his name he is not required to state it. *Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231. The person with whom he dealt may be unknown to the owner. He may be a subcontractor with whom the owner had no contractual relation, and the statute provides that the laborer may have a lien, irrespective of the existence of a contract on the part of the owner. In the action to enforce the lien, however, the claimant must state in his complaint all the facts essential to a recovery, and show that the person with whom he dealt had authority from the owner, either express or implied, to create a lien upon his property. If the owner who contracted for the improvement has in the meantime parted with all interest in the property, whether before or after filing the notice, the claimant cannot enforce his lien in an action against him alone, but must make as a defendant the owner at the time of bringing the suit. The statute is a remedial statute, adopted in obedience to the requirements of the constitution (article 20, § 15), and is to be liberally construed in furtherance of the purposes for which it was authorized. The persons for whose benefit the statute is enacted are not presumed to be versed in the niceties of pleading, and the notices which, under its provisions, they are authorized to give, have regard to substance rather than form. The terms of the section clearly indicate that it was not the intention of the legislature that in the claim of lien which he files for record the claimant shall state the name of the real owner, at the risk of losing his lien if it shall turn out that he was in error. The provision therein that the claimant shall give the "name of the owner, or reputed owner, if known," implies that, if he does not know the name of the owner, he may state this fact, and perfect his lien without naming an owner (*Lumber Co. v. Newkirk*, supra); and also that, if in good faith he gives the name of a reputed owner, he shall not lose his lien if he shall afterwards ascertain that some other person was the owner. See *Lelegne v. Schwarzler*, 67 How. Prac. 130. Under this view of the object of the section, it must be held that the claimant does not fail in perfecting his lien if, as in the present case, he states the name of the owner, or reputed owner, in the alternative. As he is not required to ascertain at his peril the name of the true owner, and as it is sufficient if he gives the name of the reputed owner, the sufficiency of the notice is not impaired by the same person being designated as owner or reputed owner. In either case it is only the opinion of the claimant upon matters that are not presumptively within his knowledge, but which he has formed from external information; and in that respect the notice which he is to file differs from a pleading in which a fact essential to a recovery must be

definitely averred. The object of this statement in his claim is, as we have seen, to designate the person against whom he seeks to establish the lien, as well as to protect others in their dealings with the property. The purpose of this investigation is to point out the individual who is to be affected thereby, rather than the attribute of ownership; and, if the individual against whose property the lien is claimed is specified, he receives all the notice which is intended by the statute, irrespective of whether he is designated as owner or reputed owner. See *Reed v. Norton*, 90 Cal. 596, 26 Pac. 767, and 27 Pac. 426.

Many other objections were made by the respondents to the introduction of the notice, but they have not been presented in their brief. The court sustained the objections as a whole, without specifying those which it deemed valid. We have, however, examined the record with reference to all of the objections, but do not deem that any of them require further consideration. The objection that in the verification of one of the claims it is stated "that the facts stated therein are true," instead of stating that the claim is true, as well as the objection to another of the notices that it stated that Ewing was the owner of the "premises," instead of stating that he was the owner of the "building," are frivolous. The only objection to the claim of the plaintiff Wellington was that it had not been filed in the recorder's office, or made by the claimant. Wellington, however, testified that he had signed the claim, and given it to Lee to be recorded; and upon this testimony, in connection with the indorsement upon the claim, the objection should have been overruled. The judgment is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

109 Cal. 221

BALFOUR v. FRESNO CANAL & IRRIGATION CO. (No. 18,437.)

(Supreme Court of California. Sept. 27, 1895.)

IRRIGATION — CONTRACTS — CONSTRUCTION — PAROL EVIDENCE.

A contract providing that for \$1,000 down and a yearly rental defendant should furnish plaintiff from "defendant's main canal, or from a branch thereof," a certain amount of water for irrigation, defendant to "place a suitable box or gate in the bank of said main canal, or a branch thereof, at the most convenient point for the conveyance of the water to said land," as soon as plaintiff should commence construction of a ditch, which it was provided he should build "from said box or gate to said land, at his own risk, cost, and expense," for the purpose of taking the water on his land, plaintiff to pay annually to defendant \$100, "the first payment to be made the first Monday in September, after the water has been brought upon the said land," is so ambiguous as to whether the yearly payment was to commence the September after plaintiff took the water upon the land through the ditch to be constructed by him, or the September after defendant had brought the water to the land ready for plaintiff, that parol evidence of the

surrounding circumstances and the intent of the parties is admissible to aid in the construction.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Robert Balfour against the Fresno Canal & Irrigation Company. Judgment for defendant. Plaintiff appeals. Reversed.

L. L. Cory, for appellant. Geo. E. Church, for respondent.

VAN FLEET, J. The parties hereto, in November, 1889, entered into four several contracts, whereby defendant sold and conveyed to plaintiff certain water rights or privileges for the irrigation of a section of land in Fresno county. The contracts were identical in terms, except that each referred to a different quarter section. So far as necessary to be stated, the stipulations were that the defendant, for the consideration of \$1,000 paid down and a yearly rental herein-after mentioned, agreed to furnish to plaintiff from "defendant's main canal, or from a branch thereof," the quantity of water contracted for; that the defendant should "place a suitable box or gate in the bank of said main canal, or a branch thereof, at the most convenient point for the conveyance of the water to said land," as soon as the plaintiff should commence the construction of a ditch, which it was provided he should build "from said box or gate to said land, at his own risk, cost, and expense," for the purpose of taking said water upon his land. It is then provided that plaintiff and his successors, etc., will pay annually to the defendant for a designated period the sum of \$100, "the first payment to be made the first Monday in September, after the water has been brought upon the said land." And it is provided that, in case of default in such payment in any year for a space of 30 days after it becomes due, the agreement shall become void at the option of the canal company. Under these contracts defendant, prior to September, 1891, carried its canal to a point accessible to plaintiff's land, and in fact partly upon the line of said land, but plaintiff has not constructed, or commenced to construct, any ditch to take the water from said canal upon his land, nor has he ever otherwise taken or used said water. In due time after the completion of its canal, as aforesaid, the defendant made demand upon the plaintiff for the payment of rent under each of said contracts for the year 1891, which plaintiff refused; and plaintiff likewise refused a demand for said rent claimed by defendant for the year 1892. Instead, plaintiff brought this action to have it decreed that there is nothing due from him to the defendant under said contracts, and to enjoin defendant from attempting to terminate or annul plaintiff's rights thereunder. Defendant filed a cross complaint, alleging its full compliance with the terms of the contracts, and that the two annual payments of rent for the years 1891

and 1892 were due and unpaid, and asked a decree enforcing the payment of the same. The court found that defendant had fully performed the contracts on its part, and rendered a decree in favor of defendant for the amount claimed, and from said decree, and an order denying a new trial, plaintiff appeals.

The whole controversy turns upon the question as to when, under the contracts, plaintiff's obligation to make the annual payments of rent provided for commences, and the solution of this question depends upon the construction to be given that particular clause which provides that the first annual payment is to be made "the first Monday in September, after the water has been brought upon said land." Plaintiff contends that this language, while somewhat ambiguous and uncertain, was used and intended to refer to the taking of the water upon the land from defendant's canal, by the plaintiff, through the medium of the ditch to be constructed by him, and that no annual payment is to become due until such actual taking by plaintiff; while defendant's contention is that the clause plainly has reference to the bringing of the water to the land by the water company, and is in no degree ambiguous; and that, when defendant completed the construction of its canal, and carried the water to said land at an accessible point, from whence it could be conducted upon the land by means of the ditch to be constructed by the plaintiff, the condition upon which depended defendant's right to the annual rent was fully complied with, and that defendant is entitled to said rent, regardless of whether plaintiff was then ready to take or use the water upon his land. In support of the construction contended for by him, plaintiff introduced evidence at the trial tending to show that during the negotiations between the plaintiff and the officers of the defendant, which ended in the execution of the contracts, plaintiff for some time refused to take the said water rights, because he was making no use of the land which required water, and he did not desire to enter into the contracts, and be compelled to pay rent for water that he then had no use for, and so stated to defendant; that the latter was anxious to have plaintiff purchase said water rights, and he was assured by the president of defendant, with whom the negotiation was had, that, if plaintiff would take the contracts, and pay a thousand dollars each, which price was somewhat higher than that for which similar rights had been sold to others, he should not be required to pay rent until such time as he should take the water upon his land for use; that it was with this understanding that plaintiff entered into said contracts, and that this was what the parties intended to express by the language used. The evidence further tended to show that the language above quoted was inserted in writing in a blank left in the

printed form of contract used by the water company, and that the clause as there inserted differed from that found in the other water-right contracts made by the company; the provision usually inserted being that the rent should be paid after the 1st of September of a certain year, without reference to when the water was brought on the land; while some of them provided that rent should be paid after the water was brought to the land; but that the contracts sued upon were the only ones providing that the rent should not be paid until the water was brought upon the land. This evidence was admitted by the court against defendant's objection that it was incompetent, as tending to vary the terms of the writing, and because all prior negotiations were deemed merged in the written contract, and could not be shown by parol. The court subsequently adopted this view, and struck the evidence out, and it is upon this ruling that the question involved arises.

If the language of the contract is, as defendant contends, plain and unambiguous, and susceptible of but one construction, then the objection was good, and the evidence properly excluded. If, however, the language employed be fairly susceptible of either one of the two interpretations contended for, without doing violence to its usual and ordinary import, or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining. This is not allowing parol evidence for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intention of the parties. "The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps a corollary, to the general rule above stated, that when any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself." *Sandford v. Railroad Co.*, 37 N. J. Law, 1, 3. For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown. Code Civ. Proc. §§ 1860, 1861; *City of Atlanta v. Schmeltzer* (Ga.) 10 S. E. 543,

545; *Keller v. Webb*, 125 Mass. 88; *Long v. Long*, 41 Mo. App. 141; *Swett v. Shumway*, 102 Mass. 305. In our judgment, the contracts in question are so far ambiguous, in the particular under consideration, as to fall within the principles here announced, and that the excluded evidence was of a character admissible to explain and fix the intention of the parties in the employment of the language used. It may be that, standing alone, the contracts would receive the construction urged by defendant. *Irrigation Co. v. Dunbar*, 80 Cal. 530, 22 Pac. 275. The language is, perhaps, not so essentially different from that under consideration in the case just cited as, in the absence of any extrinsic facts tending to show a contrary intention, to call for a different construction. But at the same time it is likewise, we think, perfectly susceptible of the construction contended for by plaintiff, if such was the meaning intended by the parties, and that without doing violence to the ordinary sense or meaning of the language employed, or importing any new term into the contract. Nor does such construction make the contract appear so unreasonable or improbable as to preclude it. In determining the meaning of the parties in the particular clause, we will look at every part of the instrument. "It is a true and important rule of construction that the sense and meaning of the parties to any particular instrument should be collected *ex antecedentibus et consequentibus*; that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done." *Broome*, Leg. Max. 442. Applying this rule, and regarding the different provisions of the contract in the light of the circumstances surrounding the parties, as disclosed by the evidence, the construction sought to be established by plaintiff is neither unreasonable nor necessarily inconsistent with the general purpose intended to be accomplished. Plaintiff paid \$1,000 in cash for each of the rights acquired by him under the contracts. Defendant was to take the water to the land, or furnish it at a convenient point from where it could be taken out by plaintiff. The contracts do not, in terms, require defendant to take the water upon the land, but only to a point where it shall be accessible or convenient; but it does in express terms provide for the water being taken upon the land by plaintiff himself. The evidence tended to show that defendant was very anxious to sell these rights to plaintiff. Possibly it was in need of the \$4,000 it would receive in cash payments, or had other special reason for desiring to make the sale. It is not at all unreasonable and may well be that, under the circumstances and in consideration of making the sale for the price asked, the defendant was willing to forego the annual rent until the water should be actually taken upon the land by plaintiff. If such was the intent sought to be expressed,

the contract should be so construed, so long as the language used may fairly include it. And without regard to the sense in which the language was used by the defendant, the grantor, if it is shown that it supposed, or had reason to suppose, that the plaintiff, its grantee, understood it in this sense, and if the sense and meaning contended for by plaintiff be a proper, although not a necessary, one, and is more favorable to him, in either case that construction should be adopted. Code Civ. Proc. § 1864; Civ. Code, § 1649. We conclude, therefore, that the court below should have retained the offered evidence, and considered it in determining the proper construction to be given the provision in question, and that its exclusion was an error for which a reversal must be had. Judgment and order denying new trial reversed, and cause remanded.

We concur: HARRISON, J.; GAROUTTE, J.

5 Cal. Unrep. 131
SCOTT v. RHODES et al. (No. 19,537.)
(Supreme Court of California. Sept. 4, 1895.)
ESTOPPEL BY RECORD — EJECTMENT — PLEADING AND PROOF.

1. One claiming under a grant by a certain name is conclusively bound by a judicial determination and definition of what land was meant by that name.

2. Recovery cannot be had in ejectment for land not specified in the complaint.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Ejectment by Maria A. Scott against A. G. Rhodes and others. From a judgment for defendants for costs, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Hunsaker & Stevens, Chalmers Scott, and E. Parker, for appellant. J. O. W. Paine, and C. H. Rippey, for respondents.

VANCLIEF, C. Action of ejectment to recover possession of the north half of a tract of land situate in the county of San Diego, described in the complaint by the name "Rancho Buena Vista," and not otherwise. The complaint is in the most general form, alleging plaintiff's ownership and possession of the north half of said tract, and that defendants ejected her therefrom, and withheld from her the possession thereof. The defendants denied plaintiff's alleged ownership and possession, and further denied that they ever entered upon or ejected plaintiff from the land described in the complaint, or that they ever withheld the possession thereof from the plaintiff. The cause was tried by the court without a jury, and the court found that plaintiff was the owner and entitled to the possession of the land described in her complaint as "the north half of the Rancho Buena Vista," but further found that neither of the defendants ever entered upon

or ejected the plaintiff from said north half, or any part thereof, or ever withheld the possession of the same, or any part thereof, from the plaintiff; and as a conclusion of law found "that the plaintiff should take nothing by this action, and that the defendants are entitled to judgment against the plaintiff for their costs," and rendered judgment accordingly. The plaintiff appeals from the judgment, and from an order denying her motion for a new trial.

The principal question for decision is one of fact: Did the defendants, or any one of them, oust or eject the plaintiff from any part of the land described in her complaint as the "north half of Rancho Buena Vista," or withhold from her the possession of any part thereof? The evidence shows with reasonable certainty what lands the defendants entered upon and withheld from the plaintiff. Each one of them, as pre-emptor or homestead claimant, separately entered upon a small, defined tract of what he claimed to be government land, outside and west of the Rancho Buena Vista; so that the controversy ultimately relates only to the location of the western boundary line of the Rancho Buena Vista. The plaintiff derived her title from a Mexican grant, made by Gov. Pio Pico to an Indian named Felipe in the year 1845, and confirmed by the United States board of land commissioners for this state, and by the United States district court. The petition of Felipe for the grant describes the land as a "small piece of land called 'Buena Vista,' * * * which piece of land consists of half a league in length and one-half in breadth, on which I maintain some little stock that serve for the maintenance of myself and family." After reciting this petition, Gov. Pico made the grant in the following words: "After having previously made the necessary investigation according to law and regulations, in the exercise of the powers vested in me, in the name of the Mexican nation, I have concluded to grant him the mentioned land, declaring it his property by the present letters patent and under the following conditions: First. * * * Second. He will solicit of the respective judge to give him juridical possession in virtue of this document, by whom the boundaries are to be marked, putting the necessary landmarks. Third. The land granted is of an extent of half a square league, and the same he actually occupies. The judge who shall give the possession will cause it to be measured according to ordinance, leaving the surplus that may result to the benefit of the nation for convenient purposes." The judge who gave juridical possession reported the measurements and boundaries of the possession given as follows: "As we stood at one of the boundaries of the garden of the Indian Felipe, the line was drawn east, and there were measured and counted two thousand five hundred varas, which terminated at the boundary of Don Lorenzo Soto, where the

party interested was ordered to place his landmark. From this place the line was drawn in a south course. There were measured and counted two thousand five hundred varas, which ended at a small peak, where stand two rocks joined together. Here the party interested was ordered to place his landmark. From this point the line was drawn, course west, and there were measured and counted two thousand five hundred varas, which ended at a small red hill, where the party interested was ordered to place his landmark. From this point the line was drawn, course north. There were measured and counted two thousand five hundred varas, which ended upon a hill where there stands a large rock, and the party in interest was ordered to place his landmark." In the order of confirmation by the United States land commission, the grant is described as follows: "The lands of which confirmation is hereby made are known by the name of 'Buena Vista,' and are bounded and described as follows, to wit: Commencing at the northwest corner of the garden of the Indian Felipe, and running east two thousand and five hundred varas to the boundary line of Lorenzo Soto's; thence running south two thousand five hundred varas to a small peak, where stand two rocks, joined together; thence running west two thousand five hundred varas to a small red hill; thence running north two thousand five hundred varas to the place of beginning, on a hill, where there is a rock,—containing in all one-half of a square league. Reference for further description is had to the original grant and to the translation of the original record of judicial possession, both of which documents are on file as evidence in the cause." In the judgment of the United States district court, affirming that of land commission, the grant is described as follows: "And it is further ordered, adjudged, and decreed that the claim of the appellee is a good and valid claim, and that the said claim be, and the same is hereby, confirmed to the extent of one-half of a square league of land, a little more or less, being the same land which is situated in the county of San Diego, known by the name of 'Buena Vista,' and bounded and described as follows: Commencing at the northwest corner of the garden of the Indian Felipe, and running east two thousand five hundred varas to the boundary line of Lorenzo Soto's; thence running south two thousand five hundred varas to a small peak, where stand two rocks, joined together; thence running west two thousand and five hundred varas to a small red hill; thence running north two thousand five hundred varas to the place of beginning, on a hill, where there is a rock,—containing in all one-half of a square league. Reference for further description to be had to the original grant and to the translation of the original record of judicial possession." The grant has been surveyed by five different United States deputy surveyors,—first,

ly located. The quadrangle F, J, K, I, represents a private survey made for defendants, which they claim to be a correct survey of the land granted.

No scale of distances upon which the map was drawn appears in the transcript except by inference. Mr. Chalmers Scott, the husband of the plaintiff, testified that he was a civil engineer and an attorney at law, and in explaining the map, among other things, said: "Plaintiff claims point A as the northwest corner of the ranch, point B as the southwest corner, point C as the southeast corner, and point E as the northeast corner, although point E is not so far east as we would be entitled to go, in my opinion. This would make the north line of the ranch (reduced to Mexican or Spanish varas) 5,028.92 varas, the east line 5,132.63 varas, the south line 4,784.47 varas, and the west line 4,246.9 varas, in length. This is according to the Willey survey. By the Wheeler survey the north line is 5,541.54 varas, and the east line 5,126.22 varas, in length; the south and west lines being identical with the Willey survey." This however, does not quite agree with the lengths of the lines as expressed in chains on the map, assuming that a Mexican vara is equal to 33 inches English measure, as it is understood to be in this state; and, further assuming that all the lines of the map were drawn upon the same scale, the length of the north line (A, E) of the Willey survey, as expressed in chains on the map, must be a gross error, for though it is nearly one-eighth of an inch longer than the south line of the same survey, it purports to be 68 chains shorter than the south line. Mr. Chalmers also testified that the broken lines on the map show the location of the section and quarter-section lines projected from adjoining government surveys. If this is true, the map must be on a scale of two inches for a mile; and this agrees very nearly with the measurements by chain as written on the map, except in case of the north line (A, E) of the Willey survey, which should be about 230 chains instead of 133.58.

The burden of proving that defendants had ousted the plaintiff from, or withheld from her the possession of some part of the grant, as properly located, was on the plaintiff; but I think she failed to sustain it. The grant in this case is not of a specific quantity within exterior boundaries inclosing more than the specific quantity granted. In her complaint the plaintiff has described the demanded premises only by a name; but in proving her title she proved a judicial determination and definition of what land was meant by that name, by which determination and definition she is conclusively bound. In the judicial proceedings before the United States land commission and in the United States district court, to which her predecessor in interest was a

party, the Mexican grant under which she claims was construed to be a grant of a specific tract of land described by courses, distances, monuments, and quantity; and there is no dispute as to the location of the monument named as the point of commencement of the judicial description, to wit, "the northeast corner of Felipe's garden." Thence running east 2,500 varas to the boundary of the land of Lorenzo Soto, which boundary is described by the witnesses as a ridge, and not otherwise; and its location by witnesses for plaintiff is consistent with the call for distance on the west course. "Thence running south 2,500 varas to a small peak, where stand two rocks, joined together." The witnesses for defendants testified that they found the small peak and the two rocks called for at the corner marked K on the diagram, whereas plaintiff's witnesses testified that the peak and rocks called for are about a mile further south, at the corner C on the diagram, and that the rocks and peak at K do not answer the call. On this point the evidence was conflicting; but, since point K answers the call for distance and quantity, and approximates that for course, I think the preponderance of evidence on this question is in favor of the defendants. Thence west 2,500 varas "to a small red hill." Defendants' witnesses professed to have found the "small red hill" at point J on the diagram, while plaintiff's witnesses located it two miles further west as point B. It was not denied that there was a small hill of a reddish color at point J, but plaintiff's witnesses claimed that it was not so red as that at point B; and, on the other hand, witnesses for defendants claimed that the hill at B was not a small hill, but was a large hill. Considering the great excess over the calls for distance and quantity in extending the south line west to B, I think the evidence fully justified its termination at point J. Thence runs the fourth and last course north 2,500 varas "to the place of beginning on a hill where there is a rock,—containing in all one-half of a square league." Plaintiff's witnesses locate this closing point at A, nearly a mile and a half from the northwest corner of Felipe's garden, which must be accepted as the place of beginning, though it is not on a hill, and no rock answering the call was found within a thousand feet of it, and though the hill on which point A is located has upon it a vast number of rocks scattered over a large area of ground, as testified by the witnesses; since to dispute that one of the boundaries of that garden is the place of beginning from which the first course ran east is to dispute the record of the grant, and to dispute that the northwest corner of the garden is the place of beginning is to dispute the record of the judgment of the United States land commission, and of the United States district court, confirming the grant, by which judgments, as

before remarked, the plaintiff is conclusively bound.

Other objections to the location and extent of the west line by the Willey survey are: (1) That it does not close the survey by nearly a mile and a half; (2) to close the survey by running from point A to the garden would make the grant quintangular, instead of a quadrangle, as called for; (3) It incloses more than three times as much land as called for; and (4) the west line is nearly a mile longer than called for. I think it clear that the evidence justified a finding by the lower court that the west boundary line of the grant is not further west than a north and south line intersecting the northwest corner of Felipe's garden; and, as there is no evidence tending to prove that any one of the defendants ever entered upon or ejected the plaintiff from any land east of said north and south line, the court was also justified in finding, as it did, that none of the defendants ever entered upon or ousted the plaintiff from the premises described in the complaint, or withheld the possession of any part thereof from the plaintiff.

The plaintiff contends, however, that she was in actual possession of land west of the said north and south line, from which the defendants ejected her, and which she is entitled to recover in this action, even though it is not within the boundaries of the Rancho Buena Vista as properly located. For two sufficient reasons this point cannot be sustained: (1) She sued for and described in her complaint only the Rancho Buena Vista; she tendered no issue as to any other land; there was no issue as to any other land tried; and therefore she cannot recover any other land in this action. (2) The evidence does not tend to prove that any one of the defendants entered upon any land while she was in the actual possession thereof, or upon any land within any inclosure. I think the order and judgment appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment appealed from are affirmed.

DE COUTS v. LAFKIN et al. (No. 19,536.) (Supreme Court of California. Sept. 4, 1895.)

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action of ejectment by Ysidora B. De Coutts against James Lafkin and others. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

Hunsaker, Britt & Goodrich, Hunsaker & Stevens, Chalmers Scott, and E. Parker, for appellant. J. O. W. Paine and C. H. Rippey, for respondents.

PER CURIAM. This is an action to recover possession of land situate in the county of

San Diego, and described as "the south half of Rancho Buena Vista." The case in every respect is like that of *Scott v. Rhodes* (No. 19,537, just decided) 41 Pac. 878. Upon the authority of that decision, the judgment and order appealed from must be affirmed, and it is so ordered.

THOMAS v. GRAND LODGE OF ANCIENT ORDER OF UNITED WORKMEN OF WASHINGTON.

(Supreme Court of Washington. Aug. 5, 1895.)

MUTUAL BENEFIT INSURANCE—CHANGE OF BENEFICIARIES—APPLICATION—MATERIALITY OF ANSWERS.

1. The interest of the beneficiary of a certificate in a benevolent association is not vested before the death of the member, but is a mere expectancy, which may be changed at any time by such member.

2. In the absence of a showing to the contrary, it will be presumed that a member of a benevolent society has power to change the certificate of membership.

3. In an action on a beneficiary certificate in a benevolent association, evidence of declarations by the member as to the truth of statements made in application for membership are admissible against the beneficiary.

4. The answers to questions in an application for membership in a benevolent society are merely representations, and, if untrue, affect the rights of the applicant in so far only as he knew them to be untrue when he made the application.

5. Where the application, signed by both parties, provided that the answers to all questions should be considered material, it was error, in an action on a beneficiary certificate issued to such applicant, to refuse to charge that such answers were material.

Dunbar, J., dissenting.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Louise M. Thomas against the Grand Lodge of the Ancient Order of United Workmen of Washington on a beneficiary certificate. Judgment for plaintiff, and defendant appeals. Reversed.

W. W. Likens and A. R. Heilig, for appellant. Ira A. Town, for respondent.

HOYT, C. J. This action was brought to recover upon what is known as a "beneficiary certificate" issued by the authority of the Supreme Lodge of the Ancient Order of United Workmen, wherein it was recited that Brother W. Hill Thomas, a workman degree member of Lodge No. 32 of said order, was entitled to all the rights and privileges of membership in the order, and to designate the beneficiary to whom the sum of \$2,000 of the beneficiary fund of the order should at his death be paid. Such certificate was issued upon certain conditions therein expressed, and therein the respondent, Louise M. Thomas, wife of the said W. Hill Thomas, was designated as the beneficiary. Upon the trial it was conceded that said W. Hill Thomas, in his lifetime, was a member of the order, under the authority of which the beneficiary certificate was issued; that he was dead; that sufficient proof thereof had been

made under the rules of the order; and that the respondent was his widow, and entitled to recover the amount due under said beneficiary certificate, if such certificate was of force against said order. It was claimed, however, that such certificate was void and of no effect. The ground of this contention was the alleged fact that in the application of said W. Hill Thomas for membership he had answered certain questions therein propounded by the order for the purpose of determining whether or not the applicant should be received as a member, and in such answers had misrepresented the facts. The substantial controversy upon the trial was—First, as to whether or not his answers to the questions thus propounded were or were not true; and, second, as to the effect of such answers, if untrue, upon the beneficiary certificate. Incident to this controversy were certain questions relating to the kind of proof which was admissible for the purpose of showing that his answers were untrue. A large number of exceptions were taken by the appellant during the progress of the trial, and they have been grouped and argued here under various assignments of error. We have carefully examined the questions raised by such exceptions, but they are too numerous for separate discussion in this opinion. The many questions raised thereby will be substantially covered by an investigation as to the rulings of the court in the admission of testimony, and as to the effect of the answers to the questions propounded in the application.

It is claimed by the appellant that the court wrongfully construed the beneficiary certificate as an ordinary life insurance policy, and thereby committed error to its prejudice. Authorities are cited which satisfy us that, if the court so construed this beneficiary certificate, it made a mistake; but the appellant was not injured by the conception of the court as to the nature of the contract, excepting so far as such conception may have influenced its action in the reception or rejection of testimony or in instructing the jury.

Upon the trial the appellant offered to show by the declarations of said W. Hill Thomas, made after the issue of the certificate, that his answers to some of the questions propounded in the application were untrue, to his knowledge at the time they were made. This evidence was excluded upon the apparent ground that upon the issue of such certificate the beneficiary therein acquired a vested interest, which could not be divested by the acts of the member upon whose life the benefit depended. That such is the nature of the interest of the beneficiary in an ordinary life insurance policy is established by the great weight of authority, but, as to beneficiary certificates of the nature of the one in controversy, a like weight of authority has established the doctrine that the interests of the beneficiary before the death of the member is a mere expectancy, which may

be changed at any time by the action of the assured.

Upon the argument there was much controversy as to whether or not a certain article of the by-laws of the order was properly in evidence under the pleadings. The effect of this by-law was to give to the member the right to change the beneficiary named in the certificate at any time before his death, upon complying with certain conditions. If this was properly in evidence, there could be no question about the right of the member to so control the benefit that the interest of the beneficiary named in the certificate would be only one of expectancy; and, even if it was not in evidence, it will be presumed that he had full right to control the benefit until the contrary is made to appear. The authorities upon this proposition are not entirely uniform, but, as above suggested, a great majority of the cases have so held. This rule is announced in section 212 of Niblack on Mutual Benefit Societies, and, upon the authority of that author and the cases therein cited, we believe it to be the correct one. The courts of some of the states have held directly to the contrary, and have construed the interest of the beneficiary in certificates of this kind the same as in ordinary life insurance policies. The courts of the state of Indiana are perhaps the most pronounced upon this side of the question, but it is shown by the opinions of the courts of that state that the weight of authority is in favor of the proposition that it will be presumed that the member has a right to change the beneficiary, unless the contrary is made to appear. This will sufficiently appear by the following quotation from the case of Assurance Fund v. Allen, 106 Ind. 593, 7 N. E. 317: "The weight of authority, as will appear from an examination of the cases cited, is in favor of the general doctrine that beneficiaries may be changed in cases where policies like the one before us are issued by such associations as the present, and that in this respect such policies are not governed by the general rule which governs ordinary insurance contracts." It is stated by the author above cited, and in most of the cases, that it is difficult to assign any reason for the distinction in this regard between this class of certificates and ordinary life policies. This may be true, but one good reason suggests itself, and that is that these certificates are not in themselves an absolute contract which could, under the constitution and by-laws of the order, be entered into with any person. Under such constitution and by-laws, these beneficiary certificates can only be issued to members. Hence it seems reasonable that anything which would affect the right to membership would affect the right to the beneficiary certificate, and that, since the membership can at any time be changed by the member without the consent of the beneficiary, he can also change the certificate. Upon reason and authority, the beneficiary certificate should be presumed

ed to be within the control of the member. This being so, nearly all the cases hold that his declarations after the certificate is issued may be introduced in evidence against the beneficiary. If he had the control of the certificate, he was the one interested therein, and, under well-settled rules, his declarations would be competent testimony, and, if against his interest, would be available to affect them. This rule is sufficiently established by section 325 of Bicknell on Mutual Benefit Societies, and cases therein cited. It follows that the appellant had the right to put in evidence the declarations of said W. Hill Thomas after the issue of the beneficiary certificate, and that the refusal of his offer to do so was error.

As to the effect of the answers to the questions propounded in the application, it is claimed on the part of the appellant that the applicant was so bound thereby that the certificate issued thereon would be void if they were untrue, whether or not, at the time they were made, they were known by the applicant to be untrue. With this contention we are unable to agree. In our opinion, the answers to such questions were but representations, and, if untrue, would only affect the rights of the applicant if at the time he made them he knew them to be untrue. This was substantially what the court instructed the jury upon that question, and we think that in so doing it committed no error.

It is true that the first instruction of which complaint is made by the appellant, if given to the jury divided into sentences, as it appears in the transcript, might have been misleading. But to have so divided it would have made the sentence immediately following the part to which objection is made nonsensical and without force, while such sentence, as a part of the one immediately preceding it, was necessary to express that which plainly appears to have been in the mind of the court. We, therefore, assume that the language which appears in the transcript as an isolated sentence was, in fact, given as a part of the one preceding it. Thus construed, the entire instruction stated the law of the case upon that question.

The appellant, among other things, asked the court to instruct the jury that each question propounded in the application and its answer must be considered material, for the reason that the parties had made it so, and that it was not the province of the jury to inquire into the materiality of such questions and answers. This instruction should have been given, and the refusal to give it was prejudicial error.

In the application was the following clause: "I hereby certify that the answers to the above questions are correct; that they are given with a full knowledge on my part that any misstatement or perversion of facts will work forfeiture of all my rights as a beneficiary of the order." This was signed by the applicant, and thereby every question

and answer was, as between the parties, made material to the risk.

We deem it unnecessary to go into further detail as to the allegations of error shown by the record. In what we have said the law of the case is sufficiently indicated for the purposes of retrial. The judgment must be reversed, and the cause remanded for a new trial.

SCOTT, ANDERS, and GORDON, JJ., concur. DUNBAR, J., dissents.

(12 Wash. 491)

STATE v. ROBINSON.¹

(Supreme Court of Washington. Aug. 5, 1895.)
HOMICIDE—FORMER JEOPARDY—EVIDENCE—DEGREES OF CRIME—INSTRUCTIONS—REVIEW.

1. On trial for murder, where it was shown that a conspiracy of which defendant was a member resulted in the killing of two men, proof of an acquittal on a prosecution for the killing of one of the victims is not available as proof of acquittal on a prosecution for murder of the other, since the killing of each was a separate offense.

2. Evidence of statements made by persons who examined the body immediately after the killing, and at the place where the killing occurred, is admissible as *res gestæ*. Anders and Scott, JJ., dissenting.

3. Where the record does not contain all the evidence on a certain issue, rulings of the court on such evidence will not be disturbed on the ground that they are not supported by evidence.

4. Where a witness testified that he was in the habit of using morphine, a physician may testify to the general effect of morphine on the mental faculties, but cannot give an opinion as to its effect on the veracity of the witness.

5. On an issue as to whether a homicide was committed in a public highway, proof that the highway was not regularly established on the public records of the county is insufficient to show that it was not a legal highway.

6. Where it was shown that the homicide was a result of a conspiracy to kill, and that defendant was present aiding and abetting the killing, the jury is not bound, under an indictment for murder in the first degree, to convict defendant of murder in the first degree or acquit him, but may convict of murder in the second degree.

7. The court is not bound to address instructions to each one of the jury, and a request to charge that "each and every one of the jury" must be satisfied of defendant's guilt beyond a reasonable doubt was properly modified by striking the qualifying words.

8. A general exception to the refusal to give instructions is insufficient to review a modification by the court of a request to charge.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

James Robinson was convicted of murder in the second degree, and appeals. Affirmed.

Clark & Allen, for appellant. L. C. Whitney, Pros. Atty., for the State.

HOYT, C. J. In December, 1892, George Schultz and Frederick Smith were shot and killed on what was known as the "John White Road" in Snohomish county, state of Washington. On account of such killing arc information was filed in the superior court

of said county, charging appellant, with others, with murder in the first degree in the killing of George Schultz. Upon this information defendant, upon his demand, was separately tried, and upon the trial a verdict of not guilty was returned by the jury. Thereafter an information was filed in said court charging him with murder in the first degree in the killing of Frederick Smith. The defendant, by his counsel, filed a plea in writing, setting up the alleged facts as to the killing of the said Schultz and Smith, and his acquittal upon his trial for the killing of the former, and thereupon moved the court for his discharge for the reason that he had been so acquitted. This motion was denied, but the written plea was allowed to stand, and in connection therewith a plea of not guilty was interposed in open court. Upon this state of the record the cause was tried, and a verdict of guilty of murder in the second degree returned by the jury. Judgment and sentence followed, from which this appeal has been prosecuted.

The first allegations of error all relate to the action of the court upon the plea of former acquittal. First, it is claimed that the motion for discharge on that account should have been granted; second, that appellant was entitled to a separate trial upon the questions presented by such plea; and third, that the court took the consideration of all questions relating thereto from the jury. It is only necessary to refer to the action of the court in instructing the jury to disregard all evidence relating to the question of former acquittal. The ruling of the court in so doing was founded upon the theory that the undisputed facts showed that appellant had never been acquitted of the crime with which he was charged in the information upon which he was on trial. This instruction was clearly erroneous, if any proof had been introduced which tended in any degree to show that the appellant had been acquitted of the crime so charged. If there was no such proof, defendant has no right to complain of the ruling of the court in denying his motion for a discharge, or in not giving him a separate trial upon the issues raised upon the plea of former acquittal. The undisputed facts show that, in an affray at which the appellant was present, two men, the said Schultz and the said Smith, were killed; that the appellant had been acquitted upon trial for the killing of Schultz, but that he had never before been on trial for the killing of Smith. It follows that, if the killing of each of the men constituted a distinct crime, there was no proof tending to show that the appellant had been formerly acquitted of the crime alleged to have been committed in the killing of Smith. The fact that the same line of proof was introduced for the purpose of showing that he was guilty of the killing of Schultz as that introduced to show his guilt in the killing of Smith would in no manner tend to show

that an acquittal for the killing of the former would constitute an acquittal for the killing of the latter, if the killing of each was a distinct crime. That such proofs in reference to two prosecutions for the commission of a single offense would be proper to go to a jury upon the question of former acquittal or conviction is beyond question, but to us it seems equally clear that proof which was necessary and competent to convict of one crime would have no weight upon such question in the prosecution for another, even although the same criminating circumstances were relied upon in the latter as in the former case. Was the killing of each of these men a distinct crime? They were killed in a single affray, and the connection of the appellant was substantially the same in his relations to such affray, as it related to each of such men. If the result of the meeting at which the two were killed had been the death of only one of them, a prosecution for murder could have been founded upon his death, and under the circumstances of this case this would have been true whether the one so killed had been Schultz or Smith; and there can be no good reason why that which would have warranted a prosecution for murder should lose force by reason of the fact that another circumstance, which in itself would warrant such a prosecution, occurred at the same time and place. If the prosecution had been founded upon the killing of the two, and the case had gone to trial upon a plea of not guilty, proof of the killing of either of them would have warranted a conviction. It follows that the killing of each was, so far as the homicide was concerned, a distinct transaction. The taking of a human life with certain intent constitutes murder, and neither law nor public policy will justify a holding that each life is of less value when taken with another than it would be if taken alone. If a person without justification intends to kill A., and does so, he will be guilty of a crime; if he intends to kill B., he will be guilty of another and a different crime; and the fact that he entertains the intent to kill both, and carries such intent into effect at the same time and place, should not be held to make of that which would otherwise be a foundation for two distinct prosecutions a foundation for only one. In our opinion, the undisputed proofs, when interpreted in the light of the law which it was the duty of the court to find, clearly showed that the appellant had never been on trial for the killing of Smith.

We shall next notice the alleged errors growing out of the admission of certain testimony; and first as to that of Harry Knowles, George Lindsey, and Robert Leckie, all of whom were allowed to testify as to the conditions surrounding the bodies at the place of the killing shortly thereafter, and also as to what was said at the time by persons who were present as to such surroundings. That it was proper for them to

testify as to the conditions surrounding the place of the homicide so soon thereafter is not seriously controverted, but it is earnestly contended that what was said by those who were making the examination should not have been allowed in evidence. There is force in this contention, but under the particular circumstances of this case we are of the opinion that the testimony was properly admitted, and if it was not, that it was of such a nature that it is not reasonable to suppose that the minds of the jury were affected by it. What was said at the time might be reasonably held to have been a part of the *res gestæ*, not perhaps of the act of the killing, but of the circumstances surrounding it.

William Noble and Alfred Elliott were allowed to testify as to statements made by William Robinson shortly before the homicide, and it is claimed that this was error, for the reason that there was no testimony tending so to connect William Robinson with the appellant as to make the statements of one evidence against the other; in other words, that there had been no proof of the conspiracy sufficient to warrant the introduction of such testimony upon that theory. It appears from the statement of facts that there had been some proof tending to establish a conspiracy between the appellant, the said William Robinson, and others to commit the homicide, and this was probably sufficient to warrant the introduction of the testimony to which objection was made. But, however this may be, the record would not warrant a reversal, for the reason that it does not appear therefrom that there was sufficient proof as to the conspiracy. Such record does not purport to contain all of the testimony introduced at the trial, nor is it made to appear therefrom that it contains all the testimony upon the question of conspiracy, or any other question presented at the trial. This being so, it is evident that no ruling of the trial court should be reversed, for the reason that such ruling was erroneous, because the necessary evidence had not been introduced to authorize it.

One W. H. Marsh had testified as a witness, and had admitted upon the stand that he was in the habit of using a certain amount of morphine daily. For the purpose of weakening his testimony, the appellant called Dr. Limerick to show the effect of the use of that quantity of morphine, and if the question propounded had gone generally to the effect upon the mental faculties of such use, it would, in our opinion, have been error to have excluded the answer. But by the form of the question the witness was asked to express his opinion as to the effect of such use upon the veracity of the witness, and, so limited, the exclusion of the answer was proper.

The evidence offered by the appellant for the purpose of showing that the place of the homicide was not in a public highway, was

not sufficient for that purpose, and for that reason we are not called upon to decide as to whether or not it was proper for the appellant to show that it was not in a highway. All that he offered to show was that it did not appear from the public records of Snohomish county to have been a regularly established highway, but that fact would not have been sufficient to show that it was not a legal highway. Highways may be such without that fact appearing upon the public records.

Appellant founds error upon the giving of certain instructions by the court, and its refusal to give one of those asked by him. His objections to instructions Nos. 3, 8, 9, and 14, given by the court, are founded upon the claim that, since there was proof tending to show a conspiracy to kill, it was the duty of the jury to convict the appellant of murder in the first degree, or acquit him. If the appellant had not been present at the time of the homicide, and his only connection with it had been the conspiring to have it done by others, the rule announced by this court at this term in the case of *State v. Robinson* (decided July 17, 1895) 41 Pac. 51, would probably require us to uphold this claim of the appellant. But there was proof tending to show that the appellant was present, aiding and abetting whatever was done, at the time of the homicide, and for that reason he stands in the same situation as though the proof had shown that he was the one who fired the shots which caused the death of Smith. Exceptions were taken to other instructions given to the jury, but no error has been assigned thereon in the brief of appellant.

The appellant asked the court to instruct the jury that: "You are further instructed that, since the defendant is presumed to be innocent until his guilt is established by such evidence as excludes from the jury every reasonable doubt, the law requires that no man shall be convicted of crime until each and every one of the jury is satisfied by the evidence in the case, to the exclusion of every reasonable doubt, of the truth of every material allegation charged in the information. So, in this case, if the jury entertain any reasonable doubt of the defendant's guilt, they should acquit him; or, if any one of the jury, after having duly considered all the evidence, and after having consulted with his fellow jurors, should entertain such reasonable doubt, the jury cannot in such case find the defendant guilty." The court gave this instruction, except that it omitted therefrom the reference to "each and every one" of the jury in one place, and "any one of" in another; and it is claimed on the part of the appellant that the instruction should have been given as requested, without such modification. The claim of error founded on this action of the court must be denied for at least two reasons: One, that it was not the duty of the court to address its instructions to each one of the jury as individuals. It

was sufficient if the law was correctly stated as it applied to the duties of the jury as a collective body. Second, no sufficient exception was taken to the modification. The exception was to the refusal to give the instruction as requested; and in view of the fact that it was given with only slight modification, this general exception was not sufficient. The exception should have been to the modification of the instruction.

We are satisfied that the defendant had a fair trial, and the judgment and sentence will be affirmed.

DUNBAR, J., concurs. GORDON, J., concurs in affirming the judgment.

ANDERS, J. (dissenting). As I am unable to say that the hearsay evidence admitted by the trial court and referred to in the foregoing opinion could not have prejudiced the appellant, I am constrained to dissent.

SCOTT, J., concurs with ANDERS, J.

STATE v. HOLMES.

(Supreme Court of Washington. Aug. 20, 1895.)

CRIMINAL LAW—REVIEW ON APPEAL.

Where there was sufficient evidence to prove murder in the first degree beyond a reasonable doubt, the degree of the crime cannot be reduced, or a new trial awarded, merely because the testimony would not be so convincing to the appellate court.

On petition for rehearing. Denied.
For original opinion, see 40 Pac. 735.

DUNBAR, J. The attorneys for the defendant in this case have filed with this court a very earnest and feeling petition asking for a rehearing of the case. So far as the questions of jurisdiction, nonwaiver, and misconduct of the jury are concerned, they were examined with great care upon the original hearing, and no argument is presented in this petition which convinces us that the conclusion we reached upon the argument of the case and announced in the opinion rendered should in any wise be modified. It is insisted that, from the fact that the court in its opinion expressed some doubt as to the correctness of the verdict under the testimony, it is the duty of the court to grant the rehearing asked for, or at least to set aside the verdict for murder in the first degree and impose that of murder in the second degree; and the case of *State v. Freidrich*, reported in 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, and 31 Pac. 332, is relied upon by the petitioners to sustain this contention. We have re-examined the case of *State v. Freidrich*, supra, but we think that it is not in point in this case. There this court found that there was no evidence whatever to sustain a verdict for murder in the first degree, because there was no evidence of premeditation, no testimony which, if undisputed, would have

warranted the jury in coming to the conclusion that the defendant, Freidrich, was guilty of murder in the first degree. But in the case at bar there was testimony tending to prove premeditation on the part of the defendant, and, while that testimony might not have been sufficient to have satisfied the minds of this court, yet it has been our uniform holding that, where a question of fact was legally presented to a jury, and there was sufficient testimony from which the jury could draw an inference of guilt, this court would not substitute its judgment for the judgment of the jury, and reverse their decree. It was said by this court in the case of *Burden v. Cropp*, 7 Wash. 198, 34 Pac. 834: "It is not enough, to authorize us to disturb the verdict of a jury, that we should be of the opinion that the evidence upon the other side was entitled to a greater weight than that upon which the verdict seems to have been founded. It is enough if there was any evidence which, if uncontradicted, would be sufficient to establish all the facts necessary to sustain the complaint of the successful party." It is true that was a civil action, but the rule is the same in criminal cases, while, of course, the degree of conviction in the mind of the juror must be greater. In one case it rests upon a preponderance of the testimony, and in the other upon a belief beyond a reasonable doubt. But in a criminal case, if the court can determine that the jury had sufficient testimony before them to convince their minds beyond a reasonable doubt of the guilt of the defendant, the fact that such testimony would not be so convincing to the minds of the members of this court would not justify the usurpation of the functions of the jury by this court. As we view the testimony, the circumstances tending to prove and disprove premeditation are conflicting, and, notwithstanding the fact that the conclusion reached by the jury might not coincide with our judgment, under the law announced by this court, and by all courts in cases of trial by jury, we are compelled to accept the decision of the jury as conclusive. The petition for rehearing will therefore be denied.

HOYT, C. J., and ANDERS and SCOTT, JJ., concur.

GUARANTEE LOAN & TRUST CO. v. GALLIHER et al.

(Supreme Court of Washington. Aug. 5, 1895.)
ACTION ON NOTE BY INDORSEER—DEFENSE—APPEAL.

1. The fact that defendant, after indorsing a matured note to plaintiff, requested plaintiff to give the maker further time for payment, was properly pleaded in an action on the indorsement, though it did not appear that such request was in writing.

2. The refusal to grant a motion to strike out testimony will not be reviewed on appeal unless it appears that the precise grounds of the motion were called to the attention of the lower court.

Appeal from superior court, Thurston county; M. J. Gordon, Judge.

Action by the Guarantee Loan & Trust Company against Milas Gallher and others on a note. Plaintiff had judgment, and defendant Gallher appeals. Affirmed.

Troy & Falknor, for appellant. Strudwick & Peters, for respondent.

SCOTT, J. This action, as against appellant, was brought to recover the balance due upon a promissory note which had been executed to him by a third party, and negotiated by him to the respondent after its maturity, he at the time indorsing the same in blank. No effort was made by the respondent to collect the note until nearly a year and a half had elapsed after its purchase. Appellant's defense to the note, as indicated by his brief, is that, under the transfer and guaranty, the respondent was bound to proceed within a reasonable time to collect the note, and that, having failed to do so, appellant was released from liability. It is further contended that the court erred in allowing the respondent to introduce proof to the effect that, at the time of the transfer of the note, appellant had requested respondent to give the makers of the note additional time, and that he consented to such delay.

As to whether the respondent proceeded with reasonable diligence, must depend upon the circumstances of the case, as there is no absolute rule for every case. But, before deciding as to whether there is any merit in appellant's contention in this particular, we must consider certain matters urged by the respondent, as to whether the questions sought to be raised by appellant here were presented to the lower court for determination.

It appears that appellant moved to strike an allegation contained in the complaint,—that he "requested plaintiff to let said note run as long as possible, in pursuance of which plaintiff allowed said note to run until October 13, 1893," at which time respondent sought to enforce payment. This motion was made on the ground that the allegation was surplusage, immaterial, and frivolous. The motion was overruled, whereupon appellant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the court overruled the demurrer. No error can be based on the contention of appellant in this respect. The allegation was material, under the circumstances, and it did not appear at that time that such request was by parol, and not in writing. Upon the trial of the cause, appellant withdrew all denials of the allegations of the complaint, except the one especially raised in his answer,—that he made no request, contract, or agreement, of any kind or nature, whereby the plaintiff was to let the note in suit run as long as possible, or for any length of time whatever. Upon this is-

sue the cause, as to him, was tried; and testimony was introduced to support said allegation in the complaint, whereby it appeared that appellant had requested respondent to extend the time, and allow the note to run, as claimed. No objection was made to this testimony, but, after its introduction, appellant moved to strike all of the testimony of the witness so testifying, except answers to the first five questions, which related to other features of the case. This motion was denied. No ground was stated by appellant as a basis for the motion, nor was any ground of objection urged against the testimony; and we are unable to say from the record that the question upon which appellant now relies, to the effect that parol testimony was not admissible to vary or contradict the contract implied by the indorsement, if the testimony did tend to vary or contradict it, was presented to the lower court; and such being the case, under the well-settled rule in such cases, error cannot be based thereon. It must appear that the precise point upon which an appellant relies for a reversal was called to the attention of the lower court, and passed upon. The motion may have been based upon another and entirely insufficient ground, and, if so, it would not be consonant with good practice that appellant should be allowed to urge another ground upon appeal. This would not be doing justice to the adverse party, or to the trial court, and would not be in keeping with the duties of appellate courts. We are of the opinion that respondent's contention against the consideration of the questions sought to be raised by appellant is well taken, and that the judgment must be affirmed.

HOYT, C. J., and ANDERS, J., concur.

WINSTON v. CITY OF SPOKANE et al.
(Supreme Court of Washington. Aug. 22, 1893.)

MUNICIPAL CORPORATIONS — LIMITATION OF INDEBTEDNESS.

Const. art. 8, § 6, providing that no city "shall become indebted in any manner" over a certain amount, does not prohibit a city, indebted over said amount, from borrowing money to complete waterworks, where the loan was to be paid out of a special fund created by the receipts derived from such waterworks, without imposing any further liability on the general funds of the city. Dunbar and Scott, JJ., dissenting.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by Patrick H. Winston, on behalf of himself and all others similarly situated, against the city of Spokane and others. Plaintiff had judgment, and defendants appeal. Reversed.

James Dawson and Blake & Post, for appellants. Winston & Winston, for respondent.

HOYT, C. J. The foundation of this action was the alleged invalidity of a certain ordinance of the city of Spokane (No. A 583). The superior court found such ordinance to be invalid, and by reason of such finding decreed to plaintiff the relief prayed for in his complaint. The claim that such ordinance was invalid grows out of the fact alleged in the complaint, and admitted in the answer, that the existing indebtedness of the city of Spokane was in excess of the limit authorized by the constitution, and it is not claimed that said ordinance is invalid for any other reason. Such ordinance authorizes the city to enter into a contract with Thels & Barroll for the furnishing of money for the completion of a system of waterworks for the city, and provides for the issuance to them, for the money so advanced, of the obligations of the city payable out of a special fund, to be created by placing therein 60 per cent. of the receipts derived from such waterworks. And it is claimed on the part of the respondent that the entering into of said contract and the issuance of such obligations of the city is the incurring of an indebtedness, within the meaning of the constitution, and that to do so at the present time is not within the power of the city, for the reason that it is already indebted beyond the constitutional limit. It will be seen that the sole question presented for our consideration is as to whether or not the ordinance in question, the contract to be executed in pursuance thereof, or the obligations provided for in said contract, will create an indebtedness of the city, within the meaning of the provisions of the constitution in relation thereto. Said ordinance and contract, when construed together, provide that the obligations to be issued in pursuance thereof shall be payable only out of the special fund, to be created out of the receipts of the waterworks as above specified, and that the city shall not be in any manner liable to pay the same, except out of moneys in said special fund. For the purposes of this case, it must be conceded that said waterworks will, in addition to supplying the money for the creation of such fund, as provided for in said ordinance, pay all the expenses incident to their operation, and for that reason the creation of such special fund can occasion no liability upon the part of the city to make any payment out of its general funds. This being so, we are of the opinion that neither the ordinance, the contract, nor the obligations to be issued by the city in pursuance thereof, do or will constitute a debt of the city, within the constitutional definition. The only obligation assumed on the part of the city is to pay out of the special fund, and it is in no manner otherwise liable to the beneficiaries under the contract. The general credit of the city is in no manner pledged, except for the performance of its duty in the creation of such special fund. The transaction, therefore, is no more the incurring of an indebtedness on

the part of the city than is the issue of warrants payable out of a special fund created by an assessment upon property to be benefited by a local improvement. Hence, the question is upon principle within the one decided by this court in *Baker v. City of Seattle*, 2 Wash. St. 576, 27 Pac. 462, in which it was held that warrants issued to a contractor for a street improvement, and payable out of a special fund to be created by an assessment therefor, were not an indebtedness of the city, within the meaning of our constitution. In that case it was not decided whether or not the city would be liable for negligence in failing to take the necessary steps for the creation of the special fund out of which the warrants were to be paid, but, from what was decided, it is clear that, in the opinion of the court, the fact of such contingent liability, if it existed, was not sufficient to make the obligations issued against the fund a part of the indebtedness of the city. The case at bar is, in our opinion, within the principle decided in that one, and, as we are satisfied with what was therein held, it is not necessary to further pursue the subject. We would, however, call attention to the case of *City of Valparaiso v. Gardner*, 97 Ind. 1, which seems to fully sustain the contention of the appellants. A large number of other cases to the same effect might be cited. In our opinion, the ordinance, construed in the light of the facts stated in the complaint and the answer thereto, was a valid one, and the contract provided for therein, when entered into, would be binding, as against the city, for the reason that the obligations to be issued in pursuance thereof would not constitute an indebtedness, within the meaning of the constitutional provision. The judgment will be reversed, and the cause remanded, with instructions to dismiss the action.

ANDERS and GORDON, JJ., concur.

DUNBAR and SCOTT, JJ., dissent.

MARQUIS v. WILLARD et al.

HIBNER v. SAME.

(Supreme Court of Washington. Sept. 5, 1895.)

LIABILITY ON OFFICIAL BONDS — ACTS DONE UNDER COLOR OF OFFICE.

The sureties on the bond of a chief of police, who, by virtue of his office, was keeper of the jail, are not liable for the acts of such officer in receiving into the prison, without any process authorizing him so to do, persons who were arrested without probable cause to believe them guilty of crime.

Appeal from superior court, King county; T. J. Humes, Judge.

Separate actions by S. J. Marquis and P. D. Hibner against D. F. Willard and others on a bond. Separate demurrers to the complaints were sustained, and plaintiffs appeal. Affirmed.

McLaughlin, Remsberg & Atkinson and Thompson, Edsen & Humphries, for appellants. James Leddy, W. T. Scott, and Frank A. Steele, for respondents.

HOYT, C. J. These actions were prosecuted against the respondent D. F. Willard as principal, and the other respondents as sureties upon the official bond of said Willard as chief of police of the city of Seattle. The superior court sustained the separate demurrers of the several respondents, and, the plaintiffs refusing to amend, judgments were entered dismissing the actions. By stipulation of the parties, it is agreed that the investigation shall be confined to the ruling of the superior court upon the demurrers of the sureties, and, if it is found that such demurrers were rightfully sustained, that the judgments shall, as a whole, be affirmed, by reason of which we are not called upon to determine the question as to whether or not the complaints stated causes of action against the respondent Willard, and have only to determine their sufficiency as against the sureties in the said bond.

The acts of the respondent Willard, which are set out in the complaints, and relied upon as constituting a breach of the conditions of the bond, consisted in receiving into the city prison—of which it was alleged he was, by virtue of his office, the keeper—the plaintiffs, who had been arrested by certain police officers of the city of Seattle upon suspicion that they had been guilty of a crime, and detaining them in such prison for 32 hours, without any warrant or other process authorizing him so to do. It is not alleged in the complaints that the defendant Willard, as chief of police or otherwise, arrested the plaintiffs; and the only connection which he is alleged to have had with the transactions was to receive them into the prison, and detain them as above stated. Did this action on his part make the sureties upon his official bond liable in damages to the plaintiffs? It is open to serious question whether or not these acts were, in any sense, official acts. No case has been called to our attention by appellants, nor have we been able to find one, which goes to the extent of holding that the keeper of a prison, in his official capacity as such, has any right to receive and detain any person without some warrant, or other process, authorizing him so to do; and if he has no such authority in the absence of process, if he receive a person without one, his act in so doing is not within the scope of his authority as keeper of the prison. If it be the rule that the keeper of a prison has no authority as such, except by virtue of process delivered to him, it must follow that in receiving a prisoner, without warrant, from an officer who had arrested him, he would be acting in his private capacity, as the agent of such officer. Until some case has been cited holding that the keeper of a prison has authority, without process, to receive and detain

a person accused of crime, we should be strongly inclined to hold, were it necessary, that he has no such authority. But in the cases at bar it is not necessary for us to decide this question; for even if it be conceded that the respondent Willard, as keeper of the prison, had authority, in a proper case, to receive and detain a person suspected of crime, without process delivered to him for that purpose, the allegations of the complaints negative the conclusion that in so receiving and detaining the plaintiffs he acted by virtue of his office as chief of police and keeper of the prison. It is therein alleged that, at the time he committed the acts complained of, there was no probable cause to believe the plaintiffs guilty of any crime. This being so, the respondent Willard, in receiving them without process, did not do so by virtue of his office, but, at most, only under color of office. This is conceded in the brief of appellants. Were such acts, under color of office, without process, such official acts that the sureties upon his official bond are liable therefor?

There is great diversity of opinion upon the question as to the liability of sureties upon official bonds for acts done under color of office. The cases uniformly hold that such sureties are liable for wrongful performance of acts which, if properly done, would be justified by his official character. But upon the question as to their liability when the act is one which is a trespass from the beginning, and unauthorized by his official character, however performed, there is great apparent want of harmony among the cases. We say "apparent want of harmony," for the reason that in our opinion a careful examination will show that the conflict between the courts of most of the states is more apparent than real. The most of the cases which have held that the sureties were liable, even though the action of the officer was but a naked trespass, have been those in which the officer, having process in his hands which authorized his acts as against the person or property therein named, had wrongfully enforced the same against other property, or a different person. It is clear that in such a case the process furnishes no justification to the officer, and he is as much a trespasser when, by virtue thereof, he levies upon the property of a person not named therein, as he would have been without process. Yet many, and perhaps a majority, of the courts have held that the person whose property is so taken may maintain an action upon the official bond to recover damages therefor. And it is claimed on the part of the appellants that these cases are in point upon the question under consideration. All the cases cited by them, with the exception of those from the state of Iowa, and perhaps one from the appellate court of the state of Illinois, were of this nature. And if, in our opinion, they were in point here, we should be inclined to agree with their contention that the weight of authority required us to hold that the complaints stated causes

of action against the sureties, though cases can be found from other courts of equal authority which hold that a levy upon the property of a third person, under process directed to the officer, will not authorize a recovery by such third person upon his official bond. But this class of cases, however decided, can have but little weight in deciding the question under consideration. For an officer to serve process placed in his hands for that purpose is a strictly official act, and, while such process would only justify him in a proper service of it, yet an improper service might be in an attempt to obey its command. It was as an officer that he received the process, and his acts under it, whether rightful or not, may well be held to have been by virtue of the office. But for the office, he would not have had the process. Without it, his acts would have been impossible. Hence such acts might well be said to be official. And since, under all the authorities, the sureties are liable for acts done by virtue of the office, there is reason for holding them liable for the wrongful acts of the officer in the execution of process, even though, in doing them, he so departs from its command as to be a trespasser. But when an officer, without process, does an act which, under the law, he has no right to do, he cannot, in any proper sense, be said to be acting by virtue of his office, and it is going far enough to hold that in so doing he is acting under color of office. Such is the reasonable rule. When he has neither process in his hands authorizing him to act, nor any provision of law upon which he can found his action, there would seem to be no reason for holding that the act was by virtue of his character as an officer. This conclusion is, in our opinion, sustained by the great weight of authority.

In *State v. McDonough*, 9 Mo. App. 63, the breach of the bond was charged to be that the principal, "without warrant or authority of law, as chief of police, and by virtue of, and under color of, his office, wrongfully and maliciously arrested the relator, and imprisoned him," etc. A demurrer to the complaint was sustained upon the ground that the act was not by virtue of his office, but was, at most, only by color of office. In the opinion occurs the following language: "The fact that under color of his office an officer does an act which is, in its inception, beyond, and out of the line of, his duty, does not show, or tend to show, that in any case he did not faithfully perform it; and, if he does this, why should his sureties be held, whose obligation cannot be extended beyond the terms of the bond? Here, assuming what is stated to be true, the defendant, not in the manner of doing what it was his duty to do, but in taking any action, went outside of, and beyond, his duties. The act done was not within the scope of the bond. Thus, though it was done *colore officii*, the sureties are not liable." In *Huffman v. Kopplekom*, 8 Neb. 344, it was contended that the sureties were not liable

because the act done was not by virtue of the office, but only under color of it; and the court, in its opinion, made use of the following language: "The second objection to this petition, and the one most relied on in this argument, is that an action can be maintained on an official bond only for injuries done *virtute officii*, and not for acts done *colore officii* merely. And so we believe the law to be, according to the best authorities." In *Ottenstein v. Alpaugh*, 9 Neb. 237, 2 N. W. 219, it was again held, by the same court, that the sureties on an official bond are answerable only for such acts of their principals as are done *virtute officii*. In *Gerber v. Ackley*, 37 Wis. 43, it was held that the sureties were only liable for acts done by virtue of the office, and not merely for acts done under color of office. In this case the facts showed that the officer was assuming to act under a writ of replevin, and, under many authorities, what he did would have been held to have been by virtue of his office; yet, notwithstanding this fact, that learned court held that his sureties were not liable. In 32 Wis. 233, the same case had been before the court, and a similar ruling intimated, but, owing to the state of the pleadings, not definitely announced. *State v. Mann*, 21 Wis. 692, is to the same effect. In *McLendon v. State*, 22 S. W. 200, the supreme court of Tennessee held that the sureties upon an official bond were not liable for the action of an officer under a process which was void upon its face.

As we have before suggested, a large number of cases have been cited by the appellants to establish a contrary doctrine; but a careful examination has satisfied us that, with the exception of those from the state of Iowa, they tend slightly, if at all, to overthrow the authority of the cases cited by the respondents. They nearly all belong to the class which, as we have seen, are not in point where the facts are as in the case at bar, and some of them show upon their face that the court had in mind the distinction between the case under consideration and one where the facts were as in these. The case of *State v. Beckner*, 132 Ind. 371, 31 N. E. 950, furnishes an example of cases of this kind. It was there held that the sureties were liable for a mistake made by an officer in the service of process placed in his hands, yet that the court intended to announce a principle which would apply where the facts were as in the case at bar is directly negated by the incorporation in its opinion of the following language: "It is contended by counsel for the appellant that, in view of the facts disclosed by the verdict, the constable was acting *virtute officii*, not merely *colore officii*. With this contention we are in accord. The constable had a legal process, and his sole purpose seems to have been the execution of the command which it carried to him. There is some conflict of authority as to whether or not there

is a right of action on the bond of a ministerial officer for an unlawful act done colore officii. But, when the officer is acting virtute officii, the authorities all agree that a suit will lie upon his bond." The case of *Ex parte Reed*, 4 Hill, 572, is relied upon by the appellants, and has been cited as authority in nearly all of the cases cited by them. An examination of the facts upon which it was decided will show that the officer was acting under process. For that reason this case, and those founded upon it, are not in point upon the question here presented.

The ruling of the superior court was in accordance with reason, and is sustained by a decided weight of authority. The judgment will be affirmed.

ANDERS, GORDON, and SCOTT, JJ., concur.

BROWN v. COEY.

(Supreme Court of Washington. Sept. 7, 1895.)

APPEAL—INSUFFICIENCY OF EXCEPTIONS.

Where there are no sufficient exceptions, the matters sought to be raised on appeal will not be considered.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by George D. Brown against Charles P. Coey. Plaintiff had judgment, and defendant appeals. Affirmed.

Dawson & Plattor, for appellant. J. S. McCarty and Rothrock & Leigh, for respondent.

PER CURIAM. This action was tried by the court without a jury. Findings of fact were made, and the only exception taken thereto was at the conclusion of the findings and the decree, and was general in form to the whole. Some of the findings were unquestionably correct, and, there being no sufficient exception, the matters sought to be raised upon this appeal cannot be considered, and the judgment is affirmed.

TAGGART v. FIRST NAT. BANK OF ANACORTES.

(Supreme Court of Washington. Sept. 10, 1895.)

ACCEPTANCE OF ORDER.

In an action against a bank on an order drawn thereon in favor of plaintiff it appeared that the bank was the agent for the collection of the price of logs on which plaintiff held a chattel mortgage, and that by agreement of all parties the bank was to pay plaintiff from the proceeds of the bills of lading left in its possession. The bank retained the order for several months, during which time it received as proceeds of the bills of lading more than enough to pay the claim, but allowed the mortgagor to draw out such receipts by checks for other matters. Held, that the bank was liable on the order.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by C. L. Taggart against the First National Bank of Anacortes on an order for the payment of money. Plaintiff had judgment, and defendant appeals. Affirmed.

Hastings & Stedman, for appellant. Million & Houser, for respondent.

SCOTT, J. Plaintiff sued the defendant to recover the balance due him upon a certain order given to him by one John Doser, and at the conclusion of the testimony the court directed the jury to bring in a verdict in his favor for the amount claimed, whereupon this appeal was taken.

The evidence disclosed the following facts: One Le Ballister was, on the 15th day of December, 1893, the owner of a boom of logs lying at Anacortes, on which the plaintiff held a chattel mortgage for \$693.65, and the firm of Taggart & Gilkey, of which plaintiff was a member, held a second chattel mortgage for \$303. On said day Le Ballister, through his agent, John Doser, sold the logs to the Nelson & Son Manufacturing Company, to be cut into shingles and shipped. The proceeds of every other car of shingles were to be applied towards paying for the logs, and the bill of lading thereof was to be deposited with the defendant in furtherance of this purpose. The contract containing the terms of sale was deposited with one Perrin, defendant's cashier, to be held by the bank, as were also the two chattel mortgages and notes which they secured. The bank collected the amount of the purchase price of the logs, and placed the amount as a special deposit or account to the credit of John Doser, agent. As soon as the bank began to receive money on the bills of lading, Perrin wrote to Doser that, according to his understanding, the amount of the plaintiff's claim by virtue of the chattel mortgages upon the logs aforesaid was to be paid before anything went to Doser. Doser answered, directing the money to be placed to his credit, and asking for a check book, saying that he would pay the plaintiff's claims by check. Shortly after this, Perrin wrote both Doser and the plaintiff on the same day, suggesting that Doser and plaintiff agree on the exact amount due the plaintiff on said mortgage claims, and that Doser give the plaintiff an order for the amount, and send it to the bank, saying it would be paid out of the proceeds of the bills of lading. This was done, and on the next day the plaintiff sent the order to the bank, as requested. The bank received the order, and retained it for several months, and during this time received as proceeds of the bills of lading more than enough to pay the claim, but, instead of paying it, applied the same in payment of checks drawn by Doser for other matters. It appears that there was not enough money in the bank to pay this order in full at any one time, and also that the bank at one time, upon the

plaintiff's asking for money, informed him that they would pay the amount then on hand if he would get a check from Doser for that amount; whereupon Doser gave the plaintiff a check for \$200, which the bank paid, and indorsed the amount upon the original order. There was no conflict in the testimony as to any of these matters. The defendant admitted that the letters aforesaid were written by Perrin, its cashier, to Doser and the plaintiff, as aforesaid, and that during all the times mentioned it held all of the papers. After holding the same for several months, and receiving the money as aforesaid, and allowing Doser to check it out contrary to the terms of the agreement, the defendant returned the order to plaintiff, and refused payment. It is contended upon the part of appellant that these circumstances did not bind the bank to hold the moneys received as aforesaid for the plaintiff until his order was paid, and that, notwithstanding it, the bank was bound to pay the subsequent checks drawn upon it by Doser. But we do not so understand it. The bank was a party to this understanding, and it was by the suggestion of its cashier that the plaintiff took the order as aforesaid for the amount of his claim, and deposited it with the bank, and upon its promise that it would apply the proceeds received from the logs in payment of it. This was binding upon the bank, and therefore it had no right to pay out such proceeds upon subsequent checks given by Doser for other matters, without retaining enough to pay the plaintiff's claim.

It was further claimed by appellant that there was a conflict in the evidence. This was true as to one or two immaterial points, but the material facts were conclusively established by the written correspondence of the parties, and these were all in evidence, and admitted to be genuine by the defendant. Judgment affirmed.

HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

STATE ex rel. JONES, Attorney General, v. MCGRAW, Governor, et al.

(Supreme Court of Washington. Sept. 10, 1895.)

STATE BONDS—LIMITATION OF INDEBTEDNESS.

Act March 22, 1895, in providing for the funding of outstanding indebtedness of the state by the issue of \$1,500,000 worth of bonds, to be "sold after notice" as provided has been given, violates Const. art. 8, § 1, authorizing the state to contract debts to raise revenue, provided that "such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed four hundred thousand dollars (\$400,000)." Hoyt, C. J., dissenting.

Application on relation of W. C. Jones, attorney general, against John H. McGraw, governor, and others, for a writ of mandamus to compel the defendants to issue bonds. Denied.

James A. Haight, for plaintiff. F. C. Owings, for defendants.

GORDON, J. This is an application for a writ of mandate commanding the respondents, as the state board of finance, to issue bonds of the state to an amount aggregating upward of \$1,500,000, and to cause the same to be sold, for the purpose of funding the outstanding warrants drawn on the general, military, and tide-land funds, pursuant to the act of the legislature approved March 22, 1895, entitled "An act relating to the fiscal affairs of the state of Washington, and declaring an emergency," which act, among other things, provides:

"Section 1. There is hereby created a fund in the treasury of the state known as the 'Loan and Interest Fund.' There is hereby created a board, consisting of the governor, state auditor and state treasurer, known as the 'State Board of Finance.' * * *

"Sec. 2. * * * Said board shall proceed to fund the outstanding warrants on the general, military and tide land funds of the state by the issue of bonds payable solely out of said 'loan and interest fund.' Said bonds shall bear interest at a rate not to exceed four per cent. per annum and shall run twenty years, save that five per cent. of said bonds shall be redeemed annually, said interest and redemption payments to be made out of said 'loan and interest fund.' Said board shall publish notice of the sale of said bonds in four cities of said state once a week for three consecutive weeks. Said bonds shall be sold after notice as hereinafter provided upon sealed bids to the highest bidder. * * * Provided, that said bonds shall not be sold for less than par, and the board shall have the right to reject all bids."

The constitutionality of this enactment is assailed upon many grounds, only one of which, however, need be noticed, as its determination disposes of the case. Section 1, art. 8, of the state constitution is as follows: "Section 1. The state may, to meet casual deficits or failures in revenues, or for expenses not provided for, contract debts, but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed four hundred thousand dollars (\$400,000) and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained, or to repay the debts so contracted, and to no other purpose whatever." Sections 2 and 3 of the same article of the constitution provide for the incurring of additional indebtedness for the purpose of repelling invasion, suppressing insurrection, and other purposes therein enumerated. But it is conceded that these latter sections in no wise affect the subject-matter involved in this proceeding. It will be observed that the authority conferred upon the respondents by the act in question is to issue and sell said bonds, after notice, to the highest bidder; and, conceding that it

is fairly to be inferred from the act that the funds realized from such sale shall be applied to the payment and discharge of the present indebtedness of the state, it is apparent that after said bonds are sold, and until the proceeds thereof are so applied, the indebtedness of the state would be increased upward of \$1,500,000, or to an amount beyond the limit of indebtedness as fixed by the constitution. Nor is it, in our opinion, a sufficient answer to say that it must be presumed that the officers intrusted to carry out the provisions of this act will fully discharge their duties, and that the present indebtedness of the state will be extinguished by the proceeds of the bonds, and ultimately the indebtedness of the state be reduced to its present limit. The prohibition in the constitution is that "such debts, * * * singly or in the aggregate, shall not at any time exceed four hundred thousand dollars," and constitutes an "impassable barrier" to the creation of any indebtedness in excess thereof for any period of time, however brief, or for any purpose, however worthy. The constitution of the state of Iowa (article 11, § 3) provides that "no county or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation,—to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness." The terms of the statute of Iowa of 1880 (chapter 132) authorized any independent school district or district township having a bonded indebtedness outstanding to issue negotiable bonds for the purpose of funding that indebtedness, and the act provided that "the treasurer of such district is hereby authorized to sell the bonds provided for in this act at not less than their par value, and apply the proceeds thereof to the payment of the outstanding bonded indebtedness of the district, or he may exchange such bonds for outstanding bonds par for par." In construing this Iowa statute with reference to the provision of their constitution above quoted, the supreme court of the United States, speaking by Mr. Justice Gray, in *Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 220, say: "There is a wide difference in the two alternatives which this statute undertakes to authorize. The second alternative, of exchanging bonds issued under the statute for outstanding bonds, by which the new bonds, as soon as issued to the holders of the old ones, would be a substitute for and an extinguishment of them, so that the aggregate outstanding indebtedness of the corporation would not be increased, might be consistent with the constitution. But under the first alternative, by which the treasurer is authorized to sell the new bonds, and to apply the proceeds of the sale to the payment of the outstanding ones, it is evident that, if new bonds are issued

without a cancellation or surrender of the old ones, the aggregate debt outstanding, and on which the corporation is liable to be sued, is at once and necessarily increased, and, if new bonds, equal in amount to the old ones, are so issued at one time, is doubled; and that it will remain at the increased amount until the proceeds of the new bonds are applied to the payment of the old ones, or until some of the obligations are otherwise discharged. It is true that, if the proceeds of the sale are used by the municipal officers, as directed by the statute, in paying off the old debt, the aggregate indebtedness will ultimately be reduced to the former limit. But it is none the less true that it has been increased in the interval; and that, unless those officers do their duty, the increase will be permanent. It would be inconsistent alike with the words and with the object of the constitutional provision, framed to protect municipal corporations from being loaded with debt beyond a certain limit, to make their liability to be charged with debts contracted beyond that limit depend solely upon the discretion or the honesty of their officers." We are fully satisfied with the reasoning of the court in that case, and accept it as authority upon the proposition here discussed. To the same effect is the case of *Bannock Co. v. C. Bunting & Co.* (Idaho) 37 Pac. 277. In that case, after reciting the order of the board of commissioners of the county which directed that the outstanding indebtedness of the said county should be funded by the issue and sale of negotiable bonds for the purpose of paying, redeeming, and funding all of the indebtedness of the county, the supreme court of Idaho say: "The purpose is stated to be to pay, redeem, and fund the principal and interest of all indebtedness of said county. Suppose, however, that the commissioners, or their successors in office, when the money came into the treasury, should conclude to use it, or a portion of it, for some other purpose. Of course, the presumption of this court is that the commissioners would scrupulously carry out the apparent intention of the board when the bonds were sold, as expressed in the above order; but the court cannot deal in presumptions in favor of proceedings taken without compliance with the constitution. Again, until the money was actually so applied, the debt would be more than doubled." Our conclusion, therefore, is that the act of March 22, 1895, is in conflict with the provisions of the constitution above quoted, and the application will be denied.

ANDERS, SCOTT, and DUNBAR, JJ., concur.

HOYT, C. J. (dissenting). In my opinion, the statute under consideration conferred authority upon the board therein provided for to change the form of the evidences of the

debt which was owed by the state, and did not in any manner contemplate the increase of such debt. If this be so, a compliance therewith would not be the creation of a debt, within the meaning of the constitutional provision upon that subject. The issuing of a warrant in the ordinary course of business is not the creation of a debt. The obligation for which the warrant is issued is the debt which the state owes, and the issuing of the warrant is the method provided by statute for the payment thereof. When there is no money in the treasury to meet a warrant issued for that purpose, such warrant may constitute the evidence of the indebtedness, but not the indebtedness itself. Warrants which there is money in the treasury to pay are not in any sense an indebtedness of the state. For this reason I am unable to agree with the conclusion of the majority that, until the money realized from the sale of the bonds had been actually applied upon the warrants for the payment of which such money had been placed in the treasury, such warrants, as well as the bonds, would be an indebtedness of the state, or even evidence of such indebtedness. That the legislature has the authority to authorize a change in the form of the indebtedness of the state is beyond question, and, in my opinion, the statute in question did no more.

STATE v. OLIVER et al.

(Supreme Court of Washington. Sept. 11, 1895.)

REPEAL OF PENAL CODE—EFFECT ON PRIOR OFFENSES.

The repeal of Pen. Code, § 192, making adultery a criminal offense, by Laws 1895, p. 371, without any saving clause as to the prior offenses, is a bar to a prosecution for such an offense committed prior to the repeal.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

W. L. Oliver and another were indicted for adultery, and from an order sustaining a demurrer and discharging the defendants, the state appeals. Dismissed.

Milo A. Root, for the State. John R. Mitchell, for respondents.

PER CURIAM. The defendants were charged by information with living in open and notorious adultery, and demurred on the ground that the information did not state facts constituting any crime. The court sustained the demurrer, and discharged the defendants, and the state has appealed. It is contended that the court sustained the demurrer on the ground that the section of the Code under which the action was brought, which was enacted while we were under a territorial form of government, had been repealed by an act of congress applying to the territories, commonly called the "Edmunds Act." 24 Stat. 635. However this may be,

an act was passed at the last session of the legislature expressly repealing the section of the Code aforesaid, without any saving clause as to prior offenses or pending cases. Laws 1895, p. 371. As this law would bar any further prosecution of the defendants for the offense charged in any event, a determination of the question as to the sufficiency of the information would be fruitless, and for that reason we decline to enter upon its consideration, and order the appeal dismissed.

STATE ex rel. PACIFIC COAST STEAMSHIP CO. v. SUPERIOR COURT OF JEFFERSON COUNTY et al.

(Supreme Court of Washington. Sept. 11, 1895.)

JUSTICE OF THE PEACE—DEFAULT JUDGMENT—REVIEW.

In case of default judgment before a justice of the peace for want of answer, there can be no review by appeal under 2 Hill's Code, § 1630, but only a review of errors of law by certiorari proceedings under section 1621. Hoyt, C. J., dissenting.

Application of the Pacific Coast Steamship Company for mandamus to the superior court of Washington, for Jefferson county, and R. A. Ballinger, judge thereof. Writ denied.

Andrew F. Burleigh and J. E. Lilly, for relator. Morris B. Sachs, for respondents.

GORDON, J. This is an application for a writ of mandamus requiring the superior court of Jefferson county, and the judge thereof, to proceed to take cognizance of an appeal taken by the relator as defendant in an action commenced in justice's court in said county, before J. A. Wood, Esq., a justice of the peace, in which action the People's Market was plaintiff. It appears from the record that complaint and notice were personally served upon the defendant in the action prosecuted in the justice's court; that, upon the return day, the defendant therein, by its attorney, appeared and filed an affidavit and application for a continuance for a period of four weeks, for the purpose of procuring the presence of material witnesses necessary to its defense of said action; that said application for a continuance was denied by the justice; that thereupon, for want of an answer or other pleading upon the part of the defendant, judgment was given and made by said justice in favor of the plaintiff therein against the defendant, for the sum demanded in the complaint; that, from said judgment, defendant appealed to the superior court of said Jefferson county, and in said court applied for leave to serve and file an answer in said cause, which application was denied and said appeal dismissed, for the reason (as appears by the return) that respondent "was powerless to permit any original answer to be filed in the superior court, where none had been filed in the justice court."

2 Hill's Code, § 1530, relating to civil ac-

tions in justices' courts, provides, where a defendant has been served with a true copy of the complaint, judgment shall be given for the plaintiff for the sum specified in the complaint, without further evidence, "when the defendant fails to appear and plead at the time specified in the notice, or within one hour thereafter." Of this statute it was said in *McCoy v. Bell*, 1 Wash. St. 504, 20 Pac. 595: "But the statute is imperative. He [defendant] must appear * * * within the hour. And when a defendant who has been served with a true copy of the complaint and notice fails to appear and plead within the time specified in the notice, or within an hour thereafter, it is the duty of the court to enter up judgment without further proof or evidence. The court has no discretion or alternative. It is a duty enjoined by the statute, and the plaintiff can demand it as a matter of right." We do not decide that the justice could not, upon a proper showing, extend the time for filing an answer and grant a continuance for that purpose. That question is not here involved, as will hereinafter be made to appear. It must be conceded that the defendant, although personally served with a copy of the complaint in the action before the justice, failed to plead, and that the judgment from which it attempted to appeal to the superior court was a judgment by default; and we think that the contention of relator that said judgment was improperly granted could not be reviewed by the superior court on a general appeal, but should have been brought to that court by certiorari proceeding. 2 Hill's Code, § 1621, provides: "If any person shall conceive himself injured by error in any process, proceeding, judgment, or order given by any justice of the peace within this state, it shall be lawful for such person to remove such process, proceeding, judgment, or order to the superior court, as hereinafter provided." This section afforded the relator an ample remedy for the correction of the error of the justice (if error it was) in overruling the application for a continuance, and rendering the judgment, under the circumstances of the case. But the ruling of the justice in that regard could not be reviewed upon an appeal from the judgment under section 1630. No provision is made by statute in this state for reviewing errors of law occurring before a justice of the peace in the trial of a civil cause, other than that provided by section 1621, supra. It seems to us that unless this right of appeal from a default judgment belongs to every defendant who may for any reason see fit to ignore the process of the justice's court, and decline to litigate therein those controversies which the legislature has invested that court with the power to hear and determine, it follows that the order of the superior court dismissing relator's appeal was rightful, and that the present application should be denied.

As a general proposition, it seems to be

well settled that an appeal will not lie from a judgment by default. *Dorr v. Birge*, 8 Barb. 351; *Colden v. Knickerbacker*, 2 Cow. 31; *Harvester Works v. Hedges* (Neb.) 7 N. W. 531; *Brayton v. Delaware Co.*, 16 Iowa, 44; *Clendenning v. Crawford*, 7 Neb. 474; *People v. El Dorado Co. Ct.*, 10 Cal. 19; *Long v. Sharp*, 5 Or. 438. In the case last cited, the court say: "By the ruling of the justice of the peace, the answer which had been filed by appellant in this case had been stricken out and set aside; and, the defendant declining to further answer or plead, judgment was rendered against him as for want of an answer. * * * If any error was committed by the justice, it was an error of law which could be most conveniently corrected by writ of review, where the court has authority to remand the cause for such further proceedings as the nature of the case and the ends of justice may require. * * * The judgment in this case was 'a judgment for want of answer,' and such a judgment as the lawmakers contemplated should be reviewed by writ of review, and not by appeal, to the circuit court." The reasons for the rule are given by the supreme court of Nebraska in *Clendenning v. Crawford*, supra, in which case the court say: "It seems clearly to be the legislative intent that actions in justices' courts must be tried upon the merits of both the claim of the one party and the defense of the other, before an appeal shall be taken to the district court; and this rule seems to be reasonable and just, for, where the law establishes the court in which a party shall bring his action, the adverse party should not be allowed to disregard the process of such court, and then select the forum of his own choice in which the cause shall be first tried upon the merits of the case. If such a practice were permitted, it would defeat the main object for which the justices' courts were established, namely, the trial and disposal of causes or controversies with the least possible expense to the parties, where the amount involved does not exceed one hundred dollars." In *People v. El Dorado Co. Ct.*, supra, the court say: "In this case, the defendant, by his default, admitted the facts alleged in the complaint. There being no issue of fact, the facts were conceded, and the justice could commit no error as to them; and, as the justice could commit no error as to the facts conceded, there could be no appeal from his judgment in reference to the facts. The defendant, having conceded the facts to be true as alleged, could not appeal against his own admission. * * * Our conclusion is that in all cases the issue of fact must be made in the court of original jurisdiction."

For the purposes of determining the motion in the superior court to dismiss the appeal, and for present purposes, the ruling of the justice denying relator's application for a continuance must be presumed to have been proper, inasmuch, as has been already seen,

as it could not be reviewed upon appeal; and, when so considered, this proceeding presents the sole question of the right to appeal from a default judgment in a case where personal service of the complaint is had, and no reason exists preventing a determination in the justice's court upon the merits. Upon the authority of the cases above cited (notwithstanding that a difference exists between the statutes of some of the states from which these cases are cited and our own, upon the subject of appeals), and the sound sense of the rule which we think is established by them, it must be held that no appeal will lie. In such a case the defendant "voluntarily suffered judgment to be entered * * * by default, and from such judgment, for manifest reasons, a direct appeal will not lie." *Port v. Parfit*, 4 Wash. 369, 30 Pac. 328. We think, too, that the ruling of the superior court in this case is supported by the authority of *Gabriel v. Railway Co.*, 7 Wash. 515, 35 Pac. 410, in which this court said: "Whatever the effect was, or whatever rights defendant may have in introducing a defense in a justice's court which is beyond the jurisdiction of said court, as to offsetting the same or any portion of the damages proved thereunder against the claim of the plaintiff, this defense was disposed of in said court; and, if defendant desired to review the ruling of the justice thereon, he should have removed said cause to the superior court by certiorari proceedings, and not by taking a general appeal." *Mandamus* to the superior court will be denied, with costs.

ANDERS, SCOTT, and DUNBAR, JJ., concur. HOYT, C. J., dissents.

STATE ex rel. TREMBLAY v. McQUADE.
(Supreme Court of Washington. Sept. 12, 1895.)

APPEAL—RECORD—APPOINTEE OF TOWN COUNCIL
—REMOVAL—PLEADING.

1. Bill of exceptions or statement of facts is not necessary on appeal where the case is tried on the complaint and demurrer thereto, and they are in the record.

2. Facts appearing in a brief, but not of record, in a cause, cannot be considered.

3. A complaint in proceedings to try title to the office of town marshal is sufficient in its allegation that respondent was duly removed from the office by the common council for cause deemed sufficient, without stating that it was after notice of the accusation against him, even if it is necessary to show that notice was first given to him.

4. Under Gen. St. § 663, providing that officers appointed by a town council, shall hold their office during the pleasure of said council, and section 691, providing that all officers elected by the council are subject to removal by that body at any time for cause deemed sufficient, such an officer may be removed without notice.

Appeal from superior court, King county; J. W. Langley, Judge.

Proceeding by Ed. Tremblay against John McQuade. A demurrer was sustained to the complaint, and relator appeals. Motion to

dismiss appeal denied, and judgment reversed.

P. V. Davis and Fred H. Peterson, for appellant. P. P. Carroll, for respondent.

ANDERS, J. This is a proceeding in the nature of a quo warranto, instituted by the relator for the purpose of obtaining possession of the office of marshal of the town of Gilman, and of ousting the respondent therefrom. The respondent moves the court to dismiss the appeal, on the alleged grounds (1) that at the time of serving the notice of appeal in this cause there was no judgment of record to appeal from; (2) that no statement of facts or bill of exceptions has been filed, served, and certified as required by law; and (3) that said relator is not an officer, as alleged in his information, and is no longer entitled to prosecute this action as said town marshal.

The statute relating to appeals to the supreme court (Laws 1893, p. 120, § 4) provides, among other things, that "if the appeal be not taken at the time when the judgment or order appealed from is rendered or made, then the party desiring to appeal may, by himself or his attorney, within the time prescribed in section three of this act, serve written notice on the prevailing party or his attorney that he appeals from such judgment or order to the supreme court." The appeal in this case was not taken at the time when the judgment appealed from was rendered, and it was therefore necessary to serve a notice in writing upon the adverse party within the time prescribed by the statute, which was done by the appellant. The judgment appealed from, as shown by the record, was rendered on November 20, 1894, and the notice of appeal was duly served on the respondent on the 20th day of December following. Under the statute, the notice was certainly served within the time limited by section 3 of the act, and there is no objection to its form or substance. The appeal was therefore properly taken. The cause was tried upon the complaint and the demurrer of the respondent, and, as the complaint and demurrer constituted portions of the record in the cause, no bill of exceptions or statement of facts was necessary or proper.

In support of the proposition that the relator is not an officer, as alleged in his information, and is no longer entitled to prosecute this action as marshal of said town, the respondent has inserted in his brief certain proceedings of the town council which are not of record in the cause, and therefore cannot be here considered. The motion to dismiss is denied.

The complaint or information alleges that "the town of Gilman, during all of the time and times herein, was and is a municipal corporation of the fourth class, organized and existing under the laws of the state of Washington; that on the 9th day of January, 1894, one John McQuade was appointed marshal

of said town of Gilman, by the common council of said town, to hold said office at the pleasure of said council, and said McQuade immediately thereafter entered upon the duties of said office, and continued therein until his removal as herein alleged; that on the 6th day of July, 1894, said respondent, McQuade, was duly removed from said office by said council for cause deemed sufficient, by resolution entered upon the records of said council; that, immediately after the removal of the respondent as aforesaid, said Tremblay was duly appointed town marshal by the council of said town to fill the vacancy caused by the removal of said respondent as aforesaid; that said Tremblay accepted the said office, and, in the form and within the time required by law and the ordinances of said town, took and subscribed the constitutional oath of office, and filed the same with the clerk of said town, and executed the official bond required by law and the ordinances of said town, which bond was duly approved by the council of said town, and the same filed with the clerk of said town, and the said relator thereby became entitled to hold said office of marshal; that said Tremblay, after qualifying for said office and filing said bond, demanded of said respondent the possession of said office, together with all books, papers, and records thereof, and of the keys of the town jail and one certain revolver, all of said property belonging to said town and pertaining to said office of marshal,—and said respondent has at all times refused, and does now refuse, to comply with said demand; that said respondent still continues to hold, exercise, and usurp said office of marshal, to the exclusion of said Tremblay; that, by reason of the usurpation of said office by said McQuade unlawfully exercising the rights of said office, this relator has been damaged in the sum of \$50." We are clearly of the opinion that this complaint states a cause of action against the respondent. If, as is admitted by the demurrer, the respondent was appointed marshal by the common council, to hold office at the pleasure of said council, and was duly removed from said office by said council for cause deemed sufficient, and the relator was duly appointed marshal to fill the vacancy caused by such removal, and accepted the office and duly qualified therefor in accordance with law, he was certainly entitled to the relief demanded in the complaint, and the demurrer should have been overruled. It appears, however, that the learned trial court was of the opinion that the complaint was defective because it failed to allege that the respondent was removed by the common council, after notice of the accusation against him, and an opportunity given to be heard in defense thereof. If it were necessary to show that notice was first given to the respondent, we still think that the allegations of the complaint were sufficient. See 2 Boone, Code Pl. p. 376. But,

as matter of fact, under the statute, no previous notice was necessary. Section 663 of the General Statutes provides that "the mayor, members of the common council, and the treasurer shall be elected by the qualified electors of such a town at a general municipal election to be held therein upon the Tuesday after the first Monday in December in each year. The treasurer shall hold office for the period of one year from and after the second Tuesday in January next succeeding the day of such election and until his successor is elected and qualified. The mayor and the members of the council shall hold office for the period of two years from and after the second Tuesday in January next succeeding the day of such election, and until their successors are elected and qualified. * * * The council shall appoint a marshal and clerk, and may, in their discretion, appoint an attorney, a pound master, a superintendent of streets and a civil engineer, and such police and other subordinate officers as in their judgment may be deemed necessary, and fix their compensation, which said officers shall hold their office during the pleasure of said council." And by section 691 it is provided that "all officers elected by the council are subject to removal by that body at any time for cause deemed sufficient." The law seems to be pretty well settled that an officer holding under statutes like ours may be removed without notice, at the pleasure of the appointing power. Judge Dillon states the law as follows: "Where an officer is appointed during pleasure, or where the power of removal is discretionary, the power to remove may be exercised without notice or hearing. But where the appointment is during good behavior, or where the removal can only be for certain specified causes, the power of removal cannot, as will presently be shown, be exercised, unless there be a formulated charge against the officer, notice to him of the accusation, and a hearing of the evidence in support of the charge, and an opportunity given to the party of making defense." 1 Dill. Mun. Corp. (4th Ed.) § 250. See, also, Throop, Pub. Off. § 361; Mechem, Pub. Off. § 454; *People v. Whitlock*, 92 N. Y. 191; *People v. Mayor*, etc., 82 N. Y. 491; *State v. Burke*, 8 Wash. 412, 36 Pac. 281. In the latter case this question was thoroughly discussed, and it is not necessary to recapitulate what was then said. We think the statute is too clear to admit of construction, and that the legislature, by the language used, intended to confer upon the council the power to remove the marshal for any cause deemed sufficient to themselves, and without notice to the respondent.

The judgment is reversed, and the cause remanded, with directions to overrule the demurrer.

HOYT, C. J., and GORDON, SCOTT, and DUNBAR, JJ., concur.

(12 Wash. 567)

PEASE et ux. v. BAXTER et al.¹

(Supreme Court of Washington. Sept. 16, 1895.)

CONDITIONAL SALE OF LAND — RESCISSION — FORFEITURE OF PAYMENTS.

A contract for the sale of land providing that, if the vendee failed to pay the price or the interest thereon within a time specified, the vendor could rescind the contract, and that all improvements and payments made by the vendee should thereupon be forfeited, is a contract of conditional sale, and, in the absence of fraud, cannot be construed as an equitable mortgage, so as to relieve the vendee from forfeiture on rescission by the vendor for default in payment of interest. *Gordon and Scott, JJ.*, dissenting.

Appeal from superior court, King county; *R. Osborn, Judge.*

Action by Hiram H. Pease and wife against Sutcliffe Baxter and others to recover land and to quiet title. Judgment for defendants, and plaintiffs appeal. Reversed.

Greene & Turner, for appellants. *Burke, Shepard & Woods*, for respondents.

DUNBAR, J. On the 6th day of August, 1890, the appellants, Hiram H. Pease and Mercie Pease, husband and wife, negotiated a sale of the land in question to Sutcliffe Baxter, one of the respondents, and Guy C. Phinney, now deceased. The amount to be paid for the land was about \$26,000. The contract, which was signed by the appellants herein and by Phinney and Baxter, provided for the payment of the purchase money in installments, and that such premises should be conveyed to the grantees when the purchase price should have been fully paid, in strict compliance with the terms of the contract. The seventh paragraph of the contract is as follows: "If said parties of the second part, their heirs, personal representatives, or assigns, fail to pay the whole or any part of said purchase price or interest within the time and on or before the day above specified whereon or within which the same is by the terms of this contract due or payable, or fail to observe or do any other of the acts or things by them according to the terms of this contract to be observed or done, then the said party of the first part, his heirs, personal representatives, or assigns, may, if he or they so elect, and at his or their mere option, rescind this contract; and in that case all payments and all improvements on said premises theretofore made by said parties of the second part, their heirs, personal representatives, or assigns, shall be forfeited to the said party of the first part, his heirs, personal representatives, or assigns, and the party of the first part, his personal representatives or assigns, may forthwith re-enter upon said premises and any or every part thereof, and expel all persons therefrom." The parties of the second part entered into possession under this contract, made the payments according to the terms of the contract, until about half the

purchase price, or \$13,000, was paid. They also expended several thousand dollars in permanent improvements upon the land. It was, moreover, provided in the contract that the parties of the second part should keep the premises insured for the sum of \$3,000. The complaint alleges that when the time came for payment of the interest due on the 6th of June, 1893, amounting to \$52.08, it was not paid, and had not been paid at the time of the commencement of the action, and that the insurance agreed upon in the contract had been suffered by Phinney and Baxter to fall below the amount covenanted. Upon the failure to pay this interest, the plaintiffs elected to rescind the contract according to its terms, and served on the various parties entitled to notice the notice which the contract provided for, and demanded possession of the premises. This demand being refused, appellants brought their action under the statute to recover possession and quiet their title. The answer admitted the contract, but, among other things, pleaded affirmatively that it was the intention of the parties to consider the contract, not as a conditional sale, but as an equitable mortgage; and proof was offered, over the objection of the appellants to sustain this contention. It was also alleged in the answer that the title was defective, and that the appellants were unable to convey to them a good and sufficient title to the land in question. There were other defenses, but we think these two propositions involve all that it is necessary to discuss in this case.

It will be observed that the main contention is as to the construction of this contract; the appellants insisting that it was a conditional sale, that the conditions were not complied with, and that they were entitled to rescind the contract according to the strict letter of its terms; while the contention of the respondents is that the contract was in fact a mortgage, and that the remedy of the appellants is to foreclose the mortgage, the land being only a security for the purchase price. The fact that this case seems to involve a hardship—that, if the contention of the appellants is to be sustained, the respondents are to be deprived both of the land and of the large amounts which they have already paid as part of the purchase price, and also large amounts expended by them in improvements—has led us to a somewhat painstaking investigation of the law governing such a case; but we are convinced that as long as people are privileged under the law to make contracts for themselves, if they are unwise enough to make contracts which are burdensome, the law cannot relieve them. This case was substantially before the court in *Reddish v. Smith*, 88 Pac. 1008, 10 Wash. 178; and it was there decided that under the provision of a contract for sale of land, that in case the purchaser fails to pay promptly the monthly installments provided for after a demand of 30 days, the

vendor could declare the contract forfeited, was entitled to enter upon and repossess himself of the premises, and thereupon the contract should be at an end, there was a forfeiture of the payments made; and it was further decided that under such contract, if any of the monthly payments were not made by the purchaser when due, it was not a waiver of the vendor's right of forfeiture that he did not declare it until three payments had become due. The contract in the case cited is not nearly so explicit as that in the one at bar. The language discussed in that contract was as follows: "In case the party of the second part shall fail to pay promptly the monthly installments herein provided for, after a demand made on him for the same of thirty days, then the party of the first part may, at his option, declare this contract forfeited, and he shall enter upon and repossess himself of the said premises, and thereupon this contract shall be at an end." In that case it was contended that the provision was simply for the forfeiture of the contract and not for the forfeiture of the payments made under the provisions of the contract, and this court said: "While it is true that the courts will not supply language to create a forfeiture where the forfeiture is not specially provided for by the parties themselves, yet it seems to us that it was the clear, unequivocal intention of the parties to this contract that the payments made by the appellants should be forfeited, in case the respondents elected so to do, upon the nonperformance of the contract by the appellants." But in the case at bar there is no possible room for construction, and, if parties have a right under any circumstances to make provisions for a forfeiture of payments in case of a sale of land, they certainly have been particular to make those provisions specific and certain in this contract. Whether we give to the language used a technical meaning or the meaning which is ordinarily given to such words, the conclusion is irresistible that a forfeiture was provided for, or else the language used is absolutely meaningless. To prevent any misconception of the right of the vendor to elect to rescind this contract, the draftsman of the contract went beyond the ordinary form of words employed in such cases, and provided that they might, at their mere option, rescind this contract; and it was not left for the courts to determine the rights of the parties when once the vendor had elected to rescind, but it is especially provided that in such cases all payments and all improvements on said premises theretofore made should be forfeited to said party of the first part. And, as still more conclusively showing that the idea of a forfeiture was one of the prominent ideas incorporated in the contract, paragraph 8 provides that "at any time after the payment of the value of said improvements and the sum that amounts to the expenses of getting possession under

said lease, the said parties of the second part" shall have the right to rescind this contract under certain conditions; and the contract provides: "And in that case, also, all payments and all improvements upon said premises theretofore made by said parties of the second part * * * shall be forfeited to said party of the first part."

It is urged by the respondents that the principle for which they contend, viz. that the contract shall be construed to be a mortgage, is no more of a violation of the well-established rule that oral testimony shall not be admitted to vary or contradict the terms of a written contract than the principle which allows an instrument upon its face a deed to be proven to be a mortgage. This exception to the general rule is so well established that it cannot now with propriety be overthrown. But while that is true, and whatever may have been the reason in the first instance for the adoption of this exception, we do not think that the rule should be extended to other instruments. A deed is really a portion of a mortgage, or, in other words, the provisions which make it a mortgage are something additional to the provisions of the deed, and they are in no way contradictory or inconsistent. But here it is too evident to admit of argument that this instrument could only be construed to be a mortgage, which would destroy the right of forfeiture, by flatly contradicting the express terms of the contract itself.

It is claimed that the question of the equitable right of the vendee was not raised before this court in the case of *Reddish v. Smith*, supra; but while it is true that the subject was not discussed under the head of "equitable mortgages," as it is by the learned counsel in this case, the equitable interests of the vendee were contended for in that case, and the principle discussed was the same, viz. the right of the vendor to rescind the contract and enforce the forfeiture provided for. A great number of cases have been cited by the respondents to sustain their contention, all of which we have carefully examined, but none of them, we think, are in point. Most of them refer to the proposition which we have just spoken of in relation to the construction of deeds, and in none of them is there construed a contract which bears any relation whatever to the contract in question. It is true, in *Fisk v. Stewart*, 24 Minn. 97, the court held that "when the real nature of a transaction between parties is confessedly that of a loan of money advanced upon the security of real estate granted to the party making the loan, whatever the form of the instrument taken as the security, it is always treated in equity as a mortgage," to which is annexed as an inseparable incident the right to an equity of redemption. But it is not confessedly a loan in this case, but, according to the terms of the contract, it was a sale of real estate, and the case cited does not bear upon the

questions involved in the case at bar. In *Gale v. Morris*, 29 N. J. Eq. 222, which was an action to reform a mortgage, the court held that an equitable mortgage could arise from an unsuccessful attempt to make a valid mortgage deed; and this is simply in accordance with the law which we noticed above, that, where it was shown conclusively that it was the intention of the parties that the instrument in question should be a mortgage instead of a deed, the courts would construe it to be a mortgage; and none of the cases cited go further than this. No case is cited by either side which is directly in point, and we must conclude that the presumption has always obtained in all courts that where a contract was plain and specific in its terms, and no fraud is alleged, the contract must be enforced. As was said by the court in *Gray v. Blanchard*, 8 Pick. 284: "It is a harsh proceeding on his [appellant's] part, but it is according to his contract, which must be enforced if he insists upon it." Even if it had been proper to have admitted oral testimony to explain away or change the meaning of this contract, the evidence was not of that positive character which would be sufficient to destroy the presumption that the intention of the parties to the contract and their final agreement had been merged in the written contract. Baxter testified that he had a conversation with Pease in which Pease stated that he did not want the principal; that he wanted to get it converted into an interest-bearing proposition; that he wanted to have a monthly income on which himself and wife could live. Conceding this to be true, it is not at all inconsistent with the idea that he intended to demand his right of forfeiture under the contract if the interest was not paid and his monthly income ceased; for, even construing it to be a mortgage, he would have a right to foreclose his lien upon the failure of the vendees to pay according to the terms of their contract, and that would equally destroy the idea of a monthly income. When asked if anything was said about a forfeiture or anything of that sort, the witness answered: "Nothing said about a forfeiture at all." This conversation, however, the witness testifies, was held some time during the last part of July, while the contract was entered into on the 8th day of August, and at that time something certainly was said about a forfeiture, and that was the time when these respondents should have objected to signing the contract if it embodied a different proposition from the one which they had agreed to a week or 10 days prior. They solemnly executed this contract, and, in the absence of fraud, it is conclusively presumed to speak the minds of the contracting parties. Any other construction would destroy the force and effect of all written obligations, and leave everything to the chance of slippery memory,—the very thing which a written contract is intended to guard against.

The other proposition urged by the re-

spondents,—that the forfeiture could not be compelled until the question of title, which is raised by the answer, had been decided,—we think, is not tenable, especially under this contract. These parties have made a law for themselves, have provided in that contract for almost every emergency, and the question of failure to give to the parties of the second part a good and sufficient deed was not neglected, for paragraph 9 provides that, upon the fulfillment by the parties of the second part of their contract, the party of the first part will give a good and sufficient deed of the premises, and, in case of failure to do so, binds himself and his heirs and personal representatives to pay them the sum of \$100,000. This is the security which they saw fit to take at the time the contract was entered into with reference to the title, and they cannot now demand new or additional security.

The judgment will be reversed, and the cause remanded, with instructions to the lower court to render judgment for the plaintiffs in the case, in accordance with the prayer of the complaint.

HOYT, C. J., and ANDERS, J., concur.
GORDON and SCOTT, JJ., dissent.

PATTON v. BARNETT, Sheriff.
(Supreme Court of Washington. Sept. 16,
1895.)

ESTOPPEL—ACQUIESCENCE.

One left in charge of a stock of goods, who knew of a sale by the owner, and surrendered possession to the purchaser without objection, is estopped to claim an interest in the goods under a partnership agreement with the owner which was unknown to the purchaser.

Appeal from superior court, Lewis county;
M. J. Gordon, Judge.

Action by Thomas N. Patton against John W. Barnett, sheriff, to recover goods seized under attachment. From a judgment of nonsuit, plaintiff appeals. Reversed.

Elliott & Forney and Edward F. Hunter, for appellant. Reynolds & Stewart, Millet & Harmon, and Cox, Cotton, Teal & Minor, for respondent.

DUNBAR, J. In the spring of 1891, one E. Richardson embarked in a commercial business in Chehalis in this state. After transacting business for a few months, he left, leaving his business in charge of H. W. Richardson as clerk and manager. The business was carried on in the name of E. Richardson. In February, 1893, E. Richardson executed to one W. P. Keenan a power of attorney, under which Keenan took possession of the entire stock of goods, which he afterwards sold to the appellant, and delivered to him the possession of the same. Shortly after possession of these goods was taken by the appellant, the respondent, as

sheriff, by virtue of certain writs of attachment sued out by various parties against E. Richardson, took said stock of goods from appellant's possession. After demand for restoration and refusal thereof, this action was brought. The respondent denied the title and ownership of the appellant, and justified under the writs of attachment against E. Richardson. During the progress of the trial it was developed that there existed between E. Richardson and H. W. Richardson a contract, which was executed prior to the execution of the power of attorney to Keenan, with reference to the goods, their sale and disposition, and the conduct of the business. It is contended by respondent that this contract constituted a contract of partnership between E. Richardson and H. W. Richardson; that the power of attorney given by the former to Keenan did not authorize the sale of any goods except those belonging to E. Richardson; that under this contract H. W. Richardson was entitled to the sole and exclusive possession of the stock of goods sought to be recovered in this action for the period of five years, terminating January 1, 1898; that as against partnership creditors no sale could be made to appellant, Patton, with knowledge that the money was to be used to pay E. Richardson's private debts, as opposed to the claims of attaching creditors. A motion based upon this contention was made, whereupon the plaintiff rested his case, and a nonsuit was granted by the court upon such motion. It appears from the testimony of both the appellant, Patton, and Keenan, who made the sale under the power of attorney, that they were not aware of this contract that had been entered into between E. Richardson and H. W. Richardson until it was developed in the testimony of the latter during the trial. We have very grave doubts whether the contract relied upon by the respondent would constitute a partnership in these goods. But, be that as it may, the uncontradicted testimony shows that H. W. Richardson was in the possession of these goods at the time they were sold by the attorney, Keenan, to the appellant, Patton; that Keenan told him he was going to sell the goods to Patton, and afterwards told him that he had so sold them; that a portion of the conversation which led up to the trade between Patton and Keenan was carried on in the store presided over by H. W. Richardson; that, after the contract of sale was made, Richardson and the appellant talked the matter over while they were invoicing the goods, and discussed the probability of appellant having made a good trade, and the prospect of his conducting a good business; and, while it is not so stated in terms, it plainly appears from the evidence that, upon the consummation of the trade H. W. Richardson, without any objections, yielded up the possession of the goods to the purchaser, Patton. Certainly, the creditors could not

be placed in any better position, so far as the appellant is concerned, than H. W. Richardson himself, and he, having consented to this sale, and having ratified it after it was executed by delivering the possession of the goods to the purchaser, would be estopped from now claiming any interest in them. There is nothing in the testimony to indicate fraud of any kind. Uncontradicted, it plainly appears that Patton was an innocent purchaser in good faith, and that, if H. W. Richardson had any legal rights in this property, he waived them by express acts. It follows, then, that under the testimony the plaintiff was entitled to recover these goods, and that the court erred in granting the motion for a nonsuit. The judgment will therefore be reversed, and the cause remanded, with instructions to the court to overrule the motion for nonsuit.

HOYT, C. J., and SCOTT and ANDERS, JJ., concur.

STATE v. ROBINSON.

(Supreme Court of Washington. Sept. 18, 1895.)

HOMICIDE—MANSLAUGHTER—SUFFICIENCY OF EVIDENCE.

1. Proof of facts charged in an indictment for murder in the first degree are sufficient to support a verdict of manslaughter. Per Hoyt, C. J., dissenting.

2. On trial for murder which was the result of a conspiracy, the proof tended as strongly to show that the conspiracy was to unlawfully prevent deceased from traveling on a certain road as that it was to kill him, and the evidence was such as would support a verdict of manslaughter against such conspirators as actually took part in the killing. *Held* that, under such evidence, a conspirator, not an active participant in the killing, could be convicted only of manslaughter. Per Hoyt, C. J., dissenting.

Dissenting opinion. For majority opinion, see 41 Pac. 51.

HOYT, C. J. The authorities all agree that a charge for murder in the first degree includes a charge of murder in the second degree and of manslaughter, and that an indictment for the first offense will support a conviction for either of the others. This is conceded in the opinion of the majority of the court. Under our statute, an indictment consists of a statement of the facts which constitute the crime, in ordinary and concise language. This being so, it must follow that a good indictment for manslaughter must state facts which, under the law, constitute manslaughter. Hence, if an indictment charging the crime of murder in the first degree will support a verdict of guilty of manslaughter, it must be because the facts which are therein alleged to have constituted the crime of murder in the first degree also include the facts which constitute the crime of manslaughter. The only reason which will warrant the courts in holding that an indictment charging murder in the first

degree also includes a charge of murder in the second degree and manslaughter is that the unlawful taking of human life is manslaughter, that when such unlawful taking is coupled with malice it is murder in the second degree, and when such malice is premeditated it is murder in the first degree, and that the fact that malice, either premeditated or unpremeditated, exists, in no manner detracts from the unlawfulness of the killing; for which reason every killing is held to be unlawful; and, since every unlawful killing is manslaughter, the fact that other characteristics necessary to constitute a higher degree of homicide accompany the killing in no manner takes from the act of killing those elements which make it manslaughter. The taking of human life, when not justifiable, is manslaughter at least, and when accompanied with malice is more than manslaughter. But the fact that when so accompanied it is more than manslaughter can in no manner take from it those elements which make it manslaughter. The whole is not only equal to, but must include all its parts. Murder in the first degree is made up of an unlawful killing, coupled with premeditated malice. But the fact that premeditation and malice accompany the unlawful act of killing does not take from it its unlawful character. It must follow that whenever facts are charged which show the killing to have been with malice and premeditation, the fact is also charged that it was unlawful, and for that reason the fact of an unlawful killing is so set out that it will support a verdict of manslaughter. The proposition above stated is not disputed by the authorities cited in the majority opinion, nor in that opinion, when considered simply as a question of pleading; but when it is considered as a question of proof it is held that killing with malice and premeditation in no degree tends to establish an unlawful killing simply. I am unable to see any reason for this distinction. An indictment must state the facts necessary to be established to constitute the offense, and, if the facts stated in the indictment are proven to the satisfaction of the jury, a verdict in accordance with such charge should be rendered. But if, as we have seen, an indictment for murder in the first degree is by all the courts held to be sufficient to support a verdict for manslaughter, it should, in my opinion, be also held that proof of the facts which are charged in an indictment for murder in the first degree would be sufficient to support a verdict of manslaughter. If, as a matter of pleading, the acts which constitute murder in the first degree include those which constitute the crime of manslaughter, it would seem that when the same acts are put in proof such proof would tend to establish the crime of manslaughter as well as that of murder in the first degree. In short, the statutes of this state and of all of the states which recognize degrees of crime in homicide, and authorize a conviction for any of the low-

er degrees upon an indictment charging a higher, can be sustained only upon the theory that each higher degree consists of a lower degree and something more. For instance, the crime of manslaughter is the unlawful taking of human life; the crime of murder in the second degree is manslaughter,—that is, the unlawful taking of human life,—with an additional characteristic, but such characteristic in no manner detracts from the force of the other elements which, without it, would constitute the crime of manslaughter. Murder in the first degree includes manslaughter, with an additional characteristic which would make it murder in the second degree, and still another necessary to the crime of murder in the first degree. Hence every murder in the first degree is, under these statutes, manslaughter, and murder in the second degree, and something more; murder in the second degree is manslaughter and something more. Upon any other theory an indictment for murder in the first degree would not support a verdict of manslaughter, for the reason that the constitution requires the facts constituting the crime to be set out in the indictment. And if, when it is alleged as a fact that the defendant killed a person with premeditation and malice, it is not also alleged as a fact that he unlawfully killed the man, within the meaning of the statute as to manslaughter, then a verdict of manslaughter would have no facts in an indictment for murder in the first degree upon which it could stand. This seems to me to be the reason of the rule which has grown up and become too well established to be now questioned, that a defendant can be convicted of one of the lower degrees of homicide upon an indictment charging a higher degree.

As I understand it, the case of *State v. Grier* (Wash.) 39 Pac. 874, was decided by this course of reasoning, and can be sustained on no other. The rule announced in the majority opinion in the case at bar is in direct opposition to this theory, and, in my opinion, unsound. Besides, its practical application, when carried to its logical conclusion, will greatly embarrass the administration of the criminal law. If facts which tend to show that the taking of life was with premeditation and malice have no tendency to show that the crime of manslaughter has been committed, then, upon a conviction for manslaughter, where the indictment charged a higher degree of homicide, it will be the duty of the court to set aside such verdict, however much testimony there may be which tends to show a premeditated and malicious killing, unless there is testimony which tends to show simply an unlawful killing, sufficient to support it without the aid of any testimony tending to show a higher degree of homicide. It is a well-known fact that juries are usually inclined to return verdicts for a less degree of homicide than those charged in the indictments, even when the most of the evidence has tended to establish the degree charged;

and if every conviction of a lower degree is to be set aside where the testimony which tends to show that degree, without the aid of that which tends to show a higher, is not sufficient to support the verdict, the most of such verdicts must be set aside; and since the law probably is, as intimated by the majority, that the rendition of such a verdict is equivalent to a verdict of not guilty as to the higher degrees covered by the indictment, the result will be that but few of those who are really guilty of some degree of felonious homicide will be punished for the crime.

There is another ground upon which the verdict under consideration can be sustained. The proof tended as strongly to show that the object of the conspiracy was to prevent, by the use of unlawful means, if necessary, the traveling of the road known as the "White Road" by the persons who were killed as that it was for the purpose of securing their death. Hence, for the purposes of this case, it should be assumed, if necessary to support the verdict of the jury, that they found that the conspiracy into which the defendant, with others, had entered was the doing of an unlawful act, and not the commission of murder; and while this would not relieve him from responsibility for all acts done in furtherance of the objects of the conspiracy, he would, under such a state of facts, be guilty of murder in the first degree only when such acts resulted in a homicide of that grade; and, as there was abundant testimony upon which the jury could have found the active participants in the execution of the objects of the conspiracy to have been guilty only of manslaughter, it follows that the defendant could properly, under such testimony, be found guilty of manslaughter only. In my opinion, the verdict was supported by the proofs. The judgment and sentence should be affirmed.

CAINE et al. v. SEATTLE & N. RY. CO.
(Supreme Court of Washington. Sept. 21, 1895.)

DEMURRER—ANOTHER ACTION PENDING—PLEA IN ABATEMENT—ACTION IN FEDERAL COURT.

1. Under Code Proc. § 189, providing that defendant may demur to the complaint on the ground of the pendency of another action between the same parties for the same cause, plaintiff may demur to a counterclaim on such grounds, since, as to such counterclaim, plaintiff is a defendant.

2. A plea in abatement to a counterclaim in an action at law in a state court on the ground of the pendency in a federal court of another action between the same parties on the same subject-matter cannot be sustained.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by E. E. Caine and another against the Seattle & Northern Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Andrew F. Burleigh, for appellant.

ANDERS, J. Respondents, who were plaintiffs in the court below, filed a complaint alleging that between May 1, 1890, and June 1, 1890, they, at the special instance and request of the defendant, performed services with their steamer J. C. Britton in transporting certain steel rails, spikes, and fish plates from Seattle to Anacortes; that the reasonable value of said services was \$665.42, no part of which sum has been paid; and demanding judgment for that sum, and interest thereon from June 1, 1890. The defendant filed its answer, consisting of denials, and also a counterclaim alleging, in substance, that plaintiffs had undertaken to transport a large quantity of steel rails and other material for defendant, subject to the usual obligations of a common carrier, and had lost such rails and material, and demanding judgment against plaintiffs for the sum of \$7,000, the value of the material alleged to have been lost. The plaintiffs demurred to this new matter, which demurrer, after argument, was overruled. Thereupon they filed their reply, setting up an agreement with the defendant substantially as stated in defendant's counterclaim, and averring that the loss of said material was occasioned by unavoidable accident and the perils of the sea, and also that an action was pending in the district court of the United States for the Northern district of Washington by said defendant as libellant against the steamer J. C. Britton as respondent, and that plaintiffs in this action were the claimants of the J. C. Britton. When the cause came on for trial, a stipulation was entered into in open court by counsel for the respective parties, whereby they waived a jury, and consented that the cause should be tried before the court. The cause then proceeded to trial, and thereupon plaintiffs objected to the consideration of the matter alleged in the answer of the defendant as an affirmative defense to plaintiffs' complaint, on the ground that at the time when said affirmative defense was filed in this cause there was, and still is, pending in the district court of the United States for the district of Washington, Northern division, another action for the same cause set forth in said affirmative defense, which action is in admiralty, and is numbered 78 on the docket of said court, and in which suit the defendant herein is libellant, said steamer J. C. Britton is respondent, and these plaintiffs are claimants; in which action the defendant is seeking to recover the value of the same cargo referred to in said affirmative defense, for the same reason and upon the same grounds alleged in said defense. The defendant, by its attorney, conceded the facts in said affirmative defense to be as alleged by plaintiffs in their objection, and thereupon the court sustained the objection of the plaintiffs, and directed that the new matter set up in the defendant's answer should not be considered in this cause, on the ground of another action pending concerning the same matter in the district court of the

United States. Thereupon defendant waived each and every of the denials contained in its answer, and conceded in open court that, but for the facts pleaded in its affirmative defense, plaintiffs were entitled to judgment as prayed in the complaint; and, defendant electing to stand upon its answer, judgment was accordingly entered in favor of plaintiffs for the amount claimed in the complaint. From this judgment defendant prosecutes this appeal.

The Code of Procedure provides (section 189) that the defendant may demur to the complaint when it shall appear upon the face thereof that there is another action pending between the same parties for the same cause; and that, when the objection does not appear upon the face of the complaint, it may be taken by answer (section 191). Inasmuch as, by the terms of the statute, the defendant may interpose the objection of another action pending, the question is suggested whether the statute is applicable to a case of this character. We have no doubt that it is, and that the court was right in so assuming. This results from the fact that a counterclaim is in the nature of a cross complaint, and must state a cause of action against the plaintiffs. Code Proc. § 195. It follows, therefore, that as to a counterclaim the plaintiffs are really defendants.

The only remaining question to be determined on this appeal is whether the pendency of an action in rem in the district court of the United States for the recovery of this same counterclaim is a valid objection to its being pleaded in this action. We are clearly of the opinion that it is not. The general rule on this question is laid down in Bliss, Code Pl. (3d Ed.) § 410, as follows: "It was early held by the supreme court of New York that section 144 of the Code, in stating this ground of demurrer, did not change the law as before existing, and that a demurrer or answer, because another action is pending in the courts of the United States or of another state, raises no valid objection to the pleading, and states no defense. The creditor may pursue the debtor or his property to judgment in different jurisdictions, but a 'satisfaction' in one may be pleaded in bar in all others." See, also, Burrows v. Miller, 5 How. Prac. 51; Cook v. Litchfield, 5 Sandf. 330; De Armond v. Bohn, 12 Ind. 607; Wadleigh v. Veazle, 3 Sumn. 165, Fed. Cas. No. 17,031; Bowne v. Joy, 9 Johns. 221; Stanton v. Embrey, 93 U. S. 548; Hatch v. Spofford, 22 Conn. 485. In the latter case the court says: "'A plea in abatement to an action at law on the ground of a pendency of a bill in equity for the same matter, between the same parties, in another court, it is believed has never been sustained in any court, foreign or domestic.' There is much in the peculiar nature and extent of the jurisdiction in these different courts to sustain this exception to the general rule. Besides, the rules of procedure and the manner of execution in these courts are not alike.

* * * But, if we are mistaken in this limitation of the general rule, there is another, which is not less obvious and decisive, viz. the suits must be pending in the same jurisdiction. This has long been the law in England." To the same effect is Insurance Co. v. Brune's Assignee, 96 U. S. 588. Moreover, it seems that, where the remedies are different, two actions for the same cause may be maintained concurrently, even in the same court. The Normandie, 40 Fed. 591. See, also, Wolf v. Cook, Id. 432; Insurance Co. v. Wager, 35 Fed. 364. And in Toby v. Brown, 11 Ark. 308, it was held that a judgment in rem against a steamboat, if unsatisfied, cannot be pleaded as a bar in a subsequent action against the owners. Sloan v. McDowell, 75 N. C. 29, was a case almost identical in point of fact with the one at bar. There the defendant had previously instituted an action in the circuit court of the United States for the Southern district of Georgia, based upon the same cause of action set up in his counterclaim in the suit then before the North Carolina court, and in respect thereto the court used the following language: "The provision in Code Civ. Proc. § 95, allowing as cause for demurrer that there is another action pending between the same parties for the same cause, must be confined to the courts of the state, where the remedies are precisely the same; the object being to protect parties from vexation and the courts from multiplicity of suits. But in different states or governments the remedies are not the same, and there may be reasons why our courts should not take notice of proceedings outside of the state which would not be applicable to our own courts." In view of these authorities, and many others which might be cited, we have no hesitation in saying that the learned trial court erred in its ruling on the objection interposed by plaintiffs. The judgment is therefore reversed, and the cause remanded, with directions to overrule the objection to defendant's counterclaim.

HOYT, O. J., and DUNBAR, SCOTT, and GORDON, JJ., concur.

RIDDELL v. PRICHARD et al.

(Supreme Court of Washington. Sept. 21, 1895.)

ACTION ON NOTE—PARTIES—REVIEW ON APPEAL.

1. An attorney to whom a note is assigned for a nominal consideration, and for the purpose of collection only, has such a title as will support an action on the note.

2. Findings of fact based on conflicting evidence will not be disturbed.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Action by C. M. Riddell against Anthony P. Prichard and another on a promissory note. Judgment for plaintiff, and defendants appeal. Affirmed.

Parsons, Corell & Parsons, for appellants.
Fenley Bryan, for respondent.

HOYT, C. J. This appeal is from a judgment rendered against the appellants, as makers of a certain promissory note. The grounds upon which it is claimed that it should be reversed are (1) that the plaintiff did not have such title to the note as would authorize him to maintain an action thereon; (2) that the note had been satisfied by the acceptance by the bank which owned it of the note of A. P. Prichard in its place; and (3) that Gilman W. Prichard was only a surety upon the note, and had been released by the extension of the time of payment.

The question raised by the first assignment of error was decided by this court adversely to the contention of the appellants in *McDaniel v. Pressler*, 3 Wash. St. 636, 29 Pac. 209. It is true that in that case the assignee of the note was not an attorney at law, but we are not aware of any law which would warrant us in holding that an attorney at law would not take the same title and rights under the assignment as any other person.

The other two assignments are founded upon the evidence introduced at the trial. The trial court, upon such evidence, found as facts that the note had not been paid, and that its time of payment had not been extended; and, for the reason that there was a substantial conflict in the testimony upon these questions, it is not within the province of this court to disturb such findings, and, as they were sufficient to warrant the conclusions of law drawn therefrom, the judgment rendered thereon must be affirmed.

ANDERS, SCOTT, DUNBAR, and GORDON, JJ., concur.

STATE ex rel. BARTON v. HOPKINS,
County Auditor, et al.

(Supreme Court of Washington. Sept. 21,
1895.)

COUNTY COMMISSIONERS—CONTROL OF COUNTY FUNDS.

County commissioners have no authority to order the transfer of money from the general fund to a fund created by themselves to expedite the payment of current county expenses.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Application, on relation of W. E. Barton, against George S. Hopkins and another to compel defendants, as county auditor and treasurer, respectively, the first to issue a warrant on the "incidental fund," and the latter to transfer thereto money from the general fund on order of commissioners. From a judgment sustaining a demurrer to the petition, relator appeals. Affirmed.

Milo A. Root, for appellant. Troy & Falknor, for respondents.

SCOTT, J. The relator, at the instance of the county commissioners, performed services for the county in sinking a well to supply the courthouse with water, for which work the commissioners allowed his bill, and ordered the county auditor to draw a warrant therefor upon a fund designated as the "incidental fund," which had been created by an order of the commissioners, who from time to time directed the county treasurer to transfer to the credit of said fund moneys from the general county fund. The respondents, Hopkins and Gelbach, were, respectively, auditor and treasurer of said county. The auditor refused to draw the warrant upon the fund specified, and the treasurer refused to transfer moneys from the general fund to the credit of the so-called "incidental fund." Whereupon the relator instituted this proceeding for a mandamus against said officers to compel them to comply with the orders made by the commissioners. The respondents demurred to the relator's petition on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the superior court, and this appeal has been prosecuted therefrom. Some questions have been argued in the relator's brief which we are not called upon by the record to decide. One of these is as to the validity of certain outstanding county warrants upon the general fund. It is also claimed in the relator's brief that, unless the county commissioners have authority to transfer moneys from the general county fund to an incidental fund to meet the necessary current expenses of the county, the conduct of the county's business, owing to the state of its finances, will be greatly impeded and interfered with, if not rendered impossible, in view of the fact that this court has held, in *Mason v. Purdy*, 11 Wash. —, 40 Pac. 130, that county warrants must be paid in the order of their issuance and presentment. And it is contended that it is necessary, for the maintenance of the county's business, that the commissioners should have a right to transfer moneys from the general county fund to an incidental fund, with which to pay the necessary current expenses of the county. A stronger case is presented in the relator's brief, in this respect also, than the record submitted justifies, for no such state of facts appears thereby. The writer of this opinion did not concur in the decision reached in *Mason v. Purdy*, but it may be well to say that no such question as the relator argues was decided in that case, as the decision there involved the priority of warrants apparently upon an equal footing, drawn against the general county fund. Of course, it is evident that the maintenance of the state and municipal governments is of paramount consideration, and the necessary means must be provided therefor or devoted thereto. But, whatever the law may be as to giving a preference to the necessary expenses of conducting the

municipal or state business, as against the incoming revenues assessed for the years in which the same are incurred, we are clearly of the opinion that there is no law authorizing the commissioners to withdraw money from the general county fund to create an incidental fund for the purpose of meeting such expenses. The general county fund is created by law for the express purpose of meeting all such expenses as the maintenance and conduct of the county's business, and the county treasurer is directed to place to the credit of this fund all moneys received by him from taxes belonging thereto. A rule which would authorize the county commissioners to withdraw moneys belonging to this general county fund and place the same to the credit of another fund of their own creation, would be to the detriment of holders of all warrants against the general county fund, and clearly a most vicious one generally. It is sufficient to say that there is no authority of law therefor. If this could be done, the money belonging to any fund of the county might be taken therefrom, and placed to the credit of a different fund which the commissioners might see fit to create or designate, and the administration of municipal affairs would be placed in hopeless confusion. We think the decision of the superior court was right in the premises, and it is affirmed.

HOYT, C. J., and GORDON, ANDERS, and DUNBAR, JJ., concur.

ROTTING v. CLEMAN et al.

(Supreme Court of Washington. Sept. 27, 1895.)

REVIEW ON APPEAL—GRANT OF NEW TRIAL.

Where a party moved for a new trial on the ground that the evidence was not sufficient to justify the verdict, and on other grounds, and it appeared that there was a substantial conflict in the testimony, the discretion of the court in granting the motion will not be reviewed on appeal, though it is not apparent upon what ground the motion was granted. Dunbar, J., dissenting.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by Nic Rotting against Jacob Cleman and others on a note. From an order granting a new trial, defendant J. H. Ramm appeals. Affirmed.

E. Pruyn, for appellant. Mires & Warner, for respondent.

ANDERS, J. This was an action on a promissory note executed and delivered to the plaintiff by the defendants. The complaint is in the ordinary form, and its sufficiency is not questioned. All of the defendants defaulted except Ramm, who filed an answer, admitting the execution of the note set out in the complaint, but alleging that he signed it as a surety for the other de-

fendants, and that he received no part of the consideration thereof, but signed said note solely for the accommodation of his codefendants; that on or about the 1st day of February, 1894, and a long time after the note became due, he gave to plaintiff a written notice that he was surety upon the note, and that he requested plaintiff to forthwith institute an action upon said promissory note; that plaintiff did not, until the 21st day of June, 1894, institute any action upon said note; that the plaintiff did not, within a reasonable time, bring his action upon said note, and prosecute the same to judgment and execution, and that defendant was thereby discharged, and wholly relieved from any liability on the note. For a second affirmative defense the defendant alleged that the plaintiff did, on the 20th day of April, 1894, for a valuable consideration, without the knowledge or consent of the defendant, agree to extend to the other defendants herein the time of the payment of said note for a period of six months from and after the 20th day of April aforesaid. The plaintiff, in his reply, denied receiving the notice mentioned in the defendant's answer, and averred that after the time at which the alleged notice to sue was given by defendant to plaintiff, the defendant instructed the plaintiff not to sue upon said note. The defense of extension of time of payment seems to have been abandoned by the defendant, and the cause proceeded to trial upon the other issues raised by the pleadings. A verdict was rendered by the jury in favor of the defendant. Thereupon the plaintiff moved for a new trial upon the grounds (1) that the evidence was insufficient to justify the verdict; (2) that the verdict was against the law; and (3) error in law occurring at the trial, and excepted to at the time. After argument and due consideration, the court sustained the motion, and granted a new trial, and the defendant appealed.

The statute (Code Proc. § 400) provides that the trial court may set aside the verdict of a jury, and grant a new trial, upon either of the grounds specified in the motion therefor in this case. Although not directly so stated, we gather from the record that the motion was sustained upon the first-mentioned ground, but whether that be correct or not is immaterial, as we will presently show. A motion for a new trial is addressed to the sound discretion of the court, and will not be interfered with on appeal unless it is manifest that the discretion vested in the court was grossly abused. Barnes v. Merrick, 6 Wis. 57; Van Valkenburgh v. Hoskins, 7 Wis. 493. And where the record shows that the motion for a new trial was made on several grounds, but does not show upon which of them the ruling of the court was based, the order will not be reversed if it was within the sound discretion of the court to make it upon any of

the grounds stated. *Oullahan v. Starbuck*, 21 Cal. 414. In this case it was within the discretion of the court to grant a new trial on the ground of insufficiency of the evidence to justify the verdict. While it is the duty of the trial court to grant a new trial when it appears to the court that the verdict is manifestly against the weight of the evidence and the justice of the case, the rule is different in appellate courts. On appeal the orders of the trial court in granting or refusing new trials will not be disturbed where the record shows a substantial conflict in the testimony. Mr. Hayne, in his work on *New Trial and Appeal* (at section 288), says: "Where there is a substantial conflict in the evidence, the supreme court will not disturb the decision of the court below. This rule has been announced more frequently than any other rule of practice. It applies equally where the court below granted as where it denied the motion for new trial." In this case the record discloses that there is a substantial conflict in the evidence as to all of the issues tried before the court, and under the rule above laid down, and which has been repeatedly recognized by this court, the order of the court below must be affirmed.

HOYT, C. J., and SCOTT and GORDON, JJ., concur. DUNBAR, J., dissents.

(12 Wash. 627)

HOWE v. BARTO et al.

(Supreme Court of Washington. Sept. 27, 1895.)

TAX DEEDS AS EVIDENCE—POWERS OF MUNICIPALITIES.

1. It was competent for a city in adopting its charter to provide that a tax deed of land sold by the proper officer for city taxes should be prima facie evidence of the regularity of the tax proceedings.

2. The provision in a city charter that a tax deed issued by the proper officer on sale of land for nonpayment of city taxes should be prima facie evidence of the regularity of the tax proceedings is not objectionable, as prescribing a rule of evidence for state courts.

Appeal from superior court, King county; T. J. Humes, Judge.

Action of ejectment by J. L. Howe against Ella Barto and others. From a judgment of nonsuit, plaintiff appeals. Reversed.

Clise & King, for appellant. Strudwick & Peters, for respondents.

HOYT, C. J. But a single question is involved in this appeal, and that is as to whether or not the courts must give force to certain sections in the freeholders' charter of the city of Seattle, relating to tax deeds. Such sections are a part of the article relating to the assessment and collection of taxes, and provide that deeds executed by the proper officer upon sale of land for taxes assessed as provided in said article shall prima facie establish the fact that the proceedings pro-

vided for in said article, and recited in the deed, have been taken as provided for in the charter. It is claimed by the respondents that these sections prescribe a rule of evidence for state courts, and that to do so was not within the power of the city in adopting its charter under the constitution and laws of the state. If the effect of such sections was to prescribe the manner in which a state court should transact its business, the claim of respondents would have to be sustained. But, as we understand them, they provide for no such thing. It is unquestioned that under the constitution and laws it was competent for the city to provide in its charter for the assessment and collection of taxes, and, to make such authority of any benefit, it must be held that it had the right to provide a penalty for failure to pay taxes so assessed, to provide for the sale of the property for the payment of the taxes thereon, and for the conveyance thereof by the proper officers of the city to the purchaser at such sale. This much must be conceded, and is not disputed by the respondents. If the city has the power to provide for the conveyance of the property, we can see no reason why it is not competent for it to provide, within proper constitutional limitations, what shall be the effect of the conveyance. The deed is executed for the purpose of conveying to the purchaser the property described therein. If the charter could provide that it should have such force, there seems to be no good reason why it could not provide that it should have such further force as to prove itself. To do so would no more interfere with the course of proceeding in a state court than would the provision providing for a tax levy and for a sale thereunder. The city was clothed with the power to provide for the levy of taxes, and for the enforcement of their collection; and, as a part of such power, it might properly provide that, if the taxes were not paid, the property should be conveyed in satisfaction thereof; and, if it could provide that such conveyance passed title, we see no reason why it could not provide that such deed should not only have force to pass title, but should further have such force as would prove itself and the recitals therein. It might be beyond its power to provide that the deed should conclusively establish the facts recited therein, for the reason that constitutional rights might thus be cut off, but to give it such prima facie force could in no manner affect such constitutional rights. In our opinion, it was within the power of the city to enact, as a part of its charter, the sections under consideration, and that it was the duty of the court to give force to their provisions, so far at least as they provided for the prima facie force of the conveyance. The judgment must be reversed, and the cause remanded for a new trial.

ANDERS, GORDON, DUNBAR, and SCOTT, JJ., concur.

BLAKE v. STATE SAV. BANK et al.
(Supreme Court of Washington. Sept. 27, 1895.)

APPELLATE JURISDICTION—INSOLVENT BANK—ACTION TO RECOVER DEPOSIT.

1. The supreme court has appellate jurisdiction of an action to rescind a contract of deposit on the ground that the bank was insolvent at the time of the deposit, though the amount involved is less than \$200.

2. To recover moneys deposited with an insolvent bank, the party may file his petition in the action wherein a receiver for said bank has been appointed.

3. One who at various times deposited moneys with a bank, not knowing of its insolvency, and from time to time drew checks on the amount, cannot, after the bank has been declared insolvent, recover from the receiver the amount remaining to his credit, as the fund was not impressed with a special trust in his favor, and could not be identified and traced into the hands of the receiver.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by J. W. Blake against State Savings Bank for the appointment of a receiver. W. G. Houser filed a petition therein to rescind a contract made with said bank. A demurrer to the petition was sustained, and said Houser appeals. Affirmed.

Lueders & Leo, for appellant. Stiles, Stevens & Tillinghast, for respondent.

ANDERS, J. This was a proceeding instituted by the appellant, W. G. Houser, to rescind a contract of deposit with the State Savings Bank, and to secure an order of the court requiring the receiver of said bank to deliver to appellant a certain balance alleged to be due him from the bank. On May 11, 1894, the State Savings Bank, having become insolvent, suspended business, and on the following day, at the suit of J. W. Blake, one J. S. Whitehouse was appointed receiver, and immediately took possession of the assets of the bank. Thereafter the appellant filed a petition in the case of Blake against the bank, setting up, among other things, which it is not necessary to mention, that said State Savings Bank was, on the 7th, 8th, 9th, and 10th days of May, 1894, and long prior thereto, in failing circumstances, hopelessly insolvent, and unable to meet its liabilities and obligations; and on said May 7, 1894, said bank and its president and cashier became and were well aware of its said failing circumstances and hopeless insolvency; that during all of said month of May, 1894, and long prior thereto, petitioner was a regular depositor with and a customer of said bank, and on April 30, 1894, had on deposit to his credit therein the sum of \$443.46; that from and after said April 30, 1894, to and including May 10, 1894, he made further deposits with said bank, amounting in all to the sum of \$980.46; that during said month of May, 1894, and up to and including May 11, 1894, he drew against his credits and deposits in said bank his check and drafts in the total

amount of \$1,261.38, thereby leaving in said bank, when it suspended business, on May 11, 1894, a balance of \$168.54 of the different deposits by him made therewith on and between May 7 and May 10, 1894; that during all the time petitioner dealt with said bank as aforesaid he was wholly unaware of its failing circumstances and insolvency, and without means of informing himself of its condition, and always, until its suspension, fully believed said bank to be solvent; that, although said bank and its said officers on said May 7, 1894, became and were aware of the insolvency thereof they, intending and contriving to cheat and defraud petitioner, wrongfully withheld and concealed from him all knowledge and information of its insolvent condition, and, intending and contriving to cheat and defraud petitioner, did wrongfully and fraudulently receive and accept from him the various sums by him offered as deposits on and between May 7 and May 11, 1894; that said bank, although requested by petitioner to return to him said balance of money so deposited as aforesaid, has failed, refused, and neglected to return the same, or any part thereof; that on May 11, 1894, and while said bank still held the sum of \$168.54 of the money so obtained from petitioner, said bank suspended payment, and discontinued business, and openly announced its insolvency; that one J. S. Whitehouse was, by the order of the court, duly appointed as receiver of said bank to wind up the affairs thereof, and on May 12, 1894, said Whitehouse duly qualified and entered upon the discharge of his duties as such receiver, and did as such receiver, on the 12th day of May, 1894, take into and still retains in his possession said sum of \$168.54, money of petitioner so received and obtained from petitioner as aforesaid; that petitioner has, since the appointment of said receiver, demanded of him the return of said money, to wit, said sum of \$168.54, but said receiver has refused and declined to return the same, or any part thereof, to petitioner. The respondent interposed a general demurrer to this petition, which was sustained by the court, and, appellant declining to further plead, a judgment was entered, dismissing the petition, from which judgment the petitioner appealed to this court.

It is insisted on behalf of the respondent that this court has no jurisdiction to review the judgment of the superior court, because the amount involved is less than \$200, and the true nature of the proceeding had was that of an action at law for money had and received. But, as it is not uncommon for courts to entertain suits in equity for such relief as is demanded in this proceeding, and as the petition purports to state a cause of action involving at least one question of equitable cognizance, we are not disposed to dismiss the appeal for want of jurisdiction.

It is also insisted that the petitioner should not have been allowed to present his claim

against the receiver by petition, but should have been compelled to resort to an independent action, and it may be true that an ordinary action would have better subserved the interests of all parties than this proceeding. But the question does not appear to have been raised in the court below, and, besides, it seems that it is within the discretion of the court either to determine claims against a receiver by petition in the original action in which he was appointed or by an independent suit. 20 Am. & Eng. Enc. Law, p. 251.

The next question is, do the facts stated in the petition entitle the appellant to an order directing the respondent to pay over to him the full amount of his claim in preference to other creditors; or, in other words, does the petition state a cause of action? We are of the opinion that it does not, for the reasons (1) that the specific fund sought to be recovered is not impressed with a special trust in favor of appellant, and (2) that it has not been identified and traced into the hands of the respondent. It seems clear to us that when appellant deposited his money in the bank in the ordinary course of business, the relation of debtor and creditor was at once created. The title to the money passed to the bank, and appellant became the bank's creditor to the extent of the amount of deposits. That appellant considered the bank his debtor in the ordinary sense, and not a mere trustee of his funds, is evident from the fact that from time to time he drew checks upon the bank for various amounts, which, when paid, he knew would be charged to his account. And none of the authorities cited by appellant announce a doctrine at variance with that which we have stated. But it is claimed by appellant that by reason of the fraud practiced upon him by the officers of the bank in receiving his deposit, and at the same time withholding and concealing from him the insolvent condition of the bank, the contract of deposit between him and the bank was void, and the title to the moneys deposited never vested in the bank, and that it became simply a trustee *ex maleficio* of his funds. The case of *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537, is mainly relied on to support this contention, but we think the facts in the case at bar are such that that case is not an authority in favor of appellant. That was an action against a receiver to recover the proceeds of certain drafts sent to other parties by an insolvent bank for collection, and which were collected by them, and the money paid into court. In delivering the opinion of the court, Andrews, J., said: "The general doctrine that, upon a deposit being made by a customer, in a bank, in the ordinary course of business, of money, or of drafts or checks received and credited as money, the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question. *Bank v. Hughes*, 17 Wend.

94; *Bank v. Loyd*, 90 N. Y. 530. The transaction, in legal effect, is a transfer of the money or drafts or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts, or checks on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business. The further rule that one who has been induced to part with his property by the fraud of another, under guise of a contract, may, upon discovery of the fraud, rescind the contract, and reclaim the property, unless it has come to the possession of a bona fide holder, is equally well settled, and does not at all depend upon the character of the wrongdoer, whether a corporation or natural person. * * * The right to a restoration in such case may be defeated by the acts or acquiescence of the defrauded party, or because the property has lost its identity and cannot be traced, or other persons have innocently acquired interests in ignorance of the fraud." It will be seen from this quotation from that case that what the court really decided was that the reception of deposits by a bank under the circumstances stated was such a fraud upon the depositor as gave him a right to rescind the contract of deposit, and reclaim the drafts or their proceeds, which, in that case, were easily distinguishable from the other assets of the bank. The conclusion of the court would no doubt have been different if the money had "lost its identity," and could not be traced. In this case the specific money sought to be recovered is not identified in any way, or even traced into the hands of the receiver. It is true that the \$168.54 claimed by appellant is said in the petition to be a part of the moneys deposited after May 7, 1894, but the assertion is a mere conclusion from facts previously stated, and is, as matter of fact, a non sequitur. It is positively alleged that during the month of May, 1894, and prior to the suspension of the bank, appellant deposited therein the aggregate sum of \$986.46, and drew out upon checks the sum of \$1,261.38; and, if that be true, we are unable to perceive how it can be said that any particular \$168.54 is a part of the funds deposited after May 7th,—the time at which the officers of the bank became aware of its insolvency. When appellant's deposits became commingled with the general funds of like character in the bank, the means of identification failed, and the money could not be reclaimed. See *Story*, Eq. Jur. § 1259; *Wilson v. Coburn* (Neb.) 53 N. W. 466; *In re North River Bank* (Sup.) 14 N. Y. Supp. 261; *City of Somerville v. Beal*, 49 Fed. 790. If it had been delivered to the bank, not as a general deposit, but for a particular purpose, it would have been a trust fund in the first instance, and the title would not have passed to the bank;

but even then it could not have been recovered without showing that it had gone into the hands of the receiver. In *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504, the petitioners delivered to one White, a private banker, \$3,000, to be invested in a bond and mortgage. The investment was not made, but, on the contrary, White spent all but \$30 of the money so received in paying his personal debts and liabilities, and afterwards made an assignment for the benefit of his creditors. The remaining \$30 was traced to the possession of the assignee, and the court held that an order directing the assignee to pay more than the \$30 to petitioners was erroneous. In reference to the question under consideration the court said: "The sole inquiry is whether a case is made for equitable intervention in favor of the petitioners, in the administration of the insolvent estate. It is clear, we think, that upon an accounting in bankruptcy or insolvency a trust creditor is not entitled to a preference over general creditors of the insolvent, merely on the ground of the nature of his claim; that is, that he is a trust creditor, as distinguished from a general creditor. We know of no authority for such a contention. The equitable doctrine that, as between creditors, equality is equity, admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears in addition that there is some specific recognized equity founded on some agreement, or the relation of the debt to the assigned property, which entitles the claimant, according to equitable principles, to preferential payment. * * * But it is the general rule, as well in a court of equity as in a court of law, that, in order to follow trust funds, and subject them to the operation of the trust, they must be identified." And in the later case of *Atkinson v. Printing Co.*, 114 N. Y. 168, 21 N. E. 178, the court used this language: "The fact that the defendant became a creditor of the insolvent bank through the fraud of its officers, and the bank a trustee ex maleficio, gave the defendant no right to a preference over other creditors, unless it could trace and recover its property." To the same effect are the cases of *Wilson v. Coburn* and *In re North River Bank*, above cited, both of which are directly in point in this case. The judgment must be affirmed.

HOYT, C. J., and SCOTT and GORDON, JJ., concur.

HAMILTON v. CARTER, Sheriff, et al.
(Supreme Court of Washington. Aug. 16, 1895.)

EXECUTION — SALE OF MORTGAGED CHATTELS —
RESTRAINING FORECLOSURE.

1. Plaintiff purchased at execution sale property on which a chattel mortgage existed,

the deputy sheriff who made the sale and the mortgagee agreeing that the mortgage, a decree of foreclosure of which had been rendered, should be first satisfied with the money paid by plaintiff. The deputy paid over the money to the clerk, and made return that the property was sold subject to the mortgage. *Held*, that plaintiff purchased the property subject to the mortgage, and that, as the deputy had no power to bind the sheriff by such an agreement, no action would lie to enjoin the sale thereof under the mortgage.

2. The fact that the mortgagee of chattels delayed for five months the sale under a decree of foreclosure, after a sale of the property, subject to the mortgage, on execution against the mortgagor, does not entitle the purchaser at execution sale to restrain sale under the foreclosure decree rendered before the execution sale.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by Lewis M. Hamilton against H. H. Carter and another to enjoin defendants from selling certain property. Plaintiff had judgment, and defendants appeal. Reversed.

Austin E. Griffiths, for appellant Carter.
J. B. Bridges, for appellant Holloway.
M. J. Cochran, for respondent.

ANDERS, J. The firm of Ninemire & Morgan recovered a judgment in the superior court of Chehalis county against one J. F. Hiatt, and caused an execution to be issued thereon and placed in the hands of the defendant Carter, who was then sheriff of said county. In pursuance of the writ, one Geissler, who was deputy sheriff, seized, advertised, and on November 9, 1891, sold certain personal property belonging to the defendant Hiatt to the respondent Hamilton, for the sum of \$425. At and prior to the execution sale, defendant Holloway held a chattel mortgage on the property sold, which he had caused to be foreclosed, the decree of foreclosure having been rendered two days prior to the sale. It appears from the complaint herein that Hamilton was apprised of the existence of this mortgage when he bid in the property, and the sheriff and his deputy were also aware of it. But it seems that both Hamilton and Holloway understood that the mortgage would be satisfied out of the proceeds of the sale. On November 30th the deputy sheriff paid the money received from Hamilton, and returned the execution with his doings thereon, to the clerk of the court. On December 5th following the court ordered the clerk to pay this money to the execution plaintiffs in part satisfaction of their judgment. Whether Hamilton or Holloway was cognizant of this order does not appear from the evidence. In April, 1892, Holloway caused an order of sale to be issued upon his judgment and decree of foreclosure, and delivered to the sheriff. The sheriff, in pursuance thereof, was about to sell the mortgaged property, when Hamilton instituted this action against him and Holloway to enjoin the proceeding. It is alleged in the complaint, among other things, in substance, that at the execution sale the sheriff refused to accept any bid less than \$425, the amount

supposed to be necessary to satisfy the mortgage lien, and that plaintiff was induced to bid and pay that sum for the property by the representation of the sheriff that it would be applied in satisfaction of said mortgage lien; that Holloway was present, and heard said representation, and assented thereto; that afterwards, and for the purpose of injuring and defrauding plaintiff, the sheriff refused to apply the money so paid to the satisfaction of said mortgage, but returned upon the execution that he sold all the right, title, and interest of Hlatt in and to the property, subject to a mortgage in favor of A. B. Holloway for the sum of \$300 and costs; that the return was so made to injure and defraud plaintiff, and was false; that, since the plaintiff paid over to the said sheriff the said sum of \$425, the defendant Holloway has caused an order of sale to issue out of the superior court, commanding the said sheriff to sell all of the property so sold to plaintiff, and that, in pursuance of said order of sale, the sheriff threatens and is about to sell the whole of said property, to plaintiff's lasting injury and damage in the sum of \$500; and that, unless the sheriff and his codefendant be restrained from further action under said order of sale, the plaintiff will suffer great and irreparable injury. The defendants demurred to the complaint upon the grounds, among others, that it failed to state facts sufficient to constitute a cause of action, and that there was a defect of parties defendant. The court overruled the demurrer, and the defendants excepted. Carter then answered, denying the representations alleged in the complaint, and affirmatively averred that prior to the date of the sale Holloway had a mortgage lien upon said property, and that the goods were purchased by Hamilton at said sale subject to the lien of said mortgage, and that Hamilton had bought other property from Hlatt, the mortgagor, subject to the same mortgage, and had agreed with Hlatt to pay Holloway sufficient of the purchase price to satisfy said mortgage. Holloway separately answered, and likewise denied the alleged representations of the sheriff, and alleged that Hamilton bought this and other property without his procurement or consent, and subject to his mortgage, and that before the sale he told Hamilton not to buy the property unless he paid the mortgage, and that Hamilton bought other property from Hlatt, agreeing to pay the mortgage with part of the purchase price, but had failed so to do, and further alleging that if the injunction be granted he, Holloway, would never recover any money due him from Hlatt under said decree, and prayed judgment against plaintiff for dissolution of the preliminary injunction, dismissal of the complaint, and for damages and costs of the action. The plaintiff's reply was a general denial of the affirmative allegations of both answers. Upon these pleadings and issues the cause was tried by

the court. Findings of fact and conclusions of law were made and filed, and a decree rendered thereon perpetually enjoining both Carter and Holloway from enforcing the decree and order of sale; that Carter amend the return upon the execution to show that at the sale the property was sold for \$425, and this sum was received by him as sheriff to apply to the discharge of the decree in the Holloway cause, and that said sum be a trust fund with which to satisfy in full the decree in favor of Holloway, and that within 10 days Carter pay said sum into court, with legal interest from date of sale, to satisfy said decree, and in case of failure that execution issue therefor in favor of Holloway, and that plaintiff and defendant Holloway severally recover their costs from Carter, and that execution issue therefor. The defendant Carter gave written notice of appeal from the judgment and decree of the court, and every part thereof, and afterwards Holloway joined in his appeal.

After a careful consideration of the facts in this case and the law applicable thereto, we are unable to discover any grounds upon which the judgment and decree can be sustained. The complaint seems to have been framed on the theory that the plaintiff purchased at the execution sale the entire and exclusive property in the goods, instead of the mere interest of the execution defendant. But this theory is contrary to law, and therefore entirely indefensible. The statute provides that the interest of the mortgagor may be seized and sold, subject, however, to the mortgage. 1 Hill's Code, § 1659. And, generally, when a purchaser at an execution sale buys property which he knows is subject to a legal or equitable claim of a third person, the title he acquires is without prejudice to such claim. In speaking of the rights of purchasers in cases like this, Mr. Freeman lays down the law as follows: "But a purchaser at a sale under a judgment is, to the same extent as if he were purchaser at a private or voluntary sale, protected from claims previously acquired by third persons from the judgment debtor, of which he has no actual nor constructive notice. But if, at the time of the sale, the purchaser has actual notice of any legal or equitable right in a third person, or if, in the absence of such notice, the instrument evidencing such right is properly of record, or if possession is held under it, then the title acquired by the purchaser cannot prejudice the interests of such third person." 2 Freem. Ex'ns (2d Ed.) § 336. The court below must have deemed this an exceptional case, for its conclusion is at variance with the rule above stated. It found as facts that the sheriff, at the time of the execution sale, represented to plaintiff Hamilton that his bid of \$425 should, so far as the same was necessary, be applied to the satisfaction and discharge of the decree of foreclosure; that he refused to so apply it, but applied it to the satisfaction of the judgment

of Ninemire & Morgan, and in his return made it appear that he had sold the property subject to Hamilton's lien; and that Holloway was present, heard the aforesaid representation, and made no objection thereto. But, even upon that state of facts, it is difficult to understand why Holloway should receive nothing upon his judgment and decree, or why the sheriff should be restrained from executing the order of sale in the foreclosure proceedings. If the sheriff agreed to pay off and discharge Holloway's judgment with the proceeds of the sale of the very property upon which Holloway relied for security, why should Holloway have objected to the sale? All he desired was payment, and it made no difference to him whether Ninemire & Morgan sold the property and paid him, or whether he sold it himself, as he had a right to do under his decree of foreclosure, in satisfaction of his claim. Moreover, Holloway had no right to object to the sale of Hiatt's interest, for the law gave Ninemire & Morgan the right to sell that upon their execution, and there is no evidence that Holloway ever intended for a moment to relinquish his lien without payment of his claim. He even testifies that he notified Hamilton's agent not to buy the property unless he paid off the mortgage, and there is no evidence disputing him. Under these circumstances, to say that, because he did not further object to the sale, he thereby forever relinquished his lien, would be to extend the doctrine of estoppel by acquiescence beyond the limits of justice, equity, or reason. Valid liens should not be thus lightly set aside. If Hamilton expected that Holloway's mortgage would be paid out of the sum bid by him, why did he not make some effort to have it so applied? He says he relied upon the undertaking or representation of the sheriff, but he ought to have known, and is presumed to have known, that the sheriff, under the law, could not receive money on an execution in one case and pay it out in satisfaction of a judgment in another case with which he at the time had nothing whatever to do. The order of sale was not in his hands at that time, and he would have been guilty of official misconduct if he had made such an application of the funds. The law required him to pay it to the clerk of the court, and he did so, and returned the execution accordingly. 2 Hill's Code, §§ 467, 469, 507. Although he did all the law required him to do, he is nevertheless commanded by the decree of the court to pay a sum of money which is not in his possession or under his control and which he has no means of recovering, to his codefendant, Holloway, who did not ask for, and is not entitled to, any such relief. We are aware of no power or authority in the courts to compel a sheriff, or any other person, to do that which is contrary to law, even if he may have promised to perform the illegal act. But the fact is, the evidence does not show that the sheriff himself ever represented to the respondent

that the proceeds of the sale would be applied to the discharge of the Holloway decree and lien. If any such representations were made at all, they were made by the deputy sheriff, and were no part of his official acts or duties, and amounted to a personal engagement on his part for which the sheriff was in no way responsible. If the respondent is in such a position that he can show that he was damaged by the representation of the deputy, he must look to him for indemnity, and not to the sheriff. *Marshall v. Hosmer*, 4 Mass. 60; *Waterhouse v. Waite*, 11 Mass. 207; *Tobey v. Leonard*, 15 Mass. 200; 5 Am. & Eng. Enc. Law, p. 635, note 1.

It is said, however, that appellant Holloway was guilty of such laches, in withholding his order of sale for a period of five months, that it would now be inequitable to permit him to avail himself of it. But we fail to see any force in this suggestion. Our statute provides that execution may issue on a judgment of a court of record at any time, provided that, after the lapse of five years, the judgment must first be revived in the manner provided by law. 2 Hill's Code, § 464. An order of sale is, in effect, merely an execution. How, then, can it be said that such an order shall be of no effect or validity simply because, in the opinion of some one, it might, or ought to, have been issued at an earlier date? There is, manifestly, no merit in such a proposition. Upon the case made by the pleadings and proofs, it appears clear to us that the respondent is entitled to no relief in this action. The judgment will therefore be reversed, and the cause remanded, with instructions to dismiss the complaint.

HOYT, C. J., and SCOTT, DUNBAR, and GORDON, JJ., concur.

NORTHERN COUNTIES INVESTMENT TRUST, Limited, v. HENDER et ux.

(Supreme Court of Washington. Sept. 13, 1895.)

APPEAL—NOTICE—APPEAL BOND—AFFIDAVITS OF SURETIES.

1. Act March 8, 1893, § 4, provides that a party desiring to appeal to the supreme court may give notice in open court when the judgment is rendered. Code Proc. § 379, provides that, on trial of an issue of fact by the court, its decision, separately stating the facts found and conclusions of law, shall be given in writing, and filed with the clerk, and judgment on the decision shall be entered accordingly. *Held*, that in such a case judgment is not "rendered" till the findings and judgment, or at least an order for judgment, are filed with the clerk; the signing and dating of the findings is not enough.

2. Under Act March 8, 1893, § 6, declaring that an appeal shall be ineffectual unless an appeal bond be filed in the superior court within a certain time; and section 10, declaring that an appeal bond shall be of no force unless accompanied by the affidavit of the sureties, containing statements as to their responsibility,—appeal is ineffectual where there is no accompanying affidavit. *Dunbar, J., dissenting.*

3. The supreme court cannot, in the absence of statutory authority, allow amendment of an appeal bond or the giving of a new one.

Appeal from superior court, Garfield county; R. F. Sturdevant, Judge.

Action by the Northern Counties Investment Trust, Limited, against Henry Hender and wife, to foreclose a mortgage. Judgment for defendants. Plaintiff appeals. Appeal dismissed.

S. G. Cosgrove and M. M. Godman, for appellant. M. F. Gose, for respondents.

ANDERS, J. The respondents move to dismiss the appeal, for the alleged reason that the court has no jurisdiction to hear and determine the matters in controversy. The specific grounds for dismissal set forth in the motion are that no notice of appeal has been given, served, or filed herein as by law required; that the appeal bond is not in form or substance such as to render the appeal effectual; that the pretended bond filed herein is void, because none of the makers of said bond have justified as by law required, or at all; and that the guardian ad litem of defendant, Henry Hender, has not been made a party to the appeal, and no notice of the appeal has been served upon him.

It is provided in section 4 of the act of March 8, 1893, relating to appeals to the supreme court (Laws 1893, p. 120), that "a party desiring to appeal to the supreme court under the provisions of this act may, by himself or his attorney, give notice in open court or before the judge, if the judgment or order appealed from is rendered or made at chambers, at the time when such judgment or order is rendered or made, that he appeals from such judgment or order to the supreme court, and thereupon the court or judge shall direct the clerk to make an entry of such notice in the journal of the court. If the appeal be not taken at the time when the judgment or order appealed from is rendered or made, then the party desiring to appeal may, by himself or his attorney, within the time prescribed in section three of this act, serve written notice on the prevailing party or his attorney that he appeals from such judgment or order to the supreme court, and within five days after the service of such notice shall file with the clerk of the superior court the original or a copy of such notice, with proof or the written admission of the service thereof, and thereupon the clerk shall enter such notice, with the proof or admission of service thereof, in the journal of the court." It is conceded that the notice of appeal was given in open court, and the record shows that the notice was entered in the journal of the court by order of the judge. It was given in strict conformity to the statute, and there is no objection to it on the ground of informality. But the respondents insist that the notice was ineffectual, because it was not given at the time the judgment appealed from was rendered or made, and because said

judgment was not rendered at chambers; the latter ground being based on the untenable proposition that the notice in open court or before the judge is limited to judgments or orders rendered or made at chambers. The action was brought to foreclose a mortgage, and was tried by the court without a jury. The record discloses the fact that the appeal bond and the motion for a new trial were filed on September 12, 1894. It further appears that the notice of appeal was given at the time when the motion for a new trial was overruled, and when the court ordered judgment to be entered in favor of the defendants in accordance with the findings of fact and conclusions of law theretofore made. The statute, it will be observed, requires the notice of appeal, if given in open court, to be given at the time when the judgment or order appealed from is rendered or made, and the question is, when was the judgment and decree rendered in this case? The court made findings of fact and conclusions of law in accordance with section 379 of the Code of Procedure, which is as follows: "Upon the trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decisions shall be entered accordingly." The findings and the conclusions of the court, as well as the judgment based thereon, were dated September 11, 1894; and it is urged on behalf of the respondents that the judgment was rendered on that date, and that, therefore, the notice which was not given at that time was too late to effect an appeal. The record, however, discloses that neither the findings of fact, conclusions of law, nor judgment were filed until the 12th of September; and, inasmuch as the statute requires the decisions of the court in cases tried without a jury to be given in writing and filed with the clerk, it follows that the judgment was not rendered until it was filed in accordance with the order of the court. It is not the mere signing of the findings, but the filing, that is essential to the decision contemplated by the statute. The action was not determined until the findings and judgment, or at least an order for a judgment, were filed with the clerk. This is evident from the fact that, at any time before filing, the findings might have been changed by the court, or new findings substituted. See *Comstock Quicksilver Min. Co. v. Superior Court*, 57 Cal. 625, and *Adams v. Nellis*, 59 How. Prac. 385. As the notice of appeal was given at the time when the court ordered judgment to be entered, it follows from what we have said that it was given within the time contemplated by law; that is, when the judgment was actually rendered.

But we are forced to the conclusion that the objection to the appeal bond is well taken, and that the appeal was not perfected in the manner prescribed by law. The bond filed

by appellant in the court below was properly conditioned to effect the appeal, but as it was not accompanied by the affidavit of the sureties required by section 10 of the act of March 8, 1893, or by any affidavit whatever, it was absolutely without force, and was therefore, in effect, no bond at all. Section 6 of the act above mentioned provides that "an appeal in a civil action or proceeding shall become ineffectual for any purpose unless at or before the time when the notice of appeal is given or served, or within five days thereafter, an appeal bond to the adverse party conditioned for the payment of costs and damages, as prescribed in section seven of this act, be filed with the clerk of the superior court, or money in the sum of two hundred dollars be deposited with the clerk in lieu thereof. * * *". And in section 10 it is declared that "an appeal bond, whether conditioned so as to effect a stay of proceedings or not, shall be of no force unless accompanied by the affidavit of the surety or sureties therein, attached thereto, in which each surety shall state that he is a resident of this state and is worth a certain sum mentioned in such affidavit, over and above all debts and liabilities, in property within this state, exclusive of property exempt from execution, and which sums so sworn to by the surety or sureties shall be at least equal to the penalty named in the bond if there be but one surety, or shall amount in all to at least twice such penalty if there be more than one surety." In *Marshaw v. McDowell*, 89 N. C. 181, the court held that language similar in substance to that used in these sections was not directory merely, but mandatory, and that an appeal must be perfected in accordance with the requirements of the statutes or it will be dismissed. That the affidavits of sureties required by statute must accompany the bond to give it validity seems to be the settled doctrine of the courts. See *Bryson v. Lucas*, 85 N. C. 397; *Bailey v. Rutjes*, 91 N. C. 420; *State v. Wagner*, Id. 521; *Turner v. Quinn*, Id. 92; *Anthony v. Carter*, Id. 229; *Holcomb v. Teal*, 4 Or. 352; *Alberson v. Mahaffey*, 6 Or. 412; *State v. McKinmore*, 8 Or. 207; *Pencinse v. Burton*, 9 Or. 178. It is true that this court, actuated then, as now, by the desire to hear every case upon its merits, declined to dismiss the appeals in *McEachern v. Brackett*, 8 Wash. 652, 36 Pac. 690, and *Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140, and perhaps some other cases, in which the affidavits were defective in not stating some one of the particular things mentioned in the statute. In so doing, we were certainly more liberal than some other courts have been under similar provisions of law, and, perhaps, went beyond the strict letter of the statute. But, be this as it may, we here have a bond unaccompanied by any affidavit whatever, not one with a defective or informal affidavit merely, and hence this case is distinguishable from those above mentioned, and must be deter-

mined on the facts presented and the law applicable thereto. The law says that the bond before us is of no force, and it is the plain duty of the court to so declare it. To remedy the difficulty confronting them, the learned counsel for the appellant have tendered, and asked to have filed, in this court, a new bond, accompanied by a proper affidavit of the sureties. Whether such a bond as the law requires to be filed in the trial court within a limited time, can, after the expiration of that time, properly be filed in this court, is a question the solution of which depends upon the authority conferred upon the court to correct or supplement the record of the court below. This is an appellate tribunal, so far as this and kindred cases are concerned, and it can amend the records sent up to it for review only in so far as it is thereunto authorized by statute. Accordingly, it is stated in 1 Enc. Pl. & Prac. p. 993, that appellate courts cannot allow a substantially defective appeal bond to be amended without statutory authority, and the cases cited seem ample to sustain the proposition.

What, then, is the statutory authority of this court in respect to the matter before us? It has authority to allow all amendments in matters of form curative of defects in appellate proceedings (*Laws 1893*, p. 129, § 19); but the defect under consideration is not merely one of form, but of substance, and therefore that provision does not meet the present emergency. Again, we are directed to disregard all technicalities, and hear, upon their merits, all cases brought before the court in the manner provided by law. But that cannot be said to be a technicality which goes to the substance of the appeal. In fact, by the express terms of our statute, this court only acquires jurisdiction of an appeal upon the taking of an appeal by notice as therein prescribed, and the filing of a bond to render the appeal effectual. *Laws 1893*, p. 128, § 16. As we have seen, the bond filed to render the appeal effectual in this instance was without force, and it may well be said that this court has not acquired jurisdiction to hear this appeal. The filing of the bond to perfect the appeal was just as necessary as the giving of notice of the appeal within the time limited, and the one can no more be dispensed with than the other. *Works, Courts*, p. 734. In many of the states provision is made by law for the amendment of a defective appeal bond or the giving of a new one, but we find no such provision in our statute, nor any provision or provisions which can be construed as giving the court the power to allow the filing of a new bond, under such circumstances as appear in this case. The appeal must be dismissed, and it is accordingly so ordered.

GORDON and SCOTT, JJ., concur.

HOYT, C. J. (concurring). In my opinion, the conclusion of the majority of the court is

inconsistent with the holding in *McEachern v. Brackett*, 8 Wash. 652, 38 Pac. 690, and *Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140, referred to therein, and I think the better practice would have been to retain this case for hearing upon the merits, upon the authority of those. A construction of a statute relating to practice announced by this court should control decisions made thereafter, as certainty is the important thing.

However, as the conclusion of the majority in this case is, in my opinion, the correct one, as shown by my dissent from the opinions in the cases above referred to, I am content to concur in the result.

DUNBAR, J. (dissenting). I fully indorse what Chief Justice HOYT has said in the first paragraph of his concurring opinion, concerning the importance of uniform holdings on questions of practice; and, as I am satisfied with the rule laid down in the former decisions of this court above referred to, I am compelled to dissent from the conclusion reached by the majority in this case.

STATE ex rel. RUTH v. PRATHER et al.,
Board of County Commissioners.
(Supreme Court of Washington. Sept. 27,
1895.)

HIGHWAYS—RECORDING SURVEYS.

Laws 1895, c. 77, § 8, provides that all field notes shall be collected by the surveyor, perfected, and recorded in his office, in the same manner as records of surveys are required to be made by the provisions of this act. Section 5 provides that each county surveyor shall record in a suitable book all surveys made by him and his deputies, except such as are made for a temporary purpose and surveys of highways and village plats. *Held*, that a county surveyor has no authority to record notes and surveys of highways. Gordon, J., dissenting.

1 Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Petition for mandamus by the state, upon the relation of A. S. Ruth, against Thomas Prather and others, constituting the board of county commissioners. From a judgment for petitioner, defendants appeal. Reversed.

Milo A. Root, for appellants. Troy & Falknor, for respondent.

DUNBAR, J. This case involves simply the construction of a statute, and admits of very little discussion. We think, however, that construing section 8, c. 77, Laws 1895 (which provides that "all field notes," etc., "shall be collected by the surveyor, perfected and recorded in his office in the same manner as records of surveys are required to be made by the provisions of this act"), in connection with section 5¹ of the same act (which ex-

cepts, from the record which the surveyor is authorized to make, surveys of highways), the construction placed upon the statute by the lower court is not justified, and that the exception in section 5 must be considered to apply also to the provisions of section 8. The judgment will be reversed, and the cause remanded to the lower court, with instructions to sustain the demurrer to the complaint.

HOYT, C. J., and ANDERS and SCOTT, JJ., concur. GORDON, J., dissents.

CHAPIN v. KENOYER et al.

(Supreme Court of Washington. Sept. 10,
1895.)

SUPREME COURT—JURISDICTION.

Where lumber upon which plaintiff claimed a lien was removed by defendant, and rendered incapable of identification, the action is one for damages, and the supreme court has no appellate jurisdiction thereof if the amount involved is less than \$200.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by E. S. Chapin, by W. W. Chapin, his next friend, against John Kenoyer and others, to recover for services rendered. Plaintiff had judgment, and certain defendants appeal. Dismissed.

Black & Leaming and Burke, Shepard & Woods, for appellants. Bruce, Brown & Cleveland, for respondent.

SCOTT, J. The plaintiff began an action, alleging, in substance, that the defendants Kenoyer employed him to render services in the manufacture of timber into shingles, and that pursuant thereto he performed labor for said defendants in manufacturing about 150,000 shingles, and that there was due him therefor the sum of \$96.91, for which he was entitled to a lien upon the shingles manufactured; and that he had filed the necessary notice of such claim, but that the defendants Underwood and the Great Northern Railway Company, having full knowledge of his rights, did, without his consent, remove, elogn, and take away 145,000 of said shingles, and rendered the same impossible of identification, without paying the amount of his claim; and he prayed judgment therefor, with interest and attorney's fees, against the contractors, and also against the other defendants, under the provisions of section 20, p. 434, Laws 1893. Issue was joined, and a trial had, and judgment rendered for the plaintiff in the sum of \$137.90. Thereafter the defendant the Great Northern Railway Company petitioned the court to set aside said judgment, which petition, after hearing, was denied, whereupon the defendant last named and the defendant Underwood appealed from the original judgment in the action, and also from the judgment of the court denying the petition to vacate. When the cause was called for argument here a motion

¹ Laws 1895, c. 77, § 5, is as follows: "Each county surveyor shall record in a suitable book all surveys made by him and his deputies, except such as are made for a temporary purpose, and surveys of highways and village plats."

was made by the respondent to dismiss said appeals, on the ground that this court had no jurisdiction thereof, the amount in controversy being less than \$200. We think this motion well taken. The property having been removed, and rendered impossible of identification, the action was substantially one for damages. Dismissed.

HOYT, C. J., and ANDERS, GORDON, and DUNBAR, JJ., concur.

STATE ex rel. DODGE v. LANGHORNE,
Judge.

(Supreme Court of Washington. Sept. 19,
1895.)

MODIFICATION OF JUDGMENT.

After the relator interpleaded in an insolvency proceeding, and recovered judgment on an interest in a fund arising from another judgment which had been assigned to him by the assignors, the court cannot, upon the petition of a witness in the action wherein said fund was recovered, modify the judgment in favor of relator so as to compel relator to pay to said witness his fees, though there was an agreement between said assignors and relator that the relator was to pay a portion of the costs.

Petition by the state, upon the relation of P. H. Dodge, for writ of prohibition to restrain W. W. Langhorne, judge, from taking any further proceedings in the matter of enforcing a certain order. Writ issued.

Edward F. Hunter, for relator. Reynolds & Stewart, for respondent.

ANDERS, J. In March, 1891, P. H. Dodge, the relator herein, recovered judgment in the superior court of Lewis county, against Box & Rhodes, known as the Chehalis Shingle Company, for the sum of \$1,338.85 and costs. On July 27, 1891, the shingle company satisfied that judgment by assigning to the relator a one-third interest in an unliquidated claim for damages which they had against the firm of Webster, Kelso & Dare. Subsequently, and according to agreement between the relator and the Chehalis Shingle Company, the latter commenced an action in the superior court against Webster, Kelso & Dare to recover the amount of their claim. This action resulted in a judgment for the plaintiffs for the sum of \$1,878 and costs, taxed at \$229.90, which judgment was rendered July 29, 1892. On March 7, 1893, the judgment and interest were paid in full by the defendants, and then amounted to \$1,829.76. During the pendency of this action the Chehalis Shingle Company made an assignment for the benefit of their creditors, under the state insolvency law, and one Newland was appointed assignee. There being a disagreement between the relator, the assignee, and some other parties as to the relator's interest in this fund, the whole thereof was, by order of the court, delivered to the clerk to be held

for future distribution. On March 13, 1893, the relator herein commenced an action, which he termed an intervention, but which was more in the nature of an interpleader, to recover the one-third interest in the amount of this judgment which he claimed under the assignment from the Chehalis Shingle Company; and on June 30, 1893, he recovered a judgment for the sum of \$632.54, which sum was accordingly paid him by the clerk of the court. By agreement between the relator and the Chehalis Shingle Company, the relator was to pay one-third of all the costs and expenses of the suit against Webster, Kelso & Dare, and the judgment which he recovered in the proceeding in intervention included certain witness fees which he alleged that he had theretofore paid. The judgment and decision of the court in favor of the relator was not appealed from by any of the parties interested in the proceeding, but on January 26, 1894, one James McAndrews presented to the judge of said court a petition reciting that he was a witness for the plaintiff in the action brought by the Chehalis Shingle Company against Webster, Kelso & Dare, and that his fees, charged up in the cost bill in that action, and to which he was entitled, amounted to the sum of \$58.20, which sum has not been paid to him, or any part thereof, except the sum of \$23.75, which was paid to him by said Chehalis Shingle Company October 26, 1891; that said Dodge wrongfully claimed and received from the clerk of this court the sum of \$58.20, witness fees belonging to petitioner, and that he had not since paid to the petitioner the said sum of \$58.20, or any part thereof; that of the amount so wrongfully withdrawn from the registry of the court by the said Dodge, the sum of \$34.45 belonged to and should be paid to your petitioner; and the petition prayed for an order directing said Dodge to return into court said sum of \$58.20, withdrawn by him, and that the court order and direct that the amount due to this petitioner for his witness fees, when paid into court, be paid to the petitioner. This petition was verified by the said James McAndrews. The judge of said court thereupon made an order directing the relator to appear before the court on February 5, 1895, to show cause why the prayer of said petition should not be granted, and further ordered and directed that a copy of the order should be delivered to the relator, or to his attorney, Edward F. Hunter. In accordance with the order of the court, a copy of the petition and order was served upon the attorney for the relator on January 26, 1894, as shown by his admission indorsed on the original petition and order. On February 5, 1894, the relator, by his attorney, filed a motion to quash the court's citation, on the grounds (1) that same was not issued in the name of the state of Washington; (2) that it is not signed by the clerk of said court; and (3) that it has not the seal of the court. The relator appeared specially for the purpose of

this motion. The court overruled the motion to quash, and the relator duly excepted. Nothing further was done in the matter until April 24, 1895, when a notice of motion for an order requiring the relator to pay the money into court was served upon him, requiring him to appear before the court on May 8, 1895. The relator failed to appear in response to that notice, and the court made an order requiring him to pay the money to the clerk of the court, and directed that he be cited to appear in court on the 3d day of June, 1895, to show cause, if any he had, why he had not complied with the order of the court. In response to this order, the relator and his attorney appeared in court and filed an answer setting up the previous orders and proceedings of the court, including the judgment in his favor in the proceeding in intervention, and claiming that that judgment was final and conclusive, and that the court did not have jurisdiction at the time of issuing the citation, or at any time since, over the subject-matter or the person of the relator. The petitioner, by his attorneys, moved to strike this answer from the files for the reason that it was not responsive to the allegations of the petition, which motion was granted by the court, and thereupon the court entered a peremptory order that the relator pay the said sum of \$58.20 to the clerk of the court. A stay of proceedings was then had, by agreement of the parties, for the period of 15 days. The relator having failed to comply with this last order of the court within the time limited, an affidavit was presented to the court by one David Stewart, attorney for the petitioner, stating the fact of noncompliance, and requesting the court to make an order compelling the relator to comply with the orders of the court, and to punish him as for a contempt of court. Upon the presentation of this affidavit and a motion founded thereon, the court directed that a warrant of arrest issue for the purpose of bringing the relator before the court to show cause why he should not be adjudged guilty of contempt, which was accordingly done. At this stage of the proceedings, the relator applied to this court for a writ of prohibition to restrain the court from further proceeding in the matter of enforcing the order.

It is contended here by the relator, as it was contended at all stages of the proceedings in the court below, that the court had no jurisdiction to make the order which it was attempting to enforce. On the other hand, it is insisted on behalf of respondent that the court had jurisdiction to hear and determine the questions presented by the petition of McAndrews, for the reason that the relator had intervened in the insolvency proceeding of the Chehalis Shingle Company, and was therefore bound by every order made therein of which he had notice. But it is difficult to perceive how the fact that he intervened in that proceeding can confer jurisdiction upon the court in this matter. We

think the question of jurisdiction must be determined without reference to that action. It must be recollected that the petitioner, McAndrews, bases his right to relief upon the fact that he was a witness in the case of the shingle company against Webster, Kelso & Dare, and was therefore entitled to a portion of the costs taxed in favor of the plaintiffs in that case as witness fees. He was not a party either to that action or to the insolvency proceedings, and if the object of his petition was to set aside or modify the judgment of the court in favor of the relator, then it is evident that he did not proceed in accordance with the provisions of the statute. Furthermore, not having been a party to the proceeding in which he has assumed to entitle his petition, he had no right to move to set aside the judgment in any event. It is only a party to an action who is entitled to move to set aside the judgment. See Code Proc. tit. 14. If the petitioner had any claim for fees or anything else against the relator, it was his duty to institute some proceeding in accordance with law directly against the relator for the recovery of the amount of his claim. This he did not do in this instance. His petition cannot be considered a complaint, because it is not such either in form or substance, and apparently was not intended to be such. Conceding all of the facts stated in it to be true, it is manifest that he has no cause of action of any character whatever against the relator. He has, by his own showing, no interest in the costs taxed in the judgment against Webster, Kelso & Dare, as a witness or otherwise. Now, it has been said by the highest authority that jurisdiction is the power to hear and determine a cause (*U. S. v. Arredondo*, 6 Pet. 691); but the power to hear and determine must be exercised in accordance with the modes prescribed by law. And though the jurisdiction of a court may be undoubted, its decision may nevertheless be invalid for the reason that it is not such as is authorized by law. As to jurisdiction, it is said by a text writer of repute that: "There must be a right in dispute between two or more parties; a proceeding, commenced under the proper rules of the law; process, formal in its character, served on the opposite party or parties to the proceeding; the subject-matter must be one that the court is empowered to hear and determine; the parties must have the right to be heard, and be within the jurisdiction of the court, or the property, if that be the subject of the action, must be within such jurisdiction; and the owner or person having the right to claim it, or to be heard, must be notified as required by law of the pendency of the proceeding." *Brown, Jur.* § 1. The same writer (section 3), in speaking of the mode of exercising judicial power, further says: "Ordinarily there must be a petition or declaration, filed in the tribunal having the capacity or jurisdiction to hear, try, and determine the particular ques-

tion involved, and this must set forth a state of facts showing that a controversy exists between the plaintiff and defendant, that the defendant or his property is within the jurisdiction of the court, or may be brought by process within it, and that the plaintiff has the right or capacity to sue, setting forth such a right to the subject of the action as gives a sufficient interest in the plaintiff or complainant to bring the suit." And in *Windsor v. McVeigh*, 93 U. S. 274, the court says: "A departure from established modes of procedure will often render the judgment void. Thus, the sentence of a person charged with felony, upon conviction by the court without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is that the courts are not authorized to exert their power in that way."

Even if it be conceded that, in this instance, the court had jurisdiction of the subject-matter and of the relator, it does not follow, according to the principles laid down in the above authorities, that it had the right or power to make the order which it is attempting to enforce. In fact, it appears that the court clearly transcended its power in making the order. It assumed to act without the filing of a complaint, and to determine without investigation or proof. This was an attempt to give effect to the will of the court, rather than that of the law. When the court struck out the answer of the relator, which was certainly relevant and material, as it was in effect a plea to the jurisdiction of the court, it committed error, and when it entered an order without a hearing its act was contrary to a fundamental principle of law. We have seen that, in order to try and determine a controversy, the defendant must be brought before the court by some process known to the statute. In this case that was not done. The order of the court was substituted for the summons provided for by law, and even the substituted process or "citation" should have been quashed on motion of the relator for the causes stated therein. It is evident that the petitioner could have no right to any part of the judgment in a cause by reason of his having been a witness therein. It is also evident, from the record and the law governing the procedure of courts, that the learned court exceeded its power and jurisdiction in making the order in question; and, the order being illegal and invalid, it follows that the relator cannot be punished for a contempt in violating it. See *People v. O'Neil*, 47 Cal. 109; *Ex parte Hollis*, 59 Cal. 405; *Brown v. Moore*, 61 Cal. 432; *Leopold v. People* (Ill. Sup.) 30 N. E. 348. Let the writ of prohibition issue.

HOYT, C. J., and SCOTT, DUNBAR, and GORDON, JJ., concur.

MACKAY v. ELWOOD.

(Supreme Court of Washington. Sept. 18, 1895.)

CORPORATIONS—ACTION ON SUBSCRIPTION BY ASSIGNEE.

1. Where it was alleged, in an action by an assignee to recover the unpaid balance on a subscription to stock, that the corporation was duly organized and existing, it was not necessary to allege that all the capital stock had been subscribed.

2. It is no defense to an action by an assignee to recover the unpaid balance on a subscription to stock that no call had been made by the directors prior to the assignment, where the assets of the corporation, including unpaid subscriptions, were insufficient to meet its liabilities.

3. In an action to recover the unpaid balance to a subscription for stock it cannot be shown as a defense under a general denial that all the capital stock was not subscribed for.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by W. D. Mackay, assignee of the W. J. Pratt Hardware Company, against John Elwood, to recover the unpaid balance of the purchase price of certain stock. From a judgment for plaintiff, and from an order denying his motion for a new trial, defendant appeals. Affirmed.

Fairchild & Rawson, for appellant. Kerr & McCord, for respondent.

GORDON, J. In 1890 the Pratt Hardware Company filed its articles of incorporation pursuant to the laws of this state, and commenced business in the city of Whatcom, with a capital stock of \$40,000, divided into 400 shares of the par value of \$100 each. In June, 1892, a receiver was appointed for said corporation, who qualified, and took possession of its assets. Thereafter said corporation made an assignment of all of its assets to Charles Requa, for the benefit of all its creditors pro rata in proportion to their respective claims, which deed of assignment was executed in pursuance of the resolution of the board of directors of said corporation, acting under the authority and direction of its stockholders. The assignee qualified, and began proceedings to remove the receiver, and to possess himself of the property of the corporation, pending which proceedings the respondent, Mackay, was selected to act as assignee by the creditors of said corporation at a meeting called for that purpose. Thereupon said Requa (the original assignee), in pursuance of an order of court, and of a mutual arrangement between all parties concerned, made in open court, deeded all the property of said corporation to respondent, and the receiver surrendered to him the possession thereof. Said Mackay qualified as assignee, and proceeded to dispose of the property of the estate, realizing therefor about \$7,000; and claims of creditors were filed with and allowed by him aggregating upwards of \$21,000. At the time of said as-

assignment there was due the corporation from various stockholders upon unpaid stock subscriptions about \$10,000, which amount (if fully paid in), together with the other assets of the corporation, would have been inadequate to discharge the indebtedness owing by the estate. The assignee having made application to the superior court of Whatcom county for that purpose, a call was issued for the balance remaining unpaid upon subscriptions to the stock of said corporation. Appellant was a subscriber originally to 10 shares of said stock (of the par value of \$1,000), and thereafter, and in addition to said subscription, had agreed orally to take an additional 40 shares of said stock (amounting to the par value of \$4,000), and had paid into the treasury of said corporation, on account of the said subscription, the sum of \$3,750, prior to the making of said assignment, leaving an unpaid balance of \$1,250, to recover which last-mentioned sum this action (after the making of said call, demand, and refusal of payment) was instituted in the superior court. A demurrer to the complaint having been overruled, appellant answered by a general denial; and from a judgment on the verdict of a jury in favor of the respondent, and from an order denying appellant's motion for a new trial below, this appeal was taken.

It is first contended that the court below erred in overruling the demurrer to the complaint, and counsel for appellant urges in this court that said complaint is defective in that it does appear therefrom (1) that the capital stock of said corporation had been all subscribed; (2) that it affirmatively appears that at the time of the execution of the deed by the corporation to Requa no call had been made by the trustees for the balance remaining unpaid upon appellant's stock subscription. In answer to the first objection, it is sufficient to say that, for the purposes of this action, it was not necessary for the pleader, in framing his complaint, to allege that all of the stock of the corporation had been subscribed, nor to anticipate defenses growing out of irregularities in the organization of the corporation. The complaint, among other things, alleges that the "W. J. Pratt Hardware Company is, and at and during all the time hereinafter mentioned has been, a duly-organized and existing corporation." This allegation we think sufficient. Boone, Code Pl. § 138, and authorities there cited. As a general rule, it is well settled that a want of capacity to sue must appear from the facts that are stated, and not from the omission of facts that would have exposed such want. *Id.* § 48. The remaining objection to the complaint involves necessarily a consideration of the nature and effect of the original deed of assignment by the corporation to Requa. The appellant insists that the law of this state governing assignments for the benefit of creditors has no application to insolvent corporations, and such

was the holding of this court in *Nyman v. Berry*, 3 Wash. St. 734, 29 Pac. 557, in construing the provisions of chapter 143 of the Code of 1881. An examination convinces us that the reasons for the holding in *Nyman v. Berry* are as applicable to the existing statute as to the one under consideration in that case, and that the contention of appellant in this regard must be upheld. But respondent insists that the assignment is sufficient and effectual as a common-law deed of assignment. In *Nyman v. Berry*, supra, this court held that in this state an insolvent corporation might make a common-law deed of assignment of all its property to a trustee for the benefit of all its creditors. That a corporation, unless restrained by the act under which it is incorporated, or prevented by other provision of statute, may assign its property to a trustee, to sell the same, and apply the proceeds to the payment of its debts, is fully sustained by the authorities. *Ardesco Oil Co. v. North American Oil & Mining Co.*, 66 Pa. St. 375; *De Ruyter v. St. Peter's Church*, 3 Barb. Ch. 119; *Robins v. Embry*, Smedes & M. Ch. 207; *Dana v. Bank*, 5 Watts & S. 223; *Hartun v. Bishop*, 3 Wend. 13; *Lenox v. Roberts*, 2 Wheat. 373. The appellant seems to concede that the assignment to Requa was effectual as a common-law assignment, but contends that a stockholder is not liable on a stock subscription until after a call or assessment is made by the directors of such corporation; and that, inasmuch as no call therefor had been made at the time of the assignment to Requa, his liability had not ripened into an obligation upon which an action could be maintained, and was not at that time an existing asset, and did not pass by the deed to the trustee. We are unable to find any authority that will support this contention. 1 Hill's Code, § 1511, provides: " * * * Each and every stockholder shall be personally liable to the creditors of the company, to the amount of what remains unpaid upon his subscription to the capital stock, and not otherwise." It has long been the settled rule in this country that the assets of a corporation constitute a trust fund for the payment of all its creditors, and every stockholder is conclusively charged with notice of the trust character which it attaches to the capital stock. *Clapp v. Peterson*, 104 Ill. 26; *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944; *Bank v. Douglass*, 1 McCrary, 86, Fed. Cas. No. 14,375. The supreme court of the United States, in *Sanger v. Upton*, 91 U. S. 56, say: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. * * * It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the

same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation." The authorities upon this proposition are overwhelming and conclusive. *Carran v. Arkansas*, 15 How. 304; *Slee v. Bloom*, 19 Johns. 456; *Briggs v. Penniman*, 8 Cow. 387; *Ward v. Manufacturing Co.*, 16 Conn. 598; *Fowler v. Robinson*, 31 Me. 189; *Bank v. Douglass*, supra; *Walt, Insolv. Corp.* 141.

Nor can the appellant—a stockholder of an insolvent corporation—be heard to urge the objection that the directors of his company failed to make a call for the balance remaining unpaid upon the subscription, where, as here, it is established that the indebtedness of the corporation largely exceeded its corporate assets, inclusive of unpaid subscription. Upon this point the supreme court of the United States, speaking by Mr. Justice Strong, in *Hatch v. Dana*, 101 U. S. 205, say: "Assuming that such a clause in the subscription ['payable as called for by the company'] meant more than an agreement to pay on demand, and that it contemplated a formal call upon all subscribers to the stock of the company, the subscriptions were still in the nature of a fund for the payment of the company's debts, and it was the duty of the company to make the calls whenever the funds were needed for such payment. If they were not made, the officers of the company violated their trust, held both for the stockholders and the company; and it would seem to be singular if the stockholders could protect themselves from paying what they owe by setting up the default of their own agents. * * * It is well settled that a court of equity may enforce payment of stock subscriptions though there have been no calls for them by the company." We think, also, that from the time of an assignment by a corporation, the obligation of each stockholder to make payment of the amount remaining unpaid on his subscription to stock, or so much thereof as might be necessary to satisfy the indebtedness of the corporation, must be treated as a debt that is presently due because, after the assignment, no power remains in the directors to make a call, and it would be contrary to all considerations of right to permit the stockholder thereby to avoid making payment for his stock as against creditors of the corporation. But, however this may be, a call was made by direction of the court prior to the institution of this suit, and this was at least sufficient. *Sanger v. Upton*, supra; *Cook, Stock & Stockh.* (2d Ed.) 207; *Marson v. Deither* (Minn.) 52 N. W. 38. In the case last cited, the court say: "The cause of action alleged is founded on the subscription contract. Of course, the money did not become due or payable until a call had been made by the

directors, or some authorized demand for payment made, equivalent to such a call. But this is but a step in the process of collection, and the order of court, which was equivalent to a 'call,' was pleaded, not as the basis of defendant's liability, but to show that the money had become due and payable according to the terms of the contract. The authority and jurisdiction of the court in which the insolvency proceedings were pending to make an order requiring payment of unpaid stock subscriptions, as the directors might have done before the insolvency proceedings, is so well established as hardly to require the citation of authorities. The court will, in such cases, do, in behalf of creditors, what it is the duty of the corporation to do in respect to calls, and may itself make the call, although, by the terms of the contract of subscription, the money is payable on the call of the directors." We think that the deed from Requa to the respondent was, under the circumstances of this case, sufficient to invest him with all the rights, and subjected him to all of the duties and responsibilities, imposed upon Requa by the original deed. In any event, the respondent, pursuant to the arrangement already noticed, undertook to execute the trust, and has nearly completed it, and the appellant is not in a position to assail his right to do so. The demurrer was properly overruled.

The other errors complained of need but little attention. They relate mainly to objections at the trial, raising in different forms the questions which have already been considered in this opinion. The court did not err in overruling the motion for nonsuit, nor in denying appellant's request for a peremptory instruction in his favor at the close of the evidence. Upon the trial, the appellant was permitted (over the objection of respondent at the time) to offer proof that all of the capital stock of the corporation had not been subscribed, and in rebuttal the respondent submitted testimony tending to show acts and conduct upon the part of the appellant amounting to an estoppel. We think it very clear that under the pleadings the appellant was not entitled to show that all of the capital stock had not been subscribed. That question was not involved in the issue joined, and, while a good defense when properly set up, could not be litigated under a general denial. Hence the proof should have been excluded, and appellant cannot be heard to complain of the court's instructions to the jury as to what acts and conduct would estop the appellant from urging the nonsubscription of all of the capital stock as a defense. The instruction complained of was more favorable to the appellant than the condition of the pleadings entitled him to. We may add that it is not apparent that the instruction was prejudicial to the appellant, even were we to hold that the inquiry to which it was applicable was a proper one for the consideration of the jury. Finding

no reversible error in the record, the judgment is affirmed.

HOYT, C. J., and ANDERS, J., concur.

COCHRANE et al. v. KING COUNTY et al.
(Supreme Court of Washington. Aug. 19, 1895.)

REPEAL OF STATUTE—ERECTION OF COUNTY BUILDINGS.

1. Code 1881, § 2683, provided that the county commissioners should submit an estimate for county buildings to the people, and, if a majority voted in favor of erection, should levy and collect a special tax in the same manner as other county taxes are collected. Section 2684 provided that the act should not prevent the commissioners from erecting buildings when there were funds in the treasury sufficient for that purpose. Act Feb. 3, 1886, amended section 2683 of the Code of 1881, but left the above provision in such section unchanged. Laws 1887-88, p. 74, relating to the same subject-matter, provided that the commissioners could incur an indebtedness not exceeding 1 per cent. of the value of the taxable property of the county for the purpose of erecting county buildings without submitting the question to a vote of the people, and expressly repealed Act Feb. 3, 1886. *Held*, that Code 1881, §§ 2683, 2684, were also repealed.

2. Act March 21, 1890, relating to the same subject-matter as Acts 1887-88, p. 74, and providing that the county commissioners may incur indebtedness to the extent of 1½ per cent. for general county purposes without submitting the question to a vote of the people, does not repeal the latter act, but, in case it did so operate, would not revive Code 1881, §§ 2683, 2684, which were repealed by Acts 1887-88, p. 74.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by William Cochrane and others against the county of King and others, to restrain the carrying out of county contracts, and the payment of warrants pursuant thereto. Judgment for defendants, and plaintiffs appeal. Affirmed.

Greene & Turner, for appellants. White, Munday & Fulton and S. H. Piles, for respondents.

HOYT, C. J. This action was brought by certain taxpayers of King county against such county, its board of county commissioners, treasurer, and auditor, and W. A. Ritchie and John Rigby, for the purpose of having certain contracts made in behalf of said county with said Ritchie and Rigby declared invalid, and to restrain the officers of the county from further proceeding in the execution of said contracts, and the treasurer from paying the warrants already issued in payment of services rendered in pursuance thereof. A demurrer to the complaint was sustained by the superior court, and judgment rendered thereon dismissing the action. The contracts in question had reference to the erection of a building for the county to be used in the care and maintenance of its paupers. It appeared from the allegations of the complaint that there was no money on hand to pay for the

erection of the building, and that by the terms of the contracts the services performed in its erection were to be paid for by warrants drawn upon the county treasurer. It was further alleged in the complaint that at no time had said defendants Gasch, Wooding, and Rutherford, or any of them, as county commissioners or otherwise, ever estimated the cost of said building and submitted the same to the people of their county at the then next general election, or given notice that the same would be submitted at any election, nor had the same ever been submitted to or voted upon by the people of the county.

It is evident, from the language of the complaint, that it was drawn upon the theory that sections 2682-2684 of the Code of 1881 were in force, and that by virtue of their provisions it was not within the power of the board of county commissioners to provide for the erection of the building without having first submitted the question to the people, as provided for in said section 2683. If the sections above referred to were in force, there was foundation for the theory upon which the complaint was drawn, though it might be an open question, even then, whether or not their provisions had any reference to the incurring of indebtedness by the board of county commissioners for any proper county purpose. It might be contended that the only thing that was prohibited, in connection with the erection of such buildings, was the levy of a special tax therefor. Neither of the sections in any manner refers to the contracting of indebtedness. The first provides that the board of county commissioners shall have no power to levy a special tax except in the manner hereinafter provided. The second provides that, if they think the public good requires a county building, they shall submit the estimate thereof to the people, and if a majority vote in favor of the proposition, shall levy and collect a special tax in the same manner as other county taxes are collected. The third provides that nothing in the act shall be so construed as to prevent the board of county commissioners from erecting such buildings when there are funds in the treasury of the county sufficient for that purpose. It is clear that neither the first nor second section in any manner relate to the incurring of indebtedness for county purposes, but it might be held that the third only authorized the erection of such buildings (except in pursuance of the provisions of the preceding section) when there were funds in the treasury sufficient for the purpose, and by inference prohibited the incurring of any indebtedness in behalf of the county for that purpose. It is not necessary for us to determine as to whether or not these sections prohibit the board of county commissioners from running the county in debt in the erection of county buildings. That question was only suggested upon the argument, and what we have said has not been because of the

necessity of deciding the question, but for the reason that the provisions in that regard might have some influence upon the question to which the argument was mainly directed. That was as to the effect of subsequent legislation upon said sections of the Code. February 3, 1886, an act was passed amending section 2683 (Laws of 1885-86, p. 172), but such amendment left the section, so far as the questions under consideration are concerned, substantially the same as it was before. In 1888 another act was passed (Laws 1887-88, p. 74), which, it is claimed on the part of the respondents, repealed by implication all of the sections of the Code above referred to. On the part of the appellants it is contended that such act had no such effect. They found this contention largely upon the fact that there was no general repealing clause contained in the act, while there was a special repeal of the act of February 3, 1886. The provisions of the act under consideration are such that it is clear that the legislature intended to affect other sections of the Code than the one specially repealed. This being so, it must be held that the object of the legislature in specially repealing the act of 1886 was to put all of the sections of the Code intended to be affected upon the same basis, so that they would be affected in a like manner by the provisions of the act, and all repealed so far, and only so far, as inconsistent with its provisions. This being so, it follows, upon familiar principles, that sections 2683 and 2684 were repealed by the act if it in substance related to and covered the whole of the same subject-matter. An examination of its provisions compels us to agree with the claim of the respondents that the subject-matter embodied in said sections 2683 and 2684 was so covered by the provisions of the act that they were repealed thereby; and it follows that, after its enactment, the powers of the board of county commissioners in relation to the incurring of indebtedness for all county purposes, including the erection of buildings for the county, were governed thereby. And since it is clear that thereunder the board of county commissioners could incur an indebtedness not exceeding 1 per cent. of the value of the taxable property of the county for the purpose of erecting a county building without the submission of the question to a vote of the people, and since there is no allegation in the complaint that the indebtedness to be incurred in the erection of the building in question, added to all the other indebtedness of the county, would exceed 1 per cent. of the valuation of its taxable property, it must follow that, if this law was still in force, the county commissioners did not exceed their authority in letting the contracts in question, and that the proceedings thereunder, and the warrants issued in pursuance thereof, were legal and of full force.

The only statute which, it is claimed, had any effect upon this one is that of March 21,

1890 (Sess. Laws 1889-90, p. 37). This statute provides that a county, by its board of supervisors, may incur indebtedness to the extent of $1\frac{1}{2}$ per cent. for general county purposes without submission of the question to a vote of the people. It also contains a provision that further indebtedness may be incurred for strictly county purposes when authorized by such a vote. This act contains no repealing clause, and if it had any effect on the act of 1886, it was by implication only. If it had the effect of repealing it, it was because the entire subject-matter was enacted upon, and if this was so, the effect of such repeal would not be to revive the sections of the Code repealed by the act of 1886, as contended by the appellants. If the act of 1886 had been specially repealed in one not covering its entire subject-matter, such contention of the appellants could be successfully maintained. But it is evident that the effect of a repeal, flowing from the fact that the entire subject-matter of the act had been included in a subsequent statute, would not be to revive a former statute, which had itself been repealed in the same way. Nor would a different result be reached if the contention of the appellants that the act of 1890 only modified that of 1886 should be sustained. In our opinion, the act of 1890 was intended by the legislature to cover the entire subject of the incurring of indebtedness by counties for general county purposes, and that the fact that the term "strictly county purposes" is used in one section, and "general county purposes" in another, has no effect upon the objects for which the indebtedness may be incurred. Under its provisions, the board of county commissioners, without a vote, may incur indebtedness not exceeding $1\frac{1}{2}$ per cent. for any proper county purposes, and when approved by a vote of the people may incur indebtedness for like purposes to the extent of 5 per cent. of the valuation of the taxable property of the county. It follows that the officers of the county were acting in pursuance of the authority conferred by the act of 1886 or that of 1890, and that in either case their acts were authorized by the statute under which they were acting. The action of the superior court in sustaining the demurrer to the complaint was proper. The judgment will be affirmed.

ANDERS, DUNBAR, GORDON, and
SCOTT, JJ., concur.

(12 Wash. 605)

KUHN v. CITY OF PORT TOWNSEND
et al.

(Supreme Court of Washington. Sept. 24,
1895.)

MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—COLLATERAL ATTACK.

1. The legality of proceedings by which territory was annexed to a city cannot be questioned in an action to restrain the collection of taxes.

2. Where a city has by statutory proceedings annexed and assumed jurisdiction over adjacent territory, one who petitioned for the annexation, and accepted the benefits of improvements, cannot, after the lapse of four years, question the jurisdiction of the city to assess taxes against a part of the annexed territory belonging to him.

Appeal from superior court, Jefferson county; R. A. Ballinger, Judge.

Action by Joseph A. Kuhn, for the benefit of himself and others similarly situated, against the city of Port Townsend and others, to restrain the collection of taxes. From a judgment for defendants, plaintiff appeals. Affirmed.

Morris B. Sachs, for appellant. Trumbull & Trumbull, for respondents.

GORDON, J. This was an action brought in the superior court of the county of Jefferson for the purpose of restraining the collection of taxes assessed against the lands of plaintiff for municipal purposes. The ground upon which relief is sought is that the property against which said taxes are levied is situated within that portion of territory attempted to be annexed to the city of Port Townsend by virtue of certain proceedings upon the part of the officers of said city, which proceedings, he alleges, were had and taken without authority of law, and are therefore void. Issue of fact was joined by answer and reply, and thereafter, upon motion of the respondents, judgment was rendered upon the pleadings in favor of respondents, from which judgment this appeal is prosecuted.

The city of Port Townsend was incorporated under an act of the legislature of the territory of Washington, approved November 20, 1881. The theory of the complaint, and the sole ground upon which the relief is sought, is that the attempted annexation proceedings were void. The prayer of the complaint is: "That upon the final hearing herein the court will order and declare the said attempted annexation of said property so as hereinbefore set forth attempted to be annexed to said city of Port Townsend, and the acts and doings of said city of Port Townsend in relation thereto, void, and of no effect."

Various errors are assigned in the appellant's brief, relating principally to matters within the discretion of the lower court, all of which, save those hereinafter noticed, were abandoned upon the oral argument in this court; and, although we have examined and considered them, we do not think that any of them are of sufficient importance to warrant a reversal of the cause. Section 9 of the act of March 27, 1890, being section 501, 1 Hill's Code, is as follows: "The boundaries of any municipal corporation may be altered and new territory included therein, after proceedings had as required in this section. The council, or other legislative body of such corporation, shall, upon receiving a petition

therefor, signed by not less than one fifth of the qualified electors thereof, as shown by the vote cast at the last municipal election held therein, submit to the electors of such corporation, and to the electors residing in the territory proposed by such petition to be annexed to such corporation, the question whether such territory shall be annexed to such corporation and become a part thereof." The section further provides for the calling of a special election to be held for that purpose, and giving notice therefor, and provision is made for canvassing and declaring the result. Continuing, the section provides that: "If it shall appear upon such canvass that a majority of all the votes cast in such territory and a majority of all the votes cast in such corporation shall be for annexation, such legislative body shall, by an order entered upon their minutes, cause their clerk, or other officer performing the duties of clerk, to make and transmit to the secretary of state a certified abstract of such vote, which abstract shall show the whole number of electors voting in such territory, the whole number of electors voting in such corporation, the number of votes cast in each for annexation and the number of votes cast in each against annexation." It then provides that "from and after the date of the filing of such abstract such annexation shall be deemed complete, and thereafter such territory shall be and remain a part of such corporation." It is alleged in the complaint that this section does not apply to, and has no relation whatsoever to, the city of Port Townsend. Learned counsel for the appellant, in his very able and exhaustive brief, has failed to advance any reasoning in support of the position thus assumed. A similar question was involved in the case of *State v. Warner*, 4 Wash. 773, 31 Pac. 25, and of that section this court there said: "In our judgment, there can be no doubt that the intention was to make it apply to municipal corporations of every class, whether existing under special territorial charters or under the constitution and subsequent laws of the state." Further consideration convinces us that this is the true meaning of that section.

It appears from the complaint in this action that in September, 1890, a petition was presented to the council of the said city, signed by a number of persons, requesting that said outlying territory (describing it, and which includes the lands of appellant) be annexed to the city of Port Townsend, and that the city limits be extended so as to include the same. Continuing, the complaint alleges that "the said city council, in pursuance thereof, and in attempting to annex the said property and extend said boundaries, caused a notice of a special election to be published." Then follows the notice, the sufficiency of which is not questioned. "That said city council caused said notice of said election to be published for the time required by law in a newspaper printed and

published within the limits of the city of Port Townsend, as required by the acts of the legislature aforesaid." Further, it alleges that "on October 27, 1890, an election was held under and by virtue of said notice, and thereafter the council proceeded to declare the result, and made its finding and declaration in respect thereto, showing a majority of 341 in favor of annexation, and thereupon the city council made an order that the city attorney and clerk draw an abstract to be filed with the secretary of state." Continuing, the complaint alleges "that ever since the finding and declaration aforesaid as to the canvassing of said vote and the drawing and filing of the abstract aforesaid with the secretary of state, the said city of Port Townsend has assumed and taken control of and legislated for and assessed taxes for general and special purposes upon and against all the property, both real and personal, within the limits described in and mentioned in said notice of election." It is alleged in the answer, and admitted by the reply, that the plaintiff was a signer of the petition (already mentioned) which was presented to the council, asking for such annexation. It is also admitted that since said attempted annexation various streets have been laid out within the territory so annexed, by authority of said city, and improvements made thereon, aggregating thousands of dollars; that the appellant also signed some of the petitions to the council praying for said improvements and the grading of said streets. It also appears that during the years 1891-92 he furnished the assessor of the city with a detailed list of all his property within the limits thereof, including in said list his property situated in the annexed portion of said city. Upon the facts above noticed, we think the judgment appealed from must be affirmed for two principal reasons, viz.: (1) A private citizen cannot question the right of a municipal corporation to exercise the authority, powers, and functions of an incorporated city. This can be done only in a direct proceeding, prosecuted by the proper public officers of the state. (2) The appellant is precluded by his conduct from maintaining the present action. The following authorities, and many others that might be cited, support the first proposition above laid down: *Voss v. School Dist.*, 18 Kan. 467; *School Dist. No. 25 v. State*, 29 Kan. 57; *Graham v. City of Greenville* (Tex. Sup.) 2 S. W. 742; *Stockle v. Silsbee*, 41 Mich. 615, 2 N. W. 000; *Clement v. Everest*, 29 Mich. 19; *Mullikin v. City of Bloomington*, 72 Ind. 161; *Railroad Co. v. Wilson* (Kan.) 6 Pac. 281. In the case last above cited the court say: "To maintain this suit, and to defeat the tax complained of, the plaintiff must establish, and the court must determine, that the organization of the district is illegal. This cannot be done in the present action. The legality of the organization cannot be questioned in a col-

lateral proceeding, nor at the suit of a private party. The organization cannot be attacked, nor any action taken affecting the existence of the corporation, except in a direct proceeding, prosecuted at the instance of the state by the proper public officer." In *Clement v. Everest*, supra, it is said: "It would be dangerous and wrong to permit the existence of municipalities to depend on the result of private litigation. Irregularities are common and unavoidable in the organization of such bodies; and both law and policy require that they shall not be disturbed, except by some direct process, authorized by law, and then only for very grave reasons." In *Mullikin v. City of Bloomington*, supra, the court say: "As there is a statute under which the town might have become a city, and the complaint shows an attempt to comply with this statute, and shows also acts performed, after such attempt (conceding that the statute was not strictly complied with), as a city corporation, and that powers were asserted under the general act for the incorporation of cities, a citizen, in his own behalf, cannot attack the right of the corporation to exercise the functions, powers, and authority of an incorporated city. In such cases as the present the right to exercise the powers and authority of a corporation can only be questioned by a proceeding in the nature of a quo warranto, filed by some one possessing competent authority, in behalf of the state." Without multiplying authorities upon a proposition so generally recognized and understood, we think it can be safely said that, where the legislature has conferred upon a city the power to enlarge its corporate limits, and, having jurisdiction of the general subject-matter thereof, the city authorities proceed to act and to declare a result, and thereafter to act upon such result, the legality of such acts cannot be called in question in a collateral proceeding. So here the subject of annexing territory to the city was one over which the council of the city of Port Townsend had jurisdiction by virtue of section 9 of the act of 1890, supra. That jurisdiction was brought into exercise by the filing of the petition, regardless of whether the petition complied with the statute, and regardless of any errors or irregularities in the proceedings of the council. "The power to hear and determine a case is jurisdiction; it is 'coram iudice' whenever a case is presented which brings this power into action." *U. S. v. Arredondo*, 6 Pet. 691. In *Morrow v. Weed*, 4 Iowa, 77, it was held: "If there be a petition, or the proper matter of that nature, to call into action the power or jurisdiction of the court, its sufficiency cannot be called in question in a collateral proceeding." To the same effect is the very well considered case of *City of Terre Haute v. Beach*, 96 Ind. 143. The objections urged against the proceedings of the council of the respondent city do not go to any question of

jurisdiction, but constitute mainly irregularities and informalities not affecting jurisdiction, and afford no ground for collateral attack.

The appellant's participation in the annexation proceedings, his subsequent recognition of the jurisdiction of the city authorities, his acquiescence in the result reached and declared by them, and his gross laches in the assertion of his rights, constitute an equitable bar to the cause of action which he, after the lapse of nearly three years, first attempted to assert; and it would be immaterial to the result were we to determine that his conduct amounted to a ratification, or an election, or requires the application of the doctrine of estoppel. *Strosser v. City of Ft. Wayne*, 100 Ind. 443; *Hayward v. Bank*, 98 U. S. 611; *Graham v. City of Greenville*, supra. In *Strosser v. City of Ft. Wayne*, supra, it is said: "If a taxpayer were permitted to long acquiesce in the order of annexation, and then secure its overthrow, great confusion would ensue, and much injustice be often done. High considerations of public policy and of justice require that a taxpayer who is notified that a public corporation claims to have extended its limits so as to take in his property should act with promptness, and proceed with diligence, if he would resist the attempted annexation." We think the lower court was right in giving judgment for the respondents and in denying appellant's application for leave to amend, and said judgment is affirmed.

HOYT, C. J., and ANDERS and DUNBAR, JJ., concur.

(29 Or. 583)

NORTON v. ELWERT.

(Supreme Court of Oregon. Oct. 7, 1895.)

INJUNCTION—REMOVAL OF WALL.

1. Injunction will lie to compel removal of the wall of a building placed by defendant on plaintiff's side of a boundary, there being no adequate and plain remedy at law.

2. Injunction to compel removal of a wall will be made perpetual, without resort to law to determine title, where the questions of title and right of possession are only incident to the question of boundary.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Suit by Sarah Norton against J. B. Elwert. Decree for plaintiff. Defendant appeals. Affirmed.

This is a suit for a mandatory injunction, to compel the removal of a wall, and to recover damages resulting from its erection, involving the location and establishment of a disputed boundary line between the lands of the plaintiff and the defendant. The facts are that the plaintiff is the owner of the north 45 feet, and the defendant of the south 5 feet, of lot 3, and all of lot 4, in block 218, situated at the northwest corner of Yamhill and West Park

streets, in the city of Portland; that in 1891 the plaintiff built a two-story frame house, which cost about \$12,000, upon her part of the lot, and in the following year the defendant commenced to repair and construct three buildings upon her adjoining land, and upon the plaintiff's failure, after notice, to remove from her building certain projections which it was claimed extended over the boundary line, removed the water table, window sills and caps, cornice, rafters, sheathing, and shingles from a large part of the south side thereof, with a view to the erection of a brick wall against it, along the supposed boundary line. The suit was commenced October 10, 1892, by filing a complaint, wherein the plaintiff alleges that the defendant, on the preceding day, commenced the erection of a house, partly on her own ground, but that the north wall thereof was, for a distance of about 50 feet, being constructed from 1½ to 2 inches upon plaintiff's premises; that the wall did not then extend the entire length of her house, but that the defendant threatened to so extend it as to exclude the light and to remove the projections of her building which then remained, and that, if the threat should be executed, she would sustain irreparable injury; that she has no adequate remedy at law; and prays for a temporary restraining order, which she asks might at the hearing be made mandatory, requiring the defendant to remove the wall from her premises and for \$5,000 damages. The defendant having denied the material allegations of the complaint, the cause was referred and the evidence taken, from which the referee found that the wall at the northeast corner of defendant's building extends upon the plaintiff's premises, at and below the surface of the ground, one-half inch, and, at a point 6 feet above the surface, 1½ inches, which extension continues upward to the top and westward about 60 feet to a point from which it begins to recede, and at the northwest corner is one-half inch south of the boundary; and, as conclusions of law, that plaintiff was entitled to a decree for \$1,750 and a mandatory injunction, compelling the defendant to remove the wall; and the court, having approved these findings, rendered a decree in accordance therewith, from which the defendant appeals.

E. B. Watson, for appellant. J. W. Whalley, for respondent.

MOORE, J. (after stating the facts). It is contended that, the defendant having erected the wall upon and being in possession of the locus in quo, a court of equity should not grant a mandatory injunction to compel the removal of the structure until the legal title to the premises occupied by it shall have been determined in an action at law, and that to grant the relief prayed for would be to substitute a suit in equity for an action in ejectment, thus depriving her of the constitutional right to a trial by jury. It is a fa-

milliar principle, which has existed since the origin of a court of chancery, that equity will not interpose its jurisdiction to try an issue where the party has a plain, adequate, and complete remedy at law; and, since the legal title to and possession of land can ordinarily be tried and recovered in an action at law, a court of equity will not, in the absence of fraud, mistake, or some other intervening equity, try the legal title to, or, unless as an auxillary relief, restore the possession of, land, except in cases of disputed boundaries, partition, and the assignment of dower, and, in these, only where the issue and relief are incidents to the principal objects of the suit. Pom. Eq. Jur. § 177. While courts of equity originally declined to restrain waste or trespass, they now frequently interpose, and by temporary injunction prevent an injury to land, even where the right thereto is in dispute and the defendant is in possession, claiming by an adverse title, if the threatened injury will be productive of irreparable damage (2 Wat. Tresp. § 1128; Bracken v. Preston, 1 Pin. 584; Long v. Kasebeer, 28 Kan. 226; Webster v. Cooke, 23 Kan. 637); and an injury is irreparable if of such a nature that it cannot be adequately compensated in damages, or cannot be measured by any certain pecuniary standard (Wilson v. City of Mineral Point, 39 Wis. 160). The right of a court of equity, in cases of irreparable injury, to interpose, and by temporary injunction preserve the status quo, and restrain a trespass upon the land the right to which is in dispute until the title can be determined in an action at law, is no longer seriously controverted (Clayton v. Shoemaker, 67 Md. 216, 9 Atl. 635; Wilson v. Rockwell, 29 Fed. 674; Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565; 1 Spel. Extr. Rel. § 367); and the refusal of a court to award a preliminary injunction in such cases would, in effect, be a denial of justice (Wilson v. City of Mineral Point, supra).

The right to grant a preliminary injunction under such circumstances being conceded, the rule, nevertheless, seems universal that where the legal title to the locus in quo is put in issue, and the jurisdiction of a court of equity is challenged, an injunction to restrain a trespass, though temporarily granted, will not be made perpetual until the legal title to the disputed premises has been tried in an action at law. 1 High, Inj. § 701; 10 Am. & Eng. Enc. Law, 799. So that, before an injunction will be made perpetual, the following conditions must coexist: First, the plaintiff's title must be admitted or established at law; and, second, the injury complained of must be irreparable in its nature, or productive of a multiplicity of actions against different parties asserting the same right. 1 High, Inj. § 701; 2 Beach, Inj. § 1142; 1 Spel. Extr. Rel. § 368; Hatcher v. Hampton, 7 Ga. 50; Thorn v. Sweeney, 12 Nev. 251; Poyer v. Village of Des Plaines, 123 Ill. 111, 13 N. E. 819.

In Echelkamp v. Schrader, 45 Mo. 505, the

plaintiff and defendant were owners of adjoining tracts of land, upon which was erected a double house, containing a partition, which was supposed to be on the line between their several estates, but, by a careful survey, it was discovered that the boundary extended across the plaintiff's section of the house about three feet from the partition. The defendant, desiring to remove the portion of the house upon his land, commenced to saw through the plaintiff's part on the line of the new survey, to prevent which he was enjoined at the suit of the plaintiff, who had for about 17 years occupied to the partition the section so claimed by him. The preliminary injunction which had been issued having been made perpetual, the defendant appealed, and the court, in reversing the decree, said: "It is usual in cases like this, where the title comes in controversy, to grant a temporary injunction to await the event of an action at law to be prosecuted by the plaintiff. But here the plaintiff is in actual possession, and has been for many years, and is therefore not in a position, nor has he any occasion, to sue. The defendant is the proper party to bring an action and test the rights of the respective parties at law. If he neglects to do this in a reasonable time, he will have no just grounds of complaint if the injunction is made perpetual against him in consequence of his own negligence." In the case last cited, there was no conflict in relation to the boundary, but, the plaintiff having been in possession for about 17 years of that part of the house which extended to the partition, the legal title thereto was in doubt, and hence it was proper to deny the perpetual injunction until the legal right could be tried in an action at law.

In the case of Haines v. Hall, 17 Or. 165, 20 Pac. 831, the defendant attempted to drive logs in a stream flowing through the plaintiff's premises, but, the quantity of water therein being insufficient for that purpose, the logs cut away the plaintiff's land, thereby producing irreparable injury, to prevent a recurrence of which the plaintiff commenced a suit to restrain the trespass and for damages. The issue made by the pleadings was the navigability of the stream; and it appearing that the plaintiff, in an action against another party who asserted the same right, had recovered damages resulting from a similar trespass (Haines v. Welch, 14 Or. 319, 12 Pac. 502), it was held by the majority of the court that equity would grant the relief prayed for; but Strahan, J., in a dissenting opinion, held that in the case of Haines v. Welch, supra, the navigability of the stream in question was not adjudicated, and, since that was not the issue in the case then pending, equity should not award a perpetual injunction until the legal right had been tried in an action at law.

The case of Mendenhall v. Water-Power Co. (Or.) 39 Pac. 399, was a suit to enjoin the defendant from trespassing upon the plaintiff's

premises, and involved a question of the width and boundaries of its right of way across the plaintiff's land. The lower court, after the evidence was taken, subject to objection, having denied a motion for leave to amend the answer so as to allege an adverse user, no question of title was in issue, and the defendant having threatened the destruction of the plaintiff's estate, in the manner in which it was enjoyed, it was held that equity would assume jurisdiction and grant final relief. To entitle a party to relief by permanent injunction to prevent a trespass upon land, he must ordinarily allege and prove, in addition to the establishment or admission of his legal title, that he is in the actual possession, as well as entitled to the possession, of the locus in quo. 2 Beach, Inj. § 1142; 1 Spel. Extr. Rel. § 364, and cases cited. At the common law, the owner of an estate in land from which he had been ousted could not maintain an action to recover mesne profits, for the reason the tenant had need of them to enable him to perform the feudal services. 3 Bl. Comm. *187. In an action of ejectment the damages recoverable were nominal, but, after the possession of the land had been restored, the plaintiff, in a subsequent action of trespass, might recover the mesne profits from the person who had unlawfully received them (Id. *205); and, to maintain an action of trespass, it was necessary for the plaintiff to allege and prove that he had an interest in the soil, and was in actual possession by entry, before he could recover damages; but in the case of disseisin he might maintain an action against the disseisor for the injury done by the disseisin itself, but he could not recover any damages for an injury done after the disseisin until he had gained possession by re-entry, and then he might recover the immediate damage done (Id. *210). In *Mendenhall v. Water-Power Co.*, supra, the plaintiff, being the owner of the fee, was constructively in possession of the locus in quo, subject to the defendant's right to occupy the easement, and, the possession of each being lawful, the question of plaintiff's ouster was not in issue. So, too, in *Haines v. Hall*, supra, the defendant's possession of the stream was founded upon its assumed navigability, and in no way interfered with the plaintiff's ownership of the fee and right of possession, which was subject only to the paramount easement, and hence the exclusive possession of the defendant was not there in issue. The common-law actions of ejectment and trespass to try the title and to recover the possession of land, and for the recovery of mesne profits as well as damages resulting from injuries to the estate, have been united by the statutory action at law for the recovery of possession of real property with damages for withholding the same. 1 Hill's Code, § 316; *Goldsmith v. Smith*, 10 Sawy. 294. 21 Fed. 611; *Wythe v. Myers*, 3 Sawy. 595. Fed. Cas. No. 18,119. These common-law actions

having been thus united, we can perceive no just reason, in cases where the title is admitted or has been established at law, why a party out of possession, when he shows such equitable circumstances as to clearly entitle him to relief, may not invoke the aid of a court of equity, and be restored to his estate; and though it must be admitted that equity will generally refuse to permanently enjoin a trespass where the defendant is in actual possession, but will leave the parties to their legal remedies, it is, nevertheless, a general principle that the remedy which warrants a refusal of relief by injunction must be plain and adequate. 1 Spel. Extr. Rel. § 370.

Applying these rules to the case made by the record, the inquiry is elicited whether, admitting the allegations of the complaint to be true, the plaintiff will suffer irreparable injury, and, if so, has she a plain and adequate remedy at law? If, in an action of ejectment, the wall cannot be removed, the injury resulting from its erection could not be compensated by any measure of damages, however great the sum which a jury might award, for it would, in effect, amount to a condemnation of the plaintiff's property, and an appropriation of it to the defendant's private use; and to concede that ever so small a strip of plaintiff's premises could be thus taken would be to admit a rule of law which must necessarily be almost limitless in its application. In an action at law it would be difficult for the plaintiff to regain possession of that portion of her land occupied by the wall, for the sheriff, when called upon, might well hesitate to execute a writ commanding a restoration of the premises, since he must cut the wall to the division line, and in doing so he might take more than the "merchant's pound of flesh," and thus render himself liable in damages to the defendant. *Baron v. Korn*, 127 N. Y. 224, 27 N. E. 804. The removal of the wall being difficult, the plaintiff has no plain remedy at law, and hence she must suffer irreparable injury, and for the recovery of the damages resulting therefrom she could have no adequate remedy at law. In all such cases, equity will, upon the theory that wherever there is a right there is also a remedy, interpose and grant complete relief, and for that purpose will, where there has been no unreasonable delay in seeking the relief, award a mandatory injunction, and place the obligation of removing the structure upon the party who caused it to be erected. *Murdock's Case*, 20 Am. Dec. 381; *Starkie v. Richmond*, 155 Mass. 188, 29 N. E. 770.

In the case at bar, the boundary between the two estates, as evidenced by the deeds of the parties, being coincident, and there being no claim of title by adverse occupancy, there can be no dispute concerning the legal title. It is true there is a contention about the boundary, the plaintiff claiming that it is located on one line, and the defendant in-

sisting it is on another, between which there is a narrow strip of land; but, when the boundary is established, the controversy is adjudicated. The title to this strip is only an incident to the principal cause of suit, and hence not necessarily involved in the issue. While it is admitted that the defendant is in the actual possession of the disputed strip, her right of possession depends upon the legal title thereto; and, there being no issue upon that question, it follows that there is no issue upon the question of the right of possession. If the plaintiff had brought an action in ejectment, all she could have obtained would have been a judgment that she was the owner and entitled to the possession, both of which conclusions are conceded to be dependent upon the location of the disputed boundary. A court of law, it must be admitted, has exclusive jurisdiction to try a question of disputed boundary, unless there are connected with the case some peculiar circumstances which render the relief, and the mode of obtaining it, in that court less efficient than in a court of equity, and in all such cases the concurrent jurisdiction of equity attaches. 1 Pom. Eq. Jur. § 180. It is evident that the relief at law, if a judgment were there rendered, determining the legal right in plaintiff's favor, would be difficult of enforcement, and certainly less efficient than in equity, and therefore the concurrent jurisdiction of the latter must necessarily attach. Nor is this conclusion in conflict with the rule announced in *King v. Brigham*, 23 Or. 262, 31 Pac. 601, as tending to deprive a party of his constitutional right of a trial by jury; for here the defendant, by constructing the wall,—conceding it to be on plaintiff's premises,—cannot take advantage of her own wrong, and thus insist upon a strict legal right, or deprive a court of equity of its right to assume concurrent jurisdiction. Neither can the defendant's possession of the premises occupied by the wall deprive equity of its jurisdiction, for it is necessary to the exercise of that right that the plaintiff should show that some portion of her land, in respect to which the establishment of the boundary is sought, is in possession of the defendant. 3 Pom. Eq. Jur. § 1385.

The record discloses that, in order to establish the boundary in dispute, the parties, by their respective attorneys, entered into the following written agreement: "It is hereby stipulated that the monument at the intersection of the center lines of Front and Washington streets, and the base line run therefrom, as referred to and established by Ordinance 177 of the city of Portland, Oregon, are to be taken and recognized by the parties hereto as the true and correct monument and base line for all surveys in the said city, and particularly for the survey of the boundary line between plaintiff's and defendant's premises in dispute in this cause, and that said monument is the correct initial point from which said survey shall start."

This ordinance prescribes the size of blocks, and the width of streets, and provides for the establishment of a stone monument at the intersection of Front and Yamhill streets, from which point all surveys of streets in that part of the city in which the property in question is situated shall be extended. It also appears from a copy of a map of the city, offered in evidence, that the distance on the center line of Front street, from the initial point, south to the intersection of the center line of Yamhill street, is 780 feet; and from this point, west on the center line of Yamhill street, to the west side of West Park street, is 2,350 feet. Measuring north from this point 30 feet—one-half the width of Yamhill street—locates the southeast corner, and 85 feet the northeast corner, of the defendant's premises; and by extending a line from the point last named, parallel with Yamhill street, establishes the boundary in dispute. The evidence shows that careful surveys have been made, and the lines run from the initial point, as above indicated, resulting in the establishment of the boundary as found by the court and referee.

The defendant having changed her attorneys since the trial of the cause in the court below, those now representing her insisted upon the argument that the stipulation established a fact which was contradicted by other evidence offered by the defendant both before and after the stipulation was executed. This evidence showed that a stone monument, containing a point intended to mark the intersection of the center lines of Front and Yamhill streets, had been set at an early day by one C. W. Burrage, at a point 779.92 feet south of the initial point, and that E. W. Pagett, as city surveyor, had indicated on this monument another point of intersection, 780.06 feet from said point; so that, if a right angle were turned at the Burrage point upon the base on Front street, the boundary in question would be .46 of an inch north of the defendant's wall; but, if turned upon the same base at the Pagett point, the line would fall 1.22 inches south of the north line of the wall, or .72 of an inch further to the south than when determined by an angle turned at a point 780 feet from the initial point. Section 4 of the ordinance referred to provides that "the surveyor of the city of Portland shall erect and establish additional stone monuments, not exceeding fifty in number, at such places as the city council shall direct: provided, that all such additional monuments shall be located at the points of intersection of the streets running parallel with said base line and those running at right angles therewith, whose points of intersection shall be ascertained and determined by surveys made from the said stone monuments at the intersection of Front and Washington streets, when established pursuant to section 1 of this ordinance; such additional monuments, when so erected and established, shall be the places of beginning

for subsequent surveys of streets, and such surveys made therefrom as places of beginning shall be valid, the same as if made from the stone monument provided for in section 1 of this ordinance." No evidence was introduced to show that C. W. Burrage, when he placed the monument at Front and Yamhill streets, was the city surveyor of Portland, or that he set it as required by the provisions of section 4 of Ordinance No. 177.

The conclusion reached upon the location of the boundary in dispute is predicated upon the survey extended from the initial point, and, under the evidence before us, is, in our judgment, decisive of the question, irrespective of the stipulation.

Upon the question of damages, it is impossible to determine the amount that should, in justice, be awarded. The evidence introduced by the plaintiff tended to show that her building had been damaged in the sum of \$4,000, and the defendant offered no evidence which tended to show that the plaintiff's building could be restored to its former condition for a less sum; and, the court having awarded \$1,750, we cannot say that it is excessive, in view of the record before us. It follows that the decree must be affirmed, and it is so ordered.

JACKSON COUNTY v. BLOOMER et al. (Supreme Court of Oregon. Oct. 7, 1895.)

NOTICE OF APPEAL—ADVERSE PARTY.

Hill's Ann. Laws, § 537, provides that notice of appeal shall be served on the adverse party. *Held*, in an action on a bond against a principal and his sureties wherein the sureties had judgment and the principal defaulted, that the principal was an adverse party, within the meaning of said section.

Appeal from circuit court. Jackson county; H. K. Hanna, Judge.

Action by Jackson county against George E. Bloomer and others on a bond. Defendants had judgment, and plaintiff appeals. Dismissed.

H. L. Benson, Dist. Atty., and L. R. Webster, for appellant. E. B. Watson, for respondents.

BEAN, C. J. This is an action brought by the county of Jackson against George E. Bloomer and the sureties on his bond as treasurer of such county to recover for his alleged defalcation as such official. The complaint, *inter alia*, alleges the qualification of Bloomer by giving the bond in suit, and that, between the dates mentioned in the complaint, he, as such treasurer, collected and received \$7,852.75 belonging to the county, which, in breach of his trust, and in violation of the conditions of his undertaking, he failed and neglected to account for or pay over. Bloomer, although served with summons, made default, and the sureties answered jointly, denying the defalcation alleged in the complaint; and upon the issues thus made the cause was

tried, and a judgment rendered in their favor on the merits. From this judgment the plaintiff appealed, without serving a notice upon Bloomer. For this reason the respondents move to dismiss the appeal, claiming that Bloomer is an adverse party to the appellant, and should have been served with notice. The rule is well settled in this state that every party to a litigation whose interests in relation to the judgment or decree appealed from are in conflict with the modification or reversal sought by the appeal is an adverse party, within the meaning of section 537 of Hill's Annotated Laws of Oregon, and must be served with the notice of appeal, and if not served the appeal must be dismissed. And the fact that a party whose interests are adverse to the appellant has made default does not preclude the necessity of serving such notice of appeal upon him. The Victorian, 24 Or. 121, 32 Pac. 1040; Moody v. Miller, 24 Or. 179, 33 Pac. 402; Hamilton v. Blair, 23 Or. 64, 31 Pac. 197. If, then, Bloomer has an interest in sustaining the judgment from which this appeal is taken, he is an adverse party to the appellant, and the failure to serve him with notice of the appeal is fatal, and the appeal should be dismissed. Now, the undertaking on which this action was brought is a joint obligation of Bloomer and the sureties, in so far, at least, that all are liable or none, and therefore, although he made default, the defense successfully made by the other defendants, going as it did to the merits, and showing that the plaintiff had no right of action against any of the defendants, inures to his benefit, and prevents the entry of judgment against him on his default. The rule on this question is thus clearly stated by Mr. Black in his work on Judgments: "In an action of contract against several defendants, if one of them suffers default, and another, under the general issue, sets up and maintains a defense which negatives the plaintiff's right to recover against either of the defendants, and shows that he has no cause of action, the plaintiff will not be entitled to judgment against the one who was defaulted, but, on the contrary, the successful defense will inure to the latter's benefit, and judgment must be rendered for both the defendants." Section 209. And to this effect are the authorities. French v. Neal, 24 Pick. 55; State v. Gibson, 21 Ark. 140; Morrison v. Stoner, 7 Iowa, 493; Adderton v. Collier, 32 Mo. 507; Waugh v. Suter, 3 Ill. App. 271; Stapp v. Davis, 78 Ind. 128. From this it seems manifest that Bloomer's interests would be materially affected by the reversal of this judgment, for the reason that it appears from the record as it now stands that plaintiff has no right of action against him or his sureties for a breach of the conditions of his undertaking on account of any of the matters or things alleged in the complaint, and so long as the judgment stands unreversed it is in effect a judgment in his favor, and prevents the entry of a judgment on his default. He is

therefore vitally interested in sustaining the judgment as it now stands, and consequently is an adverse party to this appeal. It was suggested by plaintiff's attorneys that Bloomer was not a necessary party to this action, and was never in fact legally served with summons, but these questions are hardly open to the plaintiff here. Whether he was a necessary party or not, the plaintiff saw fit to make him a party, caused a writ of attachment to issue and be levied upon his property, obtained an order for the publication of summons, caused the summons to be published directed to him, and an alleged proof of such publication to be made, and the record shows that all the defendants appeared and demurred to the original complaint, and that when the cause came on for trial Bloomer "made default." Under these circumstances the court will not, at plaintiff's suggestion, critically examine the procedure by which it sought and claimed to have obtained jurisdiction of Bloomer, for the purpose of avoiding the effect of a failure to serve him with a notice of appeal. Motion allowed, and appeal dismissed.

NORTHERN COUNTIES INVESTMENT TRUST, Limited, v. SEARS, Sheriff.

(Supreme Court of Oregon. Oct. 7, 1895.)

STATUTES — GENERAL LAWS — SUBJECT OF ACT — REVENUE ACTS — "JUSTICE WITHOUT PURCHASE."

1. Act Feb. 22, 1893, which was introduced seven days before, but became a law two days after, the act creating Lincoln county, and which provides that "each of the county clerks of the several counties in this state in which there exists such office shall receive a salary as follows"; that "the sheriffs of the several counties in this state shall receive an annual salary as follows"; that "it shall be the duty of the several clerks of the circuit and county courts in the state," etc.,—is a general law. The provisions of which the clerk and sheriff of Lincoln county are bound to observe, though following the provisions for salary is a list containing all the counties, except Lincoln, with the amount of salary set opposite each county, and the act declares that the salaries "herein provided" for in favor of "said" county clerks and sheriffs shall be audited, and no one of "such" officials shall be entitled to other compensation.

2. A statute is not within the purview of, and does not contravene, Const. art. 4, § 22, providing that "no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length," where it is not amendatory or revisory in character, but original in form, and complete within itself, exhibiting on its face its purpose and scope, though it may amend or modify existing laws on the same subject by implication, and though the title purports "to change in part the compensation and mode of payment" of certain public officers, and "to repeal certain provisions of statute."

3. Act Feb. 22, 1893, does not violate Const. art. 4, § 20, providing that every act shall embrace but one subject, as all its provisions tend to but one general object,—to prescribe the compensation and duties of certain county officers.

4. An act prescribing fees to be paid by individuals to sheriffs and clerks of courts for services, and requiring the money received by

them to be turned into the county treasury, they to be paid salaries, is not an act for raising revenue, required by Const. art. 4, § 18, to originate in the house of representatives.

5. Act Feb. 22, 1893, requiring payment to a clerk of court, by plaintiff, on instituting a suit, of \$5, and, at trial, of \$2, and providing for payment to the sheriff of certain fees for serving papers, etc., does not contravene Const. art. 1, § 10, requiring that justice shall be administered openly and without purchase.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Application of the Northern Counties Investment Trust, Limited, for mandamus to George C. Sears, as sheriff of Multnomah county. From a judgment directing a peremptory writ to issue, defendant appeals. Affirmed.

Geo. E. Chamberlain, for appellant. W. McCamant and M. W. Smith, for respondent.

WOLVERTON, J. This is a mandamus proceeding against the sheriff of Multnomah county, to compel him, as such officer, to serve a summons upon the defendants in a cause pending in the circuit court of the state of Oregon for Multnomah county, wherein the Northern Counties Investment Trust, Limited, is plaintiff, and George H. Dedman et al. are defendants. The mileage fee for the service was paid to the defendant, but he refused to comply with the request of said plaintiff to serve such summons unless other fees were also paid to him in accordance with, and as allowed by, the act of October 26, 1882. After a full hearing the court below directed a peremptory mandamus to issue, commanding the defendant to forthwith serve the summons and papers in question, without further compensation. From this judgment the defendant appeals.

The determination of the question brought up by this appeal involves the construction and constitutionality of an act entitled "An act to change in part the compensation and mode of payment thereof to the county clerks, recorders of conveyances, clerks of the circuit courts and county courts in the state, and of the sheriffs of the several counties; to repeal certain provisions of statute providing for the payment of certain fees to said officers and of trial fees in certain cases; to provide for the payment by parties to appeals, actions, suits, and proceedings of certain sums to assist the state and the several counties in defraying expenses consequent upon the administration of justice; to provide for the appointment of deputies for the various offices above enumerated in certain cases and for their compensation, and for the payment to the state and several counties of sums of money and fees paid to said officers by parties litigant,"—filed in the office of the secretary of state February 22, 1893, and an act amendatory thereof, approved February 25, 1895. For the purposes of this inquiry the two acts are essentially the same, and what is predicated of the one might generally be predicated of the other. They will therefore

be treated as one act, except in so far as it is necessary to note distinctions touching their relative provisions, or the surrounding circumstances attending their adoption.

It is contended that the act of February 22, 1893, is unconstitutional because—First, it is in conflict with subdivision 10, § 23, art. 4, of the constitution, which provides that the legislative assembly shall not pass local or special laws for the assessment and collection of taxes for state, county, township, or road purposes; second, it is a local law, "regulating the practice in courts of justice," contrary to subdivision 3, § 23, art. 4; third, it is in violation of section 22, art. 4, which provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length"; fourth, the act treats of several distinct and unconnected subjects, contrary to section 20, art. 4, which provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title"; fifth, it is an act for raising revenue, and originated in the senate, in contravention of section 18, art. 4, requiring that bills for raising revenue shall originate in the house of representatives; and, sixth, it contravenes section 10, art. 1, which requires that "justice shall be administered openly and without purchase."

1. The act provides for a fixed salary for the clerks, sheriff, and recorder, in each of the counties of the state, with the exception of Lincoln, and it is claimed that this omission is fatal to the act, under *Manning v. Klippel*, 9 Or. 367. A proper construction of the act will determine whether or not it comes within the doctrine of that case. As to whether or not the fees which the several officers are required to collect and turn over to the county treasurer are taxes, within the meaning of subdivision 10, § 23, art. 4, of the constitution, it is unnecessary for the court to decide at the present time. But if it be conceded that they are taxes, within the meaning of that clause, it does not follow that the act is local, and therefore void. Section 1 thereof provides that "each of the county clerks of the several counties in this state in which there exists such office shall receive a salary as follows." Then follows a list containing the names of all the counties, except Lincoln, with the amount of the salary set opposite each county in said list. Section 2 relates to clerks of the circuit and county courts chosen in counties where such offices exist separate from the office of county clerk. Section 3 relates to recorders of conveyances. Section 4 provides that "the sheriffs of the several counties in this state shall receive an annual salary as follows." Then follows a list of the counties, with the amount of salary set opposite, Lincoln county being omitted. Section 5 provides that: "The salaries herein provided for in favor of said county clerks, recorders of conveyances,

clerks of the circuit and county courts and sheriffs, shall be audited and paid by the several counties to the respective parties entitled thereto. In monthly payments, and in the same manner that other county charges are paid; and no one of such officials shall be entitled to receive any fees or other compensation for his services than as above provided, and except as hereinafter provided, except for furnishing to private parties copies of the records and files in his office for their benefit and convenience, in which case he shall be entitled to charge such private parties therefor at the rate of ten cents a folio, but shall not be entitled to anything for authenticating such copies, beyond including the number of words contained in the certificate of authentication in his computation of the number of folios." Section 6 provides, in effect, that "the sheriffs of the several counties in the state shall be entitled to receive the same compensation now allowed by law for the board and keeping of prisoners confined in the county jail of his county." They shall be entitled to any reward offered for the apprehension of persons charged with crime, and to receive from the state the fees now allowed by law for transporting convicts to the penitentiary, and insane and idiotic persons to the asylum. They shall also be entitled to claim from the plaintiff or moving party in any action or proceeding such reasonable sums of money as they may have been compelled to pay or incur on account of the care of property in their custody under attachment, execution, etc.; and, where they are required to travel into another county or state to make an arrest or receive a prisoner, they shall receive their actual or necessary expenses incurred. By the amendment of February 25, 1895, three provisions are added, all applicable to counties of more than 50,000 inhabitants, but none other. The first provides for letting the board of prisoners to the lowest bidder; the second requires the payment of fees received from the state for conveying convicts to the penitentiary, and insane to the asylum, to be paid into the county treasury, and the payment by the county of the actual expenses incurred; and the third is as follows: "Provided further, also, that in counties containing more than fifty thousand inhabitants the sheriff shall be entitled to receive all mileage for serving process or papers in civil cases, but shall not receive any mileage in criminal cases whatever, or on executions in civil or criminal cases." Section 7 provides that the "coroners of the several counties shall also be entitled to the same fees now allowed for the performance of service in an action, suit or proceeding where the sheriff is a party, and the party paying the same shall be entitled to recover the amount paid from the adverse party." Section 8 provides that: "It shall be the duty of the several clerks of the circuit and county courts in the state at the time any

suit, action or proceeding for the enforcement of private rights, including appeals and writs of review, but not proceedings in probate matters, is instituted to exact from the plaintiff or moving party in such suit, action or proceeding, the sum of five dollars.

* * * Such clerk shall also, at the time of filing any answer, demurrer or motion in any such action, suit or proceeding upon the part of such defendant exact from such defendant the sum of three dollars * * *

and * * * shall also exact from such plaintiff or moving party at the time such suit, action or proceeding comes on for trial or hearing upon a question of fact or law involved therein, unless referred to a referee, and except upon demurrer, an additional sum of twelve dollars. * * * And every such clerk upon receiving any money as provided in this section, shall immediately pay the same over to the county treasurer of his county and take his receipt therefor." The amendment of 1895 enlarges the fees above provided for, where the amount in controversy is above \$500, and reduces the trial fee in all cases to \$2. It also provides for the payment of a fee in probate proceedings. Section 9 provides that: "The several sums required to be paid by parties litigant to the respective officials on appeals, actions, suits and proceedings, as provided for in the two preceding sections of this act, are intended to be in lieu of the fees such parties have heretofore been required to pay said officials in such matters, and also in lieu of the trial fee such parties were prior to the adoption of this act required by law to pay, and no such fees or trial fee last referred to shall be exacted from such parties in such cases. In all other cases, however, in which fees are allowed to county clerks, recorders of conveyances, clerks of the circuit and county courts and sheriffs in civil matters including fees in probate proceedings, it shall be the duty of the said officials respectively to exact and receive from the parties required by law to pay the same * * * which fee shall upon the day it is paid to the official, be paid over by him to the county treasurer of his county." This section, as amended by the act of 1895, reads as follows: "The several sums required to be paid by the parties litigant to the clerk of the circuit or county court in appeals, actions, suits and proceedings as provided for in the two preceding sections of this act, are to be in lieu of all the fees such parties have heretofore been required to pay to clerks, sheriffs and all other officials in such matters, and the trial fee provided for in the preceding section of this act shall be in lieu of the trial fee such parties were, prior to the adoption of this act, required by law to pay, and no such fees or trial fee last referred to, or any other fee, shall hereinafter be exacted from the parties in any suit, action or proceeding."

The provisions of this act are thus fully set forth that its scope and purpose may be

readily comprehended. In the inquiry as to the intention of the legislature, where the language employed is of doubtful significance or import, we are permitted to consider the surrounding circumstances attending the adoption of the act. "The true meaning of any passage," says Mr. Endlich in his work on Interpretation of Statutes (section 27), "is to be found, not merely in the words of that passage, but in comparing it with every other part of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object, appearing from those circumstances, which the legislature had in view, and what were the cause and occasion of the passage of the act, and the purpose intended to be accomplished by it, in the light of the circumstances at the time, and the necessity of its enactment." See, also, section 26, and *Keith v. Quinney*, 1 Or. 364. The act of 1898 was introduced in the senate on January 11th, and the act creating Lincoln county was introduced in the same house January 18th,—seven days later,—but the latter act became a law and took effect two days prior to the passage of the former. However, it is apparent that, when the act under consideration was drafted and introduced, it provided a salary for the clerk and sheriff of every county in the state; and it is reasonable to suppose that the fact that Lincoln county had been created was overlooked, in its final passage, otherwise it would have been added by way of amendment. But be this as it may, and if connected with the further fact that the legislature amended the act at a subsequent session, and again omitted Lincoln county, it is nevertheless manifest that the legislature intended to provide a salary for all the clerks and sheriffs in every county in the state, and the fact only remains that it did not do so. These facts and attendant circumstances are adverted to, not that they will in any event warrant the court in construing the act, in the slightest degree, different from what the language imports, but because they enable us to ascertain what was meant by the legislature, the language employed by it being ambiguous and of doubtful significance. Were it not for the fact that salaries were fixed for the clerks and sheriffs of all the other counties in the state, except Lincoln, and the provisions of section 5, which declare that "the salaries herein provided for in favor of the said county clerks, recorders of conveyances, clerks of the circuit and county courts, and sheriffs shall be audited," and "no one of such officials shall be entitled to receive any fees or compensation for his services than as above provided," which leave the impression that the legislature was dealing with the clerks and sheriffs only in the counties named, and not with the clerks and sheriffs of all the counties in the state, there could scarcely be any question made as to the correct interpretation of the act. (The general

tenor of the language employed indicates very clearly that the legislature was dealing with the clerks and sheriffs of all the counties of the state, without excepting any from its purview, which, taken in connection with the evident legislative belief that all were included in the list of salaries affixed, leaves no doubt as to its correct interpretation. To illustrate: Section 1 provides that "each of the county clerks of the several counties in this state in which there exists such office shall receive a salary as follows"; section 4, that "the sheriffs of the several counties in this state shall receive an annual salary as follows"; section 6, that "the sheriffs of the several counties in the state shall be entitled to receive," etc.; and section 8, "It shall be the duty of the several clerks of the circuit and county courts in the state." These, and other clauses that may be noted, all indicate general legislation, with the purpose of affecting all clerks and sheriffs of the state alike, and such is the effect of the act. The legislature has simply omitted to fix a salary for the clerk and sheriff of Lincoln county, but they are not less bound to the observance of the provisions of the act than the other clerks and sheriffs of the state. The act is therefore not local, and does not contravene the provisions of subdivision 10, § 23, art. 4, of the constitution. This also disposes of the counsel's second contention,—that it is a local law, regulating the practice of courts of justice, contrary to subdivision 3, § 23, art. 4, of the constitution.

Another question in this connection: The view is advanced that under section 9 the sheriffs in all the counties are required to collect from litigants the fees prescribed by the law of 1882, which formerly obtained, for the performance of similar duties. The wording of the first clauses of section 9 is peculiar, and their meaning not entirely clear. They provide that "the several sums required to be paid by parties litigant to the respective officials in appeals, actions, suits, and proceedings, as provided for in the two preceding sections of this act, are intended to be in lieu of the fees such parties have heretofore been required to pay such officials in such matters." The legislature has, however, by the amendatory act, furnished us with its own interpretation of these clauses, as follows: "The several sums required to be paid by the parties litigant to the clerk of the circuit or county court in appeals, actions, suits and proceedings as provided for in the two preceding sections of this act, are to be in lieu of all the fees such parties have heretofore been required to pay to clerks, sheriffs and all other officials in such matters." This is the most reasonable construction of the ambiguous clauses in section 9 of the act of 1893, above referred to, and is but a legislative declaration as to their proper meaning and interpretation. Sheriffs are therefore not required to collect from litigants fees provided for by the act of 1882,

except such as the act now under consideration permits and directs.

2. Does the act of 1893 contravene section 22, art. 4, of the state constitution, which provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length." The purpose and effect of this clause of the constitution has received extended and intelligent consideration at the hands of Lord, C. J., in *Warren v. Crosby*, 24 Or. 558, 34 Pac. 661,—a recent case,—and, if applicable here, is decisive of this case also. It was there established that "statutes not amendatory or revisory in character, but original in form, and complete within themselves, exhibiting on their face their purpose and scope," do not come within the purview of this clause of the constitution, even though they may amend or modify existing laws upon the same subject by implication. The act under consideration in *Warren v. Crosby* had the effect to transfer the power to collect and assess taxes—conferred on the incorporated towns and cities of the state, by their respective charters, and also upon the different school districts, by law—to the county officers designated therein, and therefore was amendatory, by implication, of all the city charters of the state, as well as the statutes regulating the assessment and collection of taxes by school districts within the state. It was, however, an independent act, designed to accomplish an independent and distinct purpose, standing and depending alone upon the force of its own provisions for the accomplishment of the object it sought to obtain. Its scope and purposes were distinctly defined and declared within itself, and, upon its face, it did not seek or purport to revise or amend any known law; and hence it was held to be a valid enactment, under the constitution. The act under consideration is of the same nature. True, the title of the act purports to change in part "the compensation, mode of payment," etc., of certain public officers, and "to repeal certain provisions of statute"; but the act itself accomplishes the object of its enactment by force of its own terms and provisions, and its scope and purposes are perfectly manifest upon the face of it. It does not purport to revise or amend any section of the statute, or any previous enactment of the legislature, and it is none the less an original and independent act if its extraneous operation does affect other statutes. The limitation imposed by the constitution is not upon the power of the legislature to make laws, but upon the mode in which that power should be exercised in the enactment of amendatory or revisory laws, and was intended to prevent the amending or revising of existing statutes or previous enactments by substituting one phrase for another, or by inserting a sentence, or by repeating or striking out a sentence or a part of a sentence, which would, in and of themselves, convey no mean-

ing, but would depend for their operation and effect upon a proper interpolation, substitution, or elimination in comparison with the original statute or enactments. *Warren v. Crosby*, supra.

3. It is next contended that "this act provides salaries, levies taxes, and provides for the appointment of deputies, and all three subjects are expressed in the title," and that neither the act nor the title of the act is single, but embraces more than one subject, contrary to the requirements of section 20, art. 4, of the constitution, above quoted. We are required to look to the body of the act, and the provisions therein contained, for the ascertainment of the subject-matter. The title is of but little importance, except to index and fairly indicate the subject of legislation. Matters germane to or properly connected with the subject, or matters of detail, have no place in the title, although the circumstance of their being found there affords no constitutional reason for rendering the act void or inoperative. *People v. McCann*, 69 Am. Dec. 645; *State v. Silver*, 9 Nev. 231. The object of this clause of the constitution, so far as the objection here made to the act is concerned, is to prevent the combining of incongruous matters, and objects totally distinct and having no connection nor relation with each other, in one and the same bill, as well as to discourage improper combinations by the members of the legislature, which would secure support for a bill of an omnibus nature, with discordant riders attached, which, if acted upon singly, would neither merit nor receive sufficient support to secure their adoption. In short, as expressed by Mr. Cooley in his work on Constitutional Limitations (173), it was "to prevent hodge-podge or logrolling legislation." The provisions of the act under consideration tend to but one general object,—that is, to prescribe the compensation and duties of county clerks, recorders of conveyances, clerks of the circuit and county courts, and sheriffs of the several counties in the state; and they are all germane to, and properly connected with, this one general head. The act of October 25, 1880, which the court had under consideration in *Manning v. Klippel*, supra, was of the same nature, and similarly entitled; and it was then thought the act was valid, under this clause of the constitution. We think the objection of counsel here made is not well taken, and that the act contains but one general subject of legislation.

4. The next objection made is that the act under consideration is one for raising revenue, and originated in the senate, contrary to the requirements of section 18, art. 4, of the constitution. This proceeds, again, upon the assumption that the fees which are required to be paid to the officers named in the bill, and which are to be turned into the county treasuries, are taxes. Whether this assumption is right or wrong, we do not decide; but, if it be conceded that the assumption is well

founded in law, non constat that the act is one for raising revenue. Bills for raising revenue are required to have their origin in the lower branch of the legislature because it is the more numerous of the two bodies, and, being oftener renewed by elections, presumptively it more closely and directly represents the people. *Cooley*, Const. Lim. 157. The controlling feature which characterizes bills of this nature, says *Johnson, J.*, is that they "impose taxes upon the people, either directly or indirectly, or lay duties, imposts, or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens, of the benefit of good government." *U. S. v. James*, 18 Blatchf. 207, Fed. Cas. No. 15,464. This case was instituted to test the validity of an act of congress increasing the rate of postage upon third-class matter, under the national constitution, providing that "all bills for raising revenue shall originate in the house of representatives," and it was further observed by the court that: "A bill regulating postal rates for postal service provides an equivalent for the money which the citizen may choose voluntarily to pay. He gets the fixed service for the fixed rate, or he lets it alone, as he pleases, and as his own interests dictate." And hence it was concluded that the bill was not one for raising revenue. Mr. Story in discussing this clause of the national constitution, says, "The history of the origin of the power already suggested abundantly proves that it has been confined to bills to levy taxes, in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue." *Story*, Const. § 880. And this is the trend of subsequent decisions of the national courts touching the construction of this clause of the constitution. See *U. S. v. Norton*, 91 U. S. 569; *U. S. v. Hill*, 123 U. S. 684, 8 Sup. Ct. 308; *U. S. v. Broadhead*, 127 U. S. 212, 8 Sup. Ct. 1191; *The Nashville*, 4 Biss. 188, Fed. Cas. No. 10,023; and *Investment Co. v. Parrish*, 24 Fed. 200. In *The Nashville* the court say: "It is certain that the practical construction of the provision by congress has been to confine its operation to bills, the direct and principal object of which has been to raise revenue, and not as including bills out of which money may incidentally go into the treasury, or revenue incidentally arise." *Deady, J.*, in *Investment Co. v. Parrish*, says: "A bill for raising revenue, or a 'money bill,' as it was technically called at common law, is a bill levying a tax on all or some of the persons, property, or business of the country, for a public purpose; and the assessment or listing and valuation of the polls or property preliminary thereto, and all laws regulating the same, are merely measures to secure what may be deemed a just or expedient basis for the levying of a tax or raising a revenue thereon." This was predicated of the

"mortgage tax" law, which formerly prevailed in this state. In *Mumford v. Sewall*, 11 Or. 67, 4 Pac. 585, which involved an investigation of that law, with reference to its validity, under the same clause of our state constitution, this court did not feel warranted in declaring it unconstitutional, because it was not sufficiently clear that a law which merely declared that certain property theretofore exempt should thereafter be subject to taxation was strictly a law for raising revenue. Considering the similarity of the state and national constitutions touching bills for raising revenue, and the high and unbroken line of authority upon the proper construction of the latter, it is certainly a very persuasive and weighty argument for applying the same construction to the former. The very cogent reasoning employed undoubtedly has application here, and impels us to the same conclusion touching our own state constitution. A law which requires a fee to be paid to an officer, and finally covered into the treasury, of a county, for which the party paying the fee receives some equivalent in return, other than the benefit of good government which is enjoyed by the whole community, and which the party may pay and obtain the benefits under the law, or let it alone, as he chooses, does not come within the category of an act for raising revenue, and hence the objection made under this clause of the constitution is not well taken.

5. Lastly, it is contended that the act is in violation of section 10, art. 1, of the constitution, requiring that "justice shall be administered openly and without purchase." The idea of justice, as contained in this clause of the constitution, was first promulgated by the *Magna Charta*, and the reasons which led up to the declaration will serve us in construing the clause. In the days of the ancient kings of England, justice was a thing of commerce, and was avowedly bought and sold. The king's court—the supreme judiciary of the kingdom—was open to none who came not with presents to the king. Bribes were openly given for the expedition, delay, suppression, and for the preservation of justice. The barons of the exchequer, the first nobility of the kingdom, were awarded money in exchange for fair dealing, for preserving liberties under the king's charter, for helping to recover debts, for permission to make defenses, for "free law," and the like. To prevent and overthrow this barbarous and shameless practice of the times, it was stipulated in the Great Charter that "to none will we sell, to none will we deny or delay right or justice." *Harrison v. Willis*, 7 Helsk. 46. The long-fixed meaning of these words is that the right, attainment of justice,—the end of the law,—must be administered without sale. Original process must issue without price, except what the law fixes, and without denial, though the defendant be a favorite of the king or the government who interferes in his behalf, and must be proceeded with by

the judges, after suit instituted, without delay by themselves or by order of the king, and that proper judicial process must issue by the judges, without fee or reward, except that fixed by the law. *Townsend v. Townsend*, Peck (Tenn.) 15. This court has already construed the clause in question, in *Bailey v. Frush*, 5 Or. 136. *Bonham, J.*, speaking for the court, says: "We hold that the language of our constitution * * * means simply that justice shall not be bought with bribes, nor shall the attendant or incidental expenses of litigation, in the nature of costs and disbursements, be so exorbitant and onerous as to virtually close the doors of courts of justice to those who may have occasion to enter there. In other words, that the rights of the poor man to a redress of his grievances shall be equally respected with those of the rich, and that equal and exact justice shall be dealt out alike to all." The requirements of this act, as they relate to the fees and charges to be paid by litigants and others, do not impinge nor intrench upon the constitution, as thus interpreted. These conclusions affirm the judgment of the court below, and it is so ordered.

FARWELL v. NEEDHAM, County Clerk.

(Supreme Court of Oregon. Oct. 7, 1895.)

Appeal from circuit court, Linn county; George H. Burnett, Judge.

Petition for mandamus by H. Farwell against N. Needham, county clerk of Linn county, to compel defendant to file a complaint. Defendant had judgment, and plaintiff appeals. Affirmed.

Geo. G. Bingham and Thos. H. Tongue, for appellant.

WOLVERTON, J. This is a mandamus proceeding instituted for the purpose of requiring the defendant, who is the county clerk of Linn county, Or., as such officer, to file a complaint in a cause entitled in the circuit court of the state of Oregon for Linn county, wherein H. Farwell, the plaintiff herein, was plaintiff, and against one John N. Hoffman. The plaintiff tendered with the complaint the fee allowed the clerk under the act of October 26, 1882, but the defendant refused to make the filing desired until plaintiff should pay the fee fixed by the act of February 22, 1893, and by said act required to be paid before any filing could take place. The alternative writ was issued. To this a demurrer was interposed, and sustained by the court below, and the writ dismissed. Plaintiff appeals. The same questions involved here were considered in *Investment Trust v. Sears* (just decided) 41 Pac. 931, and there passed upon adversely to the contention of plaintiff. That case is therefore decisive of this. The judgment of the court below will therefore be affirmed.

BISHOP v. BAISLEY et al.¹

(Supreme Court of Oregon. Oct. 7, 1895.)

MINES AND MINING—FORFEITURE OF CLAIM—RECOVERY OF POSSESSION—PLEADINGS.

1. In an action by a prior against a subsequent locator of a mining claim, the latter, in

order to show a forfeiture by the former before his own location, must specially plead it.

2. The allowance, under objection, of an amendment of a pleading to conform to evidence offered and objected to, is rendered harmless by allowing further evidence on the question raised by such evidence.

3. In an action by a prior against a subsequent locator of a mining claim, the objection that the answer after stating the facts showing a forfeiture before defendant made his location, did not allege "that thereby the claim was forfeited," cannot be urged after trial.

4. Picking rock from the walls of a shaft or outcropping of a ledge, in small quantities, from day to day, and testing it, in order to find a paying vein, cannot be credited as part of the \$100 worth of "work and improvements" required to be made by a locator on his claim within one year from the date of his location, by Rev. St. U. S. § 2324, as amended by Supp. Rev. St. U. S. p. 276.

5. Where a mining claim has been forfeited by the locator, his going onto the claim, with tools, and securing samples of ore, is not a resumption of his work, within Rev. St. U. S. § 2324, declaring a mining claim forfeited, and allowing a relocation, if the original locator has failed to put \$100 worth of work and improvements thereon during any year preceding the issue of a patent, provided that the original locator has not "resumed work" before the attempted relocation.

6. A suit in equity will lie to restrain a continuing trespass on a mining claim by the removal of valuable ore, and for damages already done by such trespass, where the title to the property is seriously in doubt, though the question of title has not been presented in a court of law.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Action by Phillip R. Bishop against James L. Baisley and others to restrain and recover for trespass on a mining claim. From a decree for defendants, plaintiff appeals. Affirmed.

This suit was brought to restrain trespass upon a mining claim, and to recover damages for the injurious use of it by the defendants. The plaintiff, after showing his citizenship, alleges, in substance, that he is now, and was at all times mentioned in his complaint, the owner, by reason of location and possession under the general mining laws of the United States, of a certain quartz mining claim, situated in Baker county, Or., generally known and designated as the "White Pigeon Quartz Claim" (then follows a description of the claim by metes and bounds); that on or about the 1st day of May, 1893, while he was such owner and in possession of said mining claim, the defendants wrongfully entered and trespassed thereon, and dug a shaft many feet deep upon the vein therein, and at said time, and at various and divers times since, took out, carried away, and converted to their own use, large quantities of very rich gold-bearing quartz, claiming the right so to do, thereby destroying the substance of said mine and depreciating the value thereof, and that they threatened to continue, and were continuing, said trespass and waste, to the irreparable injury of the premises; that the defendants extracted gold from said mine to the value of \$30,000; that plaintiff has been greatly hinder-

ed in the possession and working of said claim, to his damage in the sum of \$50,000; and that he has no plain, speedy, or adequate remedy at law. The relief asked is for a decree perpetually enjoining defendants from further trespassing upon said claim, or interfering with plaintiff's possession; that defendants account to plaintiff for the gold extracted by them; and for damages in the sum of \$50,000. The answer puts in issue every material allegation of the complaint, except the citizenship of defendants and for a further defense alleges, in substance, that at all the times therein stated the premises therein described were vacant public lands of the United States, chiefly valuable for the mineral they contained, and were subject to location as mineral lands; that on the 1st day of May, 1893, defendant J. L. Baisley made a good and valid location of the Mabel quartz claim in Baker county, Or. Here follows a description of the claim, and other allegations as to the manner of its location. Continuing, the answer shows, substantially, that ever since May 1, 1893, defendants have been, and now are, the owners of said claim, by virtue of location and occupancy, and have at all times been, and now are, in the open, notorious, exclusive, and actual possession thereof, claiming title thereto. The reply denies specifically the material allegations of the answer, and, further replying thereto, alleges, in substance, that about December 12, 1892, defendants applied to and obtained plaintiff's permission to enter upon the said White Pigeon claim, and to prospect the quartz ledge thereon, and that their entry upon said claim was made under said license, with full knowledge of plaintiff's claim and right of possession, and in subordination thereto; that while so in possession they wrongfully and fraudulently attempted to make the alleged location of the Mabel claim, which covers plaintiff's claim for a distance of 1,260 feet from the northeast line thereof, with intent to defraud plaintiff of his rights; and that by reason of the premises the defendants are estopped from contesting the right of plaintiff to the ownership and possession of said White Pigeon mining claim.

Upon the issues being thus joined, a referee was appointed by the court to take the testimony, and to report his findings of fact and conclusions of law. In due time all the testimony which the parties had to offer was taken, and on June 25, 1894, the referee reported the same, together with his findings of fact and law, which were favorable to plaintiff. On the same day defendants filed a motion for leave to file an amended answer, which was allowed by the court, over plaintiff's protest. Defendants thereupon filed an amended answer, similar to the first, except that the defendants set up therein the location of an additional claim on May 1, 1893, designated as the "Queen of the West," which covers the remaining 240 feet of the White Pigeon not covered by the Mabel, and by way of a further defense allege, in substance, that neither

the plaintiff, nor any of his grantors or predecessors in interest, did or performed, or caused to be done or performed, any work, labor, or improvements, of any kind, nature, or description, upon, or for the use or benefit of, said alleged White Pigeon claim, under or by virtue of said alleged location of plaintiff, and that plaintiff and his grantors wholly failed and neglected to represent said claim, after the date of said alleged location, in any manner or form whatever, or to the value of anything. The plaintiff, by his amended reply, put in issue all these and other allegations of the amended answer, and the court thereupon referred the case back to the referee to take such further testimony as the parties had to offer. Other testimony was accordingly taken, mainly upon the question as to whether plaintiff had performed \$100 worth of assessment work prior to January 1, 1893, whereupon the referee reported the case back, with his findings again in favor of plaintiff. Exceptions and objections were filed to the report by both parties. The defendants, excepting only to the amount of damages found, moved the court for a confirmation of the report as to all the other findings. The court thereupon modified the findings of the referee, and rendered a decree for the defendants, from which plaintiff appeals. The testimony necessary to a full understanding of the case is noted in the opinion.

J. H. Slater and R. J. Slater, for appellants.
Chas. A. Johns, for respondents.

WOLVERTON, J. (after stating the facts). There is no doubt but that plaintiff and one C. J. Finn made a sufficient and valid location of the White Pigeon claim, November 25, 1891. This is the finding of both the referee and the court below, and is borne out by the testimony. On October 24, 1892, Finn sold and conveyed his interest in the claim to plaintiff, and thereupon plaintiff became the sole owner thereof. The fact that J. L. Baisley made a sufficient and valid location of the Mabel claim, and S. B. Baisley of the Queen of the West, on or about the 12th day of May, 1892, is also placed beyond dispute by the testimony, provided the lands and premises occupied by them were at that time open for location and occupancy by the public. The Mabel claim is identical with the White Pigeon for a distance of 1,260 feet southwestward from its northeast line, and the Queen of the West covers the rest of it. The question then is, which of these parties has the better title to the premises occupied by the White Pigeon claim? It is claimed by defendants that plaintiff forfeited his claim by not representing it as required by law,—that is to say, by failing to perform work and labor thereon, in prospecting and developing it, to the amount of \$100, prior to January 1, 1893,—and, therefore, that it was open to exploration and location at the time defendants made their location of the Mabel and Queen of the West claims, and consequently their

locations were valid, and that their title and right of possession are superior to plaintiff's.

Under the United States statutes governing the location of mines, and the acquirements of patents therefor, the locator has one year from the 1st day of January succeeding the date of his location in which to perform his first annual work. Rev. St. U. S. § 2324, as amended January 22, 1880 (Supp. Rev. St. p. 276). The plaintiff therefore had until January 1, 1893, in which to perform his annual labor upon the White Pigeon. If he failed to perform the required amount of labor prior to the last-named date, the claim would thereafter be open for relocation by any person competent under the statute. But if, having failed in performing his annual labor, he resumed and performed work thereafter to the extent required by law, his rights, after resumption, would have been the same as if no default had occurred. *Belk v. Meagher*, 104 U. S. 282; *Honaker v. Martin* (Mont.) 27 Pac. 397. But whether, if having resumed, and while in the actual possession, performing labor, and prior to the full performance of the amount required by law, the claim would be open for relocation, the authorities are divided. See *Mining Co. v. Deferrari*, 62 Cal. 160, and *Honaker v. Martin*, *supra*. The facts here do not present such a case. It is, however, plain that if plaintiff had performed \$100 worth of work on his claim prior to the date of the alleged location by defendants of their claims, as he insists that he has done, the territory covered by the White Pigeon was not open for relocation, and hence their locations could not be valid. But, aside from the question of work, plaintiff claims—First, that, before defendants can avail themselves of a forfeiture, they must plead it; second, that the court erred in allowing defendants to file their amended answer, by which they attempt to allege a forfeiture; third, that, if the court rightfully allowed the amended answer to be filed, then the forfeiture is insufficiently alleged; and, fourth, that forfeiture was not shown by the testimony. Of these in their order:

1. A mining claim, subsequent to a valid location, is property, in the highest sense of the term. It may be bought and sold, and will pass by descent. It carries with it the "exclusive right of possession and enjoyment of all the surface included within the lines" of location. The right is a valuable one, and is protected by law. It continues until there shall be a failure to represent the claim; that is, to do the requisite amount of work within the prescribed time. The right of possession and enjoyment acquired by location is kept alive by the representation prescribed by law, but, when not thus kept alive, the right is forfeited, and the claim is thereafter open for relocation. In order, therefore, to secure a valid location, it must be established that rights acquired under a prior one upon the same claim have been forfeited. The affirmative of this proposition is always cast upon

the party seeking to establish it, and hence, under the rules of pleading, it must be specially pleaded, where opportunity is offered, before a party can be heard to support it with evidence. *Renshaw v. Switzer* (Mont.) 13 Pac. 127; *Hammer v. Milling Co.*, 130 U. S. 291, 9 Sup. Ct. 548; *Belk v. Meagher*, 104 U. S. 279; *Morenhaut v. Wilson*, 52 Cal. 263; *Wulff v. Manuel* (Mont.) 23 Pac. 723; *Quigley v. Gillett* (Cal.) 35 Pac. 1040; *Mattingly v. Lewisohn* (Mont.) Id. 114. Furthermore, "a forfeiture cannot be established, except upon clear and convincing proof of the failure of the former owner to have work performed, or to have improvements made, to the amount required by law." *Hammer v. Milling Co.*, supra.

2. Plaintiff contends that as objection had been interposed to all the evidence offered by defendants to show that plaintiff had not done or performed \$100 worth of labor upon the White Pigeon claim, as required by law, for the purpose of establishing a forfeiture on the part of the plaintiff, and that as plaintiff had not offered his full evidence in refutation of the claim of forfeiture, all of which was shown by affidavit, the court erred in allowing defendants' motion for leave to file the amended answer. The rule is well established that a party is not entitled to have his pleadings amended to conform to the proof where objection was made to the introduction of evidence to cover which the amendment is desired. *Mendenhall v. Water-Power Co.* (Or.) 39 Pac. 399; *Beard v. Tilghman* (Sup.) 20 N. Y. Supp. 736. But the court below met this objection by referring the cause back to the referee, with directions to allow the parties to introduce other evidence touching the additional questions raised by the amended pleadings, so that the cause might be tried fully upon its merits. This, we think, was within the sound discretion of the court, and in furtherance of justice. Courts are always solicitous to reach the merits of every cause, and, to that end, are liberal in allowing amendments. There was no error in allowing the motion.

3. The ground of the next contention is that the amended answer, after stating the facts relied upon as constituting the forfeiture of plaintiff's claim, fails to state "that thereby the claim was forfeited"; citing *Gelston v. Hoyt*, 3 Wheat. 247. This was a case of seizure of a ship and cargo for a supposed forfeiture, and under the common-law form of pleading, then in use, it was held that, after stating the facts, it was necessary to aver "that thereby the property became and was actually forfeited, and was seized as forfeited." But under our practice these technical forms of pleading are abolished, and it is now only necessary to set forth the facts constituting the cause of action or defense, concisely, without unnecessary repetition. Not having been tested by a demurrer, the allegations of forfeiture are sufficient after trial.

4. Has a forfeiture of the White Pigeon claim by plaintiff been established by the testimony? Numerous witnesses were produced, and testified relative to the labor done upon the claim prior to January 1, 1893; and, while they differed widely as regards the estimated value of the work observed by them as having been done in the years 1891 and 1892, they substantially agreed as to its amount and extent. Many years prior to the location of the White Pigeon there had been sunk on the ledge three different shafts. Some witnesses say two, but there were undoubtedly three. The larger one is sometimes called an "incline." These shafts ranged from two to eight feet in depth, and were of different relative dimensions. The witnesses gathered their information by passing over the claim; some casually, and some for the express purpose of ascertaining what work had been done. All of them describe a new cut at the southwest corner of the claim. Some think it was within the boundary and others say it was outside, but it is immaterial to this inquiry whether it was within or beyond the boundary. This cut was evidently made with the purpose of tunneling into the hillside, and thereby to strike the ledge at some distance under the surface. It was from 20 to 25 feet long, 3 to 4 feet wide, and in the face of the cut, or at its deepest point, 4 to 5 feet deep. They testify, also, to some fresh work that had been done in one of the old shafts. This is as far as they all agree. One of the witnesses (C. M. Foster), in rebuttal, recalled having seen a cut, spoken of as a "crosscut" running across the ledge, presumably for the purpose of exposing it. The dimensions of this cut are given by the plaintiff as from 8 to 10 feet long, probably 16 inches wide, and about 12 inches deep. A witness or two relate having seen some small prospect holes, two or three in number, sunk in the earth at a point where the ledge is broken off and lost sight of, probably for the purpose of finding the ledge again. This is a synopsis of all the work observed by the defendants' witnesses which had been done in the years 1891 and 1892, after the date of the location of the White Pigeon. It was comparatively easy to distinguish the new work from that done in sinking the shafts years prior, from the action and indications left by the elements upon the exposures made by the excavations. Many of these witnesses were practical miners, and knew the value of mining labor, and their estimate of the value of the labor thus expended ranged from \$9 to \$30,—none placing it higher than the latter sum. Of the testimony offered to overcome this showing, that of plaintiff, in his own behalf, is the strongest, and is practically all that he has offered upon the question, except as he is corroborated by other witnesses. The work on the cut at the southwest corner of the claim was done by Howard, Heffrom, and Ellis, un-

der his directions, for which work he paid Howard \$10. Howard describes how it was done, and gives the time expended in doing it. He says he worked $2\frac{1}{2}$ days, 4 hours counting as a day's work. Hedstrom and Ellis each worked an hour and a half, and Bishop worked the same length of time. Bishop testifies that he himself put in about 20 days on the claim, one of which is the $1\frac{1}{2}$ hours' work referred to by Howard. He says: "My work consisted of crosscutting the ledge, sinking holes, prospecting croppings, and working the croppings by hand and mortar, and reducing the ore to pulp with water and quicksilver, using acids, and separating the gold from the quicksilver after working it." On cross-examination he describes minutely what work he did, and how. He lived at Baker City, and generally went from his home to the mine, a distance of 12 miles, and back again, each day he worked upon it. Speaking of the first and second days that he was there, he says: "I prospected the ledge,—the croppings." "Prospected by breaking the rock off the ledge, and sampling it." "I worked along the ledge then, picking and hunting for free-gold rock, knowing that she carried free gold." "That was all I done these trips." Of the third time, he says: "I started to do surface work,—that is, top work,—where there was no ledge on the break of the hill, westerly from the old shaft, where the ledge is broken off, and no one has found it." "There were several holes there that I dug at that time. I cannot tell how many." Also: "Worked on the ledge matter." "I picked rock, examined it, and prospected for the gold streak that I knew was there." In regard to the fourth trip, in April, 1892,—the former being along in March,—he says: "I prospected around on that trip on the mine, east of the old shaft on the westerly end." "Removed no dirt at that time." "Removed some rock; yes." The trace left was "by the ledge being disturbed by breaking it." The fifth time, "Broke off rock, put it in a mortar; panned it out with a gold pan." "I worked a little in the old shaft and hole No. 2, from the old shaft with a pick and shovel." The sixth trip "I run a crosscut at that time." "I removed some dirt—not a great deal—away from the hanging wall on the southwest, westerly from the old prospect shaft." The seventh trip "I cleared away around the ledge, took off rock, sampled it, marked it, and worked in hole No. 2 with pick and shovel, threw out some dirt at that time, sampled it, and brought them to town." Eighth trip "I worked on this slope westerly, to see if I could find the ledge where the break was, near the old prospect shaft, with the intention, if I could find it, of running a tunnel, and sinking and clearing out the old prospect shaft." "Prospected around with the pick some. I would break off portions of the ledge matter with my pick, and would break the rock with the eye of the

pick, or a small hammer I had with me. I would take my glass, and examine the rock, and if it did not suit me I would leave that portion of the ledge, and go to another portion. I was hunting the pay chute. The reason I was hunting the pay chute was, I found a piece of rock three inches long and one-half inch wide, and about one-half an inch deep, that had free gold in it." The ninth trip "I picked down the rock in small pieces, marked them, and cut into the ledge quite a little piece." "I took some samples out of the old shaft, No. 1, marked them, and the part of the ledge they came from, and brought them out, and took them back with me." Without following this testimony further in detail, suffice it to say that the foregoing fully illustrates the nature of the work done by plaintiff, for which he claims 20 days. When asked to "give the number, size, and dimensions of any and all new holes and crosscuts which were made on the claim after its location, up to January 1, 1893," he replied: "On the westerly slope of the White Pigeon, westerly of the old shaft, there is a crosscut in the hill, crosscutting the ledge, I should judge, perhaps fifteen feet or more. It would be about two feet to thirty inches wide, twenty-four inches deep. And several holes—I don't recollect how many—in the vicinity of where this crosscut is would average about three feet, I should judge, in length, and about two in depth. There is a great number of these—I don't recollect how many—some, several of them to try and find the ledge running parallel with the main White Pigeon, which I think would average two or three feet, and about twenty inches or two feet in depth. There was a hole, No. 3, an old shaft, to the best of my recollection, about four feet long, about thirty inches wide, and about two feet deep. I enlarged hole No. 2 by working, I should judge, about one-third. The old shaft, I have made that larger, I should judge, about one foot. The length on one side was ten feet. I had work done on the tunnel site in the fall of 1892, about twenty feet long, four feet wide, and about four and one-half or five feet deep at the big end." He further testifies that C. J. Finn rendered him a statement of 13 days' work that he did upon the claim, but he has no personal knowledge of his having done any work, except that he saw Finn at the mine one day in June, 1892, and at that time he was prospecting the ledge for ore samples, some of which he produced. He further states that he spent 8 days at home testing the samples of rock which he had taken from the mine, and had some 12 assays made of them, and that it was worth \$1.50 each to make such assays. All this work, he says, would "exceed one hundred dollars in value." The fact was established that miners' labor was worth from \$3 to \$3.50 per day.

It may be conceded that, if the nature of the work done and performed by the plaintiff

fills the measure of work required to be done annually on all unpatented claims, he has complied with the law, but, if it does not, that he has fallen short of it. A summary of the value of the labor performed will therefore be unnecessary, whether classed as assessment work or not. Section 2324, Rev. St. U. S., requires that on each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than \$100 worth of labor shall be performed, or improvements made, during each year. The time in which the first annual labor after location is required to be performed has been noted. Mr. Justice Miller, in *Chambers v. Harrington*, 111 U. S. 353, 355, 4 Sup. Ct. 423, after explaining the reasons for the adoption of this statute, says: "Clearly, the purpose was the same as in the matter of similar regulations by the miners, namely, to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it, as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger." Wade, C. J., in *Remington v. Baudit*, 6 Mont. 141, 9 Pac. 819, says: "The purpose of requiring one hundred dollars' worth of work or improvements on a mining claim each year is to so develop the mine as that a patent may issue for the claim. It is not the policy of the government to issue patents for the mineral lands until there has been a discovery, and sufficient work done upon the claim to demonstrate its value. * * * A liberal construction should be given the mining act of 1872, but it should not be so liberal as to authorize a claim to be held without representation, or a patent to be procured before any work had been done on the claim." This language is quoted with approval in *Honaker v. Martin* (Mont.) 27 Pac. 398,—a later case from the same state. Before patent can issue, the claimant is required to file with the register a certificate of the United States surveyor general showing that \$500 worth of labor or improvements has been done or made by himself or grantors. Rev. St. U. S. § 2325. So that it is apparent the statute touching the location and acquirement of mining claims was enacted to subserve two purposes, namely, to insure good faith in the locator or claimant, and to require of him that he exhibit a claim which, by reason of its development, or the improvements made therefor or for its benefit, is of some value; and it was assumed by congress that \$500 worth of labor or improvements would demonstrate its value as a mine. As to the nature of the labor or improvements, the statute would seem to require that the labor be performed or the improvements made for the development of the claim; that is, to facilitate the extraction of the metals it may contain. *Smelting Co. v. Kemp*, 104 U. S. 636; *Remington v. Baudit*, supra.

But it is insisted that whatever labor is

performed for the purpose of prospecting a mine fills the requirements of the statute, and, in support of this position, counsel cites *U. S. v. Iron-Silver Min. Co.*, 24 Fed. 568, and *Book v. Mining Co.*, 58 Fed. 107. In the former of these cases, language is employed which would seem to indicate that the term "prospecting" was used in its broadest sense. It is there said that "work done for the purpose of discovering mineral, whatever the particular form or character of the deposit which is the object of the search, is within the spirit of the statute." It is disclosed, however, by the opinion, that labor was claimed for digging prospect holes on a placer mine, evidently in trying to find veins, leads, and lodes, and it was contended that no work in that direction and for that purpose ought to be counted in an application for a patent to placer mining ground; and it was with reference to this state of facts that *Brewer, J.*, with some hesitancy, used the language above quoted. The latter case simply announces the well-settled doctrine that "labor and improvements, within the meaning of the statute, are deemed to be done upon the location when the labor is performed or improvements made for the express purpose of working, prospecting, or developing the ground embraced in the location," and was said with reference to a tunnel commenced outside of the mining claim in dispute, and intended for its development as well as other contiguous claims. The word "prospecting," when used with reference to annual labor to be expended upon a mining claim, is incapable of so broad a significance as is claimed for it. It is not used in the sense of "exploration and discovery," which is necessary before a valid location can be made, but rather in the sense of "development and demonstration," that the value of the ledge may be determined, as distinguished from the ascertainment of its existence. Now the question recurs whether picking rock from the walls of a shaft, or from the side or outcroppings of a ledge, in small quantities, from day to day, making tests for the purpose of sampling it, breaking and examining it under a glass, crushing it in a mortar and panning it out, and carrying it away and making assays of it, in attempting to find the "pay chute," as it is termed, is such as the law will permit the claimant to be credited with upon his account for annual labor performed. Such labor does not add to the value of the claim, nor does it tend to the development of the mine. Five hundred dollars' worth of labor of this nature could easily be expended, and yet the surveyor general would not be able to certify, from an inspection of the mine, that it had been done. On the contrary, on applying the test of reasonable value, he would find it far short of this amount. *Mattings v. Lewisohn* (Mont.) 35 Pac. 114; *Du Prat v. James* (Cal.) 4 Pac. 562. Such work naturally leads one to question the good

faith of the claimant, and to doubt his purpose to represent the claim except upon finding the "pay chute." This class of labor is not such as the statute contemplated, and will not avail the plaintiff, and it is apparent that, without it, he has failed in performing the \$100 worth of labor or improvements required by law. The actual work that he did which can avail him consists in the cut at the southwest corner of the claim, which cost him \$10; the crosscut made by him in one day for the purpose of exposing the ledge; several prospect holes that he sunk for the same purpose, which could be done within five days, as the outside limit; and an enlargement of one or two of the old shafts. The court below very properly found that the assessment work did not exceed \$50. The claim was therefore open to re-entry on January 1, 1893; and, unless plaintiff had resumed work thereafter as required by law,¹ it was likewise open at the time defendants relocated it. Plaintiff, in April, 1893, entered one of the old shafts, and spent an hour or so with pick and hammer, in securing samples of the ore, and it is claimed for this that it was a resumption of work; but this is not a resumption, under any of the authorities. See *Honaker v. Martin*, supra.

It was further contended that defendants' entry was under a license from the plaintiff, but it is sufficient to say that this contention is not established by the evidence.

This disposes of the case, with the exception of a question which is made as to the jurisdiction of a court of equity to take cognizance of the matter in issue, the possession and title being in dispute. It is clear from the testimony that at the commencement of the suit the plaintiff was absolutely out, and the defendants were in full possession of the claim. The inquiry has heretofore proceeded upon the assumption that the court had jurisdiction to determine all matters connected with the suit. We will now consider the contention of the respective parties upon this proposition.

This may be termed a suit to enjoin a trespass, and for an account. It falls within the category of remedies which are of purely equitable cognizance. The trespass, threatened or actual, is the element which, in proper cases, lays the foundation for equitable interference. It is the primary "cause of suit." The power to assess damages is incidental, and does not exist as an equitable remedy, except in connection with the injunction to restrain the trespass, and is sustained upon the principle that, as a general rule, a court of equity, having acquired jurisdiction for one purpose, will retain it for all,

and proceed to the adjudication of legal as well as equitable rights, with a view to the administration of full relief. *Fleischner v. Investment Co.*, 25 Or. 130, 35 Pac. 174. And, upon the further ground of preventing a multiplicity of suits, Chancellor Kent, in *Livingston v. Livingston*, 10 Am. Dec. 354, says, "This protection is now granted in the case of timber, coals, lead ore, quarries, etc.," and quotes from Lord Eldon, in *Thomas v. Oakley*, 18 Ves. 184, as follows: "The present established course was to sustain the bill for the purpose of injunction, connecting it with the account in both cases (waste and trespass), and not to put the plaintiff to come here for an injunction, and to go to law for damages." Mr. Daniell says: "The account depends entirely upon the injunction. It is incidental to, and consequential upon it. And, if a person is entitled to the one, he is entitled to the other, also, on the principle of preventing a multiplicity of suits; for otherwise he would be obliged to bring his action at law, as well as in equity,—his action, by way of satisfaction; his bill, by way of prevention." 2 Daniell, Ch. Prac. *1634. Courts of equity will enjoin a trespass only when there exists some equitable grounds for interference, as where there is danger of irreparable mischief, or that the value of the inheritance is put in jeopardy by a continuance of the trespass, or when it becomes necessary to prevent a multiplicity of suits. The primary purpose of the suit is to quiet the possession. In ordinary trespass, or where the law affords an adequate remedy, equity refuses to interfere. *Bracken v. Preston*, 44 Am. Dec. 420. The law is very old which permits the use of an injunction in restraint of waste. Lord Eldon says there is a writ at common law after action to restrain waste. *Smith v. Collyer*, 8 Ves. 90. An injunction for this purpose was, and is now, allowed a party out of possession against one in possession of lands, to restrain irremediable damage to the inheritance, but the parties must be privies in title or estate, such as landlord and tenant, mortgagor and mortgagee, or tenant of a particular estate and remainder-man; and the injunction will be allowed in all cases where an action will lie to recover possession of lands wasted, or damages for the waste. *Chapman v. Toy Long*, 4 Sawy. 33, Fed. Cas. No. 2,610, and 3 Pom. Eq. Jur. § 1348. But the remedy which permits an injunction against trespass is of more recent origin, and was first granted by Lord Thurlow, late in the eighteenth century. Lord Eldon relates the instance, of which he had a note,—the case in which the order was made being now known as the "Flamang Case,"—as follows: "There was a demise of close A. to a tenant for life, the lessor being landlord of an adjoining close, B. The tenant dug a mine in the former close. That was waste from the privity. But when we asked an injunction against his digging in the other

¹ Rev. St. U. S. § 2324, as amended by Supp. Rev. St. p. 276, declares a mining claim forfeited by failing to put \$100 worth of work and improvements thereon during any year prior to the issue of a patent, and allows a relocation by another person, provided the original locators "have not resumed work."

close, though a continuation of the working in the former close, Lord Thurlow hesitated much, but did at last grant the injunction—First, from the irreparable ruin of the property as a mine; secondly, it was a species of trade; and, thirdly, upon the principle of this court enjoining in matter of trespass where irreparable damage is the consequence." *Hanson v. Gardiner*, 7 Ves. 307. See, also, *Mitchell v. Dora*, 6 Ves. 147. Since the time of Lords Thurlow and Eldon, the remedy against trespass by injunction has become well established, and is now constantly brought into requisition. But, contrary to the injunction against waste, it is allowed a party in possession against a stranger whose entry is unlawful. 1 Spell. Extr. Rel. § 336.

It is said that injunctions are now granted much more liberally than formerly, and that the tendency is to break through the old distinction existing between waste and trespass. *Chapman v. Toy Long*, supra; *Lowndes v. Bettie*, 33 Law J. Ch. 451. The authorities, however, when closely observed, would seem to indicate that the distinction which has been broken through is mostly the distinction which formerly existed in granting the injunction in one instance while refusing it in the other. The same conditions which lay the foundation for, or that will support, an injunction in case of waste will not suffice as against trespass. The material and vital distinction regards the possession of the relative parties litigant. In case of waste the privity existing between the parties will always enable the plaintiff, while out of possession, to maintain the suit; while, without the privity of estate or title, as in case of trespass, possession, or, what is tantamount thereto, the adjudicated or admitted right of possession, or an action pending therefore, is necessary to justify the interference of a court of equity. 1 Spell. Extr. Rel. § 368. *Deady, J.*, in *Chapman v. Toy Long*, supra, states the rule broadly. He says: "It is also insisted that the complainants must first obtain possession of the premises by an action at law, before a court of equity will interfere to restrain the defendants from committing the threatened trespasses. * * *

Wherever a trespass is attended with irreparable mischief, or a multiplicity of suits, or vexatious litigation, the remedy by injunction will be applied, the same as if it were a technical waste." That was a suit for injunction, with an account, against some Chinamen who were in possession of a placer mine, and who were disqualified from locating and acquiring title to mines from the government. The plaintiff had made location, and, without acquiring possession, had entered suit. The court, however, only awarded a temporary injunction. The result of this case is approved by Mr. Justice Field in *Erhardt v. Boaro*, 113 U. S. 539, 5 Sup. Ct. 585, without adopting the reasoning. He says: "The authority of the court is exercised in such cases through its preventive writ, to

preserve the property from destruction pending legal proceedings for the determination of the title." The doctrine of the latter case is that injunction will issue, at the suit of a person out of possession, to restrain irreparable mischief going to the destruction of the substance of the estate, where the title is being litigated on the law side of the court. But we are now dealing with a suit for an injunction, coupled with an account for damages. It is sought to make the injunction perpetual, and, at the same time, recover damages for injuries sustained. The suit, in its object and purposes, is essentially different from one wherein a temporary or preliminary injunction only is sought to restrain injurious acts, irreparable in their nature, pending an action at law to determine adverse title or the right of possession. The latter is ancillary in its nature to the action at law, and in aid of it, that the plaintiff may reap the full benefit of his judgment, when duly obtained; while, upon the other hand, as we shall finally see, the action at law is in some measure auxiliary to a suit for peremptory injunction coupled with an account.

It is a well-settled rule of law that where the title is seriously in dispute the court will not entertain the injunction, except it be preliminary in its nature, and for temporary purposes only, to abide the adjudication of title by an action at law, where the estate is legal and not equitable. A peremptory or perpetual injunction is never granted in such cases as that would be, to try the title in a court of equity, where the remedy is purely legal. *Clayton v. Shoemaker*, 67 Md. 219, 9 Atl. 635; *Old Telegraph Min. Co. v. Central Smelting Co.*, 7 Morr. Min. R. 556; *Stevens v. Williams*, 5 Morr. Min. R. 452. Equity will not try title to real property where the party invoking its aid has ample facilities, and is in a position, to settle the question at law; in other words, where he has an adequate remedy at law. The underlying reason for remitting a suitor to a court of law is that the right of trial by jury may not be denied any person under the pretense of equitable cognizance. So it is that in a suit to restrain a trespass, if the relief sought is a peremptory and permanent injunction, which would in effect estop subsequent adjudication as to title, the plaintiff must possess and show such a title, as against the defendant, as will protect him in the possession. A mere prima facie title, possessory in its nature, if not disputed, is sufficient. 1 Spell. Extr. Rel. § 365. But whatever this title may be, if seriously questioned, so that the validity thereof, whether possessory or otherwise, becomes one of the primary issues in the case, then a court of equity will refuse the relief, at least to the extent of making the writ peremptory until the title is settled at law. The rule of practice is well spoken by *Wheeler, J.*, in *Burnley v. Cook*, 13 Tex. 589. He says: "In all cases where the right is doubtful, the court will direct a trial, and

in the meantime, if there be danger of irreparable mischief, or if there is any other good cause of granting a temporary injunction, it will be ordered, so as to restrain all injurious proceedings; and when the plaintiff's right is fully established a perpetual injunction will be decreed." Ruffum, C. J., in *Irwin v. Davidson*, 3 *Ired. Eq.* 317, says: "But it is plain that the jurisdiction to restrain trespasses, like that to restrain nuisances, is not an original jurisdiction of the court of equity, which enables this court, under the semblance of preventing an irreparable injury to a legal estate, to take a jurisdiction of deciding exclusively upon the legal title itself. Therefore, in such case, the plaintiff ought to establish his title at law, or show a good reason for not doing so; and, if he will not, this court cannot undertake, against a defendant's answer, to try the questions of title and trespass and nuisance. * * * and that the court of equity should only grant the injunction where the plaintiff is endeavoring to establish his title at law, and until he should have had a reasonable time allowed for that purpose." It is observed in *Stevens v. Williams*, 5 *Morr. Min. R.* 453, that: "Regularly, the law action should be brought before application is made for an injunction, and that fact should be averred in the bill; but where that has been omitted through mistake or inadvertence the rule has been, so far, relaxed to admit of the bringing of such suit after the filing of the bill,—the plaintiff being put upon terms of commencing the suit within a short time and prosecuting it with diligence." In *Clayton v. Shoemaker*, *supra*, it is held that in a case of controversy concerning the legal title the injunction will issue temporarily, so as to retain a statu quo condition until the legal title is determined, and, if the result is favorable to petitioners, then that the injunction should be made perpetual. That was a case of continuing trespass. From these authorities we get the principle, and the rule of procedure. A court of equity, always solicitous that there should not be a failure of justice, will make its relief effective, so that if, when the legal title and right of possession are settled, the preliminary injunction does not answer the purposes of the suit, a peremptory injunction will issue, and such other and further relief will be granted as is consistent with equity. The injunctive jurisdiction of courts of equity will be freely exercised to prevent trespass upon mines, as the digging and removing ores therefrom, and extracting and disposing of their products, reaches to the very substance and value of the estate, and goes to the destruction of the very essence thereof. A continued trespass of such a character would almost inevitably lead to a multiplicity of actions for damages. 2 *Beach, Inj.* § 1155. The general rule requiring the plaintiff to come with an uncontroverted legal title extends also to trespass against mines, but is relaxed somewhat in

the case of irreparable injury going to the very substance of the estate. 10 *Am. & Eng. Enc. Law*, 883; *U. S. v. Parrott*, 1 *McAll.* 271, *Fed. Cas. No.* 15,998. Lord, C. J., in *Allen v. Dunlap*, 24 *Or.* 232, 33 *Pac.* 675, says: "The general rule that a court of equity will refuse to take jurisdiction, and award even a temporary injunction, in cases of a mere trespass, is conceded; but there is an established exception in cases of mines, timber, and the like, in which an injunction will be granted to restrain the commission of acts by which the substance of an estate is injured, destroyed, or carried away. In such cases, the injury being irreparable, or difficult of ascertainment in damages, the remedy at law is inadequate."

It has been held in this state that ejectment will not lie to recover a quartz mine located under the laws of the United States, prior to the entire compliance with the requirements thereof, entitling the locator or owner to a patent, but that, the right being possessory only, an action may be maintained in the justice's court for the recovery of the mine, and that that is the proper forum in which to determine such right. *Duffy v. Mix*, 24 *Or.* 285, 33 *Pac.* 807. A possessory action establishes the only title extant when it establishes the right of possession. Now, the jurisdiction of a justice's court, as regards a question of damages, extends in amount to \$250 only, if, indeed, any damages could be recovered at all in an action for the recovery of the possession of a mining claim. But, if ejectment would lie, it is problematical whether damages for withholding it would be adequate, because of the difficulty of their ascertainment. Besides, damages could only be recovered to the date of the commencement of the action, while equity, with its injunctive powers, will afford full relief. Hence, plaintiff is required to go to the justice's court for his possession, and to the circuit court for his damages, and, if this does not prove effective, he must come here, to a court of equity, for his injunction; thus entailing a multiplicity of actions, which it is the province of equity to prevent. So that here, owing to the peculiar state of the law, we find additional reason for the interposition of a court of equity by injunction; and therefore, where an action has been commenced or is pending in a justice's court to determine the possessory title to a mine, by a party out of possession, and damage is being done, going to the impairment or destruction of the substance of the estate, the plaintiff in the action is entitled to an injunction, with an account, in a suit instituted for that purpose. An injunction will issue temporarily, however, to abide the result of the action; and, should the action result favorably to plaintiff, it will be made permanent, with an award of damages commensurate with the injuries sustained. Even where no action has been commenced, in a strong case, the injunction will issue; but the court will direct

a speedy trial at law, to determine the title and right of possession, where controverted by the defendant, and the peremptory character of the injunction made to depend upon the result of the law action. 1 Spell. Extr. Rel. § 387. From the testimony adduced at the trial, it is apparent that plaintiff has not made such a case as would entitle him to even a temporary injunction to abide an action to determine the right of possession. The decree of the court below is therefore affirmed.

(55 Kan. 674)

STATE v. LABERTEW.

(Supreme Court of Kansas. Oct. 5, 1895.)

LARCENY—DESCRIPTION OF OWNER—EVIDENCE—INDORSEMENT OF WITNESSES.

1. Where cattle belonging to Mrs. N. are stolen, and before the filing of the information she marries and becomes Mrs. A., an information charging the larceny of the cattle of Mrs. N. is not objectionable in form on account of her change of name, and where her name is indorsed on the information as Mrs. N., she may properly testify as a witness without any new or different indorsement.

2. Where the defendant is charged with the larceny of 3 head of cattle belonging to N., and it appears on the trial that 13 head of other cattle belonging to various individuals were stolen and driven away at the same time with those described in the information, it is not error to permit witnesses to testify with reference to all the cattle taken and the ownership of them, and to the fact that they were all found together in the possession of the defendant.

(Syllabus by the Court.)

Appeal from district court, Cheyenne county; A. C. T. Geiger, Judge.

W. B. Labertew was convicted of larceny, and appeals. Affirmed.

Bertram & McElroy, W. B. Ingersoll, and Thos. F. Egan, for appellant. F. B. Dawes, Atty. Gen., and I. M. Egan, for the State.

ALLEN, J. The defendant was charged with the larceny of 16 head of cattle. The information contained six counts. The first one charged the taking of a two year old bull and two heifers belonging to Martha J. Nichols. The other counts charged the larceny of cattle belonging to other parties, alleged to have been taken at the same time from the premises of said Martha J. Nichols. On motion of the defendant, the county attorney was required to elect on which count of the information the state would rely for conviction, and he elected to stand on the first count. The trial resulted in the conviction of the defendant, from which he appeals. Many errors are alleged, but we think none of them require extended notice. After the larceny and before the filing of the information, Martha J. Nichols married a man named Arnold, and it is said that the information is defective because it charges the larceny of the property of Martha J. Nichols. The objection is not good. The information correctly states the ownership of the property

at the time of the larceny. The name, Martha J. Nichols, was indorsed on the information. Objection was made to the examination of Martha J. Arnold as a witness, because her name did not appear on the information. The witness was the same person as the one whose name was indorsed on the information, and the defendant must certainly have known who was intended, and could not have been surprised by the introduction of her testimony, she being the person whose property was charged to have been stolen.

The evidence in the case showed that Mrs. Nichols lived near Bird City; that she, with the aid of her sons, kept a herd of cattle; that they were placed in a corral at night. There were about 75 head of cattle in the corral. On the night of Saturday, June 11, 1893, the cattle were placed in the corral, which was closed with a wire gate. On the next morning the gate was found open, thrown inside, and all the cattle but 16 head were found out in the oat field. Mrs. Nichols' sons, with a neighbor, tracked the missing cattle to the vicinity of St. Francis, and found them in a car, which the defendant had engaged, ready to be shipped to Omaha. They found the whole 16 head together, including the cattle belonging to Mrs. Nichols as well as those belonging to other parties and described in the subsequent counts of the information. The owners of the other cattle were called as witnesses, and testified to the fact of ownership, and also to finding their cattle in the stock yards at St. Francis on the day after they were discovered in the car, they having been turned into the stock yards from the car. Some of this testimony was stricken out, on motion of the defendant, but it is claimed that there was error in the admission of the testimony, and that it was not cured by the attempt to withdraw it from the jury. Under the facts in this case, we think there was no error in the admission of the testimony in the first instance. In proving the larceny of Mrs. Nichols' cattle, it was entirely proper to show just what was done. Mrs. Nichols' cattle were not taken separately, but together with 13 others, and it was entirely proper to show that the 13 others were taken from the same corral at the same time, that they were found in the stock yards at St. Francis, and also to show to whom they belonged, not for the purpose of convicting the defendant of different larcenies, but as facts directly connected with the larceny of the cattle belonging to Mrs. Nichols.

We perceive no error in the ruling of the court on the cross-examination of Orbin Boggs, nor in permitting the indorsement of the name of A. Riddle on the information.

The seventh and eighth instructions correctly state the law, and were applicable to the facts.

Complaint is also made of the remarks of the county attorney in his argument of the case to the jury. It appears that he attempted to discuss some matters not properly in

the case, but, on objection by the defendant, was promptly cautioned by the court to confine his argument within legitimate limits. Although we cannot say that all of the remarks of the county attorney were proper, yet we are unable to find anything of sufficient importance to require a reversal of the case.

A motion for a new trial was made and overruled. This, also, is assigned as error. It is claimed that a preponderance of the evidence is in favor of the innocence, rather than the guilt, of the defendant, and that the evidence entirely fails to show the larceny of the three cattle charged to have been taken, but shows that there was one bull, one heifer, and one steer, instead of one bull and two heifers, as charged in the information. To sustain a conviction proof of the larceny of any one of the three animals charged to have been taken is sufficient. We have examined the testimony in the case, and find ample and satisfactory evidence supporting the verdict of the jury. The cattle were taken on Saturday night, and were found in the possession of the defendant Sunday night, ready to be shipped out on a train then about to leave for Omaha. There are many circumstances indicating that the larceny was committed by the defendant, aside from the mere fact that he was found in the possession of the cattle. His story that he bought them of Hanson, and that Hanson delivered them to him a mile and a half up the river, and Hanson's statement in his deposition that he sold the cattle to Labertew, and delivered to him 16 head belonging to Mrs. Sawyer, is not very convincing proof of his innocence. It is possible that Hanson may have had some connection with the larceny, but we think the evidence very satisfactorily shows that no such transaction took place as that of the sale and delivery of these cattle by Hanson to Labertew. It is very clear that the cattle found in the defendant's possession came from Mrs. Nichols' corral, and not from Mrs. Sawyer's. It is seldom that a more satisfactory showing of guilt is made, and we find no reason to set aside the action of the court or jury in the case. The judgment is affirmed. All the justices concurring.

(55 Kan. 730)

CITY OF ARGENTINE v. ATCHISON, T. & S. F. R. CO.

(Supreme Court of Kansas. Oct. 5, 1895.)

RAILROAD COMPANIES—VIADUCTS IN CITIES.

A city of the second class is vested with power to construct at its own expense, or to require the construction by a railroad company at its expense, of a viaduct or bridge over railroad tracks within the city, where the safety and convenience of the public make it necessary; and, when it is deemed to be just that the cost of such a structure should be divided between the city and the railroad company, the city may contribute or bind itself to pay a share of such cost.

(Syllabus by the Court.)

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Action by the Atchison, Topeka & Santa Fé Railroad Company against the city of Argentine. Judgment for plaintiff, and defendant brings error. Affirmed.

Waters & Waters, for plaintiff in error. A. A. Hurd and Mills, Smith & Hobbs, for defendant in error.

JOHNSTON, J. This action was brought by the Atchison, Topeka & Santa Fé Railroad Company against the city of Argentine to recover \$3,000, being a share of the cost of two viaducts constructed in the city of Argentine by the railroad company, and which the city had agreed to pay. It appears that prior to the settlement of Argentine the railroad company had established large yards, with many tracks, at that location, and that afterwards people settled and built homes on both sides of the railroad yards. Two streets were laid out and opened across the yards, which the inhabitants of the city used in going from one side of the yards to the other. When the city reached a population of 5,000, and had within its limits a smelter and a number of elevators, making a great deal of business in the yards, crossing over the same at grade was deemed to be inconvenient and dangerous. An ordinance was then adopted by the city directing the railroad company to construct a viaduct over all the railroad tracks operated by it, at a point near a certain avenue, to be selected by the city council, and which was to be 20 feet wide, and, with the approaches, would be about 1,338 feet long. It was to be constructed according to certain plans and specifications which had been prepared, at an estimated cost of \$15,000. A further provision was that the railroad company should also build a foot viaduct over the same tracks at another point; and it was provided that, on the completion of both viaducts in accordance with the plans and specifications, the city of Argentine should pay to the railroad company \$3,000 of the cost thereof. It was provided that, on the completion of the viaducts, they should be public highways, to be used by the public instead of the grade crossings, and should be forever maintained and kept in repair by the city, without expense to the railroad company. Other provisions were made with respect to the change of the grade of the streets to correspond with the approaches to the viaducts, as well as for the reconstruction or widening of the same in certain contingencies, and for the laying of water and gas mains under the tracks of the railroad company. It was finally ordained that if, within 30 days after the passage of the ordinance, the railroad company should file in the office of the city clerk a written acceptance of the provisions of the ordinance, it should then become a contract between the city and the railroad company, binding upon both parties. Within the time limited, the terms and conditions of the or-

dinance were accepted by the railroad company. The city selected the locations for the viaducts, and they were built by the railroad company in compliance with the provisions of the ordinance, and with the plans and specifications which had been prepared, at an actual cost to the railroad company of about \$15,700; and, if the usual charges for transportation of material were made, it would add to the amount named from \$1,600 to \$2,000. The city and its officers knew of the building of the viaducts, and no legal steps were taken to prevent it, and since then the viaducts have been in constant use by the inhabitants and others for teams, vehicles, and pedestrians. At a special election in the city, bonds to pay the \$3,000 claim of the railroad company, and for the construction of certain sewers and the building of a city hall, were voted upon. The bonds have been issued and sold for such purposes. Taxes have been levied in the city to pay these bonds, and the sum of \$3,000 is in the hands of the city treasurer, set apart as the viaduct fund, having been derived from the sale of the bonds voted for the purpose of paying the \$3,000 claim of the railroad company. The claim was duly presented in writing by the railroad company to the mayor and council, with a full account of the items thereof, duly verified as required by law, but payment was refused by the city, when the present action was brought. The railroad company recovered the full amount claimed, and the city complains and presents the single proposition that it had no power to make the contract which was made with the railroad company.

Argentine is a city of the second class, and, although there is no statute which in express terms provides for the building of viaducts in cities of that class, there appears to be ample authority for such a city to build or require the building of viaducts or bridges over railroad tracks where the convenience and safety of the public make it necessary. In the act governing cities of the second class, authority is given to open and improve streets, avenues, and alleys, and to build bridges, within the city. Gen. St. 1889, par. 788. It is also provided that the city may provide for the passage of railways through the streets and grounds of the city, regulate depots, depot grounds, the crossing of railway tracks, the running of railway engines, cars, and trains within the limits of the city, and make any other and further provisions to prevent accidents at crossings and on the tracks of railways. Paragraph 821. In addition to these, there are provisions vesting the care, management, and control of the city in the mayor and council, authorizing them to open, widen, extend, or otherwise improve the streets and avenues of the city, and to prevent all encroachments upon them, and granting authority to them to enact all such ordinances as they shall deem expedient for maintaining the good government and

welfare of the city, its trade and commerce. Paragraphs 787, 811, 812, 824. Under these general provisions, we think there is ample power in a city of the second class to construct or require the construction of viaducts over railroad tracks. In addition to these, however, there is express authority given for the construction of bridges. In the more enlarged sense of that word, viaducts over railroad tracks are included. Worcester defines the word "bridge": "A pathway erected over a river, canal, road, etc., in order that a passage may be made from one side to the other." Webster defines it as "a structure, usually of wood, stone, brick, or iron, erected over a river or other water course, or over a ravine, railroad, etc., to make a continuous roadway from one bank to the other." The last-named authority defines the word "viaduct" as "a bridge." According to modern usage, the term "bridge" may be appropriately applied to the viaducts which were constructed by the railroad company; and we think it may be fairly said that the term was used in that sense in the statute. Gen. St. 1889, par. 788; State v. Gorham, 37 Me. 461.

It is conceded by the city that it had the power to compel the railroad company to build the viaducts wholly at the expense of the company, and that the city can build them at its own expense under the provisions mentioned there can be little doubt. As the city may construct them entirely at its own expense, no reason is seen why it may not contribute a part of the expense of viaducts determined to be necessary. The questions of necessity and expediency of viaducts, the character and cost of those which the safety and convenience of the public may require, and the means of providing them, including what proportion of the expense should be borne by the city and what by the railroad company, are for the determination of the mayor and council, rather than the court. The fact that the city can compel the railroad company to build a viaduct upon certain conditions at its own expense does not prevent the city from sharing the expense under other circumstances where it is deemed to be just that a division of the expense should be made; and that question, like the others which have been mentioned, so far as the municipality is concerned, rests with the legislative authority of the city.

It is contended that the viaduct is not a public highway, but is constructed over the private property of the railroad company, and for this reason, also, the power of the city is questioned. The viaducts were to be constructed at a place to be designated by the city, and to connect with the streets on each side of the tracks and yards. They were supported by posts of iron, resting on foundations of masonry, braced with iron bolts and sway rods, so as to make a safe and substantial structure. It was provided that the viaducts, when constructed, should be and remain public highways, for the use of the pub-

He. The railroad company, having accepted the provisions of the ordinance and constructed the viaducts over its yards, has effectually dedicated the land as a public highway, and would be estopped from interfering with the easement so long as it is maintained as a public highway.

Our opinion is that the district court reached a correct conclusion in holding that the city had the power to contract with the railroad company for the construction of the viaducts, and that it is liable for the share of the cost of the same which it agreed to pay. It is unnecessary to determine the validity of the provisions as to future maintenance, and upon that question we express no opinion. The judgment of the district court will be affirmed. All the justices concurring.

(55 Kan. 690)

STATE v. LEWALLEN.

(Supreme Court of Kansas. Oct. 5, 1895.)

CRIMINAL LAW—DISMISSAL OF APPEAL—REVIEW—INSTRUCTION.

1. The document brought up for review being apparently a bill of exceptions, and nothing more, the case might properly be dismissed, and would be, if insisted on by the state.

2. As it does not affirmatively appear that the document called a "record" contains all the evidence, we cannot say that the defendant did not counsel, aid, or abet the original taking of the hog.

3. An instruction that if the jury should find that the defendant conspired and confederated with other persons for the commission of the alleged crime, and that he did in any way aid or abet in its commission, either by counsel, assistance, or concealment, he might be convicted, is not properly subject to the criticism that under it the jury would be authorized to convict where there was no evidence showing any connection of the defendant with the original taking.

(Syllabus by the Court.)

Appeal from district court, Finney county; A. J. Abbott, Judge.

Joseph Lewallen was convicted of theft, and appeals. Affirmed.

G. L. Miller, for appellant. F. B. Dawes, Atty. Gen., B. F. Stocks, and H. M. Mason, for the State.

MARTIN, C. J. 1. The record in this case is very unsatisfactory in form. It purports to be, from beginning to end, including the judgment and the notice of appeal, only a bill of exceptions; thus apparently excluding the idea that there would be any record in the case except for the bill of exceptions. It even contains the original signature of the judge, although it is certified by the clerk as a transcript of the record. We would probably be justified in dismissing the case, but, as no point is made on the form of the record by counsel for the state, we have concluded to look into it.

2. The defendant was charged with stealing a hog of the value of \$10, being the personal property of H. M. Knox, on January 15, 1895. He was convicted at February

term, 1895, and sentenced to imprisonment in the penitentiary for two years and a half. The evidence tended to show that the hog was stolen and killed by David Fluke, James Davis, and the defendant's son, in the nighttime; and that it was thereafter taken to the defendant's house, where it was dressed; and that the next morning the defendant assisted in cutting it up, and concealing it in a barrel of shelled corn. It is claimed that the evidence does not show that the defendant either counseled, aided, or abetted in the original taking of the hog, and when it was brought to his house it was not the subject of grand larceny, without respect to value, having been at the time transformed into pork. If the record should plainly show that we have all the evidence before us, there might be force in this claim, but it is not affirmatively shown that the record contains all the evidence; hence he may have counseled, aided, or abetted the taking, and, if so, might lawfully be charged, tried, and convicted as if he were a principal. Code Cr. Proc. § 115.

3. The defendant complains of the following instruction: "If, therefore, in this case you should find beyond a reasonable doubt that the defendant, Joseph Lewallen, conspired and confederated with other persons for the commission of the crime alleged in the information, and that he did in any way aid or abet in its commission, either by counsel, assistance, or concealment, then he is guilty as though he had himself, without assistance, committed the offense." In commenting upon this instruction, counsel for the defendant says: "Under the circumstances of this case, the above instruction authorized the jury to convict the defendant of a felony, where there was no evidence showing any connection of the defendant with the original taking." We do not take this view of the instruction. It only authorized the jury to convict if they found beyond a reasonable doubt that the defendant conspired and confederated with other persons for the commission of the crime, and that he aided or abetted in its commission, either counseling, assisting or concealing. The judgment of the district court will be affirmed. All the justices concurring.

(55 Kan. 690)

CHICAGO, K. & W. R. CO. v. BUTTS.

(Supreme Court of Kansas. Oct. 5, 1895.)

REVIEW ON APPEAL—INTERLOCUTORY ORDER—SUBSTITUTION—EMINENT DOMAIN.

1. An order of substitution is not a final one, and, if a petition in error is filed within one year after the rendition of the judgment, this court will review, not only the judgment, but the intermediate and interlocutory orders made at any time in the progress of the case.

2. In an appeal to the district court from an award of damages in a railway condemnation, the landowner becomes the plaintiff, and the railway company the defendant.

3. Upon the facts disclosed by the record, held, that the plaintiff in error did not consent

to the revivor or substitution, and voluntarily enter a general appearance.

4. Where a railway corporation, pending an appeal against it in a right of way condemnation, consolidates with other companies, no proceeding for revivor or substitution against the new corporation can be commenced after one year from the consolidation, except by its consent. Following *Railway Co. v. Smith*, 19 Pac. 636, 40 Kan. 192, and *Cunkle v. Railroad Co.*, 40 Pac. 184, 54 Kan. 194.

(Syllabus by the Court.)

Error from district court, Sumner county; James A. Ray, Judge.

Condemnation proceedings by the Chicago, Kansas & Western Railroad Company. From a judgment in favor of S. J. Butts, a landowner, the railroad company brings error. Reversed.

This case arose out of a condemnation proceeding originally instituted by the Le Roy & Western Railway Company. The commissioners for condemnation filed their report April 22, 1886. S. J. Butts, a landowner, appealed from the award. On or about May 31, 1886, the said Le Roy & Western Railway Company entered into articles of consolidation with several other railway companies of the state, thus forming the consolidated corporation known as the Chicago, Kansas & Western Railroad Company. It is the same consolidation proceeding referred to in the case of *Railway Co. v. Smith*, 40 Kan. 192, 19 Pac. 636. Notwithstanding said consolidation, however, said S. J. Butts, as plaintiff in the court below, on October 20, 1886, filed his petition against the said Le Roy & Western Railway Company, claiming damages in a large sum; and on November 1, 1886, the Le Roy & Western Railway Company filed its answer, admitting all the allegations of the petition, except those of value and damages, and alleging that the amount allowed by the commissioners was adequate. The consolidation proceeding was not referred to either in the petition or answer. The case was tried in the district court of Sumner county in December, 1886, and the plaintiff below was awarded the sum of \$2,796.85 as damages. The said Le Roy & Western Railway Company prosecuted its petition in error in this court, where the judgment was reversed at July term, 1888, on questions of evidence. 40 Kan. 159, 19 Pac. 625. Nothing was said or intimated in this court about the consolidation. On November 8, 1889, the plaintiff in the court below filed his motion that the Chicago, Kansas & Western Railroad Company be substituted as the party defendant, and that the plaintiff be permitted to file an amended petition against said consolidated company. The consolidation was averred in the motion, and it was further alleged that the Le Roy & Western Railway Company ceased to exist as a corporation by the terms and conditions of the articles of consolidation, and that the Chicago, Kansas & Western Railroad Company had succeeded to its rights, and had assumed and agreed to pay its obligations. This motion was heard

June 16, 1890, the proceeding being entitled as in the original action,—the plaintiff appearing by his attorneys, and the Le Roy & Western Railway appearing by its attorneys; and after hearing the arguments of counsel said motion was sustained, and the plaintiff was allowed to file his supplemental and amended petition, the defendant and the Chicago, Kansas & Western Railroad Company excepting, and the Chicago, Kansas & Western Railroad Company was granted 80 days in which to plead to the supplemental and amended petition. The record does not show that any notice or summons was served upon the Chicago, Kansas & Western Railroad Company. The supplemental and amended petition was filed, setting up quite fully the prior proceedings, including the consolidation, and alleging, among other things, that the Le Roy & Western Railway Company ceased to exist as a corporate entity on May 31, 1886. The Chicago, Kansas & Western Railroad Company filed its answer, being a general denial, and a further defense to the effect that the order of the court reviving the action, and substituting the Chicago, Kansas & Western Railroad Company instead of the Le Roy & Western Railway Company, was not made within one year, nor by its consent, but that it objected to the same, and now asked that the action be dismissed. The case came on for trial September 26, 1890, when the defendant objected to the introduction of any evidence for the reason that the supplemental and amended petition did not state facts sufficient to constitute a cause of action, and affirmatively showed that the action was not revived in time. At the close of the plaintiff's evidence the defendant demurred thereto, and after the testimony was concluded on both sides the defendant requested the court to instruct the jury that the plaintiff was not entitled to recover against the Chicago, Kansas & Western Railroad Company, and that they return a verdict in favor of the defendant. A verdict was returned in favor of the plaintiff for \$3,300.64, and judgment was entered on the verdict. The defendant filed a motion for a new trial, alleging, among other things, that the court erred in making the order of revivor and substituting the Chicago, Kansas & Western Railroad Company. A petition in error was filed in this court July 16, 1891.

A. A. Hurd, W. Littlefield, and O. J. Wood, for plaintiff in error. A. E. Parker, for defendant in error.

MARTIN, C. J. (after stating the facts). 1. The defendant in error claims that the order of substitution cannot be reviewed, because it was made more than one year prior to the filing of the petition in error in this court. It is enacted by section 556 of the Code, as amended in 1881, that "no proceeding for reversing, vacating or modifying judgments or final orders shall be commenced, unless within one year after the rendition of the judge

ment or making of the final order complained of." The order of substitution, however, was neither a judgment nor a final order, within the meaning of said section, nor of sections 542 and 543 of the Code; and, as the petition in error was filed within less than one year after the judgment was rendered, it is the duty of this court to examine, not only the final judgment, but the intermediate and interlocutory orders made at whatever time in the progress of the case, the same being involved in the judgment.

2. It is also contended that, where a railroad company institutes a condemnation proceeding, it is really the plaintiff, and if any revivor or substitution was necessary, the proceeding should be instituted by the railroad company, and it had no right to complain because the landowner did so after the expiration of one year. This contention cannot be maintained. In *Boom Co. v. Patterson*, 98 U. S. 403, *Patterson* had taken an appeal to the district court from an award of condemnation in a proceeding instituted by the Boom Company. On petition of the Boom Company, the cause was removed to the Federal court, and it became an important question there whether the proceeding was a suit at law or in equity, for otherwise it could not be removed. The court says: "The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law, in the ordinary sense of those terms. But, when it was transferred to the district court by appeal from the award of the commissioners, it took, under the statute of the state, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. * * * The case would have been in no essential particular different had the state authorized the company, by statute, to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value." This court has also held that the appealing landowner is properly the plaintiff in the case. *Railroad Co. v. Owen*, 8 Kan. 274; *Railroad Co. v. Orr*, Id. 280; *Reisner v. Strong*, 24 Kan. 297.

3. The claim that the Chicago, Kansas & Western Railroad Company consented to the revivor or substitution, and voluntarily entered a general appearance, is not justified by the record. Although the motion for substitution was filed in the original case November 8, 1889, it does not appear that any notice was given of its pendency. It was called up on June 16, 1890, in the name of the original parties only, but when the order was made the Chicago, Kansas & Western Railroad Company excepted. When it filed answer, as it was bound to do under the order of the court, it made the defense that the proceed-

ings for revivor or substitution were invalid, and at every stage of the case it held to this position. We cannot say that notwithstanding all this it consented to the revivor or substitution, and voluntarily entered its appearance.

4. This brings us to the main question,—as to said order of revivor or substitution. Counsel for defendant in error earnestly and ably contends that the construction heretofore given to sections 40 and 425 to 435 of the Code, in treating old corporations which have consolidated into a new one as defunct, so as to require a revivor or substitution within one year (unless by consent), in the same manner as in the case of a deceased party being a natural person, cannot be maintained on reason or authority, and that an order of substitution of the new company in place of the old can be made at any time,—as well after as before the expiration of one year from the consolidation,—and without the consent of the new corporation. We have given due consideration to the argument of counsel, but it fails to satisfy us that the doctrine announced by the court in *Railway Co. v. Smith*, 40 Kan. 192, 19 Pac. 636, and *Cunkle v. Railroad Co.*, 54 Kan. 194, 40 Pac. 184, was erroneous, and we feel it our duty to follow those decisions. The limitation of one year may work a hardship in this case and in others, as it may do in the case of natural persons who die during the pendency of an action. The means of knowledge of a consolidation of railway corporations are much better than those respecting the death of a natural person who may reside far away. Such consolidation is generally a matter of public notoriety along the line of the railway, and the articles must be filed in the office of the secretary of state, and thus become a public record, accessible to all inquirers. It may seem strange, also, that, after counsel have appeared for a defunct corporation for more than a year after its consolidation into a new company, the latter may successfully insist that it cannot be substituted in place of the old one; but this is a necessary consequence of the position that by the consolidation the old company has ceased to exist, and that revivor proceedings are necessary to keep the case pending in court against its successor. In the case above cited from 40 Kan. 192, 19 Pac. 636, under this same consolidation, the landowner succeeded in obtaining judgment against the old company, which commenced a proceeding in error in this court; but on motion of the landowner the case was dismissed, this court holding that all the proceedings subsequent to the consolidation were void. This, of course, left the landowner without any valid judgment. What proceeding, if any, can be maintained by the landowner in such cases, we need not discuss. The judgment of the district court will be reversed, and the cause remanded for further proceedings. All the justices concurring.

(55 Kan. 678)

STATE v. GRUBB.

(Supreme Court of Kansas. Oct. 5, 1895.)

OPINION EVIDENCE—RAPE—INSTRUCTIONS.

1. After fully stating, as far as practicable, the means of knowledge and the basis of an opinion as to the age of an absent person, any witness should be allowed to give such opinion.

2. Proof of actual penetration is necessary to support a conviction for rape. "Actual contact of the sexual organs" alone is insufficient. And in this case the jury ought also to have been instructed as to the law of an attempt to commit the crime of rape.

(Syllabus by the Court.)

Appeal from district court, Jackson county; Louis A. Myers, Judge.

Eli Grubb was convicted of crime, and appeals. Reversed.

C. F. Hurrell, R. G. Robinson, and R. W. Blair, for appellant. F. B. Dawes, Atty. Gen., and A. M. Crane, for the State.

MARTIN, C. J. At March term, 1895, of the district court of Jackson county, the defendant was convicted of the crime of rape upon the person of Anna Bleidissel, a female under the age of 18 years, to wit, the age of 16 years and about 2 months, and he was sentenced to the penitentiary for a term of five years.

1. Anna Bleidissel was not present at the trial, and she gave no testimony by deposition or otherwise. Her father and her mother testified that she was born December 28, 1878. The offense was alleged to have been committed February 17, 1895. Some of the witnesses for the state testified in cross-examination that in their opinion she was 18 years of age or more. Several witnesses called for the defense stated the extent of their acquaintance with Anna, described her as to height, weight, and development, and were then asked their opinions as to her age. On objection made by the state, these witnesses were not permitted to give their several opinions as to her age. This was error. After fully stating, as far as practicable, the means of knowledge and the basis of an opinion as to the age of an absent person, any witness should be allowed to give such opinion. *Lawson, Exp. Ev. 473; Rogers, Exp. Test. 10; Foltz v. State, 33 Ind. 215, 217; Benson v. McFadden, 50 Ind. 431, 433; Kansas Pac. Ry. Co. v. Miller, 2 Colo. 444; Morse v. State, 6 Conn. 9, 13; Porter v. Manufacturing Co., 17 Conn. 249, 257, 258; State v. Douglass, 48 Mo. App. 39; Commonwealth v. O'Brien, 134 Mass. 198, 200; Garner v. State, 28 Tex. App. 561, 562, 13 S. W. 1004; Jones v. State, 32 Tex. Or. R. 108, 22 S. W. 149; Weed v. State, 55 Ala. 13, 15.* In some of the cases this kind of evidence has been admitted on the same principle that allows the opinions of nonprofessional witnesses to be given as to the sanity or mental condition of a person, after first stating the facts which have come within their observation. *Baughman v. Baughman, 32 Kan. 538, 543,*

4 Pac. 1003. The circumstance that Anna's parents had testified to her age did not render the opinion evidence of others incompetent. The jury might not deem the testimony of the parents worthy of credit. There are no degrees of parol evidence. *1 Best, Ev. § 87.* And it is for the jury to judge what weight shall be given to direct and opinion evidence, respectively, both of which are admissible in proof of the same fact.

2. The court, although using the term "carnal knowledge" in the fourth instruction to the jury, did not anywhere define it, but in the fifth seemed to assume that evidence of "actual contact of the sexual organs" was sufficient to warrant a conviction. Proof of actual penetration was necessary, and the jury ought to have been so informed. *Code Cr. Proc. § 213; State v. Frazier, 54 Kan. 719, 725, 39 Pac. 819; 2 Bish. Cr. Law, § 1127.* The evidence tended to show that the defendant and Martin Fish were drunk; that Mrs. Fish had also been drinking; and that these three and Anna were in the rooms occupied by the Fish family at least a portion, perhaps all, of the night, the defendant and Anna being in bed together part of the time. There was no direct proof of sexual intercourse. It was therefore important to instruct the jury clearly as to the evidence necessary to a conviction for rape upon a female under the age of 18 years; and, although the defendant did not ask any instruction as to the law of an attempt to commit the crime, yet we think the court ought to have informed the jury upon the subject. *Code Cr. Proc. §§ 121, 122, 236; Crimes Act, par. 2557, Gen. St. 1889; In re Lloyd, 51 Kan. 501, 33 Pac. 807.*

Some other questions are suggested, but as they are not likely to arise again, we have considered it unnecessary to decide them. Judgment reversed, and case remanded for a new trial. All the justices concurring.

(55 Kan. 682)

STATE v. WADE.

(Supreme Court of Kansas. Oct. 5, 1895.)

LARCENY—INDICTMENT—VENUE.

Where property is stolen in one county, and taken by the thief into another, he may be charged in the latter county with the larceny therein, without stating the place of the original taking.

(Syllabus by the Court.)

Appeal from district court, Wilson county; L. Stillwell, Judge.

Oscar Wade was convicted of larceny, and appeals. Affirmed.

S. S. Kirkpatrick, for appellant. F. B. Dawes, Atty. Gen., and P. C. Young, for the State.

ALLEN, J. The appellant, Oscar Wade, was charged by information in the district court of Wilson county with the larceny of cattle in Wilson county. The proof showed

that the original taking was in Elk. The only question raised on the record is whether, in order to convict the defendant on the facts as developed at the trial, it was necessary to charge in the information that the original taking was in Elk county. In *McFarland v. State*, 4 Kan. 68, a conviction under an information charging the defendant with the larceny of goods in Leavenworth county, when the proof showed the original taking to have been in Missouri, was sustained under the provisions of the statute then in force, and now as paragraph 2559 of the General Statutes of 1889. In the case of *State v. Price*, 55 Kan. —, 40 Pac. 1000, it was held that section 26 of the Code of Criminal Procedure, which provides that "when property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another county, the jurisdiction is in either county," was constitutional and did not violate that provision of section 10 of the bill of rights which secures to the accused a trial by an impartial jury of the county or district in which the offense is alleged to have been committed. Both of the cases cited are based on the recognized doctrine of the common law that "each asportation from one county to another is a fresh theft, and a prosecution may be maintained in either." See, also, *State v. Brown*, 55 Kan. —, 40 Pac. 1001. As the asportation of the stolen property within the county of Willson was sufficient to constitute the offense of larceny, it was not necessary to allege the place of the original taking. The judgment is affirmed. All the justices concurring.

(55 Kan. 715)

ATCHISON, T. & S. F. R. CO. v. HENRY.

(Supreme Court of Kansas. Oct. 5, 1895.)

CARRIERS—ASSAULT ON PASSENGER—EXCESSIVE DAMAGES.

1. The contract of a common carrier with a passenger requires the carrier to protect the passenger against interference or injury arising from the negligence or willful misconduct of its servants while engaged in performing the duties which the carrier owes to the passenger; and, where a passenger upon a railroad train is unjustifiably assaulted and beaten by an employé who owed him the duty of protection, the railroad company is responsible for his acts and liable for the injury suffered.

2. A railroad company which is carrying passengers is liable for an illegal arrest and the false imprisonment of a passenger caused to be made by the conductor in charge of the train on which the passenger was riding while acting in the line of his employment.

3. The testimony examined, and it is held that the damages awarded are not so excessive as to warrant the disturbance of the verdict.

(Syllabus by the Court.)

Error from district court, Sumner county; James A. Ray, Judge.

Action by W. T. Henry against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. T. Henry brought an action against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for injuries sustained by him on account of the alleged wrongdoing of the company, and in his petition alleged that on January 9, 1890, he boarded a train of the railroad company at Kansas City, Mo., for the purpose of riding over the Southern Kansas Division of that railroad to Wellington, Kan.; that he was provided with a ticket or stock contract entitling him to ride over the road between the points named; and that the conductor in charge of the train refused to accept his ticket or stock contract, and required him to pay in cash the sum of \$7.50 for his transportation to Wellington. In the second count of his petition, he alleges that, while he was riding as a passenger and deporting himself in a proper and orderly manner, the agents and servants of the company, in the pretended exercise of authority to preserve order on the train, wrongfully and wantonly assaulted him by striking him on the head and body several times, with great force and violence, with a heavy lantern, thereby causing him to suffer great injury in body and mind. In the third count it is alleged that, while he was conducting himself in a quiet and proper manner, the defendant, by its agents and servants, in the pretended exercise of authority, and to preserve order in and about the train, at Ottawa, did arrest him, without any warrant or authority of law, and did forcibly remove him to the common jail of the county, where he was detained for twelve hours without any reasonable or probable cause, by reason of which he suffered great physical injuries, and that he was also greatly humiliated and injured in his circumstances and credit. For all these things he prayed damages in the sum of \$10,000. The answer of the defendant was a general denial. Henry finally withdrew any claim for the amount he paid out for railroad fare from Kansas City to Wellington, and the case was finally submitted upon the claims in the second and third counts of the petition. In answer to special interrogatories which were submitted, the following findings of fact were made: "(1) On what train of cars did plaintiff take passage from Kansas City, Mo., on the 9th day of January, 1890, and over what road did the same run? Ans. On Santa Fé train, on Santa Fé road, Southern Kansas Division. (2) In what car on said train did plaintiff first take passage? Ans. Smoking car. (3) How long did he remain in such car in interrogatory No. 2 mentioned, before going into the ladies' car? Ans. A very short time; say, a few minutes. (4) Did plaintiff go to sleep soon after taking a seat in the ladies' car? Ans. He did. (5) If you answer interrogatory No. 4, 'Yes,' state whether he remained asleep until the conductor waked him up to collect his fare? Ans. According to evidence, yes. (6) How many times did the conductor wake the plaintiff up, and

state to him in regard to producing his ticket or paying his fare, before plaintiff paid the same? Ans. Either two or three times; asked him for ticket three times. (7) What was the name of the conductor on the train January 9, 1890? Ans. Eli Parsons. (8) Upon the payment of plaintiff's fare, did the conductor give him a receipt therefor? Ans. Yes. (9) Was not the plaintiff under the influence of intoxicating liquors when he entered the train at Kansas City? Ans. To a certain extent, yes. (10) After plaintiff had paid his fare, did he not, at several times thereafter, use profane and vulgar language while in the ladies' car? Ans. The evidence on this question is contradictory. We think, however, that he used profane words a few times. (11) If you answer interrogatory No. 10, 'Yes,' then please state whether or not there were any ladies present in the car at the time. Ans. Yes. (12) Is it not a fact that, while in the ladies' car, the plaintiff made threats of doing the conductor personal injury and violence? Ans. The preponderance of evidence is, we think, against such a conclusion. (13) If you answer interrogatory No. 12, 'Yes,' please state if such threats were communicated to the conductor by any of the passengers in said car. Ans. * * * (14) Was not the plaintiff drunk and boisterous while in the ladies' car on said train? Ans. No. (15) Is it not a fact that the conductor removed the plaintiff from the ladies' car to the smoker on account of his being drunk and disorderly? Ans. No." "(18) While in the smoking car, did not the plaintiff have an open knife in his hands, and was not such knife and the blade thereof long and thin? Ans. Yes. (19) Did not the plaintiff while in the smoking car threaten to do the conductor personal violence and injury? Ans. No; we think not." "(21) When the conductor and brakeman came into the smoking car, did the plaintiff have the knife above referred to in his hands, and was the same open? Ans. Yes. (22) Did not some of the passengers in the smoking car, when the conductor and brakeman came in, say, 'Look out! he [meaning the plaintiff] has got a knife?' Ans. Yes. (23) Did not the brakeman order the plaintiff to drop the knife before striking him with the lantern? Ans. Yes. (24) How many times did the brakeman order the plaintiff to drop the knife? Ans. Once. (25) How many times did the brakeman strike the plaintiff with a lantern? Ans. Three times. (26) Did not the brakeman, after striking the plaintiff with the lantern the last time, say to him, 'If you make such a pass at me again, you will be carried out of this car a corpse,' or words to that effect? Ans. Yes. (27) During all the time the plaintiff was on the train of cars, what was the treatment and demeanor of the conductor to him? Ans. His treatment of and demeanor towards the plaintiff was good, with the exception of his action in causing the arrest of said plaintiff." The jury returned a general verdict in favor of Henry,

and assessing damages against the railroad company at \$3,000. Motions to set aside the verdict and for a new trial were overruled, and judgment was awarded for the amount named in the verdict. The railroad company alleges error.

A. A. Hurd, W. Littlefield, and O. J. Wood, for plaintiff in error. J. E. Halsell, for defendant in error.

JOHNSTON, J. (after stating the facts). At the trial the plaintiff below, W. T. Henry, relied upon two grounds of recovery: One for the alleged assault made upon him by the brakeman while Henry was a passenger on the train of the railroad company, and the other for the unlawful arrest alleged to have been made at the instance of the railroad company while he was a passenger upon the train, and his illegal imprisonment for about 12 hours in the jail of Franklin county. Henry was a farmer and stock shipper, who made a shipment of cattle from Wellington to Kansas City in January, 1890, and who, in consideration of the shipment, received a ticket or stock pass entitling him not only to accompany the cattle to Kansas City, but to a return passage from that place to Wellington. On the return trip he was unable to find his stock pass, and was required by the conductor to pay a cash fare. Some difficulty arose between him and the conductor concerning the collection of the fare, in which it was contended by the employees of the company that Henry became profane, violent, and abusive, and threatened violence to the conductor. It is claimed that the threats were communicated to the conductor, who, when passing through the train, accompanied by a brakeman, found Henry with an open knife in his hand in a threatening attitude; that the brakeman approached him, and demanded that he should throw the knife down, but Henry refused, when the brakeman struck him three times upon the head with a lantern. The theory of the railroad company was that Henry was drunk, abusive, and violent; that he had become enraged because of the collection of his fare, and had threatened the lives of the employees of the company; and that, with an open knife, he was endeavoring to carry out his threats at the time he was attacked by the brakeman; and that, therefore, the conductor and brakeman were justified in committing the assault upon Henry and inflicting upon him the punishment which they did. On the other hand, Henry claims that he was not drunk nor disorderly; that while he complained of the collection of the fare, and the failure to return it after his stock pass had been found, he made no threats against the conductor, nor any attempt to attack him with a knife or in any other manner. He claimed that he was using his knife to cut a chew from a plug of tobacco which he held in his hand. The jury have specially found, upon conflicting evidence, that, while Henry used some profane language on the train, he was not drunk or boisterous; that

he made no threats of doing personal injury or violence to the conductor upon either of the cars on which he rode. There was a further finding that the brakeman struck Henry twice after he had dropped the knife.

According to the testimony which was accepted by the jury, the action of the brakeman in assaulting Henry was a gross violation of the duty of the railroad company towards a passenger. As the relation of carrier and passenger existed, he was entitled to the highest degree of care and protection against violence or interference by others so long as he conducted himself in a proper manner. If, through the negligence of the company in affording him the care and protection to which he was entitled, the passenger had suffered an injury, the company would be liable; and certainly the liability is no less where the injury is intentionally inflicted by an employé of the company who was required to exercise care and protection towards the passenger. It is true, if Henry was drunk and disorderly, and his conduct such as to render his presence offensive or dangerous, they would have been justified in excluding him from the train; and it is also true, as contended by the company, that the brakeman and conductor might repress acts of violence on his part, and under certain circumstances defend themselves or repel a threatened attack. The finding of the jury, however, makes the brakeman the aggressor, and his attack upon the passenger unjustifiable. *Stewart v. Railroad Co.*, 90 N. Y. 588; *Ray, Neg. Imp. Dut.* §§ 106, 107.

It is next contended that the company is not liable for the illegal arrest and false imprisonment of Henry. The arrest was made without a warrant, and the imprisonment continued for about 12 hours in the county jail of Franklin county. It occurred about one-half an hour after the termination of the difficulty on the train, at a time when Henry was quiet and orderly. When the train reached Ottawa, the conductor reported the occurrence of the difficulty to a superintendent, who advised that Henry should be taken from the train. The conductor inquired for an officer, and, when one was found, they went together into the train, where the conductor pointed out Henry, who was at once arrested by the officer, and taken to prison. Under these circumstances, there can be but little doubt that the conductor procured the false arrest to be made while in the line of his employment, and at a time when the relation of passenger and carrier existed between the company and Henry. It is well settled that when one in charge of a train, and engaged in the business which has been intrusted to him by the company, causes the arrest of a passenger, the company for which he is acting cannot escape liability. According to the testimony which the jury believed, Henry was arrested at midnight, when he was quietly seated in a car; and, without process or any information as to the cause of

his arrest, he was hurried from the train, and placed in jail, where he was searched, and shut up until about noon the next day. The action of the conductor, who must be held to have been acting for the company, was clearly a breach of the contract between the carrier and the passenger, which required that Henry should be carried in safety to his destination, and protected from interference by strangers or against the misconduct of the company's servants. Where the relation of carrier and passenger exists, it is held that no matter what the motive is which causes a servant of the carrier to commit an unlawful act, or to wrongfully inflict an injury upon a passenger, the carrier is responsible for the act and its natural and legitimate consequences. *Dwinelle v. Railroad Co.*, 120 N. Y. 122, 24 N. E. 319; *Hamel v. Ferry Co.* (Sup.) 6 N. Y. Supp. 102; *Palmeri v. Railroad Co.* (N. Y.) 30 N. E. 1001; *Gillingham v. Railroad Co.*, 35 W. Va. 588, 14 S. E. 243; *Ray, Neg. Imp. Dut.* § 109.

There is some testimony tending to show that the officer who made the arrest was employed by and received compensation from the railroad company. Some testimony of an objectionable nature in regard to his authority, as well as in regard to the authority of the superintendent, was received; but in view of the conclusion that has been reached, that the conductor, acting in the line of his employment, caused the arrest to be made, the objectionable testimony with respect to the authority of the police officer and of the superintendent becomes immaterial. The final complaint is that the damages awarded by the jury are excessive, but the view which the jury has taken of the facts would justify the allowance of punitive damages against the company, and, looking at all the circumstances of the case, we cannot say that the award of \$3,000 is so excessive as to indicate passion or prejudice in the jury, or justify the court in disturbing the verdict. The judgment of the district court will be affirmed. All the justices concurring.

STATE v. OLIVER.

(55 Kan. 711)

(Supreme Court of Kansas. Oct. 5, 1895.)

AMENDMENT OF INFORMATION — RE-FILED — DIS- PLACEMENT OF RAILS—EVIDENCE OF DEFENDANT.

1. Where an information charging an offense as being committed on the day after it is filed is afterwards amended, by leave of the court, again verified, and refiled on a day subsequent to that on which the offense is alleged to have been committed, the defect in stating the date of the offense becomes immaterial.

2. An information charging the removal and displacement of rails on a railroad track, under section 103 of the act regulating crimes and punishments, which states the offense substantially in the language of the statute, and charges the act to have been done with intent to injure the company, and to kill and wound its passengers and employes, is sufficient.

3. The statements of a defendant made on the witness stand at a former trial are admis-

sible against him, and their falsity may be shown by other witnesses; and, though it is competent for him to show that his former testimony was different from that stated by the plaintiff's witnesses, he cannot use such former testimony for any other purpose than to show what he did, in fact, then testify.

(Syllabus by the Court.)

Appeal from district court, Reno county; F. L. Martin, Judge.

C. W. Oliver was convicted of train wrecking, and appeals. Affirmed.

Davidson & Williams, for appellant. F. B. Dawes, Atty. Gen., and L. M. Fall, for the State.

ALLEN, J. The information, omitting the formal parts, is as follows: "That on the 20th day of September, A. D. 1894, in said county of Reno and state of Kansas, one C. W. Oliver did then and there, unlawfully, feloniously, and willfully, remove, displace, and injure certain rails on the track of the Atchison, Topeka and Santa Fé Railroad Company, and then and there being operated by said Santa Fé Railroad Company, a corporation duly organized under and by virtue of the laws of the state of Kansas, through and by its receivers, by removing from fish plates, and drawing spikes from both sides of rails, and prying rails out of line, with the intent and for the purpose of derailing and wrecking the trains of said railroad company, and injuring it, and for the purpose of and with the intent to kill and wound its passengers and employes." The information in this form was filed on the 19th of September, 1894. Afterwards, by leave of the court, it was amended by inserting the word "bolts" between the words "removing" and "from." It was then reverified and refiled on the 4th day of January, 1895. A motion to quash the information was made before the amendment, and renewed afterwards, on the ground that it did not state facts sufficient to constitute an offense under the laws of the state. It will be noticed that the offense is alleged to have been committed on the 20th day of September, 1894, while the original information was filed on the 19th day of the same month. It is urged that the charge as originally made was an impossibility, because the offense was alleged as committed in the future. Authorities are cited to sustain the proposition that such a charge is bad, and that a conviction under it cannot be upheld. On the other hand, it is said that the date alleged is clearly a mere clerical error, which may be disregarded.

We do not think that the record presents the question fairly. The defendant was tried on the amended information. That amended information was filed in January, 1895, long after the day on which the offense is alleged to have been committed. It is urged that this refileing was without the consent of the court, but we think permission to amend the information carried with it necessarily permission to file it. It was necessary that the in-

formation as amended should be verified, and the practice of refileing after amendment and verification seems to be a proper one.

Further objections are made to the form of the information, because it charges that the offense was committed with the intent to injure the company, and its passengers and employes, while the section of the statute (Gen. St. c. 31, § 103) under which the information was drawn defines an offense against property only; that the information charges the removal and displacement of rails "on" the track, when the statute says it must be "of" a railroad; and that the information is deficient in failing to state the kind of rail that was displaced, and the material of which it was made. The information charges the offense substantially in the language of the statute; and while the word "on" may be open to criticism, and is not the most apt that could be chosen, the information very clearly charges the displacement of a rail which formed a part of the track used by the railroad company, and the material of which that rail is made is unimportant, for the statute includes "any iron, wooden, or other rail." We perceive no objection to the averment that the act was done with intent to injure the company, and to kill and wound its passengers and employes. These would be the natural and probable consequences of the act charged, and the purpose of the statute is not merely to protect the property of the company, but the lives and limbs of employes and passengers traveling on the road. The information fairly apprised the defendant of the specific charge made against him, and there is nothing substantial in the criticisms made on its form.

Error is claimed in permitting the witness Moore to state what the testimony of the defendant was on the former trial of the case, and then contradicting these statements by other witnesses. It is conceded that admissions made by the defendant might be used against him, but it is claimed that the purpose of this evidence was to show that the defendant had sworn falsely on the former trial; that, for the purpose of obtaining an acquittal on that trial, he had concocted and testified to a story which was untrue. It is always competent to show the statements and claims made by a person charged with crime with reference thereto, and to show that such statements are false. The fact that a defendant in a criminal case resorts to falsehood is a circumstance which may, in connection with other facts in the case, tend to prove guilt.

The tenth instruction, with reference to the defense of an alibi, is substantially the same as that given in the case of *State v. Price*, 55 Kan. —, 40 Pac. 1001, which was held good by this court.

The defendant offered in evidence a transcript of his testimony taken on the former trial. The court instructed the jury that this evidence was admitted, and to be considered,

only for the purpose of impeaching or rebutting the evidence of the witness, who undertook to detail his evidence at a former trial. This instruction was proper. The defendant had a right to show just what his former testimony was, and to correct any misstatements made by the plaintiff's witnesses; but the statements made by him at the former trial were not competent evidence in his behalf, for other purposes. If he desired to testify on this trial, he had a right to do so; but he could not make testimony for himself by the introduction of statements made at another time, whether under oath or not. The judgment is affirmed. All the justices concurring.

(55 Kan. 694)

In re JAHN.

(Supreme Court of Kansas. Oct. 5, 1895.)

INTOXICATING LIQUORS—REGULATING SALE—CONSTITUTIONAL LAW—RIGHT OF APPEAL—TRIAL BY JURY—BAIL—HABEAS CORPUS.

1. An ordinance of a city of the third class, regulating the sale of "malt, hop tea tonic, ginger ale, cider, or any other drink of like nature" by prohibiting the sale thereof in less quantities than one gallon, and forbidding the drinking of the same at the place of sale, is a valid police regulation. *Monroe v. City of Lawrence*, 24 Pac. 1113, 44 Kan. 607, followed.

2. An ordinance of a city of the third class, prohibiting the unlawful sale of intoxicating liquors, and the keeping of any place for carrying on sales of the same, is valid, notwithstanding the penal laws of the state cover the same subject.

3. A prosecution in the police court under an ordinance prohibiting the unlawful sale of intoxicating liquors and the keeping of any place for conducting sales of the same, is criminal in its nature; and that clause of paragraph 1010, Gen. St. 1889, requiring the recognizance on an appeal in such case to be conditioned "for the payment of such fine and costs as shall be imposed" on the appellant if the case shall be determined against him, is an unreasonable restriction on the right of appeal, and in conflict with the constitutional guaranty that "the right of trial by jury shall be inviolate." Bill of Rights, § 5.

4. The inability of a person charged with an offense to give bail by reason of poverty is no ground for his discharge on habeas corpus.

(Syllabus by the Court.)

Application by John Z. Jahn for discharge on habeas corpus. Application denied.

Geo. D. Abel and David Ritchie, for petitioner. G. M. Weeks and C. B. Daughters, for respondent.

MARTIN, C. J. The petitioner was convicted in the police court of the city of Lincoln Center upon three counts for violation of Ordinance No. 139, and upon two counts for violation of Ordinance No. 113 of said city, which is of the third class. Ordinance No. 139 makes it unlawful for any person to barter, sell, or give away any malt, hop tea tonic, ginger ale, cider, or other drink of like nature in less quantities than one gallon, or to permit or allow the same to be drunk at any store or other place of sale. Ordinance No. 113 declares it unlawful for

any person other than a druggist having a permit, to sell or barter any intoxicating liquors. The petitioner denied the right of the court to try him under either ordinance, claiming that both are invalid; but this contention was overruled. He next demanded a trial by jury, but this was refused. He was then tried by the court, and found guilty upon each count, and was adjudged to pay fines amounting to \$200, besides \$95.40 costs, and he was committed to jail until the fine and costs should be paid. The court fixed the appeal bond at \$500. Afterwards the petitioner made a showing to the court of his inability to give an appeal bond, and he asked to be discharged from imprisonment, but this was refused.

1. The petitioner claims that said Ordinance No. 139 is void, but in *Monroe v. City of Lawrence*, 44 Kan. 607, 24 Pac. 1113, this court decided that an ordinance of the city of Lawrence of the same general nature was valid. The reasoning in that case is applicable here, and we consider it controlling.

2. The petitioner further contends that said Ordinance No. 113 is invalid on the ground that the sale of intoxicating liquors is regulated by the laws of the state, and any unlawful sale thereof, or the keeping of any place for carrying on such sales, is punishable under said laws, and not under city ordinances covering the same subject. If this question were new, we might think the position of counsel for petitioner a strong one, but under the old dramshop act, as well as the prohibitory amendment and the laws made in pursuance thereof, it has been held that the state may confer upon municipalities the right to punish, in pursuance of their ordinances, illegal sales of intoxicating liquors, or the keeping of any place for conducting such business within their limits. *City of Emporia v. Volmer*, 12 Kan. 633; *City of Salina v. Seltz*, 16 Kan. 143; *State v. Young*, 17 Kan. 414; *Franklin v. Westfall*, 27 Kan. 614; *City of Topeka v. Myers*, 34 Kan. 500, 8 Pac. 726; *Junction City v. Keefe*, 40 Kan. 275, 279, 280, 19 Pac. 735. And many decisions in other states are in accord with the foregoing. Tested by these authorities, we think that Ordinance No. 113 is valid.

3. The next claim of the petitioner is that he was entitled to a jury in the police court, especially upon the charges under Ordinance No. 113 for unlawfully selling intoxicating liquors and keeping a place where such liquors were unlawfully sold. A distinction has always been taken between offenses against mere municipal regulations and those which are made penal by the laws of the state because of their supposed evil consequences to society; the courts holding that the former might be punished summarily by proceedings in the municipal court, while as to the latter the defendant is entitled to a trial by jury. In *Neltzel v. City of Concordia*, 14 Kan. 446, this court held that a prose-

cution in the police court for selling liquor without a license contrary to the ordinance of the city was criminal in its nature, and after a trial on appeal by the district court could only be brought here by appeal. The complaint against the petitioner for the sale of intoxicating liquors must, we think, be treated as criminal in its character, and under section 5 of the bill of rights, declaring that "the right of trial by jury shall be inviolate," he is entitled to a trial by jury. But it was long ago settled by this court that where a statute authorizes a trial before a municipal court without a jury for a violation of a city ordinance, and at the same time secures to the defendant an appeal therefrom, clogged by no unreasonable restrictions, to an appellate court, in which he has a right to a trial by jury, such summary proceeding is not in conflict with said section 5 of the bill of rights. *City of Emporia v. Volmer*, 12 Kan. 622; *In re Rolfs*, 30 Kan. 758, 1 Pac. 523. And this position has been established by other courts, although the supreme court of the United States takes a different view of the subject, under a somewhat similar provision of the federal constitution. 1 Dill. Mun. Corp. (4th Ed.) § 439 (original section 367), and cases cited. The petitioner claims, however, that he is not allowed an appeal "clogged by no unreasonable restrictions," because, under paragraph 1010, Gen. St. 1889, he cannot appeal without entering into recognizance with good and sufficient surety conditioned for his personal appearance before the district court on the first day of the next term, "and for the payment of such fine and costs as shall be imposed on him if the case shall be determined against the appellant." In *McInerney v. City of Denver*, 17 Colo. 302, 29 Pac. 516, it was held that such a provision as the foregoing, coupled with a further condition that the defendant must pay all costs accrued in the police court before the appeal should be perfected, constituted unreasonable restrictions upon the right of appeal, and we think it unreasonable to impose the condition for the payment of the fine and costs if the case should be determined against the appellant, and that the recognizance should provide for nothing more than the appearance of the appellant before the district court of the county on the first day of the next term thereof, which, of course, implies that he will remain until his case is called and disposed of. Almost any man can obtain security for his appearance in a case where he is charged only with a misdemeanor, but it is very different when a neighbor is asked to become security for the payment of a fine, even upon a contingency, after it has been once imposed. We think that the provision in said paragraph 1010 for the payment of such fine and costs as shall be imposed is inconsistent with the constitutional guaranty that the right of trial by jury shall be inviolate, and therefore we hold this clause of said

paragraph to be inoperative and void. If the petitioner had tendered a recognizance with good and sufficient surety for his appearance, we think it would have been the duty of the police judge to have accepted and approved the same.

4. The petitioner claims that he was unable to give any security by reason of his poverty, and urges that he should be discharged for this reason, but he does not cite any authority in support of this proposition, and we know of none. Such a doctrine is too dangerous to be entertained. The order of the court is that the petitioner be remanded to the custody of the respondent, but on entering into recognizance in the sum of \$500 within 10 days, with good and sufficient security, to be approved by the police judge, conditioned for the personal appearance of the appellant before the district court of the county on the first day of the next term thereof, he will be discharged from imprisonment. All the justices concurring.

In re TUTT.

(55 aKn. 708)

(Supreme Court of Kansas. Oct. 5, 1895.)

CONSTITUTIONAL LAW—TITLE OF ACT—CRUEL AND UNUSUAL PUNISHMENT—SENTENCE—BURGLARY.

1. Section 3 of chapter 121 of the Laws of 1871 is constitutional and valid.

2. Where a defendant was charged with burglary in a freight car, under section 1 of chapter 121 of the Laws of 1871, and also with larceny under section 3 of said act, and found guilty of burglary and larceny as charged in the information, and the value of the property stolen is found to have been six dollars, *held*, that a sentence, based on such verdict, to confinement in the penitentiary at hard labor for five years, is not void; that, while the conviction for burglary is a nullity, the conviction of larceny, under section 3, is sufficient to support the sentence imposed.

(Syllabus by the Court.)

Application by Robert Tutt for a writ of habeas corpus. Application denied.

F. M. McHale, for petitioner. F. B. Dawes, Atty. Gen., A. C. Mitchell, and S. D. Bishop, for defendant.

ALLEN, J. The petitioner is confined in the state penitentiary under a sentence of the district court of Douglass county. He was charged with burglary in a freight car, and with having stolen therein a crate of tobacco cutters. After the trial of the case, the jury rendered a verdict as follows: "We, the jury in the above-entitled action, find the defendant, Robert Tutt, guilty of burglary in the second degree, as charged in the information, and larceny as charged in the information; and we find the value of property stolen to be six dollars." On this verdict the petitioner was sentenced to confinement in the penitentiary for five years. It is claimed on his behalf that the judgment is void, for the reason that chapter 121 of the Laws of 1871, entitled "An act prescribing the punishment for certain offenses

against railroad property, and in railroad cars and buildings," is unconstitutional—First. Because the act contains more than one subject. The act does not include anything more than crimes and punishments, and is not open to this objection. Second. Because section 3 provides a cruel and unusual punishment for the offense of larceny. This section reads: "If any larceny be committed in any railway depot, station house, telegraph office, passenger coach, baggage, express or freight car, or any caboose on any railway in this state, the offender may be punished by confinement and hard labor not exceeding seven years." While the punishment prescribed is severe, it is of the kind usually inflicted on offenders. This is not the only case in which larceny of property of the value of less than \$20 is made punishable by statute by confinement in the penitentiary. The same punishment is prescribed for larceny in a dwelling house, boat, or vessel, or from the person in the nighttime. The third objection made is that the law does not have a uniform operation throughout the state. The argument is that tobacco cutters stolen from a car are no more valuable and the offense can be no greater than when they are stolen from a store or any other place. The legislature has deemed the place where and the circumstances under which a larceny is committed of importance. The law applies uniformly throughout the state to all offenses committed under like circumstances, and is therefore not open to this objection. Aside from the question of the constitutionality of the law, it is claimed that the sentence is void, because this court, in the case of *State v. Gulnney*, 40 Pac. 926, held sections 1 and 2 of chapter 121 of the Laws of 1871 unconstitutional; that the conviction of burglary therefore falls, because there is no valid law to support it; that the jury, by finding the value of the property at six dollars, have rendered a verdict of guilty of petit larceny only; and that, under such a verdict, the defendant could not be punished by confinement in the penitentiary. But the verdict finds the defendant guilty of larceny as charged in the information, and the larceny charged in the information is larceny in a freight car. A fair interpretation of the verdict is that the larceny was committed in a car, and that the value of the property there stolen was six dollars. This alone might subject the defendant, under the statute, to a sentence for seven years. That imposed by the court, being but for five years, is within the limit authorized by law for the larceny. In this proceeding we cannot consider any mere question of error in the manner of rendering judgment. The sole question is whether the court had the power to render the judgment it did on the verdict, and this question must be answered against the petitioner. His application for a discharge will be denied. All the justices concurring.

(55 Kan. 724)

In re PRYOR.

(Supreme Court of Kansas. Oct. 5, 1895.)

POWERS OF CITY—REGULATING PRICE OF GAS.

In 1886, Iola, a city of the third class, granted to the Iola Gas & Coal Company, its successors and assigns, the right to lay gas pipes and mains in the streets and public grounds for the purpose of supplying the city and its inhabitants with gas. No rates were prescribed, except that the company should not charge the city more than one dollar per 1,000 cubic feet of gas for lighting the public buildings. On September 12, 1889, the company, with the assent of the city, assigned all its rights and interests to W. S. Pryor and Joseph Paullin, their heirs and assigns, one of the conditions being that said assignees would furnish private families with gas at a price not exceeding \$2.50 per stove per month and 40 cents per month per burner for illuminating purposes; and for some years past said assignees have been furnishing natural gas to the city and its inhabitants. On May 10, 1895, the city enacted an ordinance providing, among other things, that it should be unlawful for any person, firm, or corporation furnishing gas in said city to charge anything in excess of the prices therein fixed, which were very much lower than those named in the assignment, and lower than those collected from consumers. Held, that said ordinance is inoperative and void as to said Pryor & Paullin, their heirs and assigns, in so far as the same purports to establish prices for gas furnished by them to private consumers.

(Syllabus by the Court.)

Application by W. S. Pryor for discharge on a habeas corpus. Petitioner discharged.

Iola is, and at all times hereinafter mentioned was, a city of the third class in Allen county. On July 1, 1886, an ordinance of said city, being No. 268, went into effect, purporting to grant to the Iola Gas & Coal Company, its successors and assigns, the right and privilege of laying and maintaining gas pipes and mains in the streets, avenues, alleys, parks, and public grounds of the city, for the purpose of supplying and conveying gas or other volatile substances for manufacturing, heating, lighting, fuel, domestic, and other purposes. No rates were prescribed, except that the company should not charge the city more than one dollar per 1,000 cubic feet of gas for lighting the public buildings. It was provided that the gas and coal company should file its written acceptance with the clerk within 10 days, after which said ordinance should become a contract between the city and said gas and coal company. Within the time limited the company duly filed its acceptance. It expended a considerable sum in sinking gas wells, laying pipes, etc., but with indifferent success, the supply of natural gas not being adequate. On September 12, 1889, the gas and coal company, with the assent of the city, assigned its rights and privileges under said ordinance to W. S. Pryor and Joseph Paullin upon certain terms and conditions, one of which was that said assignees should furnish private families with gas at a rate not exceeding \$2.50 per stove per month and 40 cents per month per burner for illuminating purposes. Pryor & Paullin proceeded to sink

other wells, and improve and extend the plant, and at length obtained an adequate supply of natural gas, which they have been furnishing to the city and its inhabitants at contract rates. On May 10, 1895, Ordinance No. 828 took effect by publication, the same purporting to authorize corporations, firms, companies, or individuals to lay and maintain pipes in the streets, avenues, alleys, lanes, and public grounds for the purpose of supplying said city and its inhabitants with natural gas for heating and illuminating purposes, and regulating the manner of laying such pipes, the kind and quality of same, and fixing the maximum rates to be charged the consumers of gas therefor, and providing penalties for the violation of the provisions of the ordinance. It was declared unlawful for any person to make collections for gas furnished without filing a written acceptance of the conditions of the ordinance, and the rates fixed for gas for the use of families were very much lower than those named in said assignment to Pryor & Paullin, and lower than they had been collecting from consumers. Pryor & Paullin have never filed any written acceptance of the terms of the ordinance, and they have no competitor in the business as yet. Complaint was made before the police judge that W. S. Pryor had collected from S. Bevington \$1.50 for each of the months of June and July, 1895, for supplying a No. 8 cook stove, in violation of said Ordinance No. 828, which allowed only \$1 per month; and he was convicted, and fined in the sum of \$30 and \$18 costs, and was ordered to be committed to the city prison until the fine and costs should be paid. He claims that such imprisonment is unlawful, and asks to be discharged therefrom.

Campbell & Hawkins and C. E. Benton, for petitioner. H. A. Ewing, for defendant.

MARTIN, C. J. (after stating the facts). The only question arising upon the record is whether the city of Iola had authority to fix the rates to be charged for natural gas furnished to private consumers by Pryor & Paullin under the circumstances above stated. In this country, municipal corporations (except the city of Washington) are the creatures of the states in which they are located. They derive their powers from the constitution and the statutes. In *Anderson v. City of Wellington*, 40 Kan. 176, 19 Pac. 719, this court said: "The power to pass a city ordinance must be vested in the governing body of the city by the legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted, and must be essential to the declared purposes of the corporation; not simply convenient, but indispensable. * * * Any fair and reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is de-

nied." See, also, 1 Dill Mun. Corp. (4th Ed.) § 80. The act providing for the organization and government of cities of the third class contains no express grant or power to fix or regulate the prices of gas, water, or any other article of necessity or luxury. General authority is given to enact ordinances for the good government and welfare of the city (Gen. St. 1889, para. 958, 991), and such cities may provide for and regulate the lighting of streets, and they have power to make contracts with any person, company, or association to erect gas works, with the privilege of furnishing gas to light the streets, lanes, and alleys of the city for any length of time not exceeding 21 years (Id. par. 984). The respondent relies principally upon a section of the corporation law of 1888 relating to gas and water corporations, and published as paragraph 1401, Gen. St. 1889, which reads as follows: "Any gas or water corporation shall have full power to manufacture and sell and to furnish such quantities of gas or water as may be required by the city, town or village where located, for public or private buildings or for other purposes; and such corporations shall have power to lay pipes, mains and conductors for conducting gas or water through the streets, lanes, alleys and squares in such city, town or village, with the consent of the municipal authorities thereof and under such regulations as they may prescribe." Certainly there is no express power conferred upon the municipal authorities by this section to regulate the price of gas or water. Whether they might, as a condition of their consent, provide that gas or water should be furnished to the city or to its inhabitants at not exceeding certain prescribed rates, we need not now inquire. Consent was granted by Ordinance No. 268 to the Iola Gas & Coal Company, its successors and assigns, without annexing any condition as to rates, except that no more than one dollar per 1,000 cubic feet of gas should be charged for lighting the public buildings. In certain cases the state may fix and regulate the prices of commodities and the compensation for services, but this is a sovereign power, which may not be delegated to cities or subordinate subdivisions of the state, except in express terms, or by necessary implication. No such power is expressly conferred upon cities of the third class, and we do not think the right can be implied from any express provision, unless possibly that in the grant of consent to any person or corporation to so use the streets and public grounds of the city a condition might be imposed as to the maximum rates to be charged. In *Lewisville Natural Gas Co. v. State*, 135 Ind. 49, 34 N. E. 702, it was held that municipal corporations of Indiana have no power at common law to fix by ordinance the price at which natural gas shall be supplied to consumers, and that the act of March 7, 1887, providing "that the

boards of trustees of towns and the common council of cities * * * shall have power to provide by ordinance reasonable regulations for the safe supply, distribution and consumption of natural gas within the respective limits of such towns and cities," does not confer the power to regulate the price at which natural gas shall be furnished; overruling the case of *City of Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853. In the opinion the court says: "To secure the safe supply and use of natural gas is one thing, and to fix the price at which gas shall be supplied is another and a different thing." In *City of St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, it was held that neither under its authority to regulate the use of streets, nor the power to license, tax, and regulate various professions and businesses, nor the general welfare clause permitting the passage of all such ordinances not inconsistent with the provisions of the charter or the laws of the state as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, can the city of St. Louis regulate by ordinance the tariff of charges of a telephone company. In the opinion the court says: "We are at a loss to see what this power to regulate the use of the streets has to do with the power to fix telephone charges. The power to regulate the charges for telephone service is neither included in nor incident to the power to regulate the use of streets, and the ordinance cannot be upheld on any such grounds." Under the section of our statute hereinbefore fully quoted a gas or water company may lay its pipes and mains through the streets of a city only with the consent of the municipal authorities, and under such regulations as they may prescribe; but the regulations are only as to the laying of pipes and mains, and have nothing to do with the price of the gas or water passing through the pipes, and supplied to consumers. Counsel for the respondent cite the leading case of *Munn v. Illinois*, 94 U. S. 113, and others of like character, to the effect that, where the owner of property devotes it to a use in which the public have an interest, he must, to the extent of the interest thus acquired by the public, submit to the control of such property by the public for the common good. But in these cases the control was exercised by the legislature either directly or through municipalities or agencies clothed by it with the power. In the present case the legislative authority is wanting. We must therefore hold that said Ordinance No. 368 is inoperative and void as to said Pryor & Paullin, their heirs and assigns, in so far as the same purports to establish the price for gas furnished by them to private consumers. The petitioner will be discharged from custody. All the justices concurring.

(35 Kan. 709)

In re KELLAM.

(Supreme Court of Kansas. Oct. 5, 1895.)

CONSTITUTIONAL LAW—ARREST WITHOUT WARRANT.

The statute conferring authority upon the police officers of a city of the first class to make an arrest (Gen. St. 1889, par. 623), so far as it attempts to authorize an arrest without a warrant for misdemeanors not committed in the view of the officer, and merely upon suspicion, is unconstitutional and void.

(Syllabus by the Court.)

Joseph S. Kellam applies for a writ of habeas corpus. Petitioner discharged.

Eugene Hagan, David Overmyer, and F. G. Hentig, for petitioner. W. A. S. Bird, for respondent.

JOHNSTON, J. On August 3, 1895, Joseph S. Kellam was arrested by John M. Wilkerson, chief of police of the city of Topeka, upon a charge of selling intoxicating liquors in Topeka contrary to the city ordinances and to the laws of the state. No written complaint was ever filed, nor was there any warrant issued authorizing the arrest, but persons whom the chief of police deemed to be reliable had informed him that Kellam was engaged in the unlawful sale of liquors. The chief of police had no personal knowledge that an offense had been committed, but, upon information so received, he alleged that he had reasonable suspicion that an offense had been committed, and therefore he arrested Kellam, and committed him to jail. Kellam thereupon instituted this proceeding, alleging that an arrest without a warrant or other process, upon the mere suspicion of an officer that a misdemeanor had been committed, is illegal.

As an authority and a justification for the arrest, the respondent calls our attention to the following statute, conferring authority upon police officers of cities of the first class: "The city marshal or any policeman shall at all times have power to make or order an arrest upon view of an offense being committed, or upon reasonable suspicion that an offense has been committed, with or without process, for any offense against the laws of the state or of the ordinances of the city, and to bring the offender for trial before the proper officer of the city: provided, that any person arrested for any offense without process shall be entitled, on demand before trial, to have filed a complaint on oath in writing; and such person shall not at that time be tried for any other offense than that for which he was arrested and for which the complaint shall be filed." Gen. St. 1889, par. 623. In pursuance of this statutory provision, the city has enacted an ordinance which provides that policemen may arrest, with or without warrant, all persons found in the act of violating a law or ordinance or in any manner disturbing the peace and good order of the city or any of its in-

habitants. It also authorizes them to "arrest all persons found under suspicious circumstances, who cannot give a good account of themselves." The statute quoted certainly purports to give police officers power to make arrests, without warrants or other process, upon the mere suspicion that misdemeanors have been committed. But can such authority be constitutionally given? We think not. The liberties of the people do not rest upon so uncertain and insecure a basis as the surmise or conjecture of an officer that some petty offense has been committed. In section 15 of the bill of rights it is ordained that "the right of the people to be secure in their persons and property against unreasonable searches and seizures shall be inviolate," etc. This provision guarantees protection against unreasonable arrests, and when it was placed in the constitution, and in fact ever since that time, an arrest for a minor offense without a warrant, and not in the view of the officer, was deemed to be unreasonable and unlawful. Under the common law, arrests without warrants were not permitted, except for offenses committed in the view of the officer; and, in cases of felony actually committed, the officer might also arrest without process upon a reasonable suspicion. The liberty of the citizen was so highly regarded, however, that the officer arresting the supposed felon without warrant must have acted in good faith, and upon grounds of probable suspicion that the person arrested was the actual felon. Felonies were excepted on account of the gravity of such offenses, and because the public safety and the prompt apprehension of criminals charged with offenses so heinous seemed to require that such arrests should be made without warrant. The powers of officers to make arrests have been extended to some extent by statutes, but it is generally held that officers cannot be constitutionally clothed with authority to arrest without warrant for minor offenses not committed in their presence or view. *Pinkerton v. Verberg*, 78 Mich. 573, 44 N. W. 579; *Robison v. Miner*, 68 Mich. 549, 37 N. W. 2; *Shanley v. Wells*, 71 Ill. 78; *Jamison v. Gaernett*, 10 Bush, 221; *State v. Freeman*, 86 N. C. 683; *Doering v. State*, 49 Ind. 56; 11 Cent. Law J. 321; 1 Am. & Eng. Enc. Law, 732; 7 Am. & Eng. Enc. Law, 675. In considering the question of an officer making an arrest without a warrant for a misdemeanor committed at a past time, the supreme court of Michigan said: "Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our constitution guarantees. These are rights which existed long before our constitution, and we have taken just pride in their maintenance, making

them a part of the fundamental law of the land." *Pinkerton v. Verberg*, supra. In the same case it was said: "If persons can be restrained of their liberty and assaulted and imprisoned under such circumstances without complaint or warrant, then there is no limit to the power of a police officer."

Our constitution not only provides that the right of the people to be secure against unreasonable searches and seizures shall be inviolate, but it also declares, in the same section, that no warrants shall issue but on probable cause, supported by oath or affirmation. In interpreting that provision this court has held that it is only declaratory of the fundamental rights of the citizen, and is intended to protect him in his liberty and property against the arbitrary action of those in authority, and that a warrant based on a complaint verified only on information and belief is insufficient, and an arrest upon such a warrant is illegal. It was also said that "if no warrant issue but upon probable cause, supported by oath or affirmation, the support must be more than hearsay or belief." *State v. Gleason*, 32 Kan. 245, 4 Pac. 363. If an arrest cannot be made or justified on a warrant resting only on hearsay or belief, how can an arrest for a petty offense without a warrant upon the mere suspicion of an officer, not resting even on hearsay or belief, be justified? He may be irresponsible, have heard only an idle rumor, and may be actuated by malice or some other unworthy motive; and to give an officer unlimited authority to arrest without a warrant in all cases upon mere suspicion is unreasonable, and a clear infringement of the constitutional rights of the people. It is, in effect, a revival of the odious general warrants, which placed the liberty of every man in the hands of every petty officer, and which long ago received judicial condemnation. To prevent their use and the exercise of such arbitrary power at the discretion of an officer, "it has not been deemed unwise to repeat in the state constitutions, as well as in the constitution of the United States, the principles already settled in the common law upon this vital point in civil liberty." *Cooley*, Const. Lim. 364, and notes.

We readily conclude that the statute in question, which undertakes to authorize an officer to make an arrest in cases of misdemeanor without a warrant, except upon view of the offense, is unconstitutional, and for that reason the arrest of the petitioner must be held to be illegal. The petitioner will be discharged. All the justices concurring.

(55 Kan. 667)

ATCHISON, T. & S. F. R. CO. v. STEWART.
(Supreme Court of Kansas. Oct. 5, 1895.)

INJURY TO PASSENGER—EXEMPLARY DAMAGES.

1. In an action for personal injuries an allowance for attorney's fees, apart from and in addition to an allowance for exemplary damages, is erroneous.

2. Where a passenger is injured in endeavoring to alight from a train, through the negligence of the railroad company, but where there is nothing in the conduct of the employees in charge of the train to indicate malice or oppression, or any wanton, willful, or deliberate disregard of the rights of the injured passenger, no exemplary damages can be allowed.

3. The testimony in the case examined, and held to be sufficient to sustain the award made for actual damages, but insufficient to justify an award for exemplary damages or attorney's fees.

(Syllabus by the Court.)

Error from district court, Butler county; O. A. Leland, Judge.

Action by Mary Stewart against the Atchison, Topeka & Santa Fé Railroad Company. Plaintiff had judgment, and defendant brings error. Modified.

On November 16, 1890, Mary Stewart was a passenger on a train of the Atchison, Topeka & Santa Fé Railroad Company, en route from Augusta to Douglass, in Butler county. On her arrival at Douglass, and while she was attempting to alight, the train was started, and she was thrown to the ground between the depot platform and the wheels of the cars, resulting in her personal injury. She brought this action against the company, alleging that the injury was due to the negligence of the company in failing to stop the train a sufficient length of time for her to alight and leave the train. She avers that by reason of this negligence she was thrown with great force and violence to the ground, receiving severe internal injuries, which are of a lasting and permanent nature, and which have rendered her incapable of earning her livelihood. She therefore asks damages in the sum of \$10,000. The defendant company denied the charge of negligence, and alleged that the injury sustained by the plaintiff was the result of her own want of care in holding on to the guard rail of the train for a long period of time—nearly two minutes—after she had alighted from the same, by which means she fell down, or was thrown down, causing the injuries complained of. A trial was had with a jury, and the following special findings of fact were made and returned: "(1) Where and when did the accident alleged in the plaintiff's petition happen? A. Douglass, November 16, 1890. (2) Was the train in motion when the plaintiff got off? A. She was thrown off. (3) Did the accident occur to the plaintiff as she was alighting from the train? A. No. (4) Did the plaintiff get off of the train onto the platform before any accident occurred? A. No. (5) Was the plaintiff holding on to the railing on the side of the car after she had alighted from the train? A. No. (6) Is it not a fact that the train stopped and the plaintiff got off the train onto the platform without any accident happening to her? A. No. (7) Did not the plaintiff, after she got off the train onto the platform, turn her back toward the way the train was going, and hold on to the iron railing on the

side of the car after she had safely got off the train? A. No. (8) Would the accident have happened to the plaintiff had she not have held on to the iron railing on the side of the car after she had got off the train onto the platform? A. Never got off." "(10) Did not the brakeman use all reasonable means to prevent the injury to the plaintiff? A. No. (10½) Should you answer the above question in the negative, state wherein they failed. A. Brakeman indifferent, not assisting plaintiff, and conductor starting train too soon. (11) Did not the plaintiff, after the accident, walk away without any assistance? A. No. (12) When was it that the plaintiff was first examined or treated by any physician? A. About the 19th of November, 1890. (13) What business was the plaintiff engaged in at the time of the accident, and what were her duties in connection with the show business? A. Show business, and doorkeeper of the same. (14) Did the injuries of the plaintiff interfere with or prevent the plaintiff from carrying on her business? A. Yes. (15) Did not the plaintiff continue right along with the troupe that she was with, after the accident, until the troupe disbanded at the city of Yates Center over a week after the said accident? A. Yes. (16) Did not the plaintiff come to El Dorado on Tuesday following the Sunday after the accident? A. No. (17) Did she not, while at El Dorado, walk without any assistance? A. No. (18) Where did the plaintiff go from El Dorado? A. Yates Center. (19) Did not the plaintiff perform her part in the show she was with at Yates Center, Kansas? A. Probably, as collector, part of the time. (20) How long was this after the accident? A. About two weeks. (21) Did not the plaintiff get about the streets of Yates Center while she was there as well as a woman of her age usually does? A. We think not. (22) How long did the plaintiff remain at Yates Center? A. About two weeks. (23) Where did the plaintiff go from Yates Center? A. Iola. (24) Where did the plaintiff go from Iola? A. Kansas City. (25) Was not the accident caused by the act of the plaintiff in holding on to the iron railing on the side of the car after she had alighted from the train? A. No. (26) Did the accident which caused the alleged injury happen by reason of the plaintiff's attempting to get off of the train while the same was in motion? A. No; thrown off while in motion. (27) Did the train stop and start from the station before the plaintiff got off the train? A. Yes. (28) Did the plaintiff get off the train after the same had started from the station and while it was in motion. A. No; thrown off. (29) Did not the brakeman request the plaintiff to let go the iron railing after she had alighted and was standing upon the platform prior to the time of the accident? A. No. (30) Did not the conductor stop the train as speedily as he could, at the time of the accident? A. Yes. (31) Did not the brakeman catch hold of the plaintiff and

prevent her from being run over by the cars? A. No." "(34) How much do you allow for attorney's fees in this case? A. One hundred and fifty dollars (\$150). (35) How much do you allow as exemplary or punitive damages? A. Five hundred dollars (\$500)." "(37) How much do you allow as damages for the injuries sustained by the plaintiff? A. Two thousand dollars (\$2,000)." "(39) Is not the plaintiff a colored woman over fifty years old? A. Yes; colored. Do not know her age. (40) Was she not a married woman at the breaking out of the late Civil War, and the mother of eleven children at that time? A. We do not know. (41) What was the amount of the ordinary compensation the plaintiff was able to earn per day before the accident? A. We don't know." The general verdict awarded the plaintiff the sum of \$2,650, which was made up of the following items: For damages sustained, \$2,000; for punitive damages, \$500; for attorney's fees, \$150. Motions were made to require the jury to answer questions which they had failed to answer, and for a new trial, which were overruled, and judgment awarded in accordance with the verdict of the jury. The railroad company alleges error.

A. A. Hurd and Redden & Schumacher, for plaintiff in error. Gardner & Kramer, for defendant in error.

JOHNSTON, J. (after stating the facts). It is contended that the amount awarded by the jury is not warranted by the testimony, and that it is so excessive as to betray passion and prejudice on the part of the jury. That Mary Stewart fell while leaving the train, and that it resulted in some injury to her, must be conceded, but the cause of the accident and the extent of the injury are matters of dispute. Her theory is that the train did not stop at the station of Douglass a sufficient time to allow the passengers to alight from the cars, and that the train started while she was on the lower step of the car, attempting to step to the depot platform, and that she was thereby thrown between the cars and the platform. On the part of the railroad company it is claimed that the train was stopped the usual length of time, and that Mary Stewart had alighted from the train but was holding to the railing of one of the cars when the train started, and she was thereby, through her own fault, jerked down and injured. A reading of the testimony satisfies us that it is sufficient to sustain the finding of the jury that the company was negligent in starting the train while she was endeavoring to alight, and also sufficient to sustain the award of actual damages. The amount of the award is quite large, but the testimony offered in behalf of the plaintiff below tends to show that the injury occasioned by the fall was severe, that it resulted in blood passing from her and in sinking spells, and that she has suffered pain ever

since the time of the injury and was unable, by reason of her suffering, to perform labor or obtain rest and sleep. Considerable testimony was produced in behalf of the company to the effect that she was not interrupted in her regular employment, and that she did not thereafter show evidences of pain or suffering. The conflict, however, has been determined by the jury, and we are unable to say that the sum of \$2,000 allowed by the jury is so excessive as to require a reversal. The items of \$500 as exemplary damages and \$150 as attorney's fees which were awarded by the jury cannot be allowed to stand. The allowance of an attorney's fee in addition to one for exemplary damages is conceded to be erroneous, and we find nothing in the testimony which justifies an award in any amount as exemplary damages. Nothing in the conduct of the employees in charge of the train indicates malice or oppression, or any wanton, willful, and deliberate disregard of the rights of the plaintiff below. As she was not entitled to exemplary damages, no instruction upon that question should have been given, and the award made by the jury beyond actual damages should have been stricken out. We do not regard the rulings upon the testimony to have been prejudicial, nor do we deem the objections raised upon the special questions to be material. The jury, in answer to questions concerning the age of the plaintiff and the compensation she was able to earn, stated, "We don't know." The testimony upon these questions was somewhat confused and uncertain, and hence the jury may not have felt able to give satisfactory answers. We do not think, however, that the questions are very material, nor that any error was committed by the refusal to compel the jury to answer them. We find no other matters in the record which require discussion. The cause will be remanded, with directions to the district court to disallow and strike out the items for exemplary damages and attorney's fees, and when the judgment is so modified it will stand affirmed. The costs of this court will be divided between the parties. All the justices concurring.

(55 Kan. 736)

BAIN v. HOOD.

(Supreme Court of Kansas. Oct. 5, 1895.)

Error from district court, Lyon county; Charles B. Graves, Judge.

Action by C. Hood against Lucy Bain. Plaintiff had judgment, and defendant brings error. Modified.

J. G. Hutchison, for plaintiff in error. C. N. Sterry and Edwin A. Austin, for defendant in error.

PER CURIAM. Action by C. Hood to recover a debt and foreclose two mortgages given to secure the payment of the same. It resulted in a judgment against Lucy Bain and Robert Martin for \$2,611, and the foreclosure of the mortgages. A number of rulings upon the pleadings and in the trial of the cause are

assigned for error, which have been carefully examined, but we find that no reversible error was committed, nor does it appear that any of the questions presented require comment or discussion. The amount awarded, however, appears to be excessive, resulting, no doubt, from an error in the computation of interest upon the debt. The amount of the excess is \$105.11, which would reduce the judgment from \$2,611 to \$2,505.89. The cause will be remanded to the district court, with directions to modify the judgment in this respect, and, when so modified, it will stand affirmed. The costs in this court will be divided.

(55 Kan. 708)

STATE ex rel. ATTY. GEN. v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas. Oct. 5, 1895.)

MANDAMUS — ENFORCEMENT OF ORDER BY RAILROAD COMMISSIONERS.

A railroad company, which had been running an exclusive passenger train as well as a freight train each way every day over one of its branches, finding the revenues from the service insufficient to meet the expenses of maintenance and operation, withdrew the passenger train, and thereafter only ran a daily train each way, which carried both passengers and freight. Upon complaint to the board of railroad commissioners, that tribunal made an order directing the railroad company to restore and operate the passenger train as before. The railroad company declined to comply with the order, and in a proceeding in mandamus it is held that the order is not final or conclusive, and cannot be specifically enforced in the courts. State v. Kansas Cent. R. Co., 28 Pac. 208, 47 Kan. 497.

(Syllabus by the Court.)

Original application in the name of the state on the relation of the attorney general for mandamus to the Missouri Pacific Railway Company. Denied.

F. B. Dawes, Atty. Gen., for plaintiff. Waggener, Horton & Orr, for defendant.

JOHNSTON, J. The Le Roy & Caney Valley Air-Line Railroad Company constructed a short line of railroad, which was leased to the Missouri Pacific Railway Company, and which afterwards formed a branch of the Missouri Pacific system. Prior to October 20, 1889, the Missouri Pacific Railway Company, operating the branch road under the lease, ran a daily passenger train each way over the branch, and, in addition thereto, a freight train each way per day. The receipts of revenue from the operation of the train being insufficient to meet the expense of maintenance and operation, the railway company, on October 20, 1889, withdrew the passenger train, and thereafter only a daily train, carrying both passengers and freight, was run over the road each way. On November 1, 1889, a petition was presented to the board of railroad commissioners, signed by citizens living along the line of the railroad, complaining of the withdrawal of the passenger train from the road, and the discontinuance of the operation of the same, and praying for an order from that board for its restoration and operation as theretofore. After a hearing, and on January 20, 1890, the

board of railroad commissioners rendered a decision in favor of the petitioners, and ordered the railroad company to restore the passenger train service within 30 days from that date. Afterwards an extension of time for putting on the passenger train service was ordered, and a rehearing had, which resulted in an affirmance of the first order, and a direction that the passenger train should be restored to the road on or before May 1, 1890. The railway company declined to comply with this order, and the present proceeding was brought to compel compliance with and specifically enforce the order of the railroad commissioners.

The controlling question is whether the court has power to enforce such an order of the board of railroad commissioners. This question has, in effect, been answered in the negative by a decision which was made since the present action was begun. State v. Kansas Cent. R. Co., 47 Kan. 497, 28 Pac. 208. In that case it was held that an order of the board requiring the railroad company to repair its track so as to promote the safety and convenience of the public is advisory only, and is not final and conclusive upon the railroad company, or in the courts. The powers of the board in the matter of requiring a railroad company to properly operate its road and furnish sufficient passenger service are to be found in section 5 of the act creating the board and defining its powers and duties. Gen. St. 1889, par. 1328. This is the section which was construed in the cited case, and the powers of the board with respect to the operation of the road are no greater or more extended than with respect to the making of repairs. As was there held, the board is not clothed with judicial power, and its order, under the provisions mentioned, is not final and conclusive; nor has any legislative provision ever been made for the specific enforcement of such orders by mandamus or other judicial proceeding. The statute, instead of providing for the enforcement of such an order when compliance is refused, merely directs the board to make a report of its proceedings and decision to the governor. Following that decision, it must be held that the state is not entitled to the relief which is asked, and therefore the peremptory writ will be denied.

ALLEN, J., concurs. MARTIN, C. J., having been of counsel, did not sit in the case.

(55 Kan. 654)

ROACH v. ST. JOSEPH & I. R. CO.

(Supreme Court of Kansas. Oct. 5, 1895.)

RAILROAD CROSSINGS—FAILURE TO GIVE SIGNALS—CONTRIBUTORY NEGLIGENCE.

1. Whether it is negligence for the engineer not to give signals of danger by whistling or ringing a bell in the neighborhood of a dangerous private railroad crossing or not is a question which may properly be submitted to the jury.

2. A person who drives a team onto a railroad crossing at a time when a regular passenger train is about due, and neglects to look for an approaching train, which he might have seen in time to have avoided injury to himself if he had looked, is guilty of contributory negligence barring a recovery for an injury received from such train.

Martin, C. J., dissenting.
(Syllabus by the Court.)

Error from district court, Brown county; R. O. Bassett, Judge.

Action by Hannah M. Roach, administratrix of the estate of Mitchell Roach, deceased, against the St. Joseph & Iowa Railroad Company, to recover for the death of decedent. Defendant had judgment on demurrer to the evidence, and plaintiff brings error. Affirmed.

F. M. Webb and Grant W. Harrington, for plaintiff in error. M. A. Low and W. F. Evans, for defendant in error.

ALLEN, J. Mitchell Roach, the husband of the plaintiff in error, was killed on the line of railroad then operated by the defendant in error at a private crossing on his farm in Brown county, on the 11th of January, 1888. The crossing where the accident occurred was on a private road extending from the highway to the plaintiff's residence, situated on the west side of the railroad track. The railroad track enters a cut within a very few feet north from the crossing, and curves to the northwest through the cut, a distance of about 900 feet. A short distance south of the cut the railroad passes over a trestle. From the highway the private road ascends all the way to the railroad track, and a person coming in from that way cannot see the railroad track, or a train on it, until it emerges from the cut, at any point further from the track than about 30 feet from the east rail. At this point, it is clearly shown by the testimony of all the witnesses who testified with reference to it, a view of the track for the whole length of the cut can be had, and a person in a wagon can see the track, and anything that may be upon it, through the whole length of the cut. A person on the public highway near the entrance to Roach's place cannot see a train of cars while in the cut. The accident occurred in the afternoon, and was witnessed by the plaintiff and H. G. Reed, a neighbor, who lived across the public road from Roach's place. The testimony shows that the deceased, Mitchell Roach, drove into the private road from the highway with a team of mules and a lumber wagon, in which he was standing; that the mules walked at a pretty brisk rate, without stopping, until their fore feet were upon or near the east rail of the railroad track, when Roach pulled back, and endeavored to stop them, and then attempted to jump from his wagon. The mules sprang forward, and the engine of a train coming out of the cut from the north struck the front wheels of the wagon, threw him out, and killed him. It is charged that the defendant was negligent in failing to give any signal, either by

whistling or ringing a bell, before reaching the crossing. On the part of the railroad company it is contended that there was no obligation to whistle or ring when approaching this private crossing. It clearly appears from the evidence that this was a very dangerous crossing, and we think it was a question proper to be left to the jury whether, in the exercise of reasonable care, signals should have been given to warn persons at the crossing of an approaching train. Railroad Co. v. Hague, 54 Kan. 284, 38 Pac. 257. The evidence shows that no signal was given until it was too late to be of any service. The court sustained a demurrer to the plaintiff's evidence.

On the question of the negligence of the defendant there was some evidence to go to the jury, but we have to further inquire whether contributory negligence on the part of the deceased is shown. It appears that the railroad had been in operation for several years prior to the accident, and that the deceased had lived there ever since its construction. The train which caused his death was a regular passenger train, on time, and running on a time schedule that had been in force for several months. The deceased was certainly as familiar with the surroundings of the crossing, and with its dangers, as were the employes of the company. As this private way was the usual approach from the public road to his house, and often used by him, he is certainly chargeable with knowledge of its dangers. The evidence of H. G. Reed shows that he saw Mr. Roach come along the public road from the north, standing up in a lumber wagon, driving a span of mules; that he watched him all the way till he got to the railroad crossing; that just about the time the mules were stepping over the east rail he saw him pull back on his lines, and just about the same instant the engine struck the wagon, and he was killed; that he was driving on a walk, at a pretty good gait all the time; that he could not see that the mules were frightened. Mrs. Roach, the plaintiff, testified that when she was at the well, north from their house, she looked under the trestle, and saw her husband enter the place off the public road. She then started towards the house, and when she got a little over half way up the hill she heard the train, and about the same instant saw it come out of the cut; that at just about the same time she saw her husband in the act of coming on the track; that the mules had just got their front feet across the rail; that she then hallooed, and clapped her hands; that her husband made an effort to pull the mules off the track, and then he attempted to jump out towards the back end of the wagon, the mules bounded across the track, and the engine struck the front wheel of the wagon. The place where Mrs. Roach was standing was considerably lower than the crossing, so that she could only see her husband's head and shoulders just as he came up near the track. She also testifies that he had a up

on, with ear flaps dropped down loosely over his ears; that when she first saw him he appeared to be looking towards the north-west, which would be in the direction from which the train was approaching; and that the train was running very fast. The engineer in charge of the train testified that the train was running at about the usual rate of speed, not to exceed 25 miles an hour; that his attention was first called to the team by his fireman, who had been busy putting in coal, and as he looked out he exclaimed, "My God, there's a team coming on the track!" that just at that time he saw the heads of the animals; that he applied the air brakes, whistled, and reversed the engine as quick as he could. All the evidence in the case shows without controversy that when 30 feet away from the track the deceased could have seen the approaching train, if he had looked. The evidence of the witness Reed is to the effect that Roach appeared to be looking straight ahead towards the crossing, but, as Reed was some distance behind him, this statement is not entitled to much weight. At this point the deceased either did or did not look. If he did look, he must have perceived his danger, and it was his duty to have stopped at once. It was his duty to look, but the evidence indicates very strongly that he did not look when he first came in sight of the approaching train. All the circumstances indicate that he did not perceive his danger until the mule's feet were close to the east rails. Reed testifies that the mules continued to walk until that time, and both he and Mrs. Roach testify that he then pulled back on the lines in an effort to back them off. It is true that the distance between the point where he could have first obtained a view of the approaching train and the track is short, but, knowing the danger of his surroundings, it was clearly his duty to have looked at the first opportunity, and, if he saw danger approaching, to have stopped, or endeavored to stop, at once. This he did not do. The dangers of the situation, with which he certainly must have been familiar, called for a degree of caution commensurate therewith. In *Railway Co. v. Adams*, 33 Kan. 427, 6 Pac. 529, it was held: "It is the duty of a person about to cross a railroad track to make a vigilant use of his senses as far as there is an opportunity, in order to ascertain whether there is a present danger in crossing. A failure to listen or look, when by taking this precaution the injury might have been avoided, is negligence that will bar a recovery, notwithstanding the negligence of the railroad company in failing to give signals contributed to the injury." The same rule is declared in *Clark v. Railroad Co.*, 35 Kan. 350, 11 Pac. 134; *Railroad Co. v. Davis*, 37 Kan. 743, 16 Pac. 78; *Railroad Co. v. Townsend*, 39 Kan. 115, 17 Pac. 804; *Railroad Co. v. Priest*, 50 Kan. 16, 31 Pac. 674. Of the soundness of the rule followed in these cases there can be no question. Clearly, one who fails to exercise reasonable

care for his own safety, and thereby receives an injury which he might have avoided, ought not to subject another to an action for damages because of his negligence of a like kind contributing to the injury. The judgment is affirmed.

JOHNSTON, J., concurring.

MARTIN, C. J. I am constrained to differ with my brethren in this case. The deceased and those in the management of the train had an equal right to the use of the crossing, and it was their duty to be on the lookout. It is quite evident that they did not see each other in time to avoid the fatal collision. The train was in a curved cut, and running fast. When the deceased, with his team, might have been first seen from the pilot, the view of the engineer was probably cut off by the boiler. The fireman had a better opportunity of seeing the danger, but it was his duty to keep the engine hot, and he could not be looking ahead every moment for obstructions. Perhaps both the engineer and the fireman exercised ordinary care as to keeping a proper lookout. In any event, the criticism of the majority of the court upon their conduct is placed on another ground, namely, their failure to give signals while running through the cut. Now, the court cannot say that the deceased had no other duty than to look out for this train. It was his duty to watch for trains in both directions, as well as to look ahead in the road over which he was driving. He was going up hill, and had his team to manage and keep in the road. Had he been looking for this train, and thinking of nothing else, he could not have seen it more than 20 seconds before the collision. Was his failure to see it sooner than he did conclusive evidence of a want of ordinary care on his part? I think not. In my opinion, the case comes within the rule early asserted and often followed by this court, that when the circumstances are such that different men might arrive at different conclusions as to the degree of care exercised, it is then a question for the jury to decide. *Railway Co. v. Pointer*, 14 Kan. 37; *Railway Co. v. Fitzsimmons*, 22 Kan. 686; *Osage City v. Brown*, 27 Kan. 74.

(55 Kan. 688)

NEVE et al. v. ALLEN.

(Supreme Court of Kansas. Oct. 5, 1895.)

QUIETING TITLE—TITLE TO SUPPORT—PLEADING—ESTOPPEL.

1. Where an action was brought under section 594 of the Code to quiet the title to a tract of land, and the defendants pleaded facts showing that they were tenants in common as to a one-third interest, and the plaintiff in reply admitted that the defendants held the naked legal title to the extent of a one-third interest, but alleged that they had sold and received the consideration for such interest, and that a deed was given therefor by their consent by one supposed by all parties to have authority as trustee to do so, *held*, that the reply did not constitute a

departure from the cause of action alleged in the petition.

2. The naked legal title to a one-third interest in real estate does not draw to the defendants the right of possession as against one having the exclusive possession under a full equitable title to the whole premises, so as to defeat the right of the latter to have his title quieted.

3. Under the facts of this case, the Neves are estopped from claiming title as against Allen; and the other defendants, having purchased with notice, are in no better situation than the Neves.

(Syllabus by the Court.)

Error from district court, Mitchell county; Cyrus Heren, Judge.

Action by John H. Allen against John Neve and others to quiet title. Plaintiff had judgment, and defendants bring error. Affirmed.

L. J. Crans and D. M. Thorp, for plaintiffs in error. A. H. Ellis and F. T. Burnham, for defendant in error.

MARTIN, C. J. 1. On March 21, 1887, John H. Allen filed his petition against John Neve and Wealthy A. Neve, alleging that he was, and for a long time had been, in possession of N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 27, township 6 S. of range 9 W., except the 13 acres, more or less, included in the town site of West Hampton; that he claimed title in fee to the premises, and that the defendants claimed an estate or interest therein adverse to the plaintiff, but that said claim of the defendants was without any right, title, or interest whatever in said premises, or any part thereof; and praying the court to quiet his title to said premises. Service by publication was attempted in the case, but on October 8, 1887, such service was set aside by the court, and thereupon Frank J. Kelley, J. C. Mc Nerney, and D. M. Thorp, were, on their own motion, made parties defendant, and they were allowed to answer, and the case was continued for service as to John Neve and Wealthy A. Neve. The defendants Kelley, Mc Nerney, and Thorp duly filed their separate answers, and afterwards Wealthy A. Neve and John Neve filed their joint answer. The answers were of the same general import, to the effect that D. W. Spencer pre-empted said two 40-acre tracts, but died, leaving a son, Milton Spencer, and two married daughters, namely, Maria L. Huntington and Wealthy A. Neve, surviving him as his only heirs; that on May 20, 1874, a patent was issued, vesting the title in said three heirs; that by divers conveyances the undivided interests of Milton Spencer and Maria L. Huntington were vested in the plaintiff, John H. Allen, in fee, and that afterwards the undivided interest of said Wealthy A. Neve was vested in the defendants Frank J. Kelley, J. C. Mc Nerney, and D. M. Thorp by deed from said Wealthy A. Neve and her husband; that the plaintiff was, and ever since February, 1880, had been, in the possession of the whole tract, except 13 acres, more or less, included in the townsite of West

Hampton, and during the same time received the rents, issues, and profits thereof, amounting to \$3,000, and had wholly and wrongfully deprived the defendants of their part and portion thereof, and for a long time prior to the commencement of the action, and by the bringing of the same, denied the defendants' right to any portion of or interest in said premises; and praying for a partition of their one-third interest, and an accounting for the rents and profits. The plaintiff's replies to said answers were to the effect: That on April 21, 1875, Milton Spencer, Maria L. Huntington, and Wealthy A. Neve were the owners of said land, as heirs of D. W. Spencer, deceased; that on said date said Milton Spencer and wife and the said Wealthy A. Neve and husband sold their several interests in said land to Catherine A. Arthur, and the said Milton Spencer and wife then executed and delivered to said Catherine A. Arthur a deed of general warranty, it being then understood, intended, and believed between said Catherine A. Arthur, Milton Spencer and wife, and Wealthy A. Neve and husband that the deed operated as a conveyance of the interest of Wealthy A. Neve and husband to the same extent as the estate of the said Milton Spencer, for the reason that the patent granted the title to the heirs of D. W. Spencer, deceased, and recited that Milton Spencer had made proof and payment for said heirs and all believed that said patent constituted said Milton Spencer the trustee of said heirs, with full power to convey the interests of all, and they were so advised by counsel prior to the execution of said deed, and that said sale was the free and voluntary act of said Wealthy A. Neve and husband, who then and there received full value for the same, and they then and there considered that by said deed they sold and conveyed their interest in said land to Catherine A. Arthur; that immediately thereafter said Wealthy A. Neve and husband removed from said land to a distant part of this state, and thence to Colorado, where they have ever since remained, never asserting any right or claim to said land until May, 1887, and never exercising any control of the same; that said Catherine A. Arthur paid to said Wealthy A. Neve \$500 in money as the purchase price of her interest, and said Catherine A. Arthur was put in possession of said land by said Milton Spencer and said Wealthy A. Neve, and said Catherine A. Arthur and those holding under her have ever since been in the exclusive, peaceable, open, notorious, undisputed, and continuous possession of said premises, and have expended much money, and made great, valuable, and lasting improvements thereon; that on February 11, 1880, said Catherine A. Arthur and her husband, James Arthur, conveyed said land to the plaintiff by deed of general warranty, duly acknowledged and recorded, whereby the plaintiff claimed to be the owner thereof in fee simple; that said land at

the time of defendants' conveyance to Catherine A. Arthur was not worth more than \$1,000, but by reason of the money and labor expended and the improvements made thereon said property has increased to the value of \$10,000; that said Maria L. Huntington and her husband, on April 18, 1886, conveyed to said Milton Spencer, by a quitclaim deed, all their right, title, and interest in said land, and that said defendants Frank J. Kelley, J. C. McNerney, and D. M. Thorp had full notice of all the rights of the plaintiff in and to said premises long before the execution of the deed by Wealthy A. Neve and husband to them, and by reason of the premises it would be inequitable and unjust to permit said defendants to assert or maintain any right, title, estate, interest, or claim whatsoever in or to the real property in controversy. The defendants below, who are plaintiffs in error, claimed in the court below that the replies were inconsistent with the petition, and constituted a departure from it; that the petition stated a cause of action to quiet title, while the replies set forth grounds for specific performance; and they moved the court to compel the plaintiff below to elect whether he would proceed in the action to quiet title or for specific performance, but the court overruled this motion, holding that the pleadings stated only a cause of action to quiet title. Counsel controvert this position with great earnestness and at much length. They refer to Lord Coke as stating that "a departure in pleading is said to be when the second plea containeth matter not pursuant to his former, and which fortifieth not the same, and therefore it is called 'decessus,' because he departeth from his former plea." The action was doubtless intended to be brought under section 594 of the Code of Civil Procedure. All that was necessary to allege was that the plaintiff was in possession, by himself or tenant, of the real property described; that the defendants claimed an estate or interest therein adverse to him; and asking for the determining of such adverse estate or interest. It was averred in the petition that the plaintiff was the owner in fee as well as in possession. The answers were to the effect that Wealthy A. Neve was the fee-simple owner of an undivided one-third interest, and the replies must be taken to concede that she did hold the naked legal title to such one-third interest, the plaintiff claiming, however, that she had no equitable title whatever to the premises, such being wholly in him. We do not think, however, that this concession changes substantially the claim made in the petition, which need not have contained anything about the nature of the title, whether legal or equitable. The replies met fully the averments contained in the answers, substantially admitting their truth as to the legal title, but stating facts showing that it would be inequitable for the defendants to set up such naked legal title to defeat his full equitable claim to the whole premises. Nel-

ther do we think that the replies stated a cause of action for specific performance. It is not averred that Wealthy A. Neve and husband entered into an agreement, either in writing or by parol, to convey the premises to Catherine A. Arthur; but the substance of the allegation in this respect is that the Neves represented that the title stood in the name of Milton Spencer, who occupied the relation of trustee; and that his deed was sufficient to convey their title as well as his own; and on this assumption they received their full share of the purchase money, and thus the equitable title was vested in Catherine A. Arthur. We think the replies did not depart from the petition.

2. It is further contended that by virtue of the admission in the replies the legal title to the extent of an undivided one-third interest was in Wealthy A. Neve, and, as the possession of one tenant in common is the possession of all, she and her grantees must likewise be deemed in possession, and therefore the action to quiet title will not lie. But a tenant in common may oust his cotenant, and the latter may have his remedy therefor by ejectment. *Scantlin v. Allison*, 32 Kan. 376, 378, 379, 4 Pac. 618. In this case, however, it is averred in the answer that the plaintiff was in possession of the whole tract, and had been ever since February 11, 1880, denying any right in the defendants, and this is substantially admitted by the replies. Now, as the plaintiff was in possession under a legal title to the undivided two-thirds and an equitable title to the whole estate, it cannot be said that Wealthy A. Neve was in possession merely because she had the naked legal title to an undivided one-third. Possession under a full equitable title is sufficient to give the plaintiff a standing in court. Section 594 of the Code is broad and general in its terms. A person in actual possession under claim of title may have his rights adjudicated as against any adverse claimant. *Giltenan v. Lemert*, 13 Kan. 476.

3. We deem it unnecessary to discuss the evidence. It strongly tends to prove the substantial allegations of the replies. The discrepancies are unimportant. The court made very full findings of fact in substantial agreement with the averments contained in the replies, and these findings were well supported by the evidence. After the transaction between the Arthurs, the Neves, and the Spencers, it would be most inequitable and unjust to permit the Neves to claim any interest in the premises in controversy. The transaction embraces every element of an estoppel as against them, as laid down in *Clark v. Coolidge*, 8 Kan. 189, 196. The defendants Kelley, McNerney, and Thorp received their deed on or about May 23, 1887, and they stand in no better position than the Neves. It is true, they did not know of the transaction between the Neves, the Spencers, and the Arthurs in 1873, whereby James Arthur was to have this 80-acre tract and an in-

terest in the mill property in consideration of the transfer by him of a sawmill at Cawker City, a pair of corn-buhrs, and a quarter section of land near Cawker City, but they knew that the plaintiff below was in possession of the premises, claiming full ownership; that his grantor had a deed from Milton Spencer and wife, purporting to convey the full title; and that suit had been commenced by the plaintiff below for the purpose of quieting his title as against the Neves, whose adverse claim was alleged to be groundless; for they had examined the petition in this case before the delivery of the deed to them. They paid their money and took their chances, well knowing that the title was in dispute. The judgment of the district court will be affirmed. All the justices concurring.

(5 Kan. 646)

SOPER et al. v. GABE et ux.

(Supreme Court of Kansas. Oct. 5, 1895.)

SPECIFIC PERFORMANCE—TENDER OF TITLE—PLEADING—JUDGMENT.

1. Where, by the terms of a contract for the sale and conveyance of land, the purchase price is made payable in installments, and the conveyance is to be made upon the payment of the last installment, and where default is made by the purchasers in the payments, and no action is brought by the vendors to enforce the contract until after the maturity of the last installment, the obligations of the parties to the contract are mutual and dependent, and the vendors cannot maintain an action to specifically enforce the contract or to recover any part of the purchase money until they make or tender a conveyance of the land.

2. A petition filed by the vendors in an action to enforce such a contract which contains no averment of a tender of conveyance, and alleges no excuse for the failure to make such a tender, is fatally defective, and a demurrer thereto should be sustained.

3. The allegations of the answer of the purchasers, and the testimony with respect to their statements and conduct, examined, and held, that they did not constitute a waiver of the essential averments and proof of a tender of conveyance by the vendors.

4. A judgment in such action which awards to the vendors the full purchase price of the land, without requiring them to convey the same to the purchasers by a good title, is erroneous, and the error is reversible in this court although no exception was taken to the same in the trial court.

(Syllabus by the Court.)

Error from district court, Mitchell county; Cyrus Heren, Judge.

Action by William H. F. Gabe and Wilhelmina F. A. Gabe against D. W. Soper and others. Plaintiffs had judgment, and defendants bring error. Reversed.

On May 21, 1887, William H. F. Gabe and his wife sold 165 acres of land to D. W. Soper and 13 others, at the agreed price of \$14,000. A cash payment of \$2,800 was made, and the balance, which was to bear interest at 8 per cent., was to be paid in installments of \$2,800 every three months, making the last payment due upon May 21, 1888. The purchasers were to have possession of the

land three months after the sale, together with a share of the crops growing thereon. Among other things, the written agreement of the parties stipulated that punctual payment of the installments should be made as they became due, and that the purchasers should seasonably pay all taxes and assessments that might thereafter become due upon the premises. It also contained the following provision: "In case the second party [the purchasers], his legal representative or assigns, shall pay the several sums of money aforesaid punctually and at the times above limited, and shall strictly and literally perform all and singular the agreements and stipulations aforesaid, after their true tenor and intent, then the first party [the Gabes] will cause to be made and executed unto the said second party, his heirs or assigns (upon request, at the office of the first party, and the surrender of this contract), a good and sufficient warranty deed, free and clear of all incumbrances existing against said premises at the date of this contract. And it is hereby agreed and covenanted by the parties hereto that time and punctuality are material and essential ingredients of this contract. And in case the second party shall fail to make payments aforesaid, and each of them, punctually and upon the strict terms and times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid, strictly and literally, without any failure or default, then this contract, so far as it may bind said first party, shall become utterly null and void, and all rights and interests hereby created or then existing in favor of or derived from the second party shall utterly cease and determine, and the right of possession and all equitable and legal interests in the premises hereby contracted shall revert to and revest in the said first party without any declaration or forfeiture or act of re-entry or any other act by said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or services performed, as absolutely, fully, and perfectly as if this contract had never been made." The purchasers failed to make the payments provided for; and on August 6, 1889, the Gabes brought an action against the purchasers for the specific performance of the contract. In their petition they set the contract forth, and allege that \$3,000 had been paid, together with interest on the balance up to May 22, 1888, and that the remainder of the purchase money, with interest from the last date, amounting to \$11,000, was due under and by the terms of the contract. It was further alleged that the purchasers had enjoyed the use and peaceable possession of the premises ever since the making of the contract, and that the plaintiffs were ready and willing to perform their part of the agreement, and to convey the premises, upon payment of the remainder of the purchase money. The prayer of the

plaintiffs was for a judgment for specific performance, for the amount due under the contract, and an averment alleging willingness to perform their part of the agreement by the execution of a proper conveyance of the premises. The defendants, who were the purchasers, demurred to the petition, upon the ground that it did not state facts sufficient to constitute a cause of action, but the demurrer was overruled. Afterwards, the defendants answered. The answer contained: First, a general denial; second, that, by reason of the default of the defendants to make the payments agreed upon, the contract had become null and void, and all rights thereunder in favor of either party had ceased and determined; and, third, that the plaintiffs, prior to the bringing of the action, had availed themselves of the right under the contract to accept a forfeiture arising by reason of the default of the defendants, and had, prior to the commencement of the action, with the consent of the defendants, accepted and taken possession of the land, and retained all of the money paid on the contract, which, it is averred, was equal to the real value of the land. A trial was had with a jury, and, when the testimony of the plaintiffs was concluded, the defendants demurred to the evidence, but the demurrer was overruled. The jury returned a verdict for the plaintiffs for \$13,072.70. Upon this verdict an unconditional judgment for the payment of money was rendered against the defendants for the full amount of the unpaid purchase money, and no provision was made whatever for securing a title to the land to the defendants, nor that the plaintiffs should execute a deed to the defendants upon the satisfaction of the judgment, or at any other time. The defendants complain of the rulings made, and bring the case here for review.

J. D. McFarland, for plaintiffs in error. A. H. Ellis, E. S. Ellis, and F. T. Burnham, for defendants in error.

JOHNSTON, J. (after stating the facts). The first point to which our attention is called is the insufficiency of the petition. It contained no averment that a deed conveying a good title to the land, or that any deed, was ever executed by the Gabes to the purchasers, or that before the commencement of the action or at any other time the Gabes had tendered the purchasers a conveyance of the premises purchased, nor did it contain any excuse for the failure to tender a deed. The obligations of the contract are mutual and dependent, and, before one party can enforce performance, it must appear that he is not himself in default. The Gabes might have enforced the collection of all the installments preceding the last one without having tendered a conveyance of the property sold, but, as no steps were taken to collect the several installments until after the

last one was due, a single cause of action exists for the collection of the purchase money, and payment cannot be compelled until they have complied or tendered compliance with the obligations resting upon them. In a somewhat similar case it was said that "all the parties to the papers must perform at the same time, neither being under any obligation to trust the other. As it appears that Elledge has neither delivered nor tendered a deed, he cannot maintain an action for the purchase money embraced in the note sued on." *Iles v. Elledge*, 18 Kan. 296. In a later case of the same character, and where the agreements of the parties were held to be mutual and dependent, it was said that "neither party can put the other in default save by a performance or an offer to perform on his part. No action can be maintained on the note, not even to adjudge it a lien, until the plaintiff has offered to convey the premises. * * * At any rate, before either party can justly summon the other into court, and impose the expense and annoyance of a suit, he should at least tender performance on his part." *Morrison v. Terrell*, 27 Kan. 326. See, also, *Close v. Dunn*, 24 Kan. 270; *Sanford v. Bartholomew*, 33 Kan. 38, 5 Pac. 420.

It is well settled in this state that a vendor cannot enforce a contract like the one in question, and collect the purchase-price of the land which he has agreed to convey, without alleging and proving that he has performed his own obligation by making and tendering a deed of conveyance. As the delivery or tender of a deed is a prerequisite to compel a performance, allegations of a tender or offer of performance in the petition were essential; and, as the petition of the plaintiffs below wholly failed in this particular, no right of action was shown, and the court committed error in overruling the demurrer.

The demurrer to the evidence should have been sustained for the same reason. No proof of performance was offered, nor was any excuse for the want of it shown. The allegations of the answer did not supply the essential averment of tender, nor did they constitute a waiver of such averment and proof.

It is contended that the tender of a deed was unnecessary, because the proof showed that the defendants below (the purchasers) had repudiated the contract, and declined to carry out its provisions, before the commencement of the action. One of the defendants testified upon rebuttal that at an interview with the Gabes, prior to the beginning of the action, he told them that the defendants "had concluded to let the land go back." It does not appear that he had authority to speak for his associates. A single remark of this kind by one of the 14 purchasers is hardly sufficient to show that a tender would have been declined, and is wholly insufficient of itself to constitute a waiver.

The plaintiffs in error contend that the delay of the Gabes in attempting to secure performance, or in applying to the court for relief, amounts to waiver of their rights under the contract, and to an acceptance of the forfeiture. It is true that, where time is made of the essence of the contract, a party, to obtain specific performance, must have acted without unreasonable delay. In this case, however, the conduct of the parties and the circumstances of the case indicate that the Gabes had waived the payment of the money upon the day it was due, and that they and the other parties had treated the contract as still in force. The purchasers were given possession of the premises about the time of the purchase, and they continued in possession of the land until after the present action was brought. The testimony further tends to show that the purchasers had obtained an extension of time within which to make payment, and, although that time had expired, the Gabes were still endeavoring to secure the payment of the money. Under these circumstances, if a tender had been made or waived, the Gabes would be entitled to a specific performance of the contract.

The judgment that was rendered in the case is not sustained either by the pleadings or the testimony, and this objection is of itself sufficient to require a reversal and a new trial of the cause. Under its terms, the purchasers are required to specifically perform, and to pay the full purchase price of the land, without obtaining the title thereto or any credit for the value of the same. The obligations of the contract, as we have seen, were mutual, and no judgment should have been rendered requiring performance by one of the parties without also requiring it of the other. Instead of that, the judgment awards to the Gabes the full purchase price of the land, and permits them to retain the land which represents the purchase price. To entitle the plaintiffs below to judgment for specific performance, it devolved upon them to allege and prove a tender of performance. Unless a tender has been waived, they must allege and show the tender of a deed conveying a good title, and the tender should be kept good until the judgment is rendered. In this case there was no proof as to the ability of the Gabes to convey the title which they had contracted to convey, nor any showing as to the condition of the title when the judgment was rendered. There being no inquiry or finding concerning the title or the ability of the Gabes to convey, this court is without power to direct any modification of the judgment respecting title. The error in the judgment is not a mere technical defect in form, but it is a substantial one, in failing to protect the rights of the purchasers, and in adjudging a specific performance, without providing for a conveyance to them of the property for which they were required to pay.

The error in the final judgment is review-

able in this court, although no exception was taken to the same, nor any motion to correct the error in the trial court.

The remaining questions that have been discussed, upon the admission of testimony, and upon the instructions of the court, have been examined, but we find nothing in them which requires special comment. The judgment of the district court will be reversed, and the cause remanded for another trial. All the justices concurring.

(55 Kan. 681)

BOWERSOCK v. ADAMS, Sheriff.

(Supreme Court of Kansas. Oct. 5, 1895.)

FRAUDULENT CONVEYANCES—CROSS-EXAMINATION OF WITNESS—EVIDENCE—RECORDS—INJUNCTION.

1. In a controversy where it is claimed that a transfer of property was a pretense and a fraud, and where it is attended by some unusual circumstances, the court should allow an extended inquiry and great latitude in cross-examination of the parties thereto as to the consideration of the transfer, the means of the parties thereto, their conduct, and the circumstances of the transfer.

2. Certified copies of personal property statements made for purposes of taxation, which have been signed and verified by the listing parties, and preserved in the office of the county clerk, may be received in evidence where the originals would be competent, and where they are not in the possession nor under the control of the party desiring to use the same.

3. Where the plaintiff alleges that property which he is seeking to recover was seized by a sheriff under an execution issued out of a certain court, and directed to the officer as sheriff, and there is no averment that the execution was irregular in form or invalid for any reason, it will be presumed that the execution is valid and sufficient to justify the seizure of the property.

4. In proceedings in aid of execution before a probate judge, the orders made and proceedings taken do not become records of the probate court, and copies of the same certified to by the probate judge are not admissible in evidence for the purpose of showing what orders and proceedings were made and had.

5. An order of injunction restraining the sale of property will not affect one who is not a party or a privy to the proceeding, and who has had no notice, and is without knowledge that such an order has been made.

(Syllabus by the Court.)

Error from district court, Sumner county; James A. Ray, Judge.

Action of replevin by J. D. Bowersock against T. M. Adams, sheriff. Defendant had judgment, and plaintiff brings error. Reversed.

A. E. Parker, for plaintiff in error. Thomas George and W. W. Schwinn, for defendant in error.

JOHNSTON, J. This was an action of replevin, brought by J. D. Bowersock, to recover from T. M. Adams, who was sheriff of Sumner county, the possession of ten horses, two omnibuses, two hacks, one baggage wagon, and five sets of harness, of the alleged value of \$3,070. The sheriff had seized the animals and articles mentioned

upon an execution as the property of Henry Tisdale. The property had belonged to Tisdale, but Bowersock claimed that Tisdale was indebted to him in a large sum of money, and that the property was sold and transferred to him as part payment of that indebtedness. The defendant claimed that the property in fact belonged to Tisdale at the time of the levy thereon, and that the transfer was not made in good faith, but rather for the purpose of covering it up so as to defeat the creditors of Tisdale.

The bona fides of the transfer was the principal inquiry in the litigation, and upon that proposition the findings and judgment of the court were against the plaintiff. He first complains that the range given to the cross-examination of some of the witnesses was too wide, the result of which was prejudicial to him. The statements made by the plaintiff in several of the pleadings and in his testimony, together with some unusual circumstances which were brought out in the case, justified an extended inquiry and great latitude in cross-examination as to the consideration of the transfer, the means of the parties thereto, their conduct, and the circumstances of the transfer. In this view, we cannot say that prejudicial error was committed in ruling upon the objections to the cross-examination of plaintiff's witnesses.

In the course of the trial, certified copies of personal property statements, listing the property owned or formerly owned by Tisdale, were received in evidence. These statements, when signed and verified by the listing parties, are required to be returned to the county clerk, and preserved in his office. Gen. St. 1889, par. 6914. As they are official papers, required by law to be filed and preserved in a public office, copies of them duly certified by the county clerk under his official seal may be received in evidence with the same effect as the originals, where the originals are not in the possession nor under the control of the party desiring to use the same. Civ. Code, § 372. The statements in question were made before and after the alleged transfer, and tended to throw some light on the question of a change of possession, and of the management and control of the property by the parties to that transfer. We think no error was committed in receiving them.

Nor can we sustain the objection to the proof of the process under which the property was seized and held by the sheriff. The only proof offered in that respect was a certified copy of an execution issued upon a judgment of the district court of Sedgwick county. The certificate of the clerk was sufficient in form to make the copy of the execution admissible where the original was out of the possession and beyond the control of the sheriff, but no proof of the judgment upon which the execution was based was produced. To justify such a seizure by an

officer, it is generally necessary that his official character and the proceedings and process under which he acted should be shown. In this case, however, the official character of the officer was alleged in the petition, and it also contained an averment that he took possession of the property as sheriff under and by virtue of a "supposed" writ of execution issued out of the district court of Sedgwick county, Kan., and directed to him as sheriff. There was no averment that the execution was irregular in form or invalid for any reason; and as the plaintiff alleged the existence of process which, if valid, would justify a seizure of the property, its validity, in the absence of an averment to the contrary, will be presumed.

A more serious objection, however, was the admission in evidence of certified copies of certain proceedings in aid of execution had before the probate judge of Douglas county. They purport to have been had before the probate judge in October, 1888, and were instituted upon affidavit alleging that in the district court of Sedgwick county a judgment had been obtained against Henry Tisdale in favor of Samuel Wickery for \$4,800; that an execution issued thereon had been returned unsatisfied; and that Tisdale had property which he unjustly refused to apply towards the satisfaction of the judgment. Upon this affidavit the probate judge issued an order requiring Tisdale to appear and answer concerning his property. In accordance with this order, he appeared on October 3, 1888, which was about a year before the alleged transfer, and submitted to an examination concerning his property, which was made upon oath and reduced to writing. At the close of the examination, the probate judge ordered him to turn over a small sum of money which he admitted to have on his person, and ordered that he be restrained from interfering with or disposing of any of the property mentioned in his evidence. These proceedings purport to have been before John Q. A. Norton, probate judge, while the certificate attached to the papers is made by B. J. Horton, a successor, who certifies them to be copies of papers in the proceedings referred to, which he finds among the papers of the Douglas county probate court. The certified copies do not reach the rank of evidence, and their admission was error. The papers in question were not records of the probate court. While the proceedings were had before the probate judge, they were not an exercise of probate jurisdiction, nor was a record of them required to be kept in the probate court. The judge was exercising judicial functions in a case in the district court, and was in fact acting as a subordinate officer of that court, and under its supervisory control. *Young v. Ledrick*, 14 Kan. 92. Under the statute, the judge is required to "reduce all his orders to writing, which, together with a minute of

his proceedings, signed by himself, shall be filed with the clerk of the court of the county in which judgment is rendered or the transcript of the justice filed, and the clerk shall enter on his execution docket the time of filing the same." Civ. Code, § 499. Under this provision, it became the duty of the probate judge of Douglas county to transmit and file with the clerk of the district court of Sedgwick county the orders and proceedings which have been mentioned; and the clerk of that court, who had the legal custody of the records, was the only officer who was competent to give certified copies of the same that might be used as evidence. As there was no valid proof offered of these proceedings or of the order of injunction made by the probate judge of Douglas county, the admission of the testimony was prejudicial error. As this was the only testimony concerning the injunction, the court committed error in refusing to instruct the jury that there was no sufficient evidence that Tisdale had been enjoined or restrained from selling or disposing of the property in controversy at the time that he claimed to have sold it to Bowersock. In his testimony, Bowersock stated that he had no notice or knowledge of the restraining order; and, if it had been shown that such an order had been made, then the court should have granted the request of plaintiff, and instructed the jury that an injunction allowed against Tisdale would not affect the plaintiff in the matter of the purchase of the property, unless he had been notified of the injunction before the purchase of the property, or had knowledge that such injunction had been issued.

For the errors mentioned, the judgment will be reversed, and the cause remanded for a new trial. All the justices concurring.

(55 Kan. 687)

POORE et al. v. POORE.

(Supreme Court of Kansas. Oct. 5, 1895.)

WILLS—CONSTRUCTION.

An instrument in writing, denominated on its face as a last will and testament, which purports to give no present interest in any property, but only the estate of which the makers die seised, signed by the parties, and delivered to the devisee therein named before the death of the makers, but which is not witnessed nor subscribed by any person other than the makers, is without legal force, either as a conveyance inter vivos or a will.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action by David F. Poore against Hannibal Poore and James M. Poore. Plaintiff had judgment, and defendants bring error. Reversed.

This action was brought by the defendant in error, as plaintiff below, against the plaintiffs in error, who are his brothers, for the purpose of establishing his right to the en-

tire estate of Adell and Hannie Poore, deceased sisters of the parties to the suit. In his petition the plaintiff alleged the relationship of the parties, the ownership by said Adell and Hannie of certain real and personal property therein described, and that an agreement was made between said plaintiff and said Adell and Hannie in writing, by the terms of which, in consideration of certain services to be performed by said plaintiff, they agreed that they would by will give, devise, and bequeath to him all of the property which they should own at the time of their decease. That he had fully complied with all the terms of said agreement on his part. That for the purpose of carrying out such contract they executed the following instrument in writing: "The Last Will and Testament of Adell and Hannie Poore. Concordia, Kansas (Cloud Co.). We, the undersigned, do hereby give and bequeath all our real estate and personal property of which we die possessed or seised to David F. Poore, his heirs and assigns, to hold, own, and possess forever, and use as their own. We hereunto set our hands and seal this tenth day of March. Adell Poore. Hannie Poore." That on the 10th day of March, 1890, they delivered said instrument to the plaintiff. That the plaintiff is advised that said instrument is insufficient in law to pass the title of said property to said plaintiff, and that the plaintiff is in possession of all said property. The petition concludes with a prayer for a judgment requiring the defendants to execute and deliver to him deeds conveying their interests in the property, and adjudging him to be the absolute owner of the whole thereof. The action was tried by the court, and full findings of fact were made, from which it appears that the sisters committed suicide by drowning on March 11, 1890. The plaintiff claimed that the written contract mentioned in the petition was in the form of a letter from his sisters to him. The court finds that no such letter was written, and that no valid contract of the character stated in the petition was made. The court finds that the instrument above copied was not attested, nor subscribed by any witnesses, and that there is no evidence of any witness to its execution; that it was delivered to the plaintiff by his sisters, in a box with other papers, a watch, and some money; and that it was unquestionably written by Adell Poore, and signed by her and her sister. As conclusions of law the court held: "Although the paper purporting to be the last will and testament of the said Adell and Hannie was not executed as required by statute, nor in pursuance of any binding contract to make a will, yet, as it was unquestionably written and executed by them at a time when they were of full age, and of sound mind, memory, and mental capacity sufficient to make a will without any undue influence, as its provisions were, under the circumstances, in accordance with a right

and just disposition of their property, and in accordance with what had been the expectation of plaintiff and intention of the makers for a long time prior thereto as when it was executed, as the makers believed to be sufficient to convey their property to plaintiff, and was by the makers delivered to the plaintiff under such circumstances as to indicate a then present intention to convey all the property of the makers to the plaintiff, the will of the makers as to a fair and just disposition of what was their own, as this was, ought not to be thwarted and set aside, but, on the contrary, carried out and enforced. The plaintiff is therefore entitled to judgment that he is the absolute owner of the property described in the petition, and herein free from any claim of the defendants, or either of them." Thereupon judgment was rendered for the plaintiff in accordance with these conclusions of law.

Pulsifer & Alexander, for plaintiffs in error. W. W. Caldwell and A. H. Ellis, for defendant in error.

ALLEN, J. (after stating the facts). The court having found against the plaintiff's claim of the existence of a contract of any character binding his sisters to convey their property to him, the only question in the case is whether the instrument delivered by them to the plaintiff shortly before their death could have operation either as a conveyance inter vivos or as a will. We find no difficulty in reaching the conclusion that it passed no interest to the plaintiff on delivery to him. It is named a will, and in terms gives him no estate during the life of the makers, but expressly provides that he shall have that, and that only, of which they might die possessed. Neither can there be any doubt that this instrument is utterly void as a will. Section 2 of the act relating to wills expressly requires that every will shall be attested and subscribed, in the presence of the party making the same, by two or more competent witnesses. This was not done. The paper was not a will, could not be probated as such, could not and did not confer any rights on the plaintiff. The judgment is reversed, and on the facts found by the district court it is ordered that judgment be entered in favor of the defendants for their costs. All the justices concurring.

(1 Kan.A. 150)

MORRIS v. TRUMBO.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 18, 1895.)

REVIEW OF EVIDENCE AND INSTRUCTIONS.

1. A general jury finding on disputed facts and conflicting testimony, and being approved by the district court, will not be disturbed. *Peacock v. Boyle*, 21 Pac. 586, 41 Kan. 492.

2. Instructions to the jury must be taken together, and considered and construed as a whole, and where it appears from an examination of the entire record that no prejudicial er-

ror was committed by the trial court, the judgment will be affirmed. *Railroad Co. v. Midgett* (Kan. App.) 40 Pac. 985.
(Syllabus by the Court.)

Error from district court, Pottawatomie county; William Thomson, Judge.

Action by E. M. Trumbo against Charles E. Morris. Plaintiff had judgment, and defendant brings error. Affirmed.

J. W. Fitzgerald & Son, Garver & Bond, and J. F. Pringle, for plaintiff in error. Sprague & Tracy, for defendant in error.

CLARK, J. On the 4th day of January, 1889, Long Bros., as plaintiffs, commenced an action in the district court of Pottawatomie county against E. G. Olson and Charles A. Ullerick, partners doing business under the firm name of Olson & Ullerick, alleging an indebtedness to the said plaintiffs in the sum of \$444.53 on an account for groceries sold and delivered to them from November 8th to December 6th, and further alleging that the defendants had fraudulently assigned their firm property without valuable consideration for the purpose of defrauding their creditors. An attachment was issued out of said court in said action, and was on the 5th day of January levied upon a portion of the goods in controversy, of the value of \$1,527.99. On the 14th day of January the defendant in error brought this action against the sheriff for the possession of the goods attached, alleging her ownership, and right of possession thereto. The plaintiff in error, as defendant in that action, filed a general denial to the petition, and upon the trial the jury found that the plaintiff was entitled to possession of the goods attached, and assessed her damages for their detention. A motion for a new trial was promptly filed, setting up the statutory grounds, which was overruled, and the defendant, as plaintiff in error, has brought the case to this court for review, alleging error in the admission of evidence, error in the giving and refusing certain instructions to the jury, and error in overruling the motion for a new trial.

The record discloses that E. G. Olson and Charles A. Ullerick, for several years prior to January 1, 1889, had been carrying on a general grocery business in the city of St. Mary's under the firm name of Olson & Ullerick; that about the middle of November, 1889, Z. T. Trumbo and J. G. Strong, husband and father, respectively, of the defendant, began negotiations with Olson & Ullerick for the purchase of their stock of goods. Many propositions as to the price to be paid for the said goods were made and rejected, and, while no regular invoice of the stock was taken, estimates thereof were made, and an inventory of the drugs and fixtures was submitted to an examination thereof made by the agents of the defendant in error; and finally, on December 21, 1888, an agreement was reached between the parties, and said stock of goods was purchased by the defend-

ant in error, the consideration therefor being \$2,700, which was evidenced by eight notes executed by Mrs. E. M. Trumbo, each for the sum of \$337.50, four of which were made payable to the said E. G. Olson and four to the said Charles A. Ullerick. Two of these notes were made payable May 1, 1889, two September 1, 1889, two January 1, 1890, and two May 1, 1890. The two notes maturing on the latter date were, at the time of their execution and delivery, each indorsed with the payment of \$150, the same being estimated value of a horse and buggy taken by Olson & Ullerick from the defendant in error in part payment of the purchase price, leaving a balance due on said purchase of \$2,400, which was secured by a chattel mortgage on all the property purchased by Mrs. Trumbo from said firm. The record shows that the value of the stock so sold was about the amount agreed upon as its value at the time of its purchase by the defendant in error. E. G. Olson, Charles A. Ullerick, Mr. and Mrs. Trumbo, and Mr. Strong all testified that this sale was an honest, bona fide one. Olson & Ullerick testified that there was no intention on the part of said firm, or either member thereof, to defraud their creditors, and Mrs. Trumbo and her agents testified that they had no intention in said purchase to assist the said firm in defrauding their creditors. At the time of said purchase the defendant in error was the owner of real and personal property of the value of over \$2,000 above incumbrance thereon. Mr. Ullerick stated to Mr. Strong in the early part of the negotiation alluded to that the indebtedness of the firm was about \$1,200, but that it was not troubling them; that with the book accounts they had property enough outside of the stock of goods to pay their indebtedness; that they did not have to sell, but were willing to do so. This was the only information which the defendant in error or either of her agents obtained during the several weeks they were engaged in making this purchase as to the liabilities or assets of the firm of Olson & Ullerick. There was evidence submitted at the trial bearing upon the question of the sale and delivery of the stock of goods to Mrs. Trumbo, December 31, 1888, and of the delivery by her to the said firm of the notes and chattel mortgage and the horse and buggy, in payment thereof on said day; that the bill of sale of the stock of goods, the insurance policy, and the key to the store were delivered to Mrs. Trumbo on December 31st, and that she had possession of said property through her agent, Z. T. Trumbo, at the time the order of attachment was levied. Whether the account of Long Bros., upon which the suit was brought, was a valid claim against Olson & Ullerick is not disclosed by the record. The plaintiff in error offered in evidence in the court below the petition and affidavit and undertaking for attachment, and the order of attachment, with the sheriff's return thereon, in the case of Long Bros. v. Olsen & Ullerick. This evidence would tend

to show the authority under which the plaintiff in error held the goods in question, but did not establish the fact as to whether or not Olson & Ullerick were indebted to Long Bros. in any sum, nor is there any evidence in the record that Olson & Ullerick were indebted to any one at the time of this sale except to Mr. Warren, whose claim was satisfied by an assignment of some book accounts, and excepting also a debt of about \$150, which was partially satisfied by the sale under execution of the horse taken by Olson & Ullerick from Mrs. Trumbo in part payment of the stock of goods. True, Mr. Olson testified that he supposed at the time of the sale that the firm was indebted somewhere from fifteen to eighteen hundred dollars, but that he had no knowledge with reference thereto, except from information imparted to him by his partner, who, it appears, had the entire charge and management of the business of the firm, and who, under the rulings of the court, was not permitted to testify as to the amount of the firm indebtedness; but no complaint is made of this ruling. Z. T. Trumbo, J. G. Strong, and S. W. Strong, the husband, father, and uncle, respectively, of the defendant in error, had for several years been engaged in the milling business, both at St. Mary's and Laclede under the firm name of Trumbo & Co., and were so engaged at the time of this sale. They had known Olson & Ullerick, both socially and in a business way, for several years; had sold them about all the flour they had retailed there for three years, the indebtedness therefor at times amounting to from two to three hundred dollars, but were not indebted to them at the time of the sale. They had the reputation of being honest and prompt in the payment of their debts, and Trumbo & Co. had full confidence in their business integrity. Immediately after the sale the Trumbo notes to the amount of \$1,725, together with other notes belonging to the firm of Olson & Ullerick, and the chattel mortgage securing the payment of the Trumbo notes, were assigned to Mr. Warren, a banker of St. Mary's, for the benefit of the creditors of Olson & Ullerick. The record is silent as to when this transfer and assignment were made, except, that it was prior to the date the attachment was levied. These notes and chattel mortgage were soon thereafter turned over by Mr. Warren to Mr. Ullerick. What disposition was then made of these notes by Mr. Ullerick, or whether or not they had been transferred to an innocent purchaser prior to the time the defendant in error first learned that Olson & Ullerick intended, by the sale of the stock of goods, to defraud their creditors (if any such fraudulent intention existed), the record does not disclose.

The plaintiff in error complains of the ruling of the court in the admission of certain evidence. Mr. Olson, as a witness called by the plaintiff in error, had testified in his examination in chief that he turned over all of the Trumbo notes to Mr. Warren. He after-

wards modified that statement by saying that he turned them all over except the two which matured May 1, 1889, one of which was retained by him and the other by Mr. Ullerick, and this question was then asked him on cross-examination: "I will ask you if yours was paid?" The defendant objected to the question, and his objection was overruled, and the answer was, "Yes, sir." The inference might fairly be drawn from this question and answer that the note maturing May 1, 1889, payable to E. G. Olson, was paid or had been paid at the time the other notes were turned over to Mr. Warren, which was prior to the attachment levy. While this note was not due, by its terms, for nearly four months thereafter, Mrs. Trumbo sold certain real estate in St. Mary's belonging to her soon after the purchase of the stock of goods, and, for aught that appears in the record, she may have discounted this note even before the attachment suit was commenced; and the plaintiff in error cannot now be heard to complain of the ruling of the court in this instance, as no attempt was made upon his part to ascertain whether or not this note was paid prior to the date of the attachment levy, or prior to the time Mrs. Trumbo first learned of the fraud attempted to be perpetrated by Olson & Ullerick upon their creditors, if any such intention existed.

We have carefully examined the record and the evidence submitted at the trial, together with the instructions given and those refused, and we cannot say that any prejudicial error was committed by the trial court. There was some proper evidence submitted at the trial tending to prove every material fact necessary to be found by the jury to authorize the verdict that was returned, and, the questions having been passed upon by the jury, and its findings approved by the trial court, this court cannot disturb the judgment. As was said in *Well v. Eckard*, 37 Kan. 700, 15 Pac. 922: "We must hold, in accordance with established principles and repeated decisions, that the general finding and judgment include every material fact necessary to sustain such judgment;" and that in legal contemplation there is a finding by the jury that the sale of the property in question was made in good faith upon a sufficient consideration, and that Mrs. Trumbo was a bona fide purchaser thereof, and entitled to its possession. The judgment must be affirmed.

GILKESON, P. J., concurs. GARVER, J., not sitting in the case, having been of counsel in the court below.

(1 Kan.A. 157)

HEASTON v. MILLER.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 18, 1895.)

APPEAL—SUFFICIENCY OF TRANSCRIPT.

When the record brought up for a review of the rulings of the district court is based upon the transcript, it is essential that it shall con-

tain all the proceedings of the case, as shown by the record of the court below, and that it is a complete transcript must appear from the certificate of the clerk.

(Syllabus by the Court.)

Error from district court, Doniphan county; R. C. Bassett, Judge.

Action by Benjamin F. Heaston, administrator of the estate of Jacob Heaston, deceased, against Jacob Miller, individually and as guardian of Elizabeth Miller and Jacob G. Heaston. To the judgment rendered, plaintiff brings error. Dismissed.

Albert Perry, for plaintiff in error. S. L. Ryan, for defendant in error.

GILKESON, P. J. This proceeding was brought to review the judgment of the district court of Doniphan county on proceedings in error in that court to review a judgment of the probate court of said county. The right to review is challenged upon the ground that the record is insufficient. The petition in error is founded upon a transcript, and the clerk, in his certificate thereto, certifies "that the within and foregoing is a true copy of the case of Benjamin F. Heaston, Administrator of the Estate of Jacob Heaston, vs. Jacob Miller and Jacob Miller, Guardian of Elizabeth Miller and Jacob G. Heaston, as the same appears of record in this court." The certificate fails to show that the record contains a complete transcript of the proceedings in the case, and, as a matter of fact, an inspection of the record discloses that all the proceedings had are not contained in the transcript, and there is nothing to show that the proceedings in either court (probate or district) are full and complete. Nothing short of a full transcript of all the proceedings is sufficient, and that it is a full transcript must appear from the certificate of the clerk. *Westbrook v. Schmaus*, 51 Kan. 214, 32 Pac. 892. And, from our examination of the record, we think the judgment of the court below is correct. The proceedings will be dismissed. All the judges concurring.

(1 Kan.A. 159)

FIRST NAT. BANK OF FRANKFORT et al. v. FIRST NAT. BANK OF WESTMORELAND.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 18, 1895.)

APPEAL BY INTERVENERS—REVIEW.

Where, in an action brought against the three makers of a promissory note, and against whom a personal judgment is subsequently rendered, certain personal property belonging to the principal debtor is attached, and third parties, who claim liens on the attached property by virtue of certain chattel mortgages thereon given to secure the payment of promissory notes executed by the principal debtor and one of his codefendants to such third parties, upon leave of the court interplead in said action, and upon the trial between the plaintiff and the interpleaders the attachment is sustained, and

the proceeds of the attached property are by the court ordered to be applied in payment of the judgment rendered in the action in favor of the plaintiff and against all of the defendants, such judgment cannot be reviewed by an appellate court, when the judgment debtor who was not liable to the interpleaders, and whose rights will necessarily be prejudiced by a reversal or modification of the judgment complained of, is not made a party to the proceedings in error.

(Syllabus by the Court.)

Error from district court, Pottawatomie county; William Thomson, Judge.

In an action by the First National Bank of Westmoreland against J. D. Landrum and others, the First National Bank of Frankfort and another intervened. From the judgment rendered, interveners bring error. Dismissed.

W. J. Gregg and John V. Coon, for plaintiffs in error. R. S. Hick and H. O. Hutton, for defendant in error.

CLARK, J. On August 26, 1890, the defendant in error commenced its action in the district court of Pottawatomie county against J. D. Landrum, Mary A. Landrum, and James Osborn upon a promissory note for \$1,790 dated December 11, 1889, payable three months thereafter, executed by the defendants to A. B. Pomeroy, cashier of the First National Bank of Westmoreland, and in said action certain property belonging to the defendants was attached. On September 23, 1890, the plaintiff filed its motion for an order of sale of said personal property "because of its perishable nature, because of its being live stock, and because of the cost of keeping it." On September 26, 1890, the plaintiffs in error filed their separate motions in said cause for leave to interplead, each claiming an interest in and to the property attached by virtue of certain chattel mortgages thereon, which motions were allowed by the court. On October 1, 1890, an order was issued for the sale of the property attached, and said property was sold thereunder, the proceeds thereof amounting to less than the amount of the plaintiff's claim upon which suit was brought in this action. The First National Bank of Frankfort filed its interplea, and therein claimed a lien on certain of the property attached under a chattel mortgage executed by the defendant J. D. Landrum to the defendant James Osborn, to secure the payment of a note of \$1,200, and alleged that said note had been assigned to it as collateral security for the payment of a note for \$1,643.28, signed by J. D. Landrum and James Osborn, and prayed judgment in its favor against the defendant J. D. Landrum for the amount due on said collateral note and mortgage, and that the same be declared a first lien on said property, that it be given possession of said property, or, in default thereof, that it have judgment against the plaintiff for its value, which was alleged to be \$522. P. P. Thomas, in his interplea, claimed a lien on certain of the personal property attached by virtue of a chattel mortgage executed by J. D. Landrum to the defendant

James Osborn to secure the payment of a note due the latter for \$2,100, which was assigned to P. P. Thomas and A. B. Pomeroy as collateral security to certain notes owned by Thomas, amounting to \$522.22 and interest thereon, against J. D. Landrum, James Osborn, and one C. M. Osborn, and one note owned by A. B. Pomeroy, cashier, for about \$1,750, signed by J. D. Landrum and James Osborn, and alleged that, by the terms of said assignment, the proceeds of the sale under the mortgage were to be applied to the payment of these notes pro rata; and Thomas asked judgment against J. D. Landrum and James Osborn for the amount due on his notes, and that such judgment be declared a lien on the property covered by said mortgage which was taken in attachment, that he be given possession of said property, or, in default thereof, that he have judgment against the plaintiff for its value. To these interpleas the plaintiff answered by a general denial, and also alleged that the debt for the recovery of which said action was brought against J. D. Landrum, Mary A. Landrum, and James Osborn is the same debt as that referred to in the assignment of the \$2,100 note, a copy of which was attached to the interplea filed by Thomas. A trial was had in said cause, on the issues joined between the interpleaders and the plaintiff, by the court without a jury.

It appears from the record that the court found the issues in favor of the plaintiff, and rendered judgment in its favor and against the interpleaders for costs, that the attachment was sustained, and that, as between the interpleaders and the plaintiff, the chattel mortgages created no lien on the property attached. That portion of the journal entry relating to the disposition of the proceeds of the attached property reads as follows: "And it is further ordered that the proceeds of the sale of the attached property herein, sold under the former order of this court, and now in possession of and held by the clerk and sheriff of this court, be applied on the judgment of this plaintiff herein obtained against the defendants, J. D. Landrum, Mary A. Landrum, and James Osborn, first to the payment of the costs of said judgment, and then that the balance be paid over to this plaintiff as a credit on its said judgment, and that the clerk and the sheriff are directed to pay over said money in accordance herewith, to which rulings, orders, and decrees of the court the interpleaders at the time excepted and except." The plaintiffs in error complain of this judgment, and seek a reversal thereof. The defendant in error insists that there is a defect of parties defendant, and that by reason thereof this court is precluded from reviewing said judgment. By this judgment, the proceeds of the sale of the property in controversy were ordered to be applied to the payment of a judgment rendered against Mary A. Landrum and others. Mary A. Landrum is not liable upon any note held by either of the interpleaders, and it is to her interest that the

judgment of the court below should not be disturbed. The proceeds of the sale of the attached property were insufficient to satisfy the plaintiffs' claim. If the judgment complained of by the plaintiffs in error were reversed or modified, the liability of the defendant Mary A. Landrum to the defendant in error would be correspondingly increased. Any modification of said judgment which would in any manner subject the attached property to the payment of the claims of plaintiffs in error, would be prejudicial to the rights of Mrs. Landrum, and as she is not made a party to this proceeding in this court, a review of the judgment of the trial court cannot be had, and the petition in error must be dismissed.

(1 Kan. A. 177)

ABBEY v. McPHERSON.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 18, 1895.)

CONSTRUCTION OF DEED—BOUNDARIES.

1. In construing a conveyance of real estate containing repugnant calls, for the purpose of determining the location of the land granted, the descriptive courses will be varied to make them conform to the monuments fixed by the terms of the conveyance as boundary or locative calls.

2. Where the southern boundary of land conveyed is described in the instrument of conveyance as beginning at a certain point therein named, and running "thence east to the southwest corner of the land of C. on said quarter section," the southwest corner of the land of C. becomes a monument of description, and, if its location is definitely ascertained, the southern boundary of the land conveyed would be indicated by a straight line running from the point named to the southwest corner of the land of C., notwithstanding the line would run in a southeasterly direction, and the quantity of land conveyed would be about 35 acres, instead of "30 acres, more or less," as given in the instrument of conveyance.

(Syllabus by the Court.)

Error from district court, Doniphan county; R. O. Bassett, Judge.

Action of ejectment by Robert McPherson against Elmer Abbey. Plaintiff had judgment, and defendant brings error. Affirmed.

Albert Perry, for plaintiff in error. S. L. Ryan, for defendant in error.

CLARK, J. The record in this case discloses that one Nelson Abbey formerly owned all of the northwest quarter of section 35, township 3, range 22, in Doniphan county; that in March, 1859, he conveyed to one James Abbey 10 acres off the west side of the northwest quarter of said quarter section, the same being a strip of land 20 rods wide east and west and 80 rods long north and south; that on December 12, 1873, he conveyed to Henry Hughs a tract of land adjoining the tract last described, bounded as follows: "Beginning at the northeast corner of the James Abbey tract, running thence east twenty rods, thence south eighty rods, thence west twenty rods, thence north eighty rods, to the place of beginning; containing

ten acres, more or less." On January 4, 1871, he conveyed to Michael Conley part of said quarter section, containing twenty acres bounded as follows: "Beginning at the northeast corner of said quarter section, running thence west forty rods, thence south eighty rods, thence east forty rods, thence north eighty rods, to the place of beginning." On September 7, 1871, he conveyed to the said Michael Conley an L-shaped tract of the same quarter section, bounded as follows: "Beginning forty rods west of the northeast corner of said quarter section, running west twenty rods, thence south one hundred six and two-thirds rods, thence east sixty rods, thence north twenty-six and two-thirds, thence west forty rods, thence north eighty rods, to the place of beginning." Nelson Abbey died testate, and his will was duly admitted to probate on the 3d day of July, 1875, and his widow duly elected to take under the will. By the terms of his will his executors were empowered and directed to sell and convey a portion of said quarter section, and to pay the proceeds of such sale to his wife, Emeline Abbey. The land so ordered sold was described in the will as follows: "Beginning at the north line of said quarter section, at the northeast corner of the land of Henry Hughs in said quarter section of land, running thence south to the southeast corner of the land belonging to said Hughs, thence east to the southwest corner of the land of Michael Conley on said quarter section, thence north with said Conley's land to the north line of said quarter section of land, thence west on the said line to the place of beginning." He devised to his wife a life estate in all the remainder of his property, both real and personal, making his son Volney Abbey his sole residuary legatee. At his death Nelson Abbey owned all of the northeast quarter of said section 35, except the portions which he had conveyed to James Abbey, Michael Conley, and Henry Hughs, as above described. Emeline Abbey died testate, and on December 11, 1883, Alvin Healy was duly qualified as administrator of her estate, and under an order of the probate court he sold to the defendant in error, for the sum of \$390 cash, after it had been duly appraised at \$12 per acre, the real estate which the executors of Nelson Abbey were, under said will, empowered and directed to sell for the benefit of Emeline Abbey, describing the same as set out in said will. On March 25, 1885, for a consideration of \$100, Volney Abbey conveyed to the plaintiff in error, by deed, a part of the said quarter section, under the following description: "Beginning at the southeast corner of said quarter section of land, running thence one hundred sixty rods west, thence eighty rods north, thence east one hundred rods, thence south twenty-six and two-thirds rods, thence east sixty rods, thence south fifty-three and one-third rods, to the place of beginning; containing seventy acres,

more or less." On July 23, 1889, the defendant in error brought suit in ejectment against Elmer Abbey, the plaintiff in error, to obtain possession of a triangular tract of land located near the center of this quarter section, containing about five acres, which may be more particularly described as follows: Beginning at a point eighty rods south of the north line and forty rods east of the west line of said quarter section (being at the southeast corner of the land conveyed to Henry Hughs), running thence east sixty rods (to the west line of the Conley land), thence south twenty-six and two-thirds rods (to the southwest corner of the Conley land), thence in a northwesterly direction to the place of beginning,—and the question raised is as to the interpretation of the particular language used in the will by Nelson Abbey, and which was followed in the description given in the administrator's deed under which the defendant in error claims title. As will be observed, there are repugnant calls in the will and the administrator's deed. There is no contention as to the location of the southeast corner of the Hughs land. The next call in the description given in the will and administrator's deed is "thence east to the southwest corner of the land of Michael Conley on said quarter section of land." The southwest corner of Conley's land is as a matter of fact 26 $\frac{2}{3}$ rods south of a point directly east of the southeast corner of the Hughs land; and, in order to properly locate the southern boundary of the land devised to the widow, either the direction or the point of location given in this call must be rejected. The testator had, as before stated, at one time, owned all the quarter section, but had at various times sold and conveyed certain portions thereof, all of which were described in the deeds by metes and bounds; and it is presumed that he knew the location and lines of the different tracts conveyed by him prior to the execution of his will. There is nothing in the findings of fact to indicate whether the land of Michael Conley had been surveyed or fenced, or whether any artificial monuments had been placed at the southwest corner thereof, but the exact location of the southwest corner of his land was easy of ascertainment. It is contended by the plaintiff in error that the testator had in mind the southwest corner of the tract first conveyed to Conley, which is directly east of the southeast corner of the Hughs land, but he overlooked the fact that this corner was east of the west line of the last tract conveyed to Conley; that such an error would more likely occur than that he intentionally ran the line in a southeasterly direction; while the defendant in error claims that, the corners of the several tracts previously conveyed being fixed by distance from each given point, it must be presumed that the testator was perfectly acquainted with the location of this corner, and had it in mind in describing the tract devised to Emeline

Abbey, and that it must be presumed that the error in the description was made either by omitting the word "south" as qualifying the word "east," or that the word "east" was inadvertently inserted in the description, and that it was intended that the line should run from the southeast corner of the Hughs land to the southwest corner of the Conley land, in which case it would be presumed that a straight line was intended between those two points. The general rule is that in the construction of conveyances of real estate both course and quantity must give way to natural or artificial monuments or objects, and courses must be varied so as to conform to the natural or ascertained objects or bounds called for by the conveyance; and this is true notwithstanding the quantity of the land included in the description may be either greater or less than that named in the instrument of conveyance; and before course, distance, or quantity is permitted to determine the boundaries of land where there are repugnant calls, every means of fixing the location of the monuments must be resorted to. The southwest corner of Conley's land being certain, definite, and fixed, that corner will control over the course and quantity indicated in the will and deed. That, where land is described by another's land, the latter becomes a monument of description, and the true line thereof will control the courses and quantity given in the deed. See Tied. Real Prop. § 839; Park v. Pratt, 38 Vt. 552; Colton v. Seavey, 22 Cal. 497; Howe v. Bass, 2 Mass. 380; Bailey v. White, 41 N. H. 337; Pernam v. Wead, 6 Mass. 131; Wendall v. Jackson, 8 Wend. 183; 3 Washb. Real Prop. (5th Ed.) p. 428; Edson v. Knox (Wash.) 36 Pac. 698; Haynes v. Young, 36 Me. 557; Sayers v. City of Lyons, 10 Iowa, 249. In the latter case it was held that: "In the construction of a grant for the purpose of determining the location of the land, granted courses and distances will be varied, when necessary, to make them conform to natural or artificial monuments or objects fixed by the terms of the grant as boundary or locative calls. When one call of a grant was the corner of a lot in an incorporated town, and another the low-water line of a navigable stream, it was held that both must be adhered to in determining the location of the land granted, even when they do not correspond with the courses, distances, and quantity named in the description." In Pernam v. Wead, supra, it is held that where the boundaries of land as mentioned in a conveyance are fixed, known, and unquestionable monuments, although neither the courses nor distances nor the computed contents as described in the conveyance correspond therewith, the monuments will govern. In that case the boundaries of two sides were described as the lands of other individuals named in the deed. The court held that the boundary lines of these lands were fixed monuments. In this case the court below held that the proper construc-

tion to give to the clause in the will and deed under consideration is that the south line of the real estate devised to the widow was intended to run from the southeast corner of the Hughs land in a southeasterly direction to the southwest corner of the Conley land, so as to include the triangular tract which is the subject of this controversy, and rendered judgment in favor of the defendant in error; and this court is of the opinion that the construction so placed upon said instrument is the correct one, and the judgment of the court below is affirmed.

(1 Kan.A. 124)

STATE v. CONLEY.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 18, 1895.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTION—CONTINUANCE — INSTRUCTIONS.

1. An application for a continuance upon the ground of an absent witness should, upon a good cause shown, be heard at any stage of a proceeding; and, if sufficient, a continuance should be granted, unless the adverse party will consent that the facts alleged therein may be read and treated as the deposition of the absent witness.

2. Where an information charges the defendant, in general terms, with having sold intoxicating liquors contrary to the prohibitory law, and the information further alleges that the defendant had a permit issued by the proper county, and said information is attacked at the proper time by motion, *held*, that such information is insufficient.

3. Instructions in a criminal prosecution should run to the facts that are in evidence, and to all probable interpretations of them, but not to questions which are not in fact presented by the evidence. And where the information filed alleges that the defendant had a permit, and charges him with selling intoxicating liquor under a permit, and does not allege that the permit so granted to and held by him is illegal or invalid, nor in any manner attack said permit, an instruction which conveys to the jury the impression that they may find the defendant guilty of any sale, regardless of the existence of the permit, is erroneous.

4. The evidence in this case examined, and *held* to be insufficient to support the verdict against the defendant Conley.

(Syllabus by the Court.)

Error to district court, Wyandotte county; Alden, Judge.

J. R. Conley, having been convicted of selling intoxicating liquors unlawfully, brings error. Reversed.

S. C. Miller, for plaintiff in error. Caskadon & Johnson and John A. Hale, for defendant in error.

GILKESON, P. J. This was a criminal prosecution under the prohibition law. The information was filed in the court of common pleas of Wyandotte county on the 8th day of August, 1892, attempting to charge the defendants J. R. Conley and W. O. Goodwell, jointly, in six separate counts, with six separate violations of said law. The offense was charged as having been committed on the — day of July, A. D. 1892. The informa-

tion was sworn to positively by M. A. Spangler, as a private citizen, and verified by the information and belief of W. J. Morse, as deputy county attorney, of said county. The verification shows that the county attorney was at the time absent from the state. The defendant J. R. Conley made several motions, among which were motions for a continuance, to quash the information, in arrest of judgment, and also objected to the introduction of any testimony under each and every count of the information. All of said motions and the objection were overruled by the court, which rulings were excepted to by the defendant. The record does not show that the defendant Conley was ever ordered to plead, or refused to plead. A trial was had before a court and jury, as to defendant Conley. What became of defendant Goodwell, after his arrest, the record does not show. Nor does it show that he was ever present during the trial, or that a separate trial was demanded by defendants and allowed by the court. After the testimony was introduced the state elected to rely for a conviction upon the first count, viz. "Maintaining a nuisance by defendants, as charged," and upon the second, "The sale of beer to R. E. Gilbert in July, 1892." The jury found both defendants guilty upon the said first and second counts, and not guilty as to the other four counts, of the information. Defendant Conley moved for a new trial upon various grounds, which motion was overruled by the court, and defendant excepted. On the 27th day of February, 1895 (over two years after the verdict was returned), the court sentenced the defendant Conley "to confinement in the county jail for ninety (90) days, and pay a fine of five hundred dollars and costs of prosecution, and stand committed until such fine and costs were paid, and that he be sentenced upon the second count in said information, of which he was found guilty, to confinement in the county jail for the term of sixty (60) days, and that he pay a fine of \$200 and costs of prosecution." To which sentence and judgment the defendant excepted, and now appeals to this court. There are numerous errors, but we will only refer to the more important.

We think the application for time to complete the motion for continuance should have been granted, and when so completed the defendant should have been allowed to present it to the court; and the refusal to allow him to present the same was unreasonable, unjust, and contrary to the liberal spirit of our Code, which provides that (paragraph 4411) "the court may for good cause shown continue an action under any stage of the proceedings."

The next error complained of which we will notice is the overruling of defendant's motion "to make the information more definite and certain, so that he may be advised of the nature of the charge against him." Both counts of the information relied upon by the state for conviction are drawn in general terms, are defective and indefinite, and do not

state the particular kind of offense for which the defendant was tried. The information charges in both counts that the defendant had a permit, and in the first count charges generally that the defendant, then and there, at the time and place specified, unlawfully did keep and maintain the place where intoxicating liquors were, and have been, and still are continuing to be sold, bartered, and given away in violation of an act of the legislature of the state of Kansas entitled "An act relating to the sale of intoxicating liquors," approved March 5, 1887, to the common nuisance of the citizens and people of the state of Kansas. The sufficiency of this first count was challenged by motion, and also by objection to the introduction of any testimony thereunder, as well as by motion in arrest of judgment. This is a general charge. In what particular the sales were unlawful, is not pointed out by the information. Under our statutes an offense may be committed through the sale of liquor in various ways, and so a place may become a nuisance, under our statutes, by sales of liquors therein in various ways and different manners. A druggist, having a permit, who shall sell otherwise than in the manner and for the purpose mentioned in the act,—who may sell to minors, or to a person in the habit of becoming intoxicated,—may be guilty of an offense, and, by continuing so to do, his place of business may become a nuisance. While many of the strict rules which formerly obtained in criminal proceedings have been done away with, section 103 of the Code of Criminal Procedure still requires that the information must contain "a statement of the facts constituting the offense in plain and concise language without repetition." *State v. Burkett*, 51 Kan. 175, 32 Pac. 925. The second count is quite as indefinite, charging, in a general way, that these parties "sold and bartered for other than mechanical, medicinal, and scientific purposes, contrary to the statutes." In what particular did they sell for other than the excepted purposes, or to whom they sold contrary to the statutes, is not pointed out. Did they sell without being registered pharmacists, without an affidavit in the proper form? Did they make more than one sale or delivery on any one affidavit, or in any other manner which makes sales illegal under the statutes? Neither of these counts contains such a statement. In the case of *State v. Ratner*, 44 Kan. 429, 24 Pac. 953, where it was admitted that the defendant was a duly-registered pharmacist, holding a legal permit to sell intoxicating liquors, no objection was raised to the form of the information until after the verdict, when it was challenged by motion in arrest of judgment. Mr. Justice Johnson, in speaking for the court, says: "If the attention of the court had been called to the indefiniteness of the charge, it probably, and properly, would have required the state to describe the offense with greater particularity. The fact that a charge in an information

is stated in general terms will not be held bad after verdict and judgment, although it might have been held insufficient on a demurrer, or motion to quash." As has been said by Justice Allen in *State v. Burkett*, 51 Kan. 175, 32 Pac. 925: "While we have no disposition to destroy the force of the statute by nice technicalities, we are constrained to declare that the defendant who challenges the sufficiency of an information filed against him in due time is entitled to know the precise charge that is made against him, and to know in what particular it is claimed a sale of intoxicating liquor made by him is illegal."

The other error complained of is the giving of certain instructions. We think the court erred in giving paragraph 19 of the instructions, to wit: "If you find from the evidence that there is a drug store kept in the premises, or part of them, described in the information, and such drug store is owned by some other person or persons or corporation than the defendants, or either of them, then I say to you a druggist's permit issued by the probate judge of Wyandotte county to any person other than the real owner of such drug store would not authorize any sale of intoxicating liquors for any purpose, or by any person. A druggist's permit can only issue lawfully to a person actually engaged himself in the business, as druggist, on his own behalf." While it is true that a permit issued illegally would not protect the party selling under it, yet, before the legality or illegality of a permit can be questioned, it must be alleged. But in the case at bar no such averment is made. On the contrary, the state has alleged that the defendants had a permit, and no question is raised in the information as to its regularity or validity; and they are attempted to be charged with selling liquors as druggists having a permit, but selling contrary to the law governing sales under a permit. And the instructions so given would practically say to the jury that they would be warranted in finding the defendants guilty if the testimony should show that any sale had been made, without reference to the manner in which it was made, or even if made upon an application as provided by statute.

We have carefully examined the testimony in this case, and must hold that the verdict was not supported by sufficient evidence. In fact, there is no evidence to warrant a conviction of the defendant Conley upon either of the counts in the information. It is true, there is some evidence of sales having been made at the place described on the 23d day of July, 1892, but whether they were made upon application or affidavit is not shown. They were made within a few moments of each other, and these are the only sales shown. There is no evidence that Conley ever directed or ratified or had any information or knowledge of any of these sales having been made, or that the party making them was in his employ or under his control, or that he

was either owner or joint owner of the place of business; and that he was not present when the sales were made is undenied.

We deem it unnecessary to consider the other matters brought to our attention. And for the reasons herein set forth the judgment will be reversed, and case remanded to the court of common pleas of Wyandotte county, with instructions to sustain the motion to quash, and that further proceedings be had in this case in accordance with the views herein expressed. All the judges concurring.

(1 Kan. A. 713)

CARR v. HUFFMAN.¹

(Court of Appeals of Kansas, Southern Department, W. D. Oct. 1, 1895.)

REPLEVIN—ADMISSION BY PLEADINGS—EXECUTION—TRIAL BY COURT.

1. The wrongful detention of personal property is the gist of an action in replevin.

2. A party, having once solemnly admitted a fact by his pleading, is estopped from afterwards denying the truth of such admission by the withdrawing of such pleading.

3. When an officer levies on property under an execution, it is a seizure of the property, a taking the possession of the same, and it is then under the dominion of such officer.

4. Where a cause is tried before the court, and the court makes special findings of facts, and all the facts found by the court are in favor of the plaintiff, and, when taken in connection with the admitted fact, the plaintiff is entitled to recover, it is error for the court to overrule a motion for judgment for the plaintiff on the facts as found by the court.

(Syllabus by the Court.)

Error from district court, Hamilton county; A. J. Abbott, Judge.

Action by Sallie H. Carr against A. H. Huffman, sheriff of Hamilton county. Defendant had judgment, and plaintiff brings error. Reversed.

On the 25th of January, 1888, the plaintiff, Sallie H. Carr, filed her petition with the clerk of the district court of Hamilton county against A. H. Huffman, sheriff of said county, in which she alleges as her cause of action: That on the 13th day of January, 1888, she was the owner of the following specific personal property: "One J. & C. Fischer Piano, J. No. 68,547, of the value of \$300." That said defendant wrongfully took said property from said plaintiff, and has ever since that date wrongfully detained said property from her, and so wrongfully detained said property from said plaintiff, to her great damage, to wit, in the sum of \$100. That said plaintiff at the time of said wrongful taking, and ever since, to the present time, was and is the owner of said described property, and entitled to the immediate possession thereof, and that said property was then and still is of the value of \$300. The plaintiff demands judgment against the defendant for the sum of \$100 damages sustained and for the wrongful detention of the property; also demands judgment against defendant for the recovery and return of said property,

and, in the event that said property cannot be returned, then a judgment for \$300, the value of said property, and cost of this action. Plaintiff also at the time filed her affidavit in replevin; also her bond, which was duly approved by the clerk of said court. Summons was duly issued in said case and served on the defendant, and also an order of delivery issued, which was duly returned into court with a redelivery bond. On the 24th day of February, 1888, the defendant filed his answer to said petition, containing two separate counts. The first answer is a general denial of each and every allegation contained in the petition, except those allegations hereinafter admitted; second, defendant, further answering, states that he is the duly elected and qualified sheriff of Hamilton county, state of Kansas, and has been such sheriff ever since the 8th day of January, A. D. 1888, and that on the 12th day of January, 1888, he received the writ of execution issued to him out of the district court of said state of Kansas in and for said county of Hamilton, 27th judicial district, in favor of M. F. Stafford against Samuel H. Carr, for the sum of \$200, and \$5 as costs of suit; and that, by virtue of said writ of execution, he levied upon the piano described in said petition as the property of Samuel H. Carr. A copy of said execution is attached to said answer, marked "Exhibit A," and made a part thereof. This answer is duly verified by the affidavit of said defendant as true. On the 8th day of August, 1888, over the objection of the plaintiff, the court permitted the defendant to withdraw his answer, and file a motion to quash the order of delivery; and the motion to quash was by the court sustained, and the plaintiff duly excepted, and the case was taken to the supreme court of Kansas on said exceptions, and the ruling of the district court was there reversed. Carr v. Huffman, 47 Kan. 188, 27 Pac. 827, in which the supreme court holds that "the order of delivery cannot be set aside and vacated by the district court after answer for any informality or irregularity in its issue, or because praecipe was not filed by the party desiring it."

After the case was taken to the supreme court on the exceptions to the quashing and setting aside of the order of delivery, and before the case was heard and decided in the supreme court, the defendant, by leave of court, filed an answer to the petition of the plaintiff, denying each and every allegation of plaintiff's petition; and, while the case was still pending in the supreme court, the case was tried before the court, without a jury. The court made findings of fact in answer to questions submitted by plaintiff, as follows: "(1) Who was the owner of the piano described in the petition. On January 13, 1888? A. The plaintiff. (2) What was the value of said piano on January 25, 1888? Also such value on January 13, 1888? A. Three hundred and seventy-five dollars. (3)

Did the defendant, as sheriff, levy on said piano on January 13, 1888, as the plaintiff's property? If not as her property, if levied on, then how? A. As the property of Sam. H. Carr. (4) Was the defendant notified before he so levied on said piano, by the plaintiff or her agent, that it was plaintiff's property, and defendant then warned and notified not so to levy? A. He was so notified and warned. (5) Did the defendant put up a redelivery bond for the return of the property in this case, and, if so, did the coroner return the piano to the defendant? Was said piano released from said levy of execution and returned to the plaintiff? A. He did, but the piano was never actually delivered to the defendant. The evidence does not show that the piano was or was not released from the levy. (6) What was the rental value per month of said piano? A. Ten dollars. (7) What was the value to the plaintiff of the contract between her and the firm from which she purchased said piano up to February, 1886? A. It had no value as a measure of damages. (8) Was a demand made upon said defendant by the plaintiff, her agent or attorney, for said piano, prior to the bringing of this action? A. Yes." As a ninth finding, the court finds as follows: "(9) The court also finds as a matter of fact that the defendant never took the piano from the possession of the plaintiff, and that at the commencement of this action the plaintiff had the actual possession thereof." The court finds as conclusions of law: "The action of replevin cannot be maintained because there was not at the commencement of this action a wrongful detention." The plaintiff objected to the ninth finding of fact and to the conclusions of law, and moved the court for a judgment in her favor on the special findings made in response to the questions and request made by her, which motion was overruled, and plaintiff duly excepted thereto. Motion for a new trial was made and overruled, and exceptions taken by the plaintiff. Judgment was rendered against her for costs of suit, and she duly excepted, and filed her case in the supreme court for review; and the case was duly transferred, by order of the supreme court, to this court for its determination.

Milton Brown, for plaintiff in error. A. J. Hoskinson, for defendant in error.

JOHNSON, P. J. (after stating the facts). The plaintiff assigns ten separate errors for the consideration of this court. The first and second assignments have already been decided by the supreme court in the case of Carr v. Huffman, 47 Kan. 183, 27 Pac. 827, and the order of the district court quashing the writ of replevin reversed, and it is unnecessary for our consideration at this time; and the view that we take of the whole case makes it unnecessary for us to consider the several assignments of error in the order in which they occur.

The district court found that, at the commencement of the action in replevin, the plaintiff was the owner of the piano in controversy; that it was of the value of \$375; that on the 13th day of January, 1888, the defendant levied on the piano as the property of Samuel H. Carr; that, before he made the levy, he was notified that it was the property of the plaintiff, and warned not to levy on the same; that, when the piano was taken on the order of delivery in this action, the defendant put up a redelivery bond. And the court says in its finding: "But this piano was never actually delivered to the defendant." The evidence does not show that the piano was or was not released from the levy; that demand was made upon the defendant by plaintiff for said piano prior to bringing said action. The court then finds as finding No. 9: "As a matter of fact, the defendant never took the piano from the possession of the plaintiff, and that at the commencement of this action the plaintiff had the actual possession thereof." But finding No. 9 is without evidence to support it, and is in direct opposition to the facts admitted by the defendant in his original answer filed in this action, which was verified by him as true. The plaintiff, in her petition, alleges the ownership of the property; that she was entitled to the immediate possession thereof; and that same had been wrongfully taken from her by the defendant; and that he then wrongfully detained the same from her possession. To the several allegations of plaintiff's petition, the defendant entered a general denial of each, except those that were specifically admitted. The defendant admitted that he levied an execution on said piano in an action wherein M. F. Stafford was plaintiff and Samuel H. Carr was defendant, and in this manner sought to justify his possession of the property; and then, when the order of delivery was served in this case and the piano taken possession of by the coroner under the order, the defendant had a redelivery bond made, which was duly approved by the coroner, and returned with the order of delivery. The defendant is estopped by his answer and redelivery bond from denying his possession of the property. *Sponenbarger v. Lemert*, 23 Kan. 35; *Haxtun v. Sizer*, 23 Kan. 218; *Wolf v. Hahn*, 23 Kan. 420.

The defendant in his answer says "that he is the duly elected and qualified sheriff of Hamilton county, state of Kansas, and has been such sheriff ever since the 8th day of January, 1888; that on the 12th day of January, 1888, he received the writ of execution issued to him, * * * in favor of M. F. Stafford vs. Sam. H. Carr for the sum of \$200, and \$5 as cost of suit; and that, by virtue of said writ of execution, he levied upon the piano described in said petition as the property of Sam. H. Carr." This answer was afterwards withdrawn by leave of the court, but the admission made by the answer would have the same effect as though the answer

was still a part of the pleadings in the case. A party, having once solemnly admitted a fact and made it a part of the record by his pleading, cannot after such admission, by merely withdrawing the paper containing the admission from the files of the court, deny such admission, but is estopped thereby. When the defendant levied on the property, he seized it and took it into custody to satisfy the writ of execution he then held against Samuel H. Carr. Section 448, c. 80, Gen. St. 1889, provides "that the officer to whom a writ of execution is delivered shall proceed immediately to levy the same upon the goods and chattels of the debtor. * * * " "To levy" means to seize property, subject it to the satisfaction of an execution; "to levy on goods and chattels," to take into custody or seize specific property in satisfaction of a writ. Webster. Bouvier says: "In order to make a valid levy on personal property, the sheriff must have it within his power and control."

Under the findings of fact by the court and the admitted facts by the defendant, the court should have rendered a judgment on the motion of plaintiff against the defendant for a recovery of the possession of the property, and, if a return thereof could not have been had, judgment against defendant for \$300, the value of said piano as set forth in plaintiff's petition, the court having found as a fact that the piano was of the actual value of \$375, and for costs of suit. The gist of the action in replevin is the wrongful detention of personal property of another, and the court having found that the plaintiff was the owner of the property at the commencement of the action, and defendant having denied ownership, and sought to justify his seizure of the property under an execution against another party, who had no property in or right of possession in the piano, rendered the possession of the defendant wrongful. The judgment of the district court is reversed, and the court directed to render judgment against defendant for a recovery of the possession of the piano described in plaintiff's petition, and, if a return thereof cannot be had, a judgment against the defendant for the sum of \$300, with 6 per cent. per annum on the sum of \$300 from January 12, 1888, to the time of rendition of judgment,—the value thereof,—and costs of suit. All the judges concurring.

(1 Kan.A. 721)

WILSON, Sheriff, v. PANNE.

(Court of Appeals of Kansas, Southern Department, W. D. Oct. 1, 1895.)

REPLEVIN — EVIDENCE OF OWNERSHIP — AGREEMENT AS TO DAMAGES.

1. It is generally incompetent to prove a complex fact by a mere assertion of the fact itself, when such fact is the principal ground of contention; but, when all the simple, primary, and elementary facts necessary to establish a complex fact are proven, it is immaterial error to admit proof of said complex fact.

2. In an action to recover the possession of wheat taken from the bin, it is incompetent to prove ownership of the land on which the bin is located or the wheat was raised, to establish the ownership of the wheat. The ownership of the wheat in controversy could not be established by evidence as to who owned the land.

3. An agreement between the parties to the suit as to the amount of recovery is sufficient to authorize the amendment of the pleadings to correspond with said agreement, without costs; and a judgment for said amount will be upheld without such amendment having in fact been made. *Mitchell v. Milhoan*, 11 Kan. 617.

(Syllabus by the Court.)

Error from district court, Barton county; J. H. Bailey, Judge.

Action of replevin by Emma Panne against F. D. Wilson, sheriff. Plaintiff had judgment, and defendant brings error. Affirmed.

Valentine, Godard & Valentine and Diefenbacher & Banta, for plaintiff in error. Hettinger Bros., E. C. Cole, and J. T. Bradley, for defendant in error.

DENNISON, J. This is an action in replevin, brought by Emma Panne against F. D. Wilson, sheriff of Barton county, Kan., in the district court of Barton county, to recover possession of 500 bushels of wheat which had been levied upon by him under an execution against Henry Mehrhoff. The judgment was for the plaintiff below, and Wilson brings the case here for review.

The real question at issue in this case is, was the wheat the property of Emma Panne? The first error complained of by the plaintiff in error is the refusal of the court to strike out the answer of the plaintiff to the following question: "Q. State whether or not you know who is the owner of this wheat in controversy. A. Yes, sir; I am the owner." The last part of this answer is clearly improper, and not responsive to the question. However, the next question asked the witness was: "Q. You may state who was the owner of this wheat in controversy on the day it was taken from you. A. I was." No objection was made to this question or answer; therefore, no ruling was made or exception saved thereto. It is generally incompetent to prove a complex fact, when such fact is the principal ground of contention, by a simple assertion of the fact itself. *Simpson v. Smith*, 27 Kan. 565. In this case, however, Mrs. Panne introduced testimony tending to show that she purchased the seed wheat, hired the land plowed and harrowed, and the wheat sown, harvested, and threshed; that she was in possession of the land upon which the wheat was raised and stored, and was in possession of the wheat. This stated all the simple, primary, and elementary facts necessary to be shown to establish the ownership of the wheat in the plaintiff; therefore, whatever error may have been committed in refusing to strike out said answer is immaterial.

The second error complained of by plaintiff in error is in the sustaining of the objection

to the following question, asked by the defendant below in the cross-examination of the plaintiff: "Q. What, if anything, did you pay your mother for the land?" This was not error. The issues in this case were not made to try the title to the land, but to personal property; and it would make no difference in this case whether the plaintiff had ever paid anything for the land or not. The ownership of the wheat in controversy could not be established by evidence as to who owned the land.

The third and sixth assignments of error are based upon the assumption that Henry Mehrhoff was in possession of the land and the wheat. There is nothing in the pleadings or the evidence to bear out this assertion; therefore, there was no error committed in the rulings complained of.

The fourth and fifth assignments of error are based upon the assumption that Ernest Panne, the husband of this plaintiff, was the agent in and about all the business of Mrs. Panne. The uncontradicted evidence of Mrs. Panne is to the effect that Mr. Panne was her agent, so far as this farm and wheat were concerned, only in hiring and paying the threshers. He was properly permitted to testify about these two matters, and nothing else.

The seventh and eighth assignments of error are based upon the refusal of the court to allow the conversation purporting to have been had between William Mehrhoff and Grant Adams at the time said Mehrhoff was sowing the wheat, in which William Mehrhoff said the wheat belonged to him. This plaintiff contends that what was said about the wheat was part of the *res gestæ*, and, because plaintiff testified that William Mehrhoff was her agent concerning sowing and raising of the wheat, that his declarations are binding upon his principal. It is a little difficult to understand what transaction the conversation between William Mehrhoff and Grant Adams was a part of. It was not had in the presence of either of the parties to this suit. If William Mehrhoff was hired by plaintiff to put in and harvest said wheat, and acted as her agent concerning the same, it is difficult to understand where he would obtain his authority for stating that the wheat belonged to him. Certainly, no authority has been shown to have been given him by Mrs. Panne to make any such statement. The evidence further shows that William Mehrhoff died between the time of harvesting said wheat and the seizure thereof by this plaintiff in error. According to the well-known rules which govern as to a conversation being part of the *res gestæ*, and as to the admission of witnesses to testify to the conversation of a deceased person, and as to principal and agent, there was no error committed in refusing to permit said Adams to testify to said conversation.

The ninth assignment of error is upon the sustaining of an objection to the following

question by the defendant upon the cross-examination of the plaintiff: "Q. Did you at the time keep a bank account?" The plaintiff had been testifying in regard to various payments of money, checks, etc., to one of the men who threshed the wheat. There was nothing in the testimony that she gave her individual check for any amount, and it was entirely immaterial whether she kept a bank account or not.

The tenth assignment of error is so indefinite and evidently immaterial that we will not consider it.

The eleventh assignment of error is based upon the amount of recovery. The plaintiff, in her petition, claimed only 500 bushels of wheat; the verdict and the judgment were for 504 bushels and 10 pounds. During the progress of the trial, and just before the plaintiff rested his evidence, the following statement appears in the record: "It is agreed by the plaintiff and defendant that the value of the wheat is 56 cents per bushel, and it is also agreed that there were 504 bushels and 10 pounds of wheat." In the case of *Mitchell v. Milhoan*, 11 Kan. 617, the supreme court says: "It is true that the judgment does not literally follow the prayer of the petition, but we think it substantially does. The variance is so slight that the plaintiff would have had the right at any time, without costs, to amend the prayer of his petition, and therefore the variance was immaterial. *Railroad Co. v. Caldwell*, 8 Kan. 244. The judgment was for a small amount more than claimed in the petition, but it was for the amounts agreed upon by the parties, to wit, \$1,429.25 against Mitchell, and \$125 against Devenney and Green, and therefore the variance was immaterial. The plaintiff, however, should have amended his petition so as to claim these amounts." This decision is based upon correct principles of law and justice and, following it, we hold that there was no material variation between the allegations in the pleadings and the judgment.

No material error having been committed during the trial of this case, the judgment of the district court is affirmed.

JOHNSON, P. J., concurs. COLE, J., having been of counsel in the court below, not sitting in the case.

(1 Kan.A. 739)

WESTERN IRRIGATION CO. v. STAYTON.
(Court of Appeals of Kansas, Southern Department, W. D. Oct. 1, 1895.)

CASE MADE—CONTRACT—WAIVER.

1. A statement in a case made, that it "contains all the pleadings, motions, orders, verdict, instructions given by the court (as well as those refused), and findings, and the judgment rendered in the case. * * * The plaintiff, to sustain the issues upon his part, introduced the following testimony, to wit," ending the evidence with the statement, "This was all the evidence given on the trial of this cause,"—is a

statement of so much of the proceedings as is necessary to present at least some of the errors complained of in this cause, and they will be considered.

2. Where S. contracts with the W. I. Co. to furnish materials and labor necessary to build a dam on or before January 1, 1890, and when, on March 3, 1890, said W. I. Co. enters into a second contract with said S. by which he is to do additional work on said dam, a portion of it consisting of attaching the apron stipulated for in the first contract to the plates to be put in by the terms of the second contract, and when the W. I. Co. otherwise took possession of said dam, and where the only issue raised by the pleadings was as to the completion of said work in a substantial and workmanlike manner, and where the question of failure to complete the work on time is first raised in the plaintiff's brief, *held*, that said W. I. Co. has waived the time of the completion thereof, and is estopped from attempting to evade liability because the work was not completed on said 1st day of January, 1890.

(Syllabus by the Court.)

Error from district court, Kearney county; W. J. Abbott, Judge.

Action on a contract by A. A. G. Stayton against The Western Irrigation Company. Plaintiff had judgment, and defendant brings error. Affirmed.

This was an action brought in the district court of Kearney county, Kan., by A. A. G. Stayton as plaintiff against the Western Irrigation Company as defendant to recover the balance claimed to be due upon the following two contracts, the first of which reads as follows: "Articles of agreement, made and entered into this 25th day of September, A. D. 1889, by and between A. A. G. Stayton, party of the first part, and the Western Irrigation Company, by its president and secretary, parties of the second part, witnesseth: That the party of the first part, for the consideration hereinafter mentioned, agrees to furnish material and labor necessary to complete a dam in the Arkansas river, removing and changing the head gates and the waste gates more particularly described in the specifications, for the party of the second part, on or before the first of January, 1890, according to the specifications hereunto attached, and which are made a part of this contract. The party of the second part hereby agrees to pay to the party of the first part, for the construction of such dam as aforesaid, according to the specifications hereunto attached, the sum of \$2,900 payable in manner and form as follows: Said parties of the second part agree to pay for the material when purchased and loaded on the cars at the mills, when certified to and bills of lading furnished to the party of the second part by the party of the first part, and to pay all freights on said material as the same arrives at the depot at Hartland, charging the parties of the first part with the said material so purchased and the freights so paid. When the said party of the first part shall have completed the work according to the specifications hereunto attached, then the party of the second part

shall pay to the party of the first part all the remainder of said sum first mentioned to the party of the first part. Signed and sealed this day and year last above written. A. A. G. Stayton. [Seal.] The Western Irrigation Company. By O. S. Kelley, President; W. R. Linn, Secretary." Specifications accompanying the said contract will be omitted, except the statement that "all material in the above-described structure shall be of the best quality, and all the work shall be done in a substantial and workmanlike manner."

The second contract is as follows: "Articles of agreement, made and entered into this 3d day of March, A. D. 1890, by and between A. A. G. Stayton, party of the first part, and the Western Irrigation Company, by its agent J. O. Parker, party of the second part, witnesseth: That the party of the first part, for the consideration hereinafter mentioned, agrees to furnish all material and labor necessary to put in a row of piles from the north end of said company's waste gates in the Arkansas river (as per specifications hereunto attached, and which are made a part of this contract), on or before the 15th day of April, A. D. 1890. The party of the second part hereby agrees to pay to the party of the first part, for the construction of said work as per specifications hereunto attached, the sum of \$550, payable in the manner and form as follows: Said party of the second part agrees to pay for the material when purchased and delivered to the depot in Hartland, Kansas, when certified to and bills of lading furnished to the party of the second part by the party of the first part, and to pay all bills of freight on said material, charging the party of the first part with the said material so purchased and the freights so paid, and when the said party of the first part shall complete the work as per specifications, then the party of the second part shall pay to the party of the first part the remainder of said contract in full. A. A. G. Stayton. [Seal.] J. O. Parker, Agent of Western Irrigation Company." The specifications attached to said contract and made a part thereof are as follows: "Specifications for additional work to be done to dam of Western Irrigation Company's dam in the Arkansas river, near Hartland, Kearney County, Kansas, to wit: There shall be a row of piles driven from the north end of the present waste gates in a straight line, and parallel with the present dam and with the south side of island north of waste gates. Said piles shall be of good white or burr oak twelve feet long, and twelve feet in width, and twelve inches diameter at butt end, and six inches in diameter at little end, and driven ten feet apart in a straight line north of waste gates, and ten feet east of the present dam. They shall be driven until their top end shall be level with the top of the water or sand. They shall all

be driven to a level. There shall be placed on the top of piles a plate, four inches by eight inches by twenty feet, and securely bolted to the top of piles with $\frac{3}{4}$ -inch round iron and 7-inch boat spike. The east line of apron (provided in original contract) shall be fastened to said plate with $\frac{3}{4}$ -inch by 5-inch long screws in each apron plank. Which work shall be done on or before the 15th day of April, A. D. 1890. It is further agreed by the party of the first part that he will drive three 12 piles east of going to south end of waste gates without cost to the party of the second part, and board the dam up four feet high, the party of the second part furnishing the boards."

The petition of the plaintiff sets out the said contracts and specifications, alleges full performance on his part, and that there is remaining due and unpaid from the defendant to him the sum of \$370.60. The answer of the defendant admits its corporate existence, the execution and validity of the contracts and specifications, denies that it is indebted to the plaintiff in any sum, and denies each and every other allegation in the petition not herein specifically admitted, and the seventh paragraph of its answer is as follows: "That, for its defense to the second cause of action in said petition set forth, it alleges that, according to the terms of said contracts, marked Exhibits A and C, respectively, and attached to said petition, there is still remaining unpaid a balance of \$360.60, which said balance is due and payable, according to the terms of said contracts and specifications, upon the completion in a substantial and workmanlike manner of the work in said contracts and specifications set forth; that the plaintiff has failed to perform said work in such substantial and workmanlike manner; and that the defendant is willing and ready to pay such balance whenever said work is completed according to the terms of said contracts and specifications." The eighth paragraph of defendant's answer is as follows: "That, for its second defense and by way of counterclaim to cause of action in said petition set forth, it alleges and avers that it had performed all the agreements of said contracts as set forth in said petition by it to be performed; that by reason of the failure of the plaintiff to complete the work set forth in said contracts and specifications in the manner and at the times therein agrees, it has been damaged in the sum of \$500." Judgment was rendered for the plaintiff in the court below, and the defendant brings the case here for review. The defendant in error filed his motion to dismiss this proceeding in error, the principal ground being that "the plaintiff in error has not made a case containing a statement of so much of the proceedings and evidence or other matters in this action as may be necessary to present the errors complained of to this court, as required by section 547 of the Civil Code of the state of Kansas."

A. J. Hoskinson, for plaintiff in error. Milton Brown, for defendant in error.

DENNISON, J. (after stating the facts). The case made filed with the petition in error in this case contains, on page 210 of the record, the following statement: "The foregoing case made contains all the pleadings, motions, orders, verdict, instructions given by the court (as well as those refused), and findings, and the judgment rendered in the case." On page 214 of the record is the following statement in the case made: "The plaintiff, to sustain the issues upon his part, introduced the following testimony, to wit," and, after following the testimony clear through upon both sides, and at the end of the evidence, on page 194 of the record, is the following statement: "This was all the evidence given on the trial of this cause." While it is true that some of the exhibits shown by the evidence to have been introduced and read do not appear in the evidence, still the case contains a statement of so much of the proceedings and evidence as is necessary to present at least some of the errors complained of, and those errors will be considered by this court. The briefs of both the plaintiff and defendant in error in this case are so imperfectly prepared that it will be difficult to review each error in the order assigned. Many of them are immaterial, and based upon false premises and theories. The attention of the attorneys in this case is called to the language of Chief Justice Horton in *Braley v. Langley*, 28 Kan., at page 506.

The pleadings in this case raise but one issue. The petition alleges the corporate existence, the execution of the contracts, the due performance on the part of the plaintiff, a demand for the money, and the failure of the company to pay \$370.60 thereof. The answer admits the corporate existence and the execution of the contracts, denies being indebted to the plaintiff in any sum whatever, denies every allegation not specifically admitted, and in the seventh paragraph thereof, as a defense, says there is remaining unpaid \$360.60, which is due and payable upon the completion of the work in a substantial and workmanlike manner, that the plaintiff has failed to perform such work in such manner, and that the defendant is ready to pay the balance when said work is completed according to the terms of said contract and specifications. This clearly puts in issue the completion of the work in a substantial and workmanlike manner. This issue was properly submitted to the jury, and they found both generally and specially for the plaintiff, that the work was done by the plaintiff according to the contract and specifications, in a workmanlike manner, and that there was due from the defendant to the plaintiff, as the balance of the contract and the interest thereon, the sum of \$373.22. This finding is final.

As to the second defense, contained in the eighth paragraph of the answer, there is no

evidence to sustain this defense. This is admitted by the plaintiff in error in his brief. Hence, no claim for damages that may have been set up in this paragraph because of the failure to complete either of said contracts at the time mentioned therein can be considered in this case. The plaintiff in error contends that time is of the essence of the first contract,—that the petition of plaintiff in the court below alleges full compliance with the contract,—and many of his assignments of error are based upon the failure of the petition to allege a waiver of the time of the completion of the dam. It is clear that neither of the parties to this suit considered time of the essence of the contract. The second contract, which is dated the 3d day of March, 1890, speaks of and treats the dam as the property of the Western Irrigation Company, and stipulates for "additional work to be done on said irrigation company's dam," and for the driving of another row of piles, and stipulates that the east line of the apron, provided for in the original contract, should be fastened to a plate placed upon said piles, which were provided for in this second contract. The evidence shows that one J. O. Parker was the agent of the Western Irrigation Company, and was there by their direction to see that the work was properly done; that he was present while Stayton was at work upon the dam after January 1, 1890, and until the time of its completion, and that during said time, and on March 3, 1890, he, as their agent, contracted with said Stayton to do additional work upon said dam; that after the completion of the contracts he took charge of the dam and cut it down. The evidence also shows that in May, 1890, the company, knowing that the dam was not completed until about April 15, 1890, made two payments, one of about \$1,200, and one of \$39.40, upon said contracts. It would be manifestly unjust for the company to knowingly allow Mr. Stayton to proceed with the work of building the dam after January 1, 1890, to contract with him on March 3, 1890, to do "additional work," and part of it clearly a change of the first contract, to take possession of the dam and make changes in it, and then say to Mr. Stayton, "We will not pay you because you did not complete the work on or before January 1, 1890." The evidence during the trial of the case nowhere shows that any question was raised as to the failure to complete the work by January 1, 1890. Mr. Kelley, the president, Mr. Rogers, the treasurer, and Mr. Parker, the agent, frequently, after January 1, 1890, objected to the manner in which the work was being done, but nowhere object to the time in which the work is being completed. This question is first raised by the plaintiff in error in its brief in this court, after the jury had found against it upon the issue presented, i. e. the manner of doing the work. Without deciding whether time was of the essence of the first contract or not, we hold that, in view of the allegations in the

pleadings and the facts shown by the evidence, which have been specified in this opinion, the plaintiff in error has waived the time in which the contract was to have been completed, and is estopped from attempting to evade liability because the work was not completed on January 1, 1890. The second contract, which is set out in the petition and admitted in the answer, and the issue tendered by the seventh paragraph of the answer, clearly lay the foundation for the introduction of evidence tending to show that the work was completed in a workmanlike manner, and the plaintiff below would be entitled to recover by proving that said work was so completed, although it was not done until from April 15 to May 1, 1890.

We have carefully examined the evidence and the instructions, and find that, in accordance with the views herein expressed, there was no material error committed by the court during the introduction of evidence, or in the instructions given or refused. The judgment of the district court will be affirmed. All the judges concurring.

(2 Kan. A. 7)

FERGUSON v. PRINCE.¹

(Court of Appeals of Kansas, Southern Department, W. D. Oct. 1, 1895.)

JUSTICE'S COURT—PLEADINGS—TRIAL ON APPEAL.

In all actions before a justice of the peace the plaintiff is required to file a bill of particulars of his demand, and the defendant, if required by the plaintiff, shall file a like bill of particulars he may claim as a set-off, and the evidence on the trial must be confined to the items set forth in such bill; and where the case is taken on appeal it will be tried de novo in the district court upon the original papers, unless the appellate court allow amendments or new pleadings to be filed. If the plaintiff does not require the defendant to file any bill of particulars, the defendant may prove on the trial of the case any defenses he may have, without any pleading whatever. But where a defendant in open court, in stating his case, states that he intends to submit evidence to prove two separate and distinct defenses, he stands in the same position as though his defenses were set forth in a pleading, and the evidence must be confined to the defenses so stated; and where the defendant states two separate and distinct defenses, which are inconsistent, the court should require him to elect upon which one of the defenses he will rely, and the evidence upon the trial should be confined to the defenses upon which the defendant elected to stand.

(Syllabus by the Court.)

Error from district court, Ford county; A. J. Abbott, Judge.

Action on a contract by Andrew Prince against Benjamin Ferguson. Plaintiff had judgment, and defendant brings error. Affirmed.

This action was commenced before a justice of the peace to recover for work and labor done and performed by Andrew Prince, plaintiff below, for Benjamin Ferguson, defendant below. On trial before the justice, judgment was rendered in favor of the plaintiff, and the defendant appealed to the district court. The only pleading filed in the

¹ Rehearing pending.

case was the bill of particulars of the plaintiff. The case was tried on appeal in the district court by the court without a jury, and plaintiff presented evidence in support of his bill of particulars, and rested his case. The defendant then stated in open court that he would offer evidence in support of two defenses against the plaintiff: (1) That the defendant would first offer to prove that prior to the commencement of this action the plaintiff and defendant had met together, with three of their neighbors as arbitrators, and had by agreement settled all of the differences between them, including the claim sued on in this action up to that date; that the plaintiff, by such settlement, was found to be indebted to the defendant in the sum of \$24. (2) That defendant would offer evidence to show offsets and counterclaims in his favor against the plaintiff which would amount to more than the amount claimed by plaintiff in his bill of particulars. Upon this statement made by the defendant the plaintiff made a motion in open court that the defendant be required to elect which of the defenses he would offer to prove, and the court sustained the motion, and decided that the two defenses were inconsistent, and required the defendant to elect upon which of the defenses he would proceed. To the ruling of the court the defendant duly excepted, and under the ruling of the court the defendant elected to prove and stand upon the defense of settlement; and, after the defendant had submitted his evidence in support of the defense of settlement, he again offered to submit evidence to prove set-offs and counterclaims, which he claimed in the aggregate would exceed the amount claimed by plaintiff in his bill of particulars. To this offer the plaintiff objected, as being inconsistent with the first defense. The court sustained the objection of the plaintiff, and defendant excepted to the ruling of the court. The defendant then rested his case, and plaintiff then submitted testimony in rebuttal of the evidence which defendant had offered in support of his defense of settlement, and rested his case. And upon all of the evidence submitted the court found in favor of the plaintiff, and assessed his recovery at \$110. Defendant filed motion for new trial, which was overruled, and defendant excepted, and made case for the supreme court. Petition in error, with case made attached, was filed by plaintiff in error in the supreme court, and was duly certified to this court for its decision by order of the supreme court.

Sutton & McGarry, for plaintiff in error.
B. F. Milton, for defendant in error.

JOHNSON, P. J. (after stating the facts). Andrew Prince brought suit before a justice of the peace of Ford county, Kan., to recover from Benjamin Ferguson the sum of \$166 for work and labor. The defendant filed no answer or bill of particulars, and none was

demanding by the plaintiff. Upon the trial, judgment was rendered for the plaintiff below, and the case was taken to the district court by defendant below on appeal, and the case was tried in the district court without a jury, and, after the plaintiff below had submitted his evidence to prove the statement in his bill of particulars, and rested his case, the defendant below stated in open court that he would submit evidence to prove two defenses: "First. That he would offer to prove that prior to the commencement of this action the plaintiff and defendant met together, with three of their neighbors as arbitrators, and had by agreement settled all the differences between them, including the claim sued on in this action, up to date; that by such settlement the plaintiff was found to be indebted to him in the sum of \$24. Second. That defendant would offer evidence to show set-off and counterclaims in his favor against the plaintiff which would amount to more than the amount claimed by plaintiff's bill of particulars." The plaintiff below then made a motion in open court that defendant below be required to elect upon which one of the defenses he would offer proof, and the court sustained the motion, and decided that the two defenses were inconsistent, and required the defendant to elect upon which defense he would proceed. The defendant excepted to this decision of the court, and thereupon he elected to stand on the defense of settlement, and, after defendant below submitted his evidence in support of the defense of settlement, he again offered to submit evidence to prove set-off and counterclaim, which he claimed in the aggregate would exceed the amount claimed by plaintiff in his bill of particulars. To the offer the plaintiff below objected, and the court sustained the objection, and defendant below excepted. The defendant below then rested his defense, and the plaintiff below submitted rebutting testimony and rested, and upon all the evidence submitted the court found for the plaintiff below, and rendered a judgment in his favor for the amount found due.

The record presents but one question for the consideration of this court: Whether the court erred in deciding that the two defenses offered were inconsistent, and whether inconsistent defenses are admissible. Section 71, c. 81, Gen. St. 1889, reads: "In all cases before a justice the plaintiff, his agent or attorney, shall file with such justice a bill of particulars of his demand, and the defendant, if required by the plaintiff, his agent or attorney, shall file a like bill of particulars he may claim as a set-off, and the evidence on the trial shall be confined to the items set forth in said bill." Section 122, c. 81, Gen. St. 1889, provides: "That upon appeal the case shall be tried de novo in the district court upon the original papers which the cause was tried before the justice, unless the appellate court, in furtherance of justice, allow amended pleading

to be made or new pleadings to be filed." In the case of *Wagstaff v. Challiss*, 29 Kan. 506, the supreme court, in its opinion, says: "If a plaintiff in an action before a justice of the peace desires to know in advance whether the defendant claims a set-off, and the items thereof, the defendant, if required by him, shall file a bill of particulars; not otherwise. None is required by said section 71, before the justice, unless demanded by the plaintiff. If the plaintiff does not require the defendant to file any bill of particulars or other pleadings before the justice, such defendant may prove on the hearing before the justice any defense which he may have, without any pleading whatever. On appeal to the district court the parties lose no rights and gain none. Each party, without filing new pleadings, may prove any cause of action or defense which he might have proved before the justice." When defendant below stated in open court that he would then offer evidence to support two separate defenses, did that amount to the same thing in effect as though he had set up the two defenses in an answer or bill of particulars? We think it did; that the defendant then stood in the same situation as though he had set up the two defenses in a written pleading, and the same rule in relation to the evidence thereunder must be applied as though the statement was contained in a pleading. This being so, then, under the liberality of our Code, can the defendant be permitted to interpose inconsistent defenses to an action in a justice court? Section 94, c. 80, Gen. St. 1889, reads: "The answer shall contain, First. A general or specific denial of each material allegation of the petition controverted by the defendant. * * * The defendant may set forth in his answer as many grounds of defense, counter-claim or set-off and for relief as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. Each must be separately stated and numbered, and they must refer in an intelligible manner to the cause of action they are intended to answer." In the case of *Butler v. Kaulback*, 8 Kan. 673, Mr. Justice Valentine, delivering the opinion of the court, says: "In the very nature of things, a party cannot have inconsistent defenses. It is impossible that a thing may be true and untrue at the same time. For this reason parties are not allowed to set up inconsistent defenses, for such defenses carry falsehood upon their face. Therefore, whenever a defendant admits anything in his answer, it is right to presume that the admission is intended to modify and control anything else that may be found in the answer in apparent conflict therewith." In the case of *Wright v. Bacheller*, 16 Kan. 259, Justice Valentine, delivering the opinion, says: "But in verifying the first defense she swore substantially that she never executed said mortgage in any manner, either

voluntarily or involuntarily. In the second defense she denies that 'she ever executed any mortgage deed to said plaintiff, either separately or conjointly with her husband.' These allegations are inconsistent with the affirmative allegations of the answer, for it cannot be true that she executed the mortgage under duress which she never executed. The setting up inconsistent defenses like these should never be encouraged." Bliss, in his work on Code Pleading (section 342), says: "Following the liberal policy of the law as first shown in the statute of Anne, the Codes authorized the defendant to make as many defenses as he may have, and the most important question that hence arises pertaining to its extent, whether the permission is so general as to relieve the defendant from the obligation to tell the truth, so general as to authorize him to make inconsistent defenses, and of such nature that same must necessarily be untrue. To aid in the solution of the question, it is well to consider the rule in equity practice from which so much has been borrowed. Daniel thus briefly states it: "Although a defendant may be permitted to set up, by his answer, several defenses as the consequence of the same state of facts, or of the facts which are consistent with each other, a defendant cannot insist upon two defenses which are inconsistent with each other, or are the consequence of inconsistent facts. And in the application of this rule it makes no difference whether the inconsistent defenses are each substantially relied upon or are set up in the alternative. That answer is bad which either contains inconsistent defenses or an alternative of inconsistent defenses." In the case of *Auld v. Butcher*, 2 Kan. 153, Cobb, C. J., delivering the opinion of the court, says: "Suppose the defendant, together with the answer filed by him, had filed an additional answer, setting up the three-years limitation as a bar to the partnership account, the one would have been in irreconcilable antagonism with the other. By one answer he sets up a partnership account upon which he alleges there is a large balance due him, and prays the court to take an account of the partnership business, and give him a judgment for the balance in his favor. By the other he declares in the same breath that the whole partnership account is barred by the statute of limitation, and no judgment can be rendered on it. In such a case the court, on motion, would compel the defendant to elect which answer he would stand upon, and strike the other from the record, * * * but surely the defense attempted in this case is not less inconsistent with the defendant's answer than if it had been upon the record with it." Were the two defenses which the defendant below proposed to prove inconsistent defenses? If the first one was true, was the second one necessarily false? If the plaintiff and defendant had met with three of their neigh-

bors, and made a settlement of all matters between them up to the date of the commencement of the action, and a balance had been found due the defendant below, it would be inconsistent to say that there were then existing unsettled differences between them that could form either a set-off or counterclaim. We think the court ruled correctly on the motion to require the defendant below to elect upon which one of the inconsistent defenses stated by him he would proceed to submit his evidence. We do not think the court erred in sustaining the objection of the plaintiff below to submit evidence to prove a counterclaim or set-off after he had elected to rely upon his defense of a settlement. After a careful examination of this case, we do not find any error committed by the district court upon the trial. The judgment of the district court is affirmed. All the judges concurring.

(3 Kan. A. 23)

KINGSLEY v. BAGBY.¹

(Court of Appeals of Kansas, Southern Department, W. D. Oct. 1, 1895.)

TERMS OF COURT—JUDGMENT LIENS—EFFECT OF APPEAL.

1. Our statutes classify the terms of the district court into regular terms and special terms. An adjourned term is not an original term. There must be either a regular or special term in session, and the business of that term delayed, postponed, or put off until some more convenient time. This more convenient time would be an adjourned term, and a continuation of the regular or special term.

2. The regular January, 1888, term of the Finney county district court began on January 3, 1888, and on February 18 adjourned until March 6, and remained in session until March 28, 1888. *Held*, that a judgment rendered on said 28th day of March, 1888, would be a lien upon the real estate of the debtor from and after said January 3, 1888, and prior to the lien of a mortgage executed February 22, 1888, although during the time of said adjournment, to wit, from February 18th to March 6th, said district court was legally in session in another county in said district.

3. When an appeal or proceedings in error have been filed in an appellate court, seeking to reverse a judgment, and the bond for a stay of execution provided for in pars. 4652, 4654, 4655, Gen. St., has been filed, the judgment creditor does not forfeit his lien by failure to take out and levy an execution until one year after the finding of the reviewing court.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. Abbott, Judge.

Action by W. J. P. Kingsley against E. A. Bagby to foreclose a mortgage. Defendant had judgment, and plaintiff brings error. Affirmed.

W. J. P. Kingsley was the owner of a mortgage executed February 21, 1888, by John A. Stevens and wife, upon certain real estate in Finney county, Kan. E. A. Bagby obtained a judgment in the district court of Finney county, Kan., against John A. Stevens et al., on March 28, 1888. Said Stevens was the owner of said real estate, in fee simple, on

each of the dates above mentioned. The regular January term of the district court of Finney county, Kan., convened January 3, 1888, and on February 18, 1888, adjourned to March 6, 1888, and continued in said adjourned session until said 28th day of March, 1888. An appeal was taken from said judgment, and a stay bond, provided for in the first subdivision of par. 4652 of the General Statutes of 1889, was given, which remained in force until July 9, 1891, at which time judgment was affirmed.* On April 23, 1890, Kingsley filed his petition in foreclosure against Stevens et al., among whom was said E. A. Bagby, who was not personally served with summons, but was served by publication, and judgment was rendered by default on May 28, 1891. Bagby afterwards, by stipulation with Kingsley, had the judgment, as to him, set aside, vacated, and reopened. Pleadings were filed and a trial had upon the question of priority of liens, and judgment was rendered in favor of Bagby on August 6, 1891. Kingsley brings the case here for review.

Milton Brown, for plaintiff in error. H. F. Mason, for defendant in error.

DENNISON, J. (after stating the facts). In determining the priority of liens in this case, two questions are raised: First. Was the lien of Bagby's judgment prior to the lien of Kingsley's mortgage? Second. If so, did Bagby lose his priority by failing to issue and levy an execution within one year from the rendition of his judgment? We must answer the first question in the affirmative, and the second one in the negative.

"Judgments of courts of record of this state * * * shall be liens on the real estate of the debtor within the county in which the judgment is rendered from the first day of the term at which the judgment is rendered. * * *" Gen. St. 1889, par. 4515. Our statutes clearly classify terms of the district court into regular terms and special terms. The regular term is one which is held at the time fixed by statute, and a special term is one which is called by the judge according to par. 2086, Gen. St. 1889. Said par. 2086 also empowers the judges of the several district courts to hold such adjourned terms as they may deem necessary. An adjourned term is not an original term. The definition of the word "adjourned" precludes it. There must be either a regular or special term in session, and the business of that term delayed, postponed, or put off until some more convenient time. This more convenient time would be an adjourned term, and a continuation of the regular or special term. "An adjourned term is but a continuation—a part—of the regular term." "Giving the district court power to hold adjourned terms gives it power, not to adjourn from day to day, but to adjourn over a length of time, for intervening obstacles to the holding of the court." "It seems to contemplate just such exigen-

* Rehearing pending.

* Hoskinson v. Bagby, 46 Kan. 758, 27 Pac. 110.

cies as the present, where the business in one county is incomplete, and yet the day fixed for the commencement of the term in another county has arrived. The time of such adjournment is not restricted, unless it is deemed to be by the commencement of the succeeding regular term in that county." State v. Montgomery, 8 Kan. 351. See, also, Sawyer v. Bryson, 10 Kan. 199, and In re Milington, 24 Kan. 224. We therefore hold that on March 28, 1888, the regular January, 1888, term of the district court in and for Finney county, Kan., was in session, and a judgment rendered on that day would be a lien upon the real estate of the judgment debtor from and after January 3, 1888, and prior to the lien of the mortgage executed February 22, 1888.

Did Bagby lose his priority of lien by failing to have an execution issued and levied within one year from the rendition of his judgment? "No judgment heretofore rendered or which hereafter may be rendered on which execution shall not have been taken out and levied before the expiration of one year next after its rendition, shall operate as a lien on the estate of any debtor to the prejudice of any other judgment creditor. * * * Nothing in this section contained shall be construed to defeat the lien of any judgment creditor who shall fail to take out execution and cause a levy to be made as herein provided, when such failure shall be occasioned by appeal, proceedings in error, injunction or by vacancy in the office of sheriff or corner or the disability of such officer, until one year after such disability shall be removed." Gen. St. 1889, par. 4566. In this case the stay bond as provided for in pars. 4652, 4655. Gen. St., was given. The question raised in this case seems never to have been decided by our supreme court. The plaintiff in error contends that, because Bagby did not give the bond provided for in par. 4656, Gen. St., and was not refused leave by the court to enforce his judgment, his lien is subordinate to that of Kingsley. Defendant in error contends that he is not required to issue execution, even if no stay bond has been filed; and, even if this proposition is not correct, that the lien of Kingsley would not take precedence, because he was not a judgment creditor. As to the first proposition of the defendant in error, it is not necessary, in deciding this case, to consider it, because in this case the bond for a stay of execution was filed. Upon the second proposition, the facts do not bear out the contention. Kingsley became a judgment creditor of Stevens in May, 1891. When an appeal or proceedings in error have been filed in the appellate court, seeking to reverse a judgment, and the bond for a stay of execution provided for in pars. 4652, 4654, 4655, Gen. St., has been filed, the judgment creditor does not forfeit his lien by failure to take out and levy an execution until one year after the finding of the reviewing court. To hold otherwise would

be manifestly unjust to the judgment creditor, as well as to the judgment debtor. The judgment debtor has given a bond to stay execution. He does this because he does not want his property sold at a forced (and probably a sacrifice) sale, when by no possibility can he recover more than the money it sold for and the interest thereon from the time of sale. The judgment creditor probably considers his claim safe after the bond is filed. He does not want to unnecessarily oppress the debtor, neither does he care to be to the expense and trouble of selling the property until he is sure his judgment will be affirmed. Gen. St. par. 4656, however, provides that the judgment creditor may, by giving a bond and obtaining leave of the court, proceed to enforce his judgment. This leaves it to the sound discretion of the court, and it would undoubtedly require a showing that injustice would be done the judgment creditor before the court would permit the execution to issue. It is absurd to say that the legislature would permit a judgment debtor to give a bond to procure a stay of execution upon a judgment, and then compel the judgment creditor to give a counter bond and enforce his judgment, or lose his lien. The judgment of the district court will be affirmed. All the judges concurring.

(1 Kan. A. 730)

STREETER et al. v. WESTENHAVER.¹

(Court of Appeals of Kansas, Southern Department, W. D. Oct. 1, 1895.)

REFERENCE — REVIEW OF FINDINGS — APPEAL — WAIVING OBJECTIONS.

1. Where a party fails to preserve the evidence taken on the trial of a case before a referee, the court cannot review the findings of facts made by the referee, so as to determine whether they are supported by sufficient evidence, or whether they are contrary to the evidence.

2. Where a case has been tried by a referee, and he has made his findings of facts and conclusions of law in writing, and filed them with the court appointing him, and the court has rendered a judgment in accordance with the report of the referee, and the party against whom the judgment is rendered does not file any motion to set aside the report, or move for a new trial in said action, he thereby waives all objections to such report and to the judgment, and the judgment cannot thereafter be reviewed by an appellate court.

(Syllabus by the Court.)

Error from district court, Ford county; A. J. Abbott, Judge.

Action by Streeter & Bradbury against Mathias Westenhaver. Defendant had judgment, and plaintiffs bring error. Affirmed.

On the 29th day of October, 1887, the plaintiffs filed their petition in the district court of Ford county, Kan., demanding judgment against the defendant for the sum of \$304 for money overpaid on contract for grading road-bed on the Chicago, Kansas & Nebraska Railway in Ford county in the months of July,

¹ Rehearing pending.

August, and September, 1887. On the necessary affidavit and undertaking an order of attachment was issued against defendant, and his property seized in attachment, but by stipulation between the parties the attachment was discharged. On the 23d of November, 1887, the defendant filed his answer to the plaintiffs' petition. On July 9, 1889, defendant filed an amended answer and cross petition, setting up that he contracted with plaintiffs to grade one mile of roadbed on the Chicago, Kansas & Nebraska Railway in Ford county, Kan., near Kingsdown, designated as "Section 354"; that he fully complied with his contract, and there was still a balance due him from plaintiffs for such work,—the sum of \$2,913.78; and, as a second cause of action against the plaintiffs, that they are indebted to him in the sum of \$144.80 for money had and received by plaintiffs for the use and benefit of defendant; and prayed judgment against the plaintiffs on the two causes of action for the sum of \$3,058.58. To this answer and cross petition the plaintiffs, for reply, denied all the allegations of indebtedness to defendant. On the 17th day of October, 1889, by agreement of all the parties, this action was referred to one W. R. Brown, referee, for the purpose of taking the testimony, and reporting findings of facts and conclusions of law to the court, to be tried by the referee on three days' notice by either party; that said case was tried before the referee at Dodge City, Kan., and afterwards, on the 19th day of May, 1890, the referee made his findings of facts and conclusions of law, in writing, and reported the same to the court, and recommended that judgment be entered for the defendant against the plaintiffs for the sum of \$761, with interest from the commencement of this action at 7 per cent. per annum, and for costs of suit. On the 19th of May, 1890, the plaintiffs' attorney wrote a letter to the referee, asking him to put in a general exception for plaintiffs to his report, so as to save the plaintiffs' rights so they will not be entirely lost in the matter. The referee allowed this as a general exception to his report. On the 21st of May, 1890, the defendant, by his attorney, filed his motion in writing, asking the court to enter a judgment against the plaintiffs therein in accordance with the report of the referee filed in said action, and on the 23d day of May, 1890, the parties all being present by their respective attorneys, and the report of the referee coming on to be heard on the motion of the defendant for judgment in accordance with the findings and recommendations of said referee, the court thereupon rendered a judgment against the plaintiffs and in favor of the defendant in accordance with the findings and recommendations of the referee, to which the plaintiffs, by their counsel, excepted, and the exception was noted by the court, and the plaintiffs were given 60 days' time to make and serve a case for the supreme court, and defendant given 10 days to

suggest amendments thereto, and same to be settled on 5 days' notice. No case was made, but the plaintiffs bring the case to this court on a certified transcript of the pleadings and the report of the referee.

Charles H. Toll and D. V. Burns, for plaintiffs. John N. Ives, for defendant.

JOHNSON, P. J. (after stating the facts). This action was commenced by the plaintiffs in the district court of Ford county to recover from the defendant the sum of \$304, for money overpaid by plaintiffs to him for work done as subcontractor in the construction of one mile of roadbed on the Chicago, Kansas & Nebraska Railway in Ford county, Kan., in 1887. An order of attachment was issued on the commencement of the action, and defendant's property seized by the sheriff, but the attachment was afterwards discharged by agreement of the parties. The defendant filed an answer to the petition of the plaintiffs, denying any indebtedness to them, and also a cross petition, demanding judgment against the plaintiffs for the sum of \$3,058.58 as a balance due for work done under contract with plaintiffs as a subcontractor in the grading of one mile of roadbed on the Chicago, Kansas & Nebraska Railway in Ford county, Kan., in 1887. After issue had been joined by agreement of all the parties, the action was referred to a referee for the purpose of taking the testimony and reporting his findings of facts and conclusions of law to the court. The case was heard before the referee, who made findings of facts and conclusions of law, and reported the same to the court. The plaintiffs made the following exception to the finding of the referee: "I will ask you to put in a general exception for us, so that our rights will not be entirely lost in the matter." The defendant made his motion in writing, asking the court to enter up judgment in his favor in accordance with the findings of the referee. The court afterwards, in the presence of the attorneys for both parties, rendered judgment in favor of the defendant in accordance with the findings of the referee, and the plaintiffs duly excepted to the judgment of the court, and took 60 days to make a case for the supreme court; but no case was ever made. The plaintiffs bring the case here on a certified transcript containing the pleadings, affidavits, agreements of parties, and the report of the referee, and assign eight causes of error, but only specify four reasons in their brief why the judgment should be reversed: "First. The findings of facts made by the referee are not sustained by, but are contrary to, the evidence. Second. His conclusions of law, based upon the facts as found, are erroneous. Third. Error of the court below in overruling plaintiffs' exceptions to the findings of facts and conclusions of law of the referee. Fourth. Error of the court below in causing judgment to be rendered in defendant's fa-

vor, and in not causing judgment to be rendered in plaintiffs' favor, as prayed for in their petition."

This court cannot review the findings of the referee to determine whether the findings are supported by sufficient evidence, or whether they are contrary to the evidence, as the plaintiffs did not have all the evidence taken on the trial before the referee preserved in such form as this court can review it. The referee says in his report that he has reduced the evidence taken by him to writing, and that the same is appended to his report. The transcript brought to this court has the following certificate attached: "I, Thomas Lahey, clerk of the district court in and for the county and state aforesaid, in the 27th judicial district of said state, hereby certify that the foregoing and annexed papers contain true, full, and complete copy and transcript of all pleadings and papers filed in the above-entitled cause, all orders of the court, the report of the referee, the evidence submitted with the report, the judgment of the court, and all the proceedings in the above-entitled cause, as the same appears on file and of record in my office, save and except that part of transcript which relates to agreement of parties to this case, which does not appear of record; but that part marked thus '—' in said report is only a minute on trial docket." The transcript fails to show that it contains all the evidence upon which the referee made his findings. In fact, the report of the referee shows that there was other evidence, not included in the written evidence reported by him. It was the duty of the plaintiffs if they desired the court to review the findings of the referee to preserve the evidence in a bill of exceptions or a case made, showing that it contained all of the evidence. *Walker v. Manufacturing Co.*, 8 Kan. 397; *Bayer v. Cockrill*, 3 Kan. 282; *Simpson v. Woodward*, 5 Kan. 571; *Porter v. Hall*, 11 Kan. 514; *Davis v. Wilson*, Id. 74; *Hale v. Bridge Co.*, 8 Kan. 46; *Blair v. Field*, 5 Kan. 58; *Murray v. Kelley*, 23 Kan. 667; *Brown v. Johnson*, 14 Kan. 378; *State v. Harper Co. Com'rs*, 43 Kan. 195, 23 Pac. 101; *Moody v. Arthur*, 16 Kan. 419; *Hill v. Bank*, 42 Kan. 270, 22 Pac. 324; *Muscott v. Hanna*, 26 Kan. 770; *Insurance Co. v. Hogue*, 41 Kan. 524, 21 Pac. 641; *Russell v. Thompson* (Kan. App.) 40 Pac. 833. The plaintiffs failed to take any exceptions to the findings of the referee, or to his report. An exception is an objection taken to a decision of the court or judge upon a matter of law. The party objecting to the decision must except at the time the decision is made, and time may be given to reduce the exception to writing, but not beyond the term. No particular form of exception is required. The exception must state so much of the evidence as is necessary to explain it, and no more, and the whole as brief as possible. Where the decision is not entered on the record, or the grounds of objection do

not sufficiently appear in the entry, the party excepting must reduce his exception to writing, and present it to the judge for his allowance. Unless the party excepts to the decision of the court, he waives his right to complain thereafter. If the party desires the court to notice his objection, it is his duty to call the attention of the court to the matter at the time the court is rendering his decision or passing on the question objected to. The plaintiffs' attorney in this case wrote a letter to the referee, asking him to note a general exception for him to the whole findings and conclusions; but he never afterwards reduced his objections to writing, stating in what his objections consisted, did not make exceptions to any particular finding of fact or conclusion of law, and, after the report was filed, they never called the attention of the court to any objection, nor did they in any manner object to the court about the finding of the referee, or his conclusions of law. If the findings of fact or the conclusions of law of the referee were not satisfactory to the plaintiffs, it was their duty to call the attention of the court to the error of the referee in some manner, and ask the court to either set the report aside or modify in such manner as was right and proper. The plaintiffs, failing to make their objection to the court, waive their right to come into this court at this time, and ask to have it set aside, or modified in any particular. The plaintiffs excepted to the judgment of the court, and were given 60 days to make case for the supreme court, but have failed to preserve any of the proceedings in said case by either bill of exceptions or made case, and the plaintiffs also made no motion for new trial, nor in any other manner asked the court to correct any error that might have occurred upon the trial of said case, and thereby waived their right to a review of the judgment of the court below.

It is contended by the plaintiffs, without any exceptions whatever it is the duty of the court to determine whether the findings and the evidence are sufficient to support the judgment, and in support of this contention they rely on the case of *Foster v. Volghtlander*, 36 Kan. 572, 13 Pac. 777; but upon an examination of that case we find that it does not support this claim, but is directly opposite to it. Mr. Justice Johnston, delivering the opinion of the court, says: "The report of the referee was made and duly served on the plaintiff in error on April 9, 1885, and was not filed in the court until April 13, 1885, but no exception was made to the report, or to any of the proceedings before the referee. They complain that the report is not as definite and complete as it should have been in failing to state the existence, terms, and conclusion of the partnership, and because it did not contain a detailed account of assets and indebtedness of the firm, the amount invested by each partner in the business, and the amount drawn out by

each, as well as the liability of each for the amount awarded in favor of the defendant in error. The plaintiffs in error are hardly in a position to complain. Aside from the fact that no exceptions were taken to the action of the referee, they did not request him to find more fully or specifically, although they had four days' notice before filing of the report, of what findings it contained; nor did they ask the court, after the report was filed, to refer the same for an additional or more complete statement of facts. Having brought none of the testimony or proceedings taken or had before the referee, we are unable to say what further findings the referee could or should have made.

* * * Without the evidence or any exceptions, the only question to be considered is whether the findings support the judgment rendered, and this we determine in the affirmative. The questions principally argued are not fairly raised by the record. The defects complained of are such as might have been made the subject of an application for further and more specific findings, but the plaintiffs in error chose not to avail themselves of the remedy. * * *

All of the evidence and proceedings were before the court when it overruled the motion to set aside the report, and without these we cannot say the rulings were erroneous." Counsel also calls our attention to the case of *Koehler v. Ball*, 2 Kan. 155; but in that case the plaintiff in error made his motion in the district court to set aside an order of the court confirming a sheriff's sale, and also to set aside the appraisement and sale of the land, and the court refused to entertain his motion, and he filed his petition in error in the supreme court to reverse the order of confirmation of said sale, and attached to his petition in error a transcript of the proceedings had in the district court; Cobb, C. J., delivering the opinion of the court, quoting from the opinion of the supreme court of Ohio, with approval, in the case of *Bank v. Buckingham*, 12 Ohio St. 402: "The object of an exception is generally to bring up on the record for review a decision of the court upon a matter of law which the record would not otherwise show. In such case the exception must be reduced to writing, and allowed and signed by the court; but where the decision excepted to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing it to be noted at the end of the decision that he excepts * * *. If the record shows such final judgment to be erroneous, it is the right of the party aggrieved to have it reversed, vacated, or modified on petition in error to the proper reviewing court." There being nothing in the record showing the proceedings to be erroneous, the only question that this court can consider is whether the final judgment rendered by the court is in accordance with the findings of facts made by the referee and reported to

the court. We are satisfied that the judgment of the court is fully sustained by the facts as found. The judgment of the district court is affirmed. All the judges concurring.

LUNDEEN v. LIVINGSTON ELECTRIC LIGHT CO.

(Supreme Court of Montana. Oct. 14, 1895.)
OBSTRUCTING STREET—NEGLIGENCE—PROXIMATE CAUSE.

1. A guy wire running from a telegraph pole across a street to a post four or five feet above the ground, and two feet from the sidewalk, is an obstruction to the free and ordinary use of said street.

2. Where defendant negligently ran a guy wire from a telegraph pole across the street, and a stranger's horse, becoming frightened, ran into and broke the wire, causing it to strike and injure plaintiff, defendant's negligence was the proximate cause of the injury.

Appeal from district court, Park county; Frank Henry, Judge.

Action by L. F. Lundeen against the Livingston Electric Light Company for personal injuries. Plaintiff had judgment, and defendant appeals. Affirmed.

This is an action for damages for personal injuries. It appears from the record that the defendant corporation was on the 3d day of July, 1892, the owner of a franchise obtained from the city of Livingston, authorizing it to own and operate an electric light plant for the purpose of lighting said city, and was on said day operating said plant, with poles and wires put up and established in and along the streets thereof. It became its duty, under said franchise, to so operate said plant that it should in no way obstruct the free use of the streets, alleys, and public ways of said city. In placing its poles on which its wires were strung, the company had established a pole at the corner of Second and Park streets. To strengthen and support this pole, a guy wire was run from it to a post planted across Second street, in Park street, a few feet from the sidewalk on said Park street. This post, it appears, was from four to six feet high, and the guy wire was fastened around it four or five feet above the ground, and extending thence to the pole across Second street. It appears that on said 3d day of July the plaintiff was riding at a moderate gait, on horseback, along said Park street, in company with one of the witnesses. Near the intersection of said streets a man by the name of Bender, also on horseback, passed the plaintiff. Here Bender's horse became frightened, and for a time unmanageable, and shied across the street, and ran against the guy wire, and broke it near the post to which it was fastened. The broken wire recoiled, and wound itself around the waist of the plaintiff, who was riding in the rear of Bender, pulled her from her horse to the ground and inflicted upon her serious injuries, to recover damages for which this suit is brought. The defend-

ant denies that it was guilty of negligence by placing and maintaining the post and guy wire in and along the streets of said city, as alleged in the complaint. It also denies the damages. The case was tried with a jury, who returned a general verdict for the plaintiff in the sum of \$500. At the request of the defendant the following special findings of fact were submitted to the jury, and made and returned by them: "First. Was the pole and guy wire of the defendant company, which is alleged to have caused the accident in this case, so placed as to be dangerous to the traveling public in the ordinary use of Park and Second streets in the city of Livingston? Answer. Yes. Second. Did the defendant company use due and ordinary care in placing the said pole and guy wire where it was placed? Answer. No. Third. Would the accident have happened, had not the horse of the witness Bender run against the pole? Answer. No." Judgment was rendered for the plaintiff, in accordance with the verdict and findings. From this judgment and the order refusing a new trial, the defendant appeals.

Savage & Day, for appellant. Campbell & Stark and John T. Smith, for respondent.

PEMBERTON, C. J. (after stating the facts). The defendant contends that the evidence is insufficient to sustain the verdict, in that there is no evidence that the post and wire, or either of them, constitute an obstruction of the free use of the streets, in their ordinary and usual use. We think the evidence is ample to support the finding in this particular. The evidence is that the post to which the wire was attached was five or six feet high; that the wire was fastened to it about four or five feet above the ground. The post was placed in the street some two feet, at least, from the edge of the sidewalk. We think that the wire was attached to the post so near to the ground that if a horse, being ridden or driven by the post, shied and ran under the wire, injury would be almost inevitable to the rider or driver. The wire was hung so low that a person stepping off the sidewalk, at or near the post, in the nighttime, and attempting to pass under the wire, would be liable to receive serious injury by contact with it. A man of ordinary height could not pass under the wire, at or near the post, without his head coming in contact therewith. We think the post and wire were not only obstructions, but dangerous ones. It seems that ordinary foresight and prudence would have enabled the defendant to have foreseen the probable consequence of placing the post and wire in the street in the manner in which they were placed. Whether placing the post and guy wire in the street by the defendant constituted an obstruction to the free and ordinary use thereof was a question of fact, to be determined by the jury. *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 360; *Rail-*

way Co. v. Prescott, 8 C. C. A. 100, 50 Fed. 237; *Sweeney v. City of Butte*, 15 Mont. 274, 39 Pac. 286.

The real controversy involved in this case, we think, is found in the instructions given and refused by the court. Instruction 2, as given by the court, is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff was injured and sustained damage as charged in the complaint, and that such injury was the combined result of an accident and of an obstruction in said Park street, and that the damage would not have been sustained but for such obstruction, although the primary cause was a pure accident, still if the jury further believe from the evidence that the plaintiff was guilty of no fault or negligence on her part, and the accident one which common prudence and ordinary sagacity on the part of the plaintiff could not have foreseen and provided against, then the defendant is liable, provided the jury believe from the evidence that the defendant was guilty of negligence, either in the placing of such obstruction in the street in such a manner as to prevent the free use thereof, or in not removing the same, if the same was an obstruction to the free use of said street." The court refused an instruction requested by the defendant, as follows: "You are further instructed that although you may believe from the evidence that the poles and wires thus placed in Park street by the defendant were dangerous to the traveling public, in their ordinary use of the street, yet if you believe that the injury to the plaintiff was approximately caused by the act of the witness Bender's horse, while running away, in running against said pole or wire, and would not have happened but for the act of the said horse, you will find for the defendant." The defendant contends that the court erred in giving said instruction, and in refusing to give the one requested by it. The contention of the defendant is that plaintiff was injured as a result of Bender's horse running against and breaking the guy wire, and that although the defendant was guilty of negligence in placing the wire in such a place and condition that the horse, under the attendant circumstances, would run against and break it, still it is not liable for damages for the injuries sustained by plaintiff. This contention proceeds upon the hypothesis that the placing of the wire in the street by the defendant must have been the sole cause of the injuries of the plaintiff; that the defendant is not liable for injuries resulting from an accidental intervening or other proximate cause, notwithstanding its negligence in placing the wire in the street. The defendant contends that the plaintiff would not have been injured if the horse had not run against and broken the wire, and therefore the defendant is not liable, however negligent it was in putting the wire in the street. *Brennan v. City of St. Louis*, 92 Mo. 482, 2 S. W. 481, is very

similar, in its facts and principles involved, to the case at bar. In that case the plaintiff, a child 3 years old, was with her sister, 13 years old, who was pushing a baby carriage with a baby in it, and were all on the sidewalk, close to a ditch which had existed for some months, when another little girl came up, stumbled against the plaintiff, and both fell into the ditch, and plaintiff's leg was broken. In discussing that case the court said: "The first contention is that plaintiff should have been consulted because, from all the evidence, it appears the condition of the street was not the cause of the accident, but that it was caused by the stumbling of the other girl. It is true, no amount of care on the part of the city government can prevent children, or, for that matter, grown people, from stumbling. All this does not relieve the city from the necessity of keeping the streets in a reasonably safe condition, though the want of care on the part of the person injured may prevent a recovery. Cases are to be found where it seems to be held, under like circumstances, that, in order to recover, it must be proved that the injury was occasioned solely by the neglect of the defendant, and not the neglect of the defendant combined with some accidental cause. But this court, in discussing a like question in *Bassett v. City of St. Joseph*, 53 Mo. 290, loc. cit. 300, said: 'It is true that, if it had not been for the attempt of the mule to kick, the injury might not have occurred; and it is equally true that, if there had been no excavation at hand, the kicking of the mule would have been harmless.' And further on the conclusion is reached that, if the plaintiff was without fault, she would have a right to recover, notwithstanding the cause contributing to the injury was the attempt of the mule to kick plaintiff, and she, attempting to protect herself, fell or jumped into the excavation. The same principle, that the plaintiff may recover where he is in the exercise of ordinary care and prudence, and the injury is attributable to the defective street, with some accidental cause, was again asserted in *Hull v. Kansas City*, 54 Mo. 598, and must be taken as established law in this state." So while it may be true that plaintiff here would not have been injured if the horse had not run against and broken the guy wire, it is also true that the horse would not have run against and broken it if defendant had not negligently placed it in the street. In *Railway Co. v. Prescott*, 8 C. C. A. 109, 59 Fed., at page 242,—a case quite similar to the one at bar,—the court say: "With respect to the suggestion that the injuries complained of were immediately occasioned by the sudden shying of the horse which the plaintiff was driving, it is only necessary to say that the shying of the horse cannot be regarded as the sole proximate cause of the injury.

The obstruction which had been placed in the highway directly contributed to the accident, and the jury was justified in so finding." And see authorities cited. This authority holds that there may be more than one cause contributing to the injury, and that if the obstruction placed in the street contributed to the injury, and the shying of the horse was not the sole cause, then the defendant was liable. The same doctrine is asserted in *Ivory v. Town of Deer Park*, 116 N. Y. 476, 22 N. E. 1080. In *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, a boy walked upon defendant's track, and was injured. It was the duty of defendant to fence its track. In this case the road contended that the want of a fence was not the cause of the injury; that the cause of the injury was the boy's negligently going upon the track. In other words, the defendant contended that the want of a fence was not the sole proximate cause of the injury. The court, in treating this contention, said: "It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause,—*causa causans*,—this is, no doubt, strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it *causa sine qua non*; a cause which, if it had not existed, the injury would not have taken place; an occasional cause? And that is a question of fact, unless the causal connection is evidently not proximate."

We think it was the duty of the defendant to have placed this guy wire so high above the ground that persons could pass under it, either on foot or horseback, in the day or night time, without danger of being injured. Placed as it was, it was not only an obstruction to the free and ordinary use of the street, but it was dangerous to the safety of persons who had the right to travel the streets. We think that a reasonably prudent person must have foreseen, when stringing this wire in the street as it was strung, that just such accidents and calamities were liable to occur as happened to the plaintiff in this case. Persons and corporations acquiring franchises and privileges to use the streets of towns and cities in this state, for profit, should be held to a strict observance of legal obligations to guard and protect the persons, lives, and property of the inhabitants thereof.

We have treated all the questions presented which we deem material to a determination of the case. We think the case was properly and fairly tried, and the right result reached. The judgment and order appealed from are affirmed.

DE WITT and HUNT, JJ., concur.

STATE v. GLEIM.

(Supreme Court of Montana. Oct. 7, 1895.)

INDICTMENT AGAINST ACCESSORY—EVIDENCE—INSTRUCTIONS—EXAMINATION OF WITNESS—COMPETENCY OF JUROR.

1. Though the distinctions between accessories before the fact and principals are abolished, an indictment first setting out the guilt of the principal offender, and then charging that, "before the commission of said felony, defendant did" "counsel, aid, incite, and procure" said principal to commit the felony, is unobjectionable.

2. On the trial of one who, at common law, would have been an accessory before the fact, the record of conviction of the principal is prima facie evidence of the latter's guilt.

3. Where one of defendant's attorneys, before testifying for the defense, did not ask permission to argue the case, as required by a rule of court, it was not error to refuse to permit him to do so.

4. A charge that the law did not require the jury to be satisfied beyond a reasonable doubt of each link of the chain of circumstances relied upon to establish defendant's guilt; that it was sufficient if, taking all of the testimony together, the jury was satisfied beyond a reasonable doubt of defendant's guilt,—was erroneous, as it was necessary for the state to prove beyond reasonable doubt each fact and circumstance necessary to complete the chain.

5. The jury being the sole judges of the weight of the evidence, it was error to charge that defendant's voluntary admissions, proved by competent testimony, were entitled to great weight.

6. The prosecution has no right to examine defendant so as to elicit testimony reflecting on her moral character, where it was not proper cross-examination, and did not legitimately tend to impair her credibility.

7. A juror who has formed a fixed opinion as to the guilt or innocence of the principal offender ought not to sit on the trial of the person charged as an accessory.

8. It was proper to refuse to permit a witness to be asked, for the purpose of affecting her credibility, whether she was addicted to the morphine habit, unless it was intended to show that she was under the influence of the drug at the time the events happened about which she was testifying, or that her powers of recollection were impaired thereby.

9. An instruction defining moral certainty should state that the juror must be so convinced by the evidence of the truth of the fact that he himself would venture to act upon such conviction in matters of the highest concern and importance to his own interests.

Appeal from district court, Missoula county; F. H. Woody, Judge.

Mary Gleim was convicted of assault with intent to commit murder, and appeals. Reversed.

Toole & Wallace, for appellant. H. J. Haskell and Thos. C. Marshall, for the State.

HUNT, J. Patrick Mason, Mary Gleim, and William Reed were jointly indicted for an assault, with intent to commit murder, upon one Burns. Appellant, Mary Gleim, was separately tried after Mason had been convicted. She was found guilty, and sentenced to the penitentiary for 14 years.

1. Appellant contends that the indictment will not support a verdict and judgment of guilty, "because it nowhere charges that

said Mary Gleim committed the crime of assault with intent to murder." The material charging parts of the indictment are as follows: "That one Patrick Mason, late of the county of Missoula, state of Montana, on or about the 13th day of February, A. D. 1894, at the county of Missoula, in the state of Montana, did feloniously, deliberately, premeditatedly, and of his malice aforethought, make an assault in and upon one C. P. Burns, and certain giant powder and other highly explosive substance, a more particular description of which is to said jurors unknown, in, upon, around, and under the house where the said C. P. Burns was then and there present and sleeping, did feloniously, deliberately, premeditatedly, and of his malice aforethought, put and lay, and the same did then and there, feloniously, deliberately, premeditatedly, and of his malice aforethought, explode, and cause to be exploded, with intent in him, the said Patrick Mason, to kill and murder the said C. P. Burns. And that before the commission of the said felony, at the time and place aforesaid, one Mary Gleim and William Reed did feloniously counsel, aid, incite, and procure the said Patrick Mason to commit, in manner and form aforesaid, the said felony. All of which is contrary to the form of the statute," etc. The indictment is substantially a common-law charge against Mason as principal and Mary Gleim as an accessory before the fact. It follows the precedents of Wharton (1 Whart. Prec. Ind. § 97) and of Archbold (Archb. Cr. Prac. & Pl. pp. 67, 77). Bishop on Criminal Procedure (volume 2, § 8), quoting Chitty on Criminal Law, lays down the course to be—First, to state the guilt of the principal, as if he alone had been concerned; and then, in case of accessories before the fact, to aver that the procurer, "before the committing of the said felony, in form aforesaid, to wit, on, etc., with force and arms, etc., did maliciously and feloniously incite, move, procure, aid, and abet (or counsel, hire, and command) the said principal felon to do and commit the said felony, in manner aforesaid, against the peace, etc."

The statutes (sections 176, 177, Cr. Prac. Act 1887) provide that:

"Sec. 176. Any person who counsels, aids or abets in the commission of any offense, may be charged, tried and convicted, in the same manner as if he were a principal.

"Sec. 177. An accessory before the fact, to the commission of a felony, may be indicted, tried and punished; though the principal be neither indicted nor tried."

By section 12, c. 2, p. 502, Comp. St. 1887, it is provided: "Any person who stands by, and aids, abets or assists, or who, not being present, hath advised and encouraged the commission of a crime, shall be deemed a principal offender, and shall be punished accordingly."

It is plain that the old distinctions be-

tween accessories before the fact and principals are abolished by these statutes (*State v. King*, 9 Mont. 445, 24 Pac. 265); but we see no objection to the form of an information charging a person as an accessory rather than as a principal. To so charge is to the advantage of a defendant, because it notifies him of the attitude which the state will assume when the case is brought to trial, by setting out the facts constituting the offense with greater certainty than is requisite where an accessory is indicted as a principal. This point was directly raised in *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36, where the court held that an information stating facts sufficient to constitute a defendant an accessory at common law charges him with guilt as a principal under the statutes, and that to allege such facts as would have been sufficient against him as an accessory at common law is charging him as a principal under the statute. We are of opinion that the rights of the defendant were not prejudiced by the form of the charge. *State v. Littell* (La.) 12 South. 750; *Territory v. Guthrie* (Idaho) 17 Pac. 39.

2. On the trial of the appellant, Gleim, the court, over the objection of the defendant, permitted the record of the conviction of Mason, the principal actor, to be introduced, and after having fully instructed the jury that it was essential, in order to convict the defendant Gleim, that they should find that Mason was guilty of having committed the crime charged, instructed as follows: "That the record of the trial and conviction of Patrick Mason was introduced in the trial of this case, for the purpose of establishing as a fact, prima facie, the guilt of said Mason. The record is prima facie evidence of the guilt of said Mason, but it is not conclusive evidence. It, however, remains prima facie evidence of the fact which it was introduced to prove, unless you believe from the evidence in this case that the defendant Mary Gleim has introduced evidence in this case which raises in your minds a reasonable doubt (as explained in these instructions) of the guilt of said Mason; but, if such testimony raises in your minds such reasonable doubt of the guilt of Mason, then you should find the defendant Gleim not guilty. But, unless the evidence introduced by the defendant Gleim does raise in your minds a reasonable doubt (as explained in these instructions) of the guilt of the said defendant Mason, you should receive such record of trial and conviction as evidence establishing the guilt of said Patrick James Mason. But, in determining the question of the guilt or innocence of the said Patrick James Mason, you are not confined to the record of trial and conviction introduced in this case, but you should carefully consider all of the evidence introduced in this case tending to prove or disprove the guilt of said Mason; and after a full and careful consideration of all the evidence in the case, in connection

with the record in evidence, you have a reasonable doubt of the defendant Mason's guilt, you should find the defendant Gleim not guilty." While it is true that the statute makes an accessory before the fact a principal, yet the evidentiary facts by which the accessory is to be incriminated may materially differ from those which are necessary and sufficient to convict the principal. In this case, for instance, to incriminate the appellant, Gleim, at all, under the theory of the state, as charged and contended for, it was not only necessary to prove the guilt of Mason, as alleged, but to go further, and to demonstrate beyond a reasonable doubt that the appellant, Gleim, counseled, aided, and abetted Mason in the perpetration of the crime charged. Therefore, although the accessory might be deemed a principal under the statute, and was indicted with the principal, it became impossible for the state to convict appellant upon the same evidence applicable to the principal, because the agency of the accessory in the perpetration of the crime charged operated by a radically different method from the principal's. The statute, in simplifying the procedure, has obliterated old distinctions between principals and accessories, but the object of the simplification is largely to enable a guilty accessory to be punished without making his guilt depend upon the conviction of the principal. The facts, however, that the principal offense was committed, and that the principal who was charged to have committed it was guilty, were among the essential elements upon which must be predicated the guilt of the accessory Gleim. And right here is to be observed an important distinction between proof of a charge against a principal, and an accessory made principal by the statute alone (but indicted with the principal, as in this case), and proof of a charge against several persons, ordinarily jointly indicted as simple codefendants, and who are in fact principals. In the one instance, the accessory before the fact being confessedly absent at the time of the commission of the principal offense, there can be no conviction without proof of the guilt of the principal; while, in the other case, whether or not any defendant other than the one on trial participated in the criminal act is immaterial, and forms no essential part of the case against the defendant on trial. Where, therefore, as in this case, the guilt of the principal must be proved as part of the case against the accessory, we cannot think that it is necessary for the state, where the principal has been convicted, to do more on its prima facie case than to offer the record of conviction of the principal as prima facie evidence of his guilt of the crime charged against him. We do not think that the fact that the principal has been convicted is proof of the guilt of the accessory. But it does make out a prima facie case of the principal's guilt, and unless rebutted by evidence of the accessory, as it

may be, is competent to prove that material element of the crime charged against the accessory, and upon the truth of which must depend the guilt of the accessory; namely, the commission of the crime of the principal, for which she is held responsible in law, provided she procured or aided and abetted the principal to commit the same. Although there are some cases holding a contrary view, we are satisfied with the reasoning of the authorities which permit the introduction of the record of the conviction of the principal. *Maybee v. Avery*, 18 Johns. 352; *People v. Buckland*, 13 Wend. 593; *Levy v. People*, 80 N. Y. 327; *State v. Mosley*, 31 Kan. 355, 2 Pac. 782; *Com. v. Knapp*, 10 Pick. 477; *Abb. Trial Brief (Cr.)* § 624; *Anderson v. State*, 63 Ga. 675; *Rosc. Cr. Ev.* p. 171; 1 *Russ. Crimes*, p. 87; *Archb. Cr. Prac. & Pl.* p. 83; *Com. v. York*, 9 Metc. (Mass.) 93; *Studsill v. State*, 7 Ga. 2.

3. Joseph K. Wood, Esq., of counsel for appellant, was a witness in defendant's behalf upon the trial. He desired to participate in the argument for the defense. The court refused to permit him to do so, under a rule of court which provides that if the attorney of either party offers himself as a witness in behalf of his client, and gives evidence on the merits of the trial, he shall not argue the case or sum it up to the jury, unless by permission of the court. It does not appear by the record that, before the counsel testified, he explained to the court his position, and asked permission to argue the case. Under the circumstances, we cannot think that the enforcement of the rule was erroneous or even harsh.

4. The defendant asked the court to instruct the jury upon the law of circumstantial evidence, as follows: "The testimony in this case is wholly circumstantial. And while it is not necessary, in order to warrant a conviction on a criminal charge, for the state to prove the commission of the act by an eyewitness or by direct testimony, and while the guilt of the defendant may be established by circumstantial evidence, still, in order to support a conviction upon circumstantial evidence alone, each fact and circumstance necessary to complete the chain to fasten the guilt upon the defendant must itself be distinctly and independently proven by competent evidence beyond a reasonable doubt; and all the facts and circumstances, when so proven, must not only be sufficient in themselves to satisfy the mind of the guilt of the accused beyond a reasonable doubt, but they must exclude every other reasonable supposition except that of his guilt." The court modified the instruction offered, and gave another upon the subject of circumstantial evidence, so that the jury were instructed as follows: "The testimony in this case is wholly circumstantial. And while it is not necessary, in order to warrant a conviction on a criminal charge, for the state to prove the commission of the act

by eyewitnesses or by direct testimony, and while the guilt of the defendant may be established by circumstantial evidence, still, in order to support a conviction upon circumstantial evidence alone, each fact and circumstance necessary to complete the chain to fasten the guilt upon the defendant must itself be independently proven by competent evidence; and all the facts and circumstances, when so proven, must not only be sufficient in themselves to satisfy the mind of the guilt of the accused beyond a reasonable doubt, but they must exclude every other reasonable supposition except that of his guilt." "That the law requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction does not require that you should be satisfied beyond a reasonable doubt of each link of the chain of circumstances relied upon to establish the defendant's guilt; it is sufficient if, taking all of the testimony together, you are satisfied beyond a reasonable doubt that the defendant is guilty."

The charge that, in order to warrant a conviction, the jury must not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt, but that it is sufficient if, taking all the testimony together, they are satisfied beyond a reasonable doubt that the defendant is guilty, is erroneous and prejudicial to the rights of the defendant. This identical instruction was reviewed by the supreme court of Colorado in the recent and somewhat celebrated *Dr. Graves Murder Case* (*Graves v. People*, 32 Pac. 63). The court there condemn the instruction upon principle, as tending to confuse a jury, and well express our views by saying that "the jury are quite as likely to have applied that portion of the instruction referring to the links to those facts which the law requires to be established beyond a reasonable doubt to warrant conviction as to those evidentiary matters which go to prove such facts, and one or more of which may fall, while the ultimate fact might still be sufficiently established." An Illinois case (*Bressler v. People*, 117 Ill. 422, 8 N. E. 62) has approved of the instructions here complained of, but the reasoning supporting the conclusion of the court is not sound. "It involves," says Thompson on Trials (volume 2, § 2514), "the solecism that, although the circumstances do arrange themselves in the form of the links of a chain, yet that, when one link of the chain is broken, the chain itself may still remain entire; ignoring the obvious conception that no chain can be stronger than its weakest link." The authorities disapproving of these instructions are collected in the Colorado decision to which we have referred. We believe it to be correct that the prosecution need not prove beyond a reasonable doubt every circumstance offered in evidence which tends to establish the ultimate circumstances or facts on which it relies for a conviction,

but if the metaphor of a chain is used, and each circumstance relied upon forms a link, the link becomes a necessary part of the whole chain, and must therefore be proved beyond a reasonable doubt. The cable metaphor, as approved by the Colorado supreme court in *Clare v. People*, 9 Colo. 122, 10 Pac. 799, illustrates the force of circumstantial evidence more clearly perhaps than does the chain comparison. In the cable simile the circumstances which tend to establish the ultimate circumstances or facts are aptly compared with the strands of a cable. All such evidentiary matters going to prove such ultimate circumstances or facts need not be established beyond a reasonable doubt, and still each ultimate fact or circumstance must be proved beyond a reasonable doubt; just as a few strands of the cable may part, and yet it still remains so strong "that there is scarcely a possibility of its breaking." We, therefore, think that, if the chain metaphor is to be used, the instruction, as offered, correctly stated the law, and that it is necessary for the state to prove each fact and circumstance necessary to complete the chain, * * * by competent evidence, beyond a reasonable doubt, etc., and that it was reversible error to charge to the contrary. *Territory v. McAndrews*, 3 Mont. 158.

There are other errors complained of by the appellant. The respondent contends that they are not properly before us for review, but, as the case must be tried again, we will briefly refer to them.

First. Error is assigned upon the following instruction: "That parol evidence of the verbal admissions of a defendant may be evidence of a most satisfactory character. If the jury can see, from the evidence, that the alleged admissions of the crime charged in the indictment were clearly and understandingly made by the defendant, and that they were precisely identified, and the language correctly and accurately repeated by the witness, then such testimony is entitled to great weight." It was error in the court to instruct the jury that testimony of admissions of defendant was entitled to great weight. The jury being the sole judges of the weight to be given to the testimony, the court should not tell them what particular weight to give to any portion of the testimony. *State v. Sullivan*, 9 Mont. 174, 22 Pac. 1088; 2 Thomp. Trials, § 2287.

Second. Upon the trial the counsel for the state, on the cross-examination of the appellant, propounded a great many questions calculated to degrade the defendant before the jury. The inquiry took a wide and varied range. She was asked if she had not rented houses for purposes of prostitution at various places in Montana; whether she had not been "a kind of a backer for the prostitution of female persons in Missoula and Hamilton"; whether she had not had a fight with a priest; whether she had not hugged and kissed a jurymen after she had been found

not guilty of some misdemeanor upon one occasion; whether she had not had a fight with a French prostitute at some time; and whether, at another time, she had not "run a young gentleman through a saloon"; whether she had not been drunk when she was in jail; and, finally, if her picture did not hang in the Rogue's Gallery in the city of New York. We cannot conceive upon what theory of the law this line of testimony was allowed. It was not cross-examination of what appears by the record to have been the appellant's evidence in chief, nor did it legitimately tend to impair the credibility of the defendant as a witness. Its effect must have been highly injurious and prejudicial to the defendant in the minds of the jury. Most of the matters involved in the questions were wholly remote from the question of her guilt or innocence of the crime for which she was on trial, and the investigation seems to have drifted to a rambling assault upon the general character of the defendant, extending not only to all of the offenses with which she may have ever been at any time charged, or even suspected, whether rightfully or not, but likewise to cases where she was acquitted, and to her infirmities of habit, her obscenity of speech, and general depravity of life. Such an examination we most earnestly disapprove of. It was oppressive and unjust, no matter how wicked or degraded the defendant may have been by common report. We find a well-considered decision, censuring such an examination of a defendant, in the recent case of *People v. Un Dong (Cal.)* 39 Pac. 12.

Third. It does not appear whether or not any of the jurors who sat upon the trial of this case had stated upon their voir dire that they had fixed opinions as to the guilt of Patrick Mason, the principal, but the appellant's counsel implies that they did, and argues the point in his brief. A juror who has formed a fixed opinion as to the guilt or innocence of the person charged to be the principal offender ought not to sit upon the trial of the person charged as an accessory. *Arnold v. State*, 9 Tex. App. 435.

Fourth. We see no error in refusing to permit a witness to be asked, on cross-examination, for the purpose of affecting her credibility, whether or not she is addicted to the morphine habit (*State v. White [Wash.]* 39 Pac. 160), unless it is proposed to show that the witness was under the influence of the drug at the time the events happened about which she testified, or unless she is under the influence of morphine at the time she is testifying, or unless it is made to appear that her powers of recollection are impaired by the habitual or excessive use of the drug.

Fifth. The court defined a reasonable doubt in substantially the exact language of the *Webster Case*, 5 Cush. 320, and which was expressly approved of in *Territory v. McAndrews*, 3 Mont. 158. As part of the definition, however, of a moral certainty, the court

charged that "moral certainty may be said to bear the same relation to matters relating to human conduct that absolute certainty does to mathematical subjects. It is a state of impression produced by facts in which a reasonable man feels a sort of coercion or necessity to act in accordance with it. It is not only what men in general will unhesitatingly believe to be true, but what they will be willing to act upon." If the definition of moral certainty is to be given at all, "to be thoroughly impressive it should be carried one step further. * * * Is the juror so convinced by the evidence of the truth of the fact sought to be proved that he himself would venture to act upon such conviction in matters of the highest concern and importance to his own interests? If this be so, he may declare himself morally certain." *Territory v. McAndrews*, supra.

The condition of the record in this case is faulty. The transcript recites that the instructions given by the court are as follows. Then follow what, doubtless, were the instructions read to the jury. At the conclusion of many such instructions, however, we find the word "Given," and, at the conclusion of others, "Given as modified," without specifying what the instruction given was.

The error of the court in charging as it did upon circumstantial evidence is properly presented, and upon that point the case is reversed, and a new trial ordered. Reversed and remanded.

PEMBERTON, C. J., and DE WITT, J., concur.

BLAINE et al. v. BRISCOE et al.

Appeal of HIGGINS.

(Supreme Court of Montana. Sept. 30, 1895.)

JUDGMENT BY DEFAULT—VACATING—CONTEMPT.

1. The court was justified in refusing to set aside a default where, though appellant was not served with summons, her son-in-law and agent employed attorneys to appear for her, and, though said agent made affidavit that he employed said attorneys without her consent, appellant, on appeal, argued that the demurrer interposed by the other defendants should have been sustained, and it did not appear when appellant first had knowledge of such appearance or default, nor that on discovering said default she immediately moved to set it aside.

2. Code Civ. Proc. 1887, § 584, subd. 9, provides that "any other unlawful interference with the process or proceedings of a court" shall constitute contempt. *Held*, that the unauthorized employment of counsel to appear for another may constitute contempt.

Appeal from district court, Lewis and Clarke county; H. R. Buck, Judge.

Action by Mary Louise Blaine, administratrix of the estate of Alice M. Blaine, and others, against John O. Briscoe and others. From a judgment overruling a demurrer to the complaint, and from an order refusing to vacate that judgment, W. E. Higgins, as administrator of the estate of Sarah J. Coyle, appeals. Affirmed.

This is an appeal from a judgment rendered upon the overruling of defendants' demurrer to the complaint, and also an appeal from a special order made after judgment denying the motion of defendant Sarah J. Coyle to set aside the judgment in the case. The complaint was filed October 10, 1893. A demurrer on the part of all the defendants was filed by Messrs. Word & Smith, attorneys at law, on October 16, 1893. The demurrer was overruled October 19, 1893. On November 20th the default of John O. Briscoe and Sarah J. Coyle was entered. On the 23d of November, judgment was entered in favor of plaintiffs, and against the defendants.

W. J. Anson, for appellant. Toole & Wallace, for respondents.

DE WITT, J. On the appeal from the judgment, the only matter now for consideration is whether the demurrer to that pleading was properly sustained. Nothing appears to indicate that there was any defect in the complaint by reason of which the demurrer should have been sustained. The judgment must therefore be affirmed.

The point upon which the defendant Sarah J. Coyle or her administrator now relies is the alleged abuse of discretion by the district court in denying her motion to set aside the default. The motion was made upon the ground that she was never served with summons, and that the appearance for her by Messrs. Word & Smith, attorneys at law, was unauthorized. It is true that she was not served with summons. But, if she appeared by counsel, that was equivalent to service of summons. Code Civ. Proc. 1887, § 80. As against this proposition, Mrs. Coyle's counsel contend that she never authorized Messrs. Word & Smith to appear for her. The facts, as they appeared upon the hearing of the motion, were as follows: John O. Briscoe, one of the defendants, was the son-in-law of the defendant Mrs. Coyle. Briscoe had formerly owned the real estate in dispute, and had conveyed the same to his mother-in-law. He was Mrs. Coyle's managing agent in renting and caring for the property. Upon the service of summons upon Briscoe, he retained Messrs. Word & Smith in the case, informing them that he had authority to employ counsel to appear for the defendant Mrs. Coyle. Upon this information and request from Briscoe, Mr. Robert B. Smith, of that law firm, filed a demurrer for all the defendants. As noted in the statement of the case above, this demurrer being overruled, all of the defendants defaulted for want of an answer, and judgment was entered. On the motion to open the default and set aside the judgment, Mrs. Coyle filed her affidavit, in which she stated that she did not know Messrs. Word & Smith, and that she never authorized them to appear for her. Upon the motion there was also filed the affidavit of John O. Briscoe. That affidavit is as follows: "State of Montana, County of

Lewis and Clarke—*vs.*: J. O. Briscoe, being duly sworn, deposes and says that he is the agent of Sarah Coyle, one of the defendants in the above-entitled action, for the purpose of renting and collecting rents of the property in dispute by and between these plaintiffs and defendants herein; and this affiant further deposes and says that he voluntarily, and without the knowledge, consent, or approval of the said Sarah Coyle to employ counsel to represent her in the said cause, that he did authorize Messrs. Smith & Word to appear and represent her interest in this entitled action. J. O. Briscoe. [Duly verified.]” There were a great many other affidavits filed on the motion, which do not seem to us to be of great importance. Upon the showing made, the district court refused to open the default. The defendant Mrs. Coyle appealed. Since the filing of the record, Mrs. Coyle has died. W. E. Higgins, her administrator, has been substituted in her stead.

Granting and denying motions to open defaults are matters within the sound discretion of the district court. Upon the bare showing made by the affidavits, it might appear, perhaps, that there was ground for the district court to set aside this default, and allow Mrs. Coyle to file an answer. But there are other circumstances in this case which addressed themselves to the discretion of the district court. It is significant to observe that Mrs. Coyle, in the district court and in her brief in this court, seeks to take every advantage which might accrue to her by virtue of the filing of the demurrer by Mr. Smith. She even comes here and argues that the demurrer should have been sustained. She puts herself in the inconsistent position of seeking the benefit of Mr. Smith's legal services, and at the same time of repudiating his authority to appear for her. Again, it is to be noted that Mrs. Coyle's default was entered November 20th. She moved to set it aside on January 3d. She studiously avoided to state in her affidavit when she obtained information that Mr. Smith had appeared for her, or that her default was entered. For all that appears, she may have been fully aware of the appearance of these attorneys from the very day when they filed their demurrer, which was October 16th. Her omission to state when she obtained this information is extremely significant. In moving to set aside a default, one must be prompt, and not dilatory. If Mrs. Coyle were surprised at finding this judgment entered against her, if she were surprised that Messrs. Smith & Word appeared for her, she should, in fairness to the district court, have stated when she obtained this information. Her silence in this respect leaves her open to the well-founded suspicion that she was playing for any advantage by Mr. Smith's appearance, and for a repudiation of such ap-

pearance when it suited her convenience. Furthermore, we have the fact of Mrs. Coyle being a family connection of defendant Briscoe, and the further statement of some of the affidavits that it was understood that, when Mrs. Coyle was in this state, she resided in the family of said Briscoe. Under all of these circumstances, and owing to the further fact that, if any injustice had been done Mrs. Coyle, she has a remedy in an action in equity, we are of opinion that the district court did not abuse its discretion in declining to open the default. The judgment and the order are affirmed.

In remitting this case to the district court, we call the attention of the district judge to the remarkable affidavit of J. O. Briscoe, which has been quoted in this opinion above. It is provided in section 584 of the Code of Civil Procedure (1887) as follows: “The following acts or omissions, in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: * * * Ninth. Any other unlawful interference with the process or proceedings of a court. * * *” Whether the conduct of Briscoe, as disclosed by the record, is a contempt, is a question which has not been investigated or argued before us. It would seem that such conduct was an unlawful interference with the proceedings of the district court. Briscoe employed Mr. Smith to appear for Mrs. Coyle. This is not denied. Then he boldly states that he did this voluntarily, and without the knowledge, consent, or approval of Mrs. Coyle. The district court is advised to institute proper proceedings for the determination of whether said Briscoe was guilty of contempt of court, and, upon such inquiry, to deal with him as seems proper and just under the law and the facts. Remittitur forthwith. The judgment is affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(17 Mont. 53)

STATE v. SIMMS.

(Supreme Court of Montana. Oct. 14, 1895.)

Appeal from district court, Cascade county; C. H. Benton, Judge.

Samuel Simms was convicted of grand larceny, and appeals. Affirmed.

J. A. Hoffman, for appellant. H. J. Haskell, for the State.

PER CURIAM. The defendant was convicted in the district court of the crime of grand larceny. This is an appeal from the judgment. There was no motion in arrest of judgment in the court below. No errors in the judgment have been called to our attention, and we have discovered none. The information is sufficient to support the judgment. The appeal is absolutely without merit. The judgment is affirmed.

**STATE ex rel. AACHEN & M. FIRE INS.
CO. v. ROTWITT, Secretary of State.**

(Supreme Court of Montana. Oct. 14, 1895.)

FOREIGN CORPORATIONS—CONDITIONS PRECEDENT TO DOING BUSINESS—CONSTRUCTION OF STATUTES—FOREIGN FIRE-INSURANCE COMPANIES—FILING COPY OF CHARTER—STATUTORY PROVISIONS—IMPLIED REPEAL—GENERAL AND SPECIAL ACTS.

1. Comp. St. 1887, c. 24, provided that all foreign corporations should file with the secretary of the territory a copy of the charter or certificate of incorporation, and a statement of the finances of the company, and a designation of attorney for service of process. Act March 8, 1893, expressly repealed Comp. St. 1887, c. 24, and provided that a foreign corporation could do business after filing with the secretary of state a certified designation of an agent for service of process in the state. Civ. Code, 1895, §§ 1030-1033, re-enacted provisions similar to Comp. St. 1887, c. 24, but in different phraseology, with different provisions as to penalties and reports of finances. Pol. Code, 1895, § 5186, passed after the enactment of Civ. Code 1895, §§ 1030-1033, expressly declares that Act March 8, 1893, shall be in full force. *Held*, that Civ. Code 1895, § 1030, requiring a foreign corporation to file with the secretary of state a copy of its charter, and section 1083 a semi-annual report, were new and original enactments, and therefore not affected by the re-enactment in Pol. Code 1895, § 5186, of the repealing clause of Act March 8, 1893.

2. Where two acts relating to the same subject-matter are passed at the same session of the legislature, there is a strong presumption against implied repeal, and both acts will be given effect as far as compatible.

3. Civ. Code 1895, § 1030, requires a foreign corporation to file a copy of its charter with the secretary of state; and section 1034 provides that the act shall be applicable to foreign life insurance companies not conducted on the assessment plan. *Held*, that, since such insurance companies are not regulated by any other statutes, their mention operates as an exclusion of all other foreign corporations which are specially regulated by other statutes.

4. The conditions precedent to the doing of business by foreign fire insurance companies being regulated by Civ. Code, tit. 4, c. 1, § 650 et seq., providing, among other things, that they shall file a copy of their charter with the state auditor, such companies are not affected by Civ. Code, § 1030, relating to foreign corporations generally, and requiring them to file such charter with the secretary of state.

Appeal from district court, Lewis and Clarke county; H. N. Blake, Judge.

Petition by the Aachen & Munich Fire Insurance Company for a writ of mandamus to Louis Rotwitt, secretary of state, to compel respondent to file a copy of petitioner's charter. From a judgment quashing the writ, with costs, petitioner appeals. Reversed.

Relator avers that it is a foreign fire insurance corporation, with its principal place of business in Aix-la-Chapelle, Germany; that, desiring to do business in Montana, and to avail itself of the rights conferred upon foreign corporations by sections 659 and 670, tit. 4, c. 1, Civ. Code Mont., it duly filed in the office of the state auditor a written appointment of an agent within the state to receive service of process on behalf of said company, with acceptance of such appointment by such agent,

also a certified copy of the charter and articles of incorporation of said company, and a statement giving the name of said company, the place where located, the amount of its capital stock, the deposit of money for the benefit or security of the assured, and a copy of the last annual report of said company, and in all respects complied with the provisions of said statute, and paid the state auditor the sum of \$81, the amount of his fees and proper charges; that thereupon the state auditor duly issued to said company a license and certificate of authority to do its insurance business within the state of Montana; that thereafter, on July 30, 1895, the said company presented to the secretary of state a certified copy of its charter and articles of incorporation, with the appointment of an agent for this state, and requested said respondent, the secretary, to file and record said papers in said office, and tendered to said respondent \$5, his legal fee for services in and about the premises; that the said secretary refused to receive and file the said certified copy of said company's charter or articles of incorporation, or the designation of said company's authorized agent, and refused the tendered fee; that said refusal was in violation of the duties of the secretary of state; that deponent has no plain, speedy, and adequate remedy in the ordinary course of law in the premises, and therefore prays for an alternative writ of mandate commanding the secretary of state to receive and file the papers of said company, or show cause why he has not done so. An alternative writ was issued by the district court. The respondent, the secretary of state, through his counsel, the attorney general, moved to quash the petition, upon the ground that it did not state facts sufficient to warrant the relief prayed for. The court sustained the motion to quash, and rendered judgment in favor of respondent for costs. The relator appeals from the judgment.

H. G. & S. H. McIntire, for appellant. H. J. Haskell, for respondent.

HUNT, J. (after stating the facts). The legislature of 1895, in fixing the official fees of the secretary of state, provided, by subdivisions 3, 4, and 10, § 410, Pol. Code, that "for receiving and filing each certificate of incorporation he shall charge and collect the sum of fifty cents on each one thousand dollars of the capital stock of any company or corporation: * * * provided, that no additional fee shall be charged for filing and recording articles of incorporation; * * * for issuing each certificate of incorporation, three dollars; for filing and recording notice of appointment of agent, five dollars."

The contention of the relator is that there is no existing law requiring a foreign fire insurance corporation to file a copy of its charter or articles of incorporation in the office of the secretary of state. It is conceded by the petition of relator that it is necessary

for it to file with the secretary (respondent) a written designation of an agent to receive service of process on its behalf, but it insists that when this written designation is tendered to the secretary, with the fee for filing and recording the same, nothing more is required of relator as a condition precedent to its right to do business in the state, and that the state cannot exact the sum of 50 cents upon each \$1,000 of the company's capital stock. The state, on the other hand, insists that the relator must file with the respondent a certified copy of its articles of incorporation, in addition to its designation of an agent to receive process, and must pay the fees prescribed by section 410 of the Political Code, referred to, before it can do business within Montana. To decide the question, we must closely inquire into the various statutes of the state and territory, imposing certain conditions upon foreign corporations.

By the act of the legislative assembly "concerning fire insurance companies and agents," approved February 21, 1879 (Sess Laws 1879, p. 54), it was made unlawful for any foreign fire insurance company to do business in Montana unless possessed of an actual capital of \$200,000; and any such company desiring to do business in Montana was obliged to appoint an agent upon whom process could be served, and to file the authority of such agent with the auditor of the territory. This act also required a foreign fire insurance company to file a certified copy of its act of incorporation or charter, with a statement showing the amount of capital stock, assets, liabilities, etc., with the auditor of the territory. It was made unlawful for any such company to do any business until it had first procured a certificate from the auditor stating that the company had complied with the provisions of the act. This act also appears in Rev. St. 1879, p. 559, c. 31. By an act approved February 14, 1881 (Laws 1881, p. 52), concerning insurance companies and agents, the provisions of the act of February 21, 1879, were extended to life as well as fire insurance companies. By an act "regulating insurance companies," approved March 8, 1883 (Laws 1883, p. 67), the formation of insurance companies within the territory was regulated; and, among other things, it was provided, by sections 23-26 of said act, that foreign fire insurance companies should file a designation of an attorney to acknowledge service of process for such company in Montana, and also a certified copy of their charter or deed of settlement, etc., with the auditor. The provisions of the law of 1883 are found, in substance, in sections 586-589, pp. 777-779, div. 5, Gen. Laws (Comp. St. 1887). By an act concerning foreign corporations, approved July 22, 1879, to be found also in chapter 24, p. 720, Comp. St. 1887, all foreign corporations were required to file in the office of the secretary of the territory, and in the office of the county recorder of the county wherein they intended to carry on busi-

ness, a duly-authenticated copy of their charter or certificate of incorporation, together with a statement of the financial affairs of such corporation, and a designated attorney or person upon whom service of process could be had. By an act approved March 2, 1893 (Laws 1893, p. 103), entitled "An act to amend section 586 of the fifth division, Compiled Statutes of Montana" (which was really taken from part of the act of 1883), the legislature amended section 586, in particulars, however, not material to the question under investigation. Thereafter, on March 8, 1893 (Laws 1893, p. 91), by an act to provide the conditions "upon which foreign corporations may do business in this state," it was provided that, before any foreign corporation could begin to carry on business in Montana, it should, by its certificate, under the hand of its president and the seal of such company, file in the office of the secretary of state a designation of an agent upon whom service of process might be made.

It is important at this point of the investigation to note that in this last act of March 8, 1893, there is an express repeal of chapter 24, p. 720, Comp. St. Mont. 1887. The noticeable differences between the new law of 1893 and the repealed chapter 24, were these: In the old act there was a requirement that a foreign corporation should, before doing business within the state, file in the office of the secretary of state, and in the office of the county clerk of the county wherein it intended to carry on business, a duly-authenticated copy of its charter or certificate of incorporation, and a statement of its financial matters in detail. All these provisions were entirely omitted in the new law, which swept away the whole of chapter 24. The new law simply provided that foreign corporations should, before commencing business, file with the secretary of state a certificate designating an agent upon whom service of summons and other process could be made, and stating the principal place of business of such corporation in Montana. The penalties for omitting to file the certificate or certificates required were also different under the two laws. But it is beyond dispute that from 1893 up to the time of the adoption of the Codes there were no requirements of foreign corporations as conditions precedent to their right to do business in the state, except those embodied in the law of 1893. Advancing to later legislation, we must ascertain the condition of the law as affected by the new Codes of 1895. The Civil Code was duly approved February 19, 1895. It was acted upon by the legislature as it had been reported by the Code commission in 1892. Doubtless, it was thought more convenient to pass the Codes as reported, and thereafter to legislate with relation to the Codes as adopted. Examining the Civil Code, we at once find that statutes similar, but by no means identical, with the provisions of chapter 24, of the

Compiled Statutes of 1887, were adopted as a part of the new Civil Code of the state, under title 11, "Foreign Corporations." See sections 615-618, p. 115, of the Civil Code reported by the Code commission.

A principle of construction is here properly invoked. The legislature are presumed to have passed the Code, and this title 11 as part of it, with deliberation, and with knowledge of the law which existed at the time of the passage of this Code, to wit, the act of March 8, 1893, and which had expressly repealed chapter 24 as it stood in the Compiled Statutes of 1887. They were not bound, however, to approve of the action of the legislature of 1893 in repealing chapter 24 of the Laws of 1887; and the presumption is that, in the new sections adopted, they intended to impose obligations upon foreign corporations seeking to do business in the state, similar in most respects to those required before the law of 1893 took effect, and they did so to a great extent. Civ. Code, §§ 1030-1033, inclusive. On March 13, 1895, the same legislature which had passed the Civil Code expressly declared that "An act to provide the conditions upon which foreign corporations may do business in this state," approved March 8, 1893, should be in full force and effect. Pol. Code 1895, § 5186. Part of this act, as hereinbefore stated, contained an express repeal of chapter 24 of the Compiled Statutes of 1887; that is, a repeal of a law with provisions quite, but not wholly, similar to those concerning foreign corporations which had just been adopted by the legislature in the Civil Code as sections 615 to 618. But this declaration that the act of 1893 should be in full force and effect did not affect sections 615 to 618, just theretofore adopted in the Civil Code, because these sections were new and different enactments of the legislature; and a reiteration by the legislature of 1895 of the clause of the law of 1893, repealing chapter 24 of the Laws of 1887 (if such reiteration was intended), could have no effect upon any sections or chapters other than chapter 24 of the Laws of 1887, specifically enumerated, while as to that chapter it was useless, because it had already been repealed two years before. To confirm our view that title 11 of the Codes as adopted (sections 1030-1033, Civ. Code 1895) was a new enactment, and was understood to be such, we find that the phraseology, and in part the substance, of the sections of the two laws, differ. The penalty clauses and the periods fixed for reports are not the same. Besides, about a month after the Civil Code was adopted, the legislature passed an act entitled "An act to amend title 11 of part 4 of the first division of the Civil Code of Montana, entitled 'Foreign Corporations.'" This law was approved March 19, 1895. It added two sections to title 11, pt. 4, div. 1, Civ. Code, exactly as such Code had been reported by the Code

commission in 1892, and as it had been adopted in 1895. These amendments were germane to the title, and were regularly numbered 619 and 620. The legislature thus preserved the title of the chapter and the correct numerical sequence of the sections of the adopted Code relating to the subject of foreign corporations. These amendments were as follows:

"Sec. 619. Any foreign corporation that has heretofore engaged in business, performed acts or made contracts in this state, may, within ninety days from the date this act goes into effect, comply with the provisions hereof, and thereupon all its acts and contracts done and made before this act goes into effect shall be valid and enforceable, any statutes of this state heretofore enacted to the contrary notwithstanding.

"Sec. 620. Foreign life insurance companies, not on the assessment plan, are hereby declared to be embraced within the provisions of this act."

Section 619 is now section 1034, and section 620 section 1035, of the Civil Code (1895). The renumbering was done by the codifier in his arrangement of the various provisions of the Codes.

We conclude, therefore, that the legislature enacted both laws,—the one, title 11, as adopted, by way of new enactment; the other, by express retention of the act of March 8, 1893. As before stated, we regard the repealing clause in the 1893 act as ineffective against the new legislation of 1895. Both laws must therefore be upheld if, by fair and reasonable interpretation, they may be made to operate in harmony and without absurdity. *Suth. St. Const. § 152*. There is a presumption that the legislature did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. "In an endeavor to harmonize statutes seemingly incompatible, to avoid repeal by implication, a court will reject absurdity as not enacted, and accept with favorable consideration what is reasonable and convenient." *Id.* It is also a rule of construction that, where two acts were passed at the same session of the legislature, effect should be given to each, if possible. In such a case the presumption is strong against implied repeal. *Railroad Co. v. Ford*, 53 Tex. 364; *Smith v. People*, 47 N. Y. 330; *Suth. St. Const. § 153*.

Tested by these rules of statutory construction, all that portion of section 1030 which requires foreign corporations to file in the office of the secretary of state a duly-authenticated copy of their charter or articles of incorporation, and also a statement, verified as required by said section, showing the various matters embraced within the six enumerated subdivisions of said section 1030, must be sustained. The latter portion of said section 1030, providing that a foreign corporation shall also file its consent to be sued in

the courts of this state, and a certificate that service of process may be made upon such person, is, we think, repealed by the act of March 8, 1893 (section 1032, Civ. Code), which covers the whole subject of the designation of an agent to receive process. Section 1031 of the Code, requiring the consent of the person designated to act as agent, is not included in any portion of the law of 1893, and seems not to be repugnant to any of the provisions of said law. Certainly, so far as it is in the nature of a rule of evidence, it must be given effect. Section 1033 of the Civil Code, which provides for a semiannual report of the affairs of foreign corporations, is not embraced at all in the act of 1893, and must also be sustained as a new enactment of 1895. Section 1032 of the Civil Code, imposing a penalty upon foreign corporations for omitting to file the documents required to be filed, is clearly repugnant to section 1037, or section 2 of the act of March 8, 1893, so far as it imposes a penalty for failing to file the certificate of designation of an agent upon whom process may be served, and for omitting to state the principal place of business of such corporation in the state. Under general rules, all those portions of section 1032 prescribing penalties which are inconsistent with section 1036 are therefore repealed. Pol. Code, § 5165; Suth. St. Const. § 160.

Having determined that foreign corporations, unless otherwise specially controlled, must file duly-authenticated copies of their charters or articles of incorporation in the office of the secretary of state, and in other respects comply with title 11, Civ. Code 1895, it would be proper, in the present case, to decide the further question whether the secretary may exact the fees provided for in section 410, Pol. Code, were it not for our opinion that foreign fire insurance corporations are not included within the general law requiring foreign corporations to file copies of their articles with the secretary of state.

At the time of the adoption of the Civil Code, and as part of it, we find, in chapter 1, tit. 4, § 650 et seq., a distinct system with relation to stock and mutual insurance companies. This system extends to associations to be formed in the state, and to foreign insurance companies as well. By sections 660 and 670, in order for any foreign fire insurance company to transact any business of insurance in Montana, it must be possessed of \$200,000 of paid-up capital; it must appoint an attorney in each county in which agencies are established, and shall file with the state auditor a written instrument authorizing such attorney to acknowledge service of process, and also a certified copy of their charter or articles of incorporation, together with a statement, under the oath of the president or vice president and the secretary stating the name of the company, and the place where located, the amount of its capital stock, with an exhaustive detailed statement

of the stock and items, as required from companies organized under certain other laws of the state. It is further provided that such statement shall show to the full satisfaction of the state auditor that the company, if organized without the United States, has deposited in some one of the United States or territories not less than \$100,000 for the special benefit of the assured, and shall file a copy of the last annual report. It is declared to be unlawful for any person to act for any insurance company referred to in the chapter in transacting business of insurance in this state without procuring from the state auditor a certificate of authority that such company has complied with the requirements of said chapter. Statements and evidences of investments required of foreign companies must be renewed annually. If the auditor is satisfied that the capital securities and investments remain secure, he shall furnish a renewal of the certificate. The auditor, whenever he deems it expedient, may examine the affairs and condition of any foreign insurance company doing business in the state, and must, if it appears that the affairs of any such company are in an unsound condition, revoke the certificate granted in its behalf, and must publish the notice of revocation thereof; and the agents of the company are required, after notice of such revocation, to discontinue the issuing of policies. By section 678, the auditor's certificate that such a foreign insurance company has in all respects complied with the insurance laws must be published annually.

We are clearly of opinion that the laws relating especially to fire insurance companies contemplate that the state auditor is the official with whom must be filed certified copies of their charter, or articles and other documents required of them by the various sections of the insurance statutes, and that it was not the intention of the legislature to include foreign fire insurance companies in those statutes generally applicable to foreign corporations, and which require them to file certified copies of their articles of incorporation with the secretary of state. Obviously, such was the legislative intent, for, by section 1035 (one of the amendments of 1895), foreign life insurance companies, not on the assessment plan, which appear not to be, especially, strictly regulated by special laws, were declared to be embraced within the provisions of the act under the title of "Foreign Corporations." The expression that this one class of foreign insurance companies should be included in the law strengthens the opinion that other foreign companies, if regulated by law, were to be excluded from the operation of the general law concerning corporations. *Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 643. The case at bar is very like that of *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554, where the supreme court held that where it was the settled policy of

the state for insurance companies to make returns, and receive certificates of authority from the auditor, they could not reasonably be held to be governed by the act concerning foreign corporations generally, which required a certificate to be filed with the secretary of state designating an agent upon whom service might be made, and stating the principal place of business of the corporation within the state. Upon this authority, the relator should not be held to the necessity of filing its articles of incorporation with the respondent (secretary). Nor is it necessary under the general law of 1893, codified as section 1036, Civ. Code, for relator to file a certificate designating an agent to receive process, and a principal place of business in the state, unless possibly such a necessity exists by reason of the date of the approval of the act expressly declaring the act of 1893 in force being subsequent to the date of the adoption of the Civil Code. See Pol. Code, § 5186; *Gutzell v. Pennie* (Cal.) 30 Pac. 836; *Murfree, Foreign Corp.* § 199. A final decision upon this point is reserved, inasmuch as the relator has tendered such a certificate, together with the legal fee for filing and recording the same, to the secretary, and asks for a writ to compel the respondent to file and record the same.

As the alternative writ issued was quashed on respondent's motion, we see no objection to remanding the case, with permission to relator to amend to conform to the views of this opinion. *State v. Baggott*, 96 Mo. 63, 8 S. W. 737; *State v. City of Milwaukee*, 22 Wis. 380; *Brown v. Rahway*, 51 N. J. Law, 279, 17 Atl. 122; *Hlgh, Extr. Rem.* § 579. The judgment of the district court is therefore reversed, and the proceeding is remanded, with directions to permit the relator to amend his petition by limiting the averments and prayer of the same to an application for a writ of mandate to compel the secretary of state, upon payment of a fee of five dollars, to file and record the relator's certificate, under the hand of its president and seal of such company, designating an agent, who shall be a citizen of the state, upon whom service of summons and other process may be made, and also stating the principal place of business of such corporation in this state; and, when such petition is so amended, let a peremptory writ issue from the district court accordingly. Reversed and remanded.

PEMBERTON, C. J., and DE WITT, J., concur.

(109 Cal. 197)

BANK OF UKIAH v. GIBSON et al. (No. 15,862.)

(Supreme Court of California. Sept. 25, 1895.)

CHATTEL MORTGAGES—VALIDITY—BONA FIDE PURCHASER.

1. A chattel mortgage of property other than that which Civ. Code, § 2955, provides may be mortgaged, is nevertheless valid as against the mortgagor, or a purchaser from him

with notice of the mortgage, though there was no delivery of the mortgaged property.

2. Such mortgage is also valid as against a purchaser of the mortgaged property without notice of the mortgage, where such purchaser gave her notes for the price, and the notes are still unpaid in the hand of her vendor, who, with notice of the mortgage, purchased the property from the mortgagor. *McFarland, J.*, dissenting.

In bank. Appeal from superior court, Mendocino county; R. W. Orump, Judge.

Action by the Bank of Ukiah, a corporation, against H. S. Gibson, T. J. Weldon, and Mrs. M. O. Drew, to foreclose two mortgages. From so much of the judgment as denied foreclosure as to part of the property included in the mortgage, plaintiff appeals. For former report, see 89 Pac. 1039. Reversed.

J. A. Cooper, for appellant. J. M. Mannon, T. L. Carothers, J. W. Oates, J. Q. White, and J. H. Seawell, for respondents.

GAROUTTE, J. Plaintiff brought this action to foreclose two mortgages given by defendant Gibson, one upon certain real estate, and the other upon certain sheep and neat cattle. One Weldon purchased the cattle and sheep of Gibson, the owner, subsequent to the date of the mortgage, and prior to the commencement of the foreclosure proceedings, and thereafter sold the sheep to Mrs. M. O. Drew. These vendees are made defendants. The court entered a decree foreclosing the mortgage as to the real estate and the neat cattle, but denied a foreclosure as to the sheep, and plaintiff now appeals from that portion of the judgment denying a foreclosure as to the sheep. This appeal is before us upon a judgment roll without a bill of exceptions.

At the time Gibson gave the chattel mortgage to plaintiff upon the sheep and cattle he retained possession of the property, and, although this mortgage was made, executed, verified, and acknowledged as required by law pertaining to chattel mortgages, still sheep and cattle at the date thereof were not among the articles of personal property which could be mortgaged under section 2955 of the Civil Code. But as to the mortgagor, Gibson, the fact that this kind of personal property was not enumerated in said section 2955 is wholly immaterial, for, as between the parties, a chattel mortgage upon any character of personal property is valid. *Tregear v. Water Co.*, 76 Cal. 537, 18 Pac. 658; *Works v. Merritt*, 105 Cal. 467, 38 Pac. 1109. The merits of this appeal rest upon the sufficiency of the findings to support the judgment, and we think the consideration of a single question demands a reversal of the judgment, and a new trial of the case. The court found as a fact that Weldon purchased this personal property from the owner, Gibson, with full knowledge of the chattel mortgage to the plaintiff bank, and as to Weldon there can be no question but that he failed to get any title, either to the sheep or cattle, which would defeat plaintiff's mortgage. It

follows that, as to the neat cattle which remained in his possession, the judgment of the trial court was correct. But let us examine the situation of the defendant Mrs. Drew, who purchased the sheep from Weldon, and took actual possession thereof. The court made a finding of fact to the effect that she had no knowledge of plaintiff's mortgage, and further found that she gave her promissory note in the sum of \$7,300 to Weldon in payment for the sheep, and that said note was payable one day after date, but has never been paid, and that Weldon is still the holder and owner thereof. This state of facts is fatal to her claim of title, for upon such facts she was not a bona fide purchaser for a valuable consideration. While it may be said that she was a bona fide purchaser in a limited sense,—that is, she was free from fraud, and bought without notice,—still she parted with no valuable consideration. She has lost nothing by the transaction, and is in no worse position than though Weldon had made her a present of the sheep. The consideration for her contract having failed, she has a complete defense to any recovery upon the note by Weldon. If the note had been negotiated, and was in the hands of an innocent third party, the case would assume an entirely different form, for an irrevocable obligation would then be outstanding against her; but such is not the fact, as disclosed by this record. Mr. Pomeroy, in his work upon Equity Jurisdiction (section 751), says: "It is further settled that there must be actual payment before any notice, or, what in law is tantamount to actual payment, a transfer of property or things in action, or an absolute change of the purchaser's legal position for the worse, or the assumption by him of some new, irrevocable, legal obligation. It follows, therefore, that his own promise, contract, bond, covenant, bond and mortgage, or other non-negotiable security for the price, will not render the party a bona fide purchaser, nor entitle him to protection; for upon failure of the consideration he can be relieved from such obligations in equity, even if not at law." See, also, *Eversdon v. Mayhew*, 65 Cal. 167, 3 Pac. 641. For the foregoing reasons, the judgment is reversed, and the cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.

McFARLAND, J. I dissent. The mortgage of the sheep was fraudulent and void except as between the parties thereto, under section 3440 of the Civil Code, because it "was not accompanied by an immediate delivery, and followed by an actual and continued change of possession." Sections 2955-2972 apply only to mortgages of the kinds of personal property therein enumerated, and of which, as therein expressly provided, constructive notice may be given by recordation.

A mortgage of any other kind of personal property is simply the "lien" mentioned in section 3440, and comes within the same category as the fraudulent sale or "transfer of personal property" declared in that section to be void. Under the statute the retention of the possession of the property by the vendor or mortgagor is itself an inherent fraud; and third persons should not be driven into a contest of the issue of "notice." If that issue can be raised in every case where the statutory fraud has been committed, the provision of the Code might as well be abolished. In *White v. Cole*, 24 Wend. 123, the court say: "Again, it is said the plaintiff had notice of the lien by mortgage. This is an objection of a very ancient date, one which has been often made, but never without being overruled. The obvious consequence of listening to it would be to furnish a ready expedient for the protection of fraud of the kind now alleged in all cases." Moreover, Mrs. Drew had no notice of the mortgage; and, in my opinion, she was a subsequent purchaser in good faith, within the meaning of section 3440. She purchased from one who had both the legal title and the possession. The doctrine that such a purchase is not valid because not for cash in hand paid does not, in my judgment, apply to a case where the original sale or mortgage sought to be shielded is itself expressly pronounced fraudulent by the statute. In the passage quoted from Pomeroy on Equity Jurisdiction the author is dealing principally with the question of priority under the recordation laws, and with cases where the original transfer was perfectly legitimate, and not in any sense fraudulent. The purchase by Mrs. Drew may have been a very advantageous one to her, and, in order to protect her credit, pledged by her note, she may have been compelled to forego other advantageous business opportunities. Why, therefore, was she not a purchaser in good faith, under section 3440, which has not even the provision "for value," or "for a valuable consideration," as against one whose claim is expressly declared fraudulent? Most of the business transactions of the country are upon the basis of credit. Suppose she had sold the sheep on credit for mutton to wholesale dealers, who had sold them on credit to retail butchers, who had sold them by leg and loin on credit to family customers, by whom they had been eaten, could the appellant have followed down the line, and recovered against any one through whom the sheep or the meat had passed? The rule that a subsequent purchaser has protection only when he has made actual present payment is applicable, in my opinion, only in cases of conveyances of land, where failure to change possession is not declared a fraud, or to mortgages of personal property without change of possession, which are specially provided for by statute. I think the judgment should be affirmed.

BANK OF UKIAH v. GIBSON et al. (No. 15,663.)

(Supreme Court of California. Oct. 1, 1895.)

In bank. Appeal from superior court, Mendocino county; R. W. Crump, Judge.

Action by the Bank of Ukiah against E. S. Gibson and others. From so much of the judgment as is in favor of defendant Drew, plaintiff appeals. Reversed.

J. A. Cooper, for appellant. J. M. Mannon, T. L. Carothers, J. W. Oates, J. Q. White, and J. H. Seawell, for respondents.

PER CURIAM. This is an action in claim and delivery to recover the neat cattle and sheep described in the mortgage to foreclose which the action was brought. *Bank v. Gibson* (No. 15,662, filed September 25, 1895) 41 Pac. 1008. Plaintiff recovered the neat cattle described in its complaint, and defendant Drew had judgment in her favor for the sheep, wool, etc. Plaintiff appeals from so much of the judgment as is in favor of said defendant Drew. That portion of the judgment appealed from is reversed, for the reasons given in, and upon the authority of, *Bank v. Gibson*, supra.

100 Cal. 186

DAVIS v. WARD et al. (No. 18,376.)

(Supreme Court of California. Sept. 25, 1895.)

MORTGAGES—ERRONEOUS DESCRIPTION—RECORD—BONA FIDE PURCHASERS.

1. The record of a mortgage which, by mistake, fails to describe the land intended to be mortgaged, is not constructive notice to a purchaser of such land, as Civ. Code, §§ 1213, 1214, made the record of a mortgage constructive notice only of "the contents thereof." *Erickson v. Rafferty*, 79 Ill. 209, distinguished.

2. In an action to reform a mortgage so as to include land not described therein, the defense of a bona fide purchaser of such land is not established by showing payment of a small part of the purchase money, the giving of notes secured by mortgage on land, and the transfer of the notes and mortgage by the vendor, without showing that the transferee of the notes or mortgage paid value therefor.

Department 2. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Action by John T. Davis against Henry I. Ward and others to reform and foreclose a mortgage. There was judgment in favor of defendants, and plaintiff appeals. Affirmed as to defendant Fleming. Reversed as to the other defendants.

J. A. Hannah, for appellant. Bradley & Farnsworth, for respondents.

McFARLAND, J. This action was brought to have reformed (and foreclosed) a certain mortgage, executed October 8, 1891, by the defendant Ward to one Vancil, and duly recorded April 8, 1892, and by Vancil assigned to plaintiff. Brown, Fleming, and the Visalla Savings Bank were made defendants as claiming some interest in the mortgaged premises. It is averred in the complaint that the mortgage was intended to be of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 13, and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, section 24, in township 18 S., range 25 E., M. D. B. & M., but that by mutual mistake of the parties the mortgage

was made to describe the lands as situated in range 24; and the prayer is to have the mortgage reformed so as to describe the premises as being in range 25. Ward made default. Brown and Fleming answered, setting up that after the execution of said mortgage said Ward had sold and conveyed to Brown about one-half of the said land in range 25, and the remainder to Fleming; and that they were bona fide purchasers for a valuable consideration and without notice of the mistake in said mortgage. (The description in the mortgage would have corresponded with lands bought by Brown and Fleming if the range had been 25 instead of 24.) The bank set up that it was the assignee and holder of two negotiable promissory notes given by Brown to Ward, and also assignee of a mortgage given by Brown to Ward upon the said land purchased by Brown from Ward as aforesaid to secure said notes; and that it purchased said notes and mortgage for value, and without notice, etc. The court granted a nonsuit as to Fleming, Brown, and the bank, and rendered judgment in their favor. From this judgment, and from an order denying his motion for a new trial, plaintiff appeals.

Appellant contends that purchase in good faith without notice, etc., is an affirmative defense, and that, therefore, the granting of the nonsuit was erroneous. But appellant put Brown and Fleming on the stand as his witnesses, and it was proved affirmatively by their testimony that they had no notice nor information of any kind in reference to the said mortgage by Ward to Vancil. It was also proven that Fleming was a purchaser for value, and that he had made full payment of the purchase money at the time of his purchase. The only question, therefore, as far as notice is involved, is whether or not they had constructive notice; and this question must, beyond doubt, be answered in the negative. They were concerned only with the land which they purchased, and were chargeable with constructive notice of whatever the record showed as to that land; and the record showed an unincumbered title to that land in Ward. If it was their duty to have known of the record of the mortgage to Vancil, an examination of that record would merely have shown that the mortgage there recorded was upon land six miles away from the land purchased by them; and the record of that mortgage was constructive notice only of "the contents thereof." Sections 1213, 1214, Civ. Code. It was not constructive notice of any mistake. *Chamberlain v. Bell*, 7 Cal. 293; *Frost v. Beekman*, 1 Johns. Ch. 288; *Sanger v. Oraigue*, 10 Vt. 555; 5 Lawson, Rights, Rem. & Prac. § 2279; Pom. Eq. Jur. § 654. The case of *Erickson v. Rafferty*, 79 Ill. 209, cited by appellant, is not in point. There the subsequent purchaser in that case was so circumstanced as to be put on inquiry, and had been informed that there was a mortgage on the land. So far, therefore,

as respondent Fleming is concerned the nonsuit was properly granted as to him, for it was shown that he was a purchaser without notice, and had paid the purchase money in full. But the turn which the case took left Brown and the bank in a different position.

The authorities leave somewhat doubtful the point whether one setting up the defense of subsequent purchase in good faith without notice must show that he had no notice (*Pearce v. Foreman*, 29 Ark. 568); but the general rule clearly is that he must affirmatively show a purchase for value, and that the purchase money had been paid before notice. There might, perhaps, be peculiar circumstances—such as investments for improvement of the property, etc., so that a purchaser could not be put in statu quo—which would take a purchase made wholly or partly upon credit out of the rule; but the general rule is as above stated. *Eversdon v. Mayhew*, 65 Cal. 167, 3 Pac. 641; *Scott v. Umbarger*, 41 Cal. 419; *Land Co. v. Morgan*, 95 Cal. 552, 30 Pac. 1102; *Isenhoot v. Chamberlain*, 59 Cal. 630; *Boone v. Chiles*, 10 Pet. 210; *Wells v. Morrow*, 38 Ala. 128; *Jewett v. Palmer*, 7 Johns. Ch. 68. In *Eversdon v. Mayhew*, supra, this court, speaking of one claiming protection as a bona fide purchaser, declares that he must aver and prove "the payment of the purchase money in good faith, and without notice actual or constructive, prior to and down to the time of its payment; for, if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser." In *Jewett v. Palmer*, supra, Chancellor Kent says: "A plea of a purchase for a valuable consideration, without notice, must be with the money actually paid; or else, according to Lord Hardwicke, you are not hurt. The averment must be, not only that the purchaser had not notice, at or before the execution of the deeds, but that the purchase money was paid before notice. * * * Even if the purchase money be secured to be paid, yet, if it be not in fact paid before notice, the plea of a purchase for a valuable consideration will be overruled." There are numerous cases to the same effect, in addition to those above cited. Now, in the case at bar, while the evidence did show that Brown purchased without notice, it also showed that the purchase price was something over \$1,300, and that Brown had actually paid only about \$200, and had given his promissory note to Ward for the balance of the purchase money, with a mortgage on the land which he purchased from Ward as security for the note. Nothing had been paid when this suit was commenced except "about \$200," and no circumstance is shown that would take the case out of the rule above stated. He made the purchase about October 14, 1892, and says he heard of the mortgage about two months afterwards; and this present action was brought within three months after his purchase, and when he had notice

of the commencement of the action he had paid only \$200 of the purchase money.

As to the bank, there is no evidence whatever of the condition or validity of its claim; no evidence at all upon the subject. The bank joined with Brown in an answer, in which it is alleged that Brown made two promissory notes to the order of Ward, each for \$573, and executed to him a mortgage upon the land in question to secure said notes; that Ward assigned said notes and mortgage to the bank; and that the bank took said assignment without notice of the mistake in the mortgage to Vancil. There is, also, we think, a sufficient averment in said answer that the bank purchased said notes and mortgage for a valuable consideration. If these averments had been proven, the case would have assumed a very different aspect. If the notes and mortgage were actually assigned to the bank for value, paid to Ward by the bank before any notice, then Brown's defense to the notes of failure of consideration was cut off, and the defense of both Brown and the bank to this action would be complete; for, in that event, the notes would have been payment. *Partridge v. Chapman*, 81 Ill. 137; *Freeman v. Deming*, 3 Sandf. Ch. 327; *Baldwin v. Sager*, 70 Ill. 503; *Pom. Eq. Jur. § 751*, and notes. But there is no proof whatever that these averments were true. Therefore, as the case stood at the time of the nonsuit, the evidence merely showed that Brown had paid only a small part of the purchase money. No other facts material to the subject were shown. Under these circumstances he was entitled to protection only to the extent that he was—to use the expression of Lord Hardwicke—"hurt." The rule, therefore, applies "that where a part only of the price or consideration has been paid before notice, either the defendant should be entitled to the position and protection of a bona fide purchaser pro tanto, or that the plaintiff should be permitted to enforce his claim to the whole land only upon condition of his doing equity by refunding to the defendant the amount already paid before receiving the notice." *Pom. Eq. Jur. § 750*. In *Land Co. v. Morgan*, 95 Cal. 552, 30 Pac. 1102, *Beatty, C. J.*, speaking for the court in bank, said: "The authorities cited in appellant's brief amply sustain the proposition that notice before payment is equivalent to notice before purchase, and that, when there has been a partial payment before notice to a second vendee of the original vendor's lien, he is affected pro tanto as to the residue." Of course, the principle is as applicable to an unrecorded mortgage as to a vendor's lien. See, also, *Burton v. Reagan*, 75 Ind. 77. The judgment and order denying a new trial should be affirmed as to respondent Fleming, but the order granting a nonsuit in favor of respondent Brown and the bank was erroneous, and as to them the judgment must be reversed, and a new trial granted. The new trial should be conducted in

accordance with the views hereinbefore expressed, and the parties should be allowed to make proper amendments to their pleadings if they so desire.

The judgment and order appealed from are affirmed as to the respondent George A. Fleming, and as to the respondents Thomas Brown and the Visalia Savings Bank the judgment and order are reversed, and the cause remanded for a new trial.

We concur: TEMPLE, J.; HENSHAW, J.

100 Cal. 203

HALL v. SUSSKIND. (No. 19,527.)

(Supreme Court of California. Sept. 25, 1895.)

ABATEMENT—ANOTHER ACTION PENDING.

An action to recover damages for conversion will not abate because of the pendency of an action theretofore brought by defendant against an officer who held under a writ of attachment the property alleged to have been converted, in which action plaintiff intervened and asserted his right to the property, as the issues in the two actions are different.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by A. I. Hall, assignee in insolvency of L. M. Wagner, against Henry Susskind. There was a judgment in favor of plaintiff, and defendant appeals. Affirmed.

Wells & Lee, for appellant. Graff & Latham, for respondent.

SEARLS, C. This is an action to recover from the defendant the sum of \$60,000 as damages for the value of certain property, to wit, diamonds, watches, and jewelry, alleged to have belonged to the estate of L. M. Wagner, an insolvent, and to have been, through a conspiracy between defendant, L. M. Wagner, the insolvent, and J. B. Wagner, her husband, secreted and concealed to prevent its coming into possession of plaintiff, as assignee, and which was taken possession of, converted, and in part sold by defendant. That the portion of said property sold by defendant was of the value of \$30,000, etc. Defendant answered, denying many of the allegations of the complaint, and, as a further and separate defense, pleaded the pendency of another action in the superior court between the same parties for the same cause of action, etc., stating the facts in apt language. The court tried the issues made by the plea in abatement, and filed its written findings thereon, from which it appears, in addition to the facts of the insolvency of L. M. Wagner, her voluntary application for a discharge, the election and qualification of the plaintiff herein as assignee, the assignment of the estate to him by the clerk, etc., that, prior to the insolvent's petition being filed, a portion of her estate, consisting of diamonds, watches, and jewelry, was secreted so as to prevent its coming into the possession of the plaintiff, as assignee; that the defendant herein, know-

ing that such goods had been secreted, and the purpose thereof, and to prevent their coming to the assignee, received and took possession of said concealed property, and, after selling a portion thereof, retained possession of the remainder in his store in Los Angeles until the 26th day of July, 1893, when it was taken possession of by J. C. Cline, sheriff of the county of Los Angeles, under a writ of attachment in an action by M. Wunsch et al. v. L. M. Wagner, the insolvent, as her property. H. Susskind, the defendant herein, thereupon brought an action in claim and delivery in the superior court against the sheriff to recover as his own the goods so attached. Thereupon the plaintiff in this action intervened in said action, and claimed possession of the goods so attached as the assignee in insolvency of said L. M. Wagner, to whose estate he claimed the goods belonged, and he was adjudged to be entitled to the possession thereof as such assignee, as against both the plaintiff and defendant therein. It was also found that the goods attached were of the value of \$20,000. Thereupon Henry Susskind, the plaintiff in said action in claim and delivery, moved the court for a new trial in said cause, and such motion is still pending, undecided, and undetermined. The judgment on the findings in this action upon the plea in abatement was that "this action should abate so far as it involves any property formerly belonging to L. M. Wagner, concealed by the said Henry Susskind, and held by him in his possession in the store on South Spring street, on the 26th day of July, 1893, and on that day taken possession of by the said J. C. Cline, as sheriff of said county, by virtue of a writ of attachment then in his hands against the said L. M. Wagner; and that as to any other property of said L. M. Wagner taken by the said Henry Susskind, and sold by him, prior to the said 26th day of July, 1893, and not then in his possession, the action proceed to trial." Defendant Henry Susskind appeals from the judgment on his plea in abatement.

"The law abhors multiplicity of actions, and therefore, whenever it appears on record that the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate; for if it were allowed that a man should be twice arrested, or twice attached by his goods for the same thing, by the same reason he might suffer in infinitum." Bac. Abr. tit. "Abatement," subd. M. The same author says: "When a writ is brought for two things, and it appears the plaintiff cannot have any other action for the one of them, the writ shall stand for the part that is good." In order that a plea in abatement by reason of the pendency of another action may be effectual, it must appear that such former action is between the same parties and for the same subject-matter, or, in other words, that it is of such a character that, had a judgment been

rendered therein on the merits, such judgment could be pleaded in bar of the second action. A judgment in personam "is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceedings, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding." Code Civ. Proc. § 1908, subd. 2. "A fact or matter in issue is that upon which plaintiff proceeds by his action, and which the defendant controverts in his pleading, while collateral facts are such as are offered in evidence to establish the matters or fact in issue." *Garwood v. Garwood*, 29 Cal. 522. The rule is restricted to facts directly in issue, and does not embrace facts which may be in controversy, but rest in evidence, and are merely collateral. *Freem. Judgm. § 257*. The question is not, simply, were given facts controverted at the former trial? but, were they in issue? If they were not, they do not come within the rule. *King v. Chase*, 15 N. H. 16; *Roberts v. Robeson*, 27 Ind. 454; *Jackson v. Lodge*, 36 Cal. 28; *Gray v. Dougherty*, 23 Cal. 272; *Caperton v. Schmidt*, 26 Cal. 493. That the judgment of a court of competent jurisdiction directly upon the same point is, as a plea, a bar, or, as evidence, conclusive between the same parties upon the same matter directly in question, is a proposition so thoroughly established as to need no argument.

The question in the present case is, were the issues in the action for claim and delivery, the pendency of which is pleaded here, the same, and between the same parties, as this action? The action of claim and delivery is a possessory action. It is the lineal descendant of one of the early remedies given by the common law, instituted for the purpose of recovering possession of chattels, and known as "replevin." The scope of its application has been greatly enlarged in modern times, but the essential object of the action remains the same, viz. to enforce plaintiff's right to the present possession of chattels as against a defendant who unlawfully detains them, and under our law to recover their value, if possession cannot be had, together with damages for the detention. The investigation is confined to the property mentioned in the complaint. Other property cannot be brought into the controversy by answer. *Lovensohn v. Ward*, 45 Cal. 8. In the present case *Henry Susskind*, the defendant and appellant here, commenced an action as plaintiff in claim and delivery against *J. C. Cline*, as sheriff, to recover possession of certain jewelry, etc., taken by the sheriff as the property of *L. M. Wagner*. His cause of action—that is to say, the ground upon which he sought to maintain his action—was his right to the immediate possession of the property as against the detention thereof by de-

fendant. When the plaintiff *A. I. Hall*, as assignee in insolvency of *L. M. Wagner*, intervened in that action, it was to enforce his own claim as such assignee to the possession of the property in dispute. By so doing he could not enlarge the scope of the inquiry by extending it to property not involved in that action, or to wrongful acts of the plaintiff therein in relation to other property. As evidence of his right to possession, intervenor could show the ownership of his assignor, the insolvent, her fraudulent, and therefore void, attempt to transfer it to *Susskind*, the plaintiff; but all these things were admissible only as evidence and in support of his ownership and right to possession, and were collateral to the question of the wrongful detention of the property by *Cline* as sheriff, in whose possession it was at the commencement of the action. In the present action, *Hall*, as assignee, sues to recover damages for the fraudulent concealment and conversion by defendant of the property of the insolvent, *L. M. Wagner*. His cause of action upon which he counts is a different one from that upon which he waged his contention as an intervenor in the former action against the sheriff, and incidentally against defendant, *Susskind*, as a party to that action. Had the plaintiff here instituted that action, *Susskind* would not have been a necessary party to it; and it was only by virtue of his having brought it, and by reason of plaintiff, *Hall*, having intervened, that he became a party.

Roberts v. Robeson, 27 Ind. 454, was in most respects similar to this case. That was a suit involving the validity of an assignment for the benefit of creditors, which was alleged to be void for fraud. It was attempted to conclude the assignee by pleading the record of a suit brought by him against the sheriff to recover the possession of certain property which was included in the assignment, and which had been seized by the sheriff under process against the assignor. Judgment had gone against the assignee, and it was held that the record was only conclusive as to the particular property involved in the suit against the sheriff. The court said: "That judgment was conclusive as to *Roberts* against any claim he could set up by virtue of the assignment to the property involved in that action. But as to any other property covered by the assignment the judgment could have no force. The question the jury passed upon was, simply, the title to the property involved in that suit, and although they (the jury) may have treated the assignment as void, it could only be established in that case as to the property involved." *King v. Chase*, 15 N. H. 9, is to like effect. The reasoning in those cases does not combat the theory that a judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar; or, as evidence, conclusive between the same parties, upon the same matter, etc.; but points to the broad distinction which exists between

that which is in issue in a case and that which, though not a part of the issue, is controverted; or, in other words, the distinction between evidentiary facts going to establish the issue and the ultimate facts involved in the issue itself. The former may have been controverted, yet the result is not conclusive as to them; while as to the latter the judgment is conclusive if they were determined or might have been determined.

In the present case the unlawful seizure gave the plaintiff a separate and distinct cause of action against Cline, the sheriff, to enforce which he intervened in the action between Susskind and said Cline. In that action the issues were as to intervenor's right to the property as against Susskind and Cline, and the detention thereof by the latter. All the other facts were but evidentiary to those ultimate facts involved in the issue, and, however much such evidentiary facts may have been controverted at the trial, the result did not crystallize them as a part of the issues in the case. It is true, the plaintiff here, according to the allegations of the complaint, had at the same time a cause of action against Susskind for the fraudulent purchase or procuring of the same and other like property from his assignor in insolvency. He could not include his action for damages as to that in the replevin suit for two reasons: (1) Because, under the doctrine enunciated in *Lovensohn v. Ward*, supra, he could not inject this new matter into the action of replevin. (2) Because, under section 427 of the Code of Civil Procedure, a cause of action to recover specific personal property, with or without damages for withholding thereof, cannot be united with a cause of action for injury to property; and for the further reason that the separate cause of action against Susskind did not affect Sheriff Cline. A party may not split up a single cause of action, and maintain separate actions thereon, but every wrong furnishes a cause of action. All damages arising from a single wrong, though at different times, make but one cause of action. *Bendernagle v. Cocks*, 19 Wend. 207. But wrongs perpetrated at different times by the same or by different persons furnish separate causes of action. In this last sense plaintiff's cause of action against the defendant was distinct from that against him and Sheriff Cline, enforced in the action in which he intervened. As a matter of course his recovery in the intervention suit diminishes by so much his right to recover in this action, just as would have occurred had the defendant herein voluntarily delivered to him and had he accepted the same property.

When the sheriff seized a portion of the goods to which the plaintiff here was or claimed to be entitled, it gave to plaintiff a cause of action against such sheriff for the goods thus unlawfully taken, but did not entitle him to intervene in that action except to recover the goods thus taken. Had the

sheriff taken possession of all the property claimed by the assignee under the alleged fraudulent transfer by Wagner to Susskind, and had the plaintiff here under such circumstances intervened and claimed a part only thereof, he would have been concluded by the judgment in intervention from recovering the residue in another action. If A. is the owner of two horses, which are wrongfully taken from him by B., who transfers one of them to C., it would hardly, we think, be contended that a recovery from C. of the horse held by him would be a bar to a recovery of the other horse held by B. Yet in principle the case supposed would not differ from the one at bar. It is only where a claim is founded upon one entire contract, or upon one single or continuous tortious act, that it cannot be divided into distinct demands, and be made the subject of separate actions. The taking of a portion of the property, claimed by the plaintiff as assignee, by the sheriff, constituted a separate tortious act, giving to plaintiff a right of action, which was waged by him as an intervenor in the action against the sheriff, and did not conclude him in this action against the original tortfeasor, Susskind, brought to recover as to the residue of the property. In the first action the parties were not the same as in the present one, and Hall, the assignee, was not entitled therein, as an intervenor, to introduce the evidence necessary to sustain the present action. This being so, it follows that the court below did not err in its rendition of judgment on the plea of the pendency of another action between the same parties for the same cause of action; and the judgment appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

109 Cal. 165

VAN SANDT v. ALVIS et al. (No. 18,396.)
(Supreme Court of California. Sept. 25, 1895.)

HOMESTEAD—MORTGAGES—RENEWAL.

Where the owner of a homestead which is subject to a mortgage given by him to secure the purchase money, in order to procure an extension of time to pay the debt, gives new notes therefor and a new mortgage on the land, the new notes and mortgage did not create a new incumbrance, but simply changed the form of the old incumbrances, and the lien on the homestead is not defeated by the fact that the mortgagors did not join in the new mortgage.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by Mary E. Van Sandt, as executrix of the last will and testament of A. A. Van Sandt, deceased, against C. P. Alvis and another, to foreclose a mortgage. From so much of the decree as enforces the lien of the

mortgage against the homestead, defendants appeal. Affirmed.

F. T. Baldwin and Nicol & Orr, for appellants. James H. & J. E. Budd, for respondent.

SEARLS, C. This is an action to foreclose a mortgage upon the homestead of the defendants. Plaintiff had a decree of foreclosure, adjudging his claim to the extent of \$2,495.28 to be a lien upon the homestead, and a personal judgment against defendant C. P. Alvis for the residue of indebtedness found due to plaintiff. Defendants appeal from so much of the decree as relates to the lien upon their homestead. The appeal was taken within 60 days after judgment, and the record contains a bill of exceptions. The facts as admitted by the pleadings and found by the court may be summarized as follows: A. A. Van Sandt, plaintiff's testator, was the owner of certain lands situate in the county of San Joaquin, state of California, which on the 1st day of October, 1883, he sold and conveyed to the defendant C. P. Alvis for the sum of \$5,000, receiving in payment therefor \$1,000 in cash and four promissory notes for \$1,000 each, payable at one, two, three, and four years, with interest at $8\frac{1}{2}$ per cent. per annum, and, if not paid, the interest to be added to the principal, and draw like interest; and, to secure the payment of said several promissory notes, said Alvis executed to his grantor, said Van Sandt, a mortgage upon the land so conveyed to him, which mortgage was duly recorded. Thereafter, and on the 29th day of June, 1886, defendant C. P. Alvis made and recorded a declaration of homestead in due form upon the land so conveyed to and mortgaged by him. The defendant Caroline Alvis was and is the wife of C. P. Alvis. A. A. Van Sandt died on the 19th day of January, 1887, leaving a last will and testament, and plaintiff is the duly appointed and qualified executrix thereof. On the 1st of September, 1888, defendant C. P. Alvis, not having paid the promissory notes aforesaid, and being unable to pay the same, applied to the plaintiff herein for an extension of time to pay the same, and agreed that, if the time was extended, he would pay the same; and thereupon said C. P. Alvis made his promissory note for \$4,000, payable to plaintiff as administratrix (executrix), or her order, on or before four years, with interest at $8\frac{1}{2}$ per cent. per annum, and conditioned as in the former notes, and providing that, if the interest was not paid annually, the whole sum should become due at the option of plaintiff; and, to secure the payment thereof, said C. P. Alvis executed to plaintiff a mortgage upon the same premises covered by the first mortgage, and theretofore included in the homestead. Plaintiff accepted and recorded the new mortgage, received the promissory note, satisfied the former mortgage of record, and delivered to said defendant the four old prom-

issory notes. Defendant Caroline Alvis, the wife of the other defendant, had full knowledge of all the facts, acts, and representations of her husband in procuring an extension of the time of payment of said first notes, and consented thereto, but did not unite with her husband in the execution of the mortgage of 1888 upon the homestead. The interest not having been paid upon the last-mentioned note, plaintiff elected to consider the whole amount due, and instituted this action in 1891, at which time three of the original promissory notes of 1883 were barred by the statute of limitations as against Caroline Alvis; and the court so found, and decreed the fourth note, which was not thus barred, to be a lien upon and secured by the mortgage upon the homestead.

From the foregoing statement of facts it appears that no new indebtedness was sought to be created or secured by a lien upon the homestead. The indebtedness on account of the purchase price of the homestead, which was secured by the original mortgage thereon, was in part about to become barred by the statute of limitations, and was at the request of the defendant C. P. Alvis extended at the same rate of interest, and a new mortgage executed upon the same property. As to the first mortgage, which was executed by C. P. Alvis at the date of his purchase of the premises to secure a portion of the purchase price thereof, no homestead could thereafter be carved out of the property, so as to impair the rights of the mortgagee. *Montgomery v. Tutt*, 11 Cal. 190; Civ. Code, § 1241 (4). The first mortgage was, therefore, a valid lien upon the premises prior in time and superior to the homestead claim. Section 1242 of the Civil Code provides that: "The homestead of a married person cannot be conveyed or incumbered, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife;" and "a homestead can be abandoned only by a declaration of abandonment, or a grant thereof executed and acknowledged: (1) By the husband and wife, if the claimant is married; (2) by the claimant, if unmarried." Civ. Code, § 1243. So far, then, as the creation of a lien upon the homestead is involved, it can only be accomplished by the joint action of the spouses. And a valid and subsisting lien upon the homestead of married persons cannot be extended so as to defeat the plea of the statute of limitations by the husband alone. *Barber v. Babel*, 36 Cal. 11.

The question in the case at bar relates, not to the power of the husband to incumber the homestead without the joint action of the wife, but is this: Was the execution of the new note and mortgage the creation of a new incumbrance, or simply a change of the form of the old incumbrance? *Swift v. Kraemer*, 13 Cal. 530, was a case in which one Revalk, an unmarried man, owned a lot of

land upon which there were two mortgages, one of which, for \$1,500, was held by Kraemer. Revalk married in 1857, and thereafter executed another mortgage, in which his wife did not join, upon the property previously covered by the two mortgages, and which in the interim had become a homestead of Revalk and wife. Kraemer had paid off one of the prior mortgages, and satisfied the other, which constituted (except as to \$500) the consideration of the last mortgage. The release of the old mortgages and the execution of the new one were on the same day. The court said: "But, as to the debts secured by the original mortgage to Leck and Fontacelli and Kraemer, we regard the cancellation of the old mortgages and the substitution of the new as contemporaneous acts. It was not creating a new incumbrance, but simply changing the form of the old. A court of equity, looking to the substance of such a transaction, would not permit a release, intended to be effectual only by force of and for the purpose of giving effect to the last mortgage, to be set up, even if the last mortgage was inoperative. It would not permit Revalk to take Kraemer and Eisenhardt's money and apply it in extinguishment of a prior incumbrance, and then claim that the property should neither be bound by the new mortgage or the old," etc.—citing *Dillon v. Byrne*, 5 Cal. 455; *Birrell v. Schie*, 9 Cal. 106; *Carr v. Caldwell*, 10 Cal. 380. See, also, *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743. The case of *Barber v. Babel*, 36 Cal. 11, was one upon all fours with the case at bar, except that there the original note and mortgage were barred by the statute of limitations at the time of suit brought to foreclose, and the court held that as the original mortgage was barred, and as the wife had not joined in the execution of the second mortgage, no recovery could be had. *Sawyer, C. J.*, in his opinion, at page 23 of the report, refers to and quotes from *Swift v. Kraemer* with apparent approval, and places the decision upon such bar of the first note and mortgage and the invalidity of the second mortgage.

It is very evident in the case at bar the first mortgage was only released to give effect to the second one, and in a court of equity the defendants should not be heard to say that the second mortgage is void by reason of not being executed by the wife, and at the same time to successfully contend that the release of the first mortgage extinguished it. The complaint states the whole facts of the transaction, sets out both the mortgages, and asks that they be decreed to constitute but one security. Under such circumstances, the court below was justified in holding as it did in substance: (1) That the second mortgage upon the homestead was void as against the wife by reason of her not having joined in such mortgage; (2) that the first mortgage, having been satisfied only for the purpose of giving effect to the sec-

ond one, will in equity be deemed to be and remain in force until the demand secured thereby is barred, etc.; (3) that one of the notes secured by the first mortgage not being barred at the date of suit brought, a foreclosure upon the homestead could be decreed as to that note only. That part of the judgment appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

100 Cal. 192

MARYSVILLE ELECTRIC LIGHT & POWER CO. v. JOHNSON. (No. 18,351.)

(Supreme Court of California. Sept. 25, 1895.)

SUBSCRIPTION TO CORPORATION—LIABILITY.

1. A corporation formed for the "purpose of producing electricity and power" cannot maintain an action on a subscription to a corporation to be formed "for the purpose of furnishing the incandescent system of electric lighting."

2. If the subscribers present for the purpose of organizing the corporation are the agents of an absent subscriber, their authority extends only to the formation of such a corporation as has been agreed upon.

Commissioners' decision. Department 2. Appeal from superior court, Yuba county; John C. Gray, Judge.

Action by the Marysville Electric Light & Power Company against F. W. Johnson on a subscription to stock. Defendant had judgment, and plaintiff appeals. Affirmed.

O. A. Webb and Wm. G. Murphy, for appellant. W. H. Carlin, for respondent.

SEARLS, C. This is an action by the plaintiff, a corporation, to recover from the defendant \$1,000, upon his agreement to take stock in a corporation thereafter to be formed. The agreement was executed by defendant and some 36 others on the 25th day of March, 1890, and is in the words and figures following: "For the purpose of forming a corporation to have for its object the furnishing of the incandescent system of electric lighting to those who may desire the same, and to provide the funds for the purchase of the necessary plant, we, the undersigned, hereby subscribe for stock to the amount set opposite to our respective names. Amounts to be due and payable upon the formation of the company and the issuance of the stock." Then follows the list of names signing the agreement, with the amounts by them severally subscribed, among which is the name of defendant, who subscribed \$1,000. On or about the 20th day of March, 1890, the subscribers to the agreement, or a portion of them, met and organized the corporation, plaintiff herein, under the laws of the state of California. The second section of the articles of incorporation defines the objects of the corporation, as follows: "That the pur-

poses for which it is formed are producing electricity for light and power." Defendant did not participate in the formation of the corporation, consent thereto, or in any way waive any of his rights under the agreement.

The facts are simple, and involve the single proposition as to the liability of defendant to pay \$1,000 to a corporation formed for the purpose of "producing electricity for light and power," under his agreement to pay said sum "for the purpose of forming a corporation to have for its object the furnishing of the incandescent system of electric lighting to those who may desire the same, and to provide the funds for the purchase of the necessary plant." That the agreement in question was valid and binding upon the parties, and sufficient in law to authorize the plaintiff, if organized as a corporation in consonance therewith, to maintain an action to recover the sum agreed to be paid, is well settled. *Water Co. v. Beecher*, 101 Cal. 70, 85 Pac. 849; *Power Co. v. Johnson*, 98 Cal. 538, 29 Pac. 126; *Railroad Co. v. Hildreth*, 53 Cal. 123; *Water Co. v. West*, 94 Cal. 399, 29 Pac. 785. Morawetz, in his work on Private Corporations, at section 52, in discussing the contract of membership, says: "An offer or contract to become a shareholder in a corporation, or to subscribe for shares thereafter, does not become binding, or create a liability, until all conditions precedent, upon which the offer or contract is made, have been performed,"—citing *Railroad Co. v. Curtiss*, 89 N. Y. 219; *Ferry Co. v. Balch*, 5 Gray, 810; *Goff v. Winchester College*, 6 Bush, 448; *Edinboro' Academy v. Robinson*, 37 Pa. St. 210,—and adds: "It is plain that no liability is incurred unless the corporation which is organized is the specific corporation which was contemplated at the time of the agreement." *Hotel Co. v. Coyle*, 85 Me. 405; *Manufacturing Co. v. Fox*, 12 Vt. 804; *Manufacturing Co. v. Schafer*, 57 Cal. 396. Defendant subscribed for stock to the amount of \$1,000 "for the purpose of forming a corporation having for its object the furnishing of the incandescent system of electric lighting, * * * and to provide the funds for the necessary plant." The formation of a corporation for such purpose was a condition precedent to the right of plaintiff to recover. Until it has done so, it is not perceived upon what theory it can compel payment. If plaintiff can add the element of a power company to its attributes, upon the same principle it may adopt any other function, and still hold the defendant liable. An individual may be quite willing to contribute his money and assume the responsibilities of a stockholder in a corporation to furnish light, and at the same time decline to embark in an enterprise to furnish power, or to engage in other and distinct branches of business. It is sufficient to say that defendant only agreed to pay his money for stock in a corporation for lighting purposes, and that he cannot, under his contract, without his consent, be

compelled to pay money towards the formation of a corporation for an additional and distinct purpose.

Appellant contends that, for the purposes of the organization of the corporation, the subscribers present were the agents for those subscribers who were absent, and, in support of the proposition, cites *West v. Crawford*, 80 Cal. 19, 27 Pac. 1123. The answer to this contention is that, if the subscribers with defendant are to be deemed his agents in the formation of a corporation, the extent of their authority as such agents only went to the formation of such a corporation as had been agreed upon; and, when they went beyond the bounds thus set, they exceeded, as against the nonconsenting defendant, their authority, and their acts, as to him, were void.

This conclusion reached, it follows that the plaintiff is not entitled to recover, and that other questions involved need not be considered. The judgment appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(113 Cal. 221)

BLOOD v. LA SERENA LAND & WATER CO. (No. 19,510).¹

(Supreme Court of California. Sept. 27, 1895.)

UNAUTHORIZED MORTGAGE BY CORPORATION — RATIFICATION—AMENDING PLEADING—DISCRETION OF COURT.

1. Where land was purchased for a corporation by its officers without authority, and a mortgage executed for the purchase price, and the corporation, after learning of the transaction, took possession of the land, surveyed and platted it, took its rents and profits, sold some of it, and exercised ownership over it, subject to the mortgage, the corporation, was bound by the purchase and mortgage.

2. Under an allegation that a contract was made by defendant, it may be shown that it was made by ratification of the unauthorized acts of its officers.

3. Where, on a trial to foreclose a mortgage for the purchase price of land, defendant corporation discovered that its officer who had purchased the land for it was also the agent of the vendor, but did not move to amend its answer so as to set up the fraud until six months after the trial, the refusal of the court to permit it to do so was not an abuse of discretion.

4. Civ. Code, § 2314, provides that "a ratification may be rescinded when made * * * with an imperfect knowledge of the material facts of the transaction ratified." *Held*, that a corporation cannot rescind a ratification on the ground that its agent in conducting a sale was also the agent of the other party, where it did not appear that the corporation was ignorant of the dual relation of the agent, or that its agent was vested with any discretion in effecting the sale.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by James A. Blood against La Se

rena Land & Water Company to foreclose a mortgage. There was judgment for plaintiff, and defendant appeals. Affirmed.

Thos. McNulta and Chapman & Hendricks, for appellant. R. B. Canfield and J. W. Taggart, for respondent.

BRITT, C. Foreclosure of mortgage. Defendant is a corporation. The complaint (filed May 24, 1892) was in the usual form, alleging, with other matters, that defendant made its promissory note to plaintiff on August 30, 1887, for the sum of \$52,500, besides interest, due one year from date, and at the same time, to secure payment of the note, executed to plaintiff a mortgage of certain lands in Santa Barbara county. The note and mortgage were subscribed with the name of the defendant by its president and secretary, and both bore the impress of a seal purporting to be that of the corporation. The only defense made by the answer was that the defendant never authorized the execution of the note and mortgage. Defendant filed a cross complaint, stating, among other things, that about September 1, 1887, plaintiff conveyed to defendant by deed the premises described in the mortgage, and that, as part of the consideration therefor, said note and mortgage were delivered to plaintiff without the authority or consent of defendant, and that it was not privy to the purchase of the land; that defendant never appropriated to itself the use of the land or the profits thereof; that defendant's board of directors, at a meeting held May 26, 1892, passed a resolution reciting that the purchase of said land (called the "Blood Ranch") and the execution of said note and mortgage were never authorized by the defendant, and directing the president of the company to make in its name, and tender to plaintiff, a reconveyance of the land, excepting a small parcel previously conveyed by defendant, in conjunction with plaintiff, to one Thompson; that such a deed was so made and tendered to plaintiff on May 31, 1892, and by him rejected. Upon this cross complaint defendant prayed that the note and mortgage be declared void. The court sustained a demurrer to the cross complaint, and the correctness of its action in that regard is not impugned. We state the matters there alleged merely to illustrate the subsequent history of the case.

It is disclosed by the record that the plaintiff was the owner of the land (about 350 acres) in the year 1887, and authorized his nephew, also named James A. Blood, a real-estate broker, to make sale of the same at the price of \$105,000, agreeing to pay him a commission of \$5,000, contingent upon his effecting a sale. The broker associated several other persons with himself, and they formed in August, 1887, the defendant corporation, for the purpose of buying plaintiff's land. Said broker conducted the negotiation with plaintiff on behalf of the promoters of the corporation, and the terms of the pur-

chase were substantially settled before August 29, 1887, at which time officers of the corporation were elected, said broker becoming its secretary and a member of its board of directors. Plaintiff executed a deed of the land to defendant, and at the same time received (but from whose hands does not clearly appear) the said note and mortgage as security for the deferred or second payment of one-half the agreed purchase price, the first payment being made partly in cash (about \$37,500), paid by the subscribers to defendant's stock, and partly in such stock itself. There was no resolution of defendant's board of directors authorizing the purchase of the land or the issuance of the note and mortgage, nor was the seal affixed thereto ever adopted as the corporate seal by any direct action of the board for that purpose. Plaintiff's deed to defendant bore the same date as the mortgage,—August 30, 1887; but they were not in fact exchanged until about September 15th, following. Shortly afterwards the defendant took possession of the land, and its board of directors, by resolution, authorized the survey and subdivision of the same into lots, blocks, and streets, and fixed prices at which subdivisions might be sold. The board also ordered the letting of parcels of the land for temporary purposes, and in September, 1888, passed a resolution directing the execution of a deed to plaintiff of $8\frac{1}{4}$ acres thereof, at the price of \$3,750; and in February, 1890, in the same manner authorized the conveyance of a parcel (apparently about 15 acres) to one Thompson. Deeds were executed pursuant to such resolutions. In the conveyance to Thompson plaintiff joined. The defendant caused portions of the land to be cultivated, and took the proceeds of the crops grown thereon in the year 1888. It also caused to be cut some trees growing on the land, and, through its board of directors and officers, exercised many other acts of ownership not necessary to be detailed. All the proceeds of said sales of land, as well as the net receipts from sales of crop, were paid over by defendant to plaintiff on the note in suit. In April, 1889, the board of directors passed a resolution reciting that, "owing to the great depression in real estate, it is impossible to sell our La Serena property [covered by the mortgage], either in whole or part"; and requesting plaintiff to accept the proceeds of the ranch in lieu of interest on the company's indebtedness to him, and to assume the management of the ranch. Such proposal was acceded to by plaintiff, and was carried into effect. The trial was had in November, 1892; the evidence closing on the 23d day of that month. Said real-estate broker was a witness, and, incidentally to the main purposes of his examination, gave testimony of his agency to sell the land, and of his interest in effecting the sale. On May 12, 1893, the court announced orally its decision in favor of plaintiff; and on May 25th following, be-

fore the findings were signed, defendant applied for leave to amend its answer by adding a defense thereto based on the circumstances of the dual agency of the broker and his interest in making the sale, which matters, it was alleged, were unknown to the subscribers for the company's stock. It was stated in an affidavit accompanying the motion for leave to amend that knowledge of the facts averred in the proposed amendment was first obtained by defendant from said testimony of the broker at the trial. Such amendment contained no allegations looking to a rescission of the contract, nor any reference to the offer to reconvey the land to plaintiff, as in the cross complaint to which a demurrer had been sustained. The court refused leave to amend, and judgment passed for plaintiff, with provision for execution generally in case of deficiency after sale of the premises.

1. For the purposes of the decision, it may be assumed, in accordance with the contention of appellant, that the corporation was not originally privy to the purchase of the land from plaintiff, and that the instruments in suit purporting to be its obligations were originally executed without its authority. But it is manifest—leaving out of view for the moment the effect of the broker's double agency—that the corporation adopted as its own the whole transaction with plaintiff, of which the execution of the note and mortgage was an inseparable part. Defendant, acting through its board of directors and officers, and they having full knowledge of the terms of the mortgage, took possession of the land, surveyed and platted it, cultivated it, took its rents and profits, sold and conveyed some of it, and offered to sell the remainder, and in all respects conducted itself as the absolute owner thereof, subject only to the incumbrance of the mortgage. The facts that the proceeds of sale of portions of the land and of produce grown thereon were all paid over to plaintiff for application on the indebtedness in question, and that after April 23, 1889, the entire profits of the land were delivered to him in lieu of interest, cut no figure in the case, so far as we see, except to show defendant's knowledge of the debt and recognition of its liability thereon. With the assent of defendant, signified in the manner we have stated, the title to plaintiff's land passed to defendant, and the contract of sale thus became fully executed. Obviously, defendant could not take the land in virtue of the contract made in its name, and repudiate the obligation to pay therefor imposed by the same contract. Civ. Code, §§ 1589, 2311. The principle declared in section 2310 of the same Code, illustrated by *Salfeld v. Reclamation Co.*, 94 Cal. 546, 29 Pac. 1105, and invoked by appellant, has no application to this case. *Borel v. Rollins*, 30 Cal. 419; *Rogers v. Land Co.*, 134 N. Y. 211, 32 N. E. 27; *Gribble v. Brewing Co.*, 100 Cal. 72, 34 Pac. 527, and cases cited; *Fraser v. Bridge*

Co., 103 Cal. 79, 36 Pac. 1037; 1 Mor. Corp. §§ 548, 549. Appellant argues that the ratification or adoption of the contract by defendant cannot be considered, because not alleged in the complaint; but we understand the rule to be that it is sufficient in such cases to aver that the contract was made by defendant without describing the processes by which it was made. *Goetz v. Goldbaum* (Cal.) 37 Pac. 646.

2. That a broker cannot represent both parties to a contract of sale in which discretion, judgment, and skill are to be exercised by him, unless they have knowledge of his double capacity, and consent to be so represented, and that a party led unwittingly into a contract by means of such double agency may avoid the contract by methods suitable to the circumstances of the case, are propositions not to be denied. *Empire State Ins. Co. v. American Cent. Ins. Co.*, 138 N. Y. 446, 34 N. E. 200, and cases cited; *Cassard v. Hinmann*, 6 Bosw. 8. Cf. *Hunsaker v. Sturgis*, 29 Cal. 142; *Davis v. Rock Creek Co.*, 55 Cal. 359. In this case the real-estate broker, as a promoter of the corporation, occupied a relation of trust to the subscribers for the stock and to the corporation itself. *Burbank v. Dennis*, 101 Cal. 100, 35 Pac. 444. If he failed to disclose to his associates his agency for the plaintiff and his interest in effecting the sale, and if he was charged with any duty in their behalf beyond merely communicating to plaintiff their determination in the matter reached, independently of his suggestion or influence, then his conduct in negotiating the purchase as their agent also was a fraud upon them. Civ. Code, §§ 2230–2234. But fraud as a defense to an action on contract is "new matter" which must be pleaded, and cannot be given in evidence under a mere denial of the execution of the contract. *Boone*, Code Pl. §§ 66, 67, 148; *Gushee v. Leavitt*, 5 Cal. 160; *Capuro v. Insurance Co.*, 39 Cal. 123; *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045. In the present instance defendant made no attempt at defense on the ground that fraud had infected the transaction with plaintiff until more than six months after the trial, where the facts constituting the alleged fraud were divulged, and after the court had ordered judgment for plaintiff. We are therefore of opinion that, even if defendant had once the right to assail the contract because of the agency of said broker to sell as well as to purchase the land, the right was waived by failure to assert it; and that, under the circumstances appearing, the court did not abuse its discretion in refusing to allow an amendment to the answer setting up the alleged fraud.

3. But it is said that the fact that the broker represented both parties to the transaction for the sale of the land was a matter unknown to defendant at the time of its proceedings evincive of adoption and ratification of the contract with plaintiff, and hence the effect of those proceedings as confirmatory of

the contract is nullified. Civ. Code, § 2314. That section provides that "a ratification may be rescinded when made without such consent as is required in a contract, or with an imperfect knowledge of the material facts of the transaction ratified, but not otherwise." Now, if it were conceded, as we do not concede, that defendant could obtain a rescission without some appropriate pleading showing the ground therefor, and that it had taken the steps necessary to give it the right to rescind, yet we think the evidence before us does not bring defendant's case within the scope of said section 2314. It does not show but that all the promoters of the corporation, and the corporation itself, after it was organized, had full knowledge of the broker's relation to the plaintiff and interest in bringing about a sale; or that the price and terms of sale were not fixed by those connected with him in the purchase without his intervention, so that he had no discretion to exercise for their benefit, and was a mere mouthpiece to communicate to plaintiff the result of their deliberations. See *Empire State Ins. Co. v. American Cent. Ins. Co.*, 138 N. Y. 449, 34 N. E. 200. Since defendant seeks to avoid the effect of an active affirmation of the contract with plaintiff during a period of several years, we think it had the burden of proof to show, at least, ignorance or imperfect knowledge of matters which might have influenced its conduct, and we also think that it failed to sustain such burden; this aside from the question of the necessity to plead the alleged defense. We find no substantial error in the record. The judgment and order should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

100 Cal. 242

TAHOE ICE CO. v. UNION ICE CO. (No. 18,381.)

(Supreme Court of California. Sept. 27, 1895.)

CONTRACT—BREACH—DAMAGES—EVIDENCE.

1. Where there is a substantial conflict in the evidence, the verdict will not be disturbed on appeal.

2. On a breach by a vendee in the third year of a contract for the purchase of an annual ice crop of a specified number of tons for five years from January 1st, at a fixed price per ton, the vendor, in December of that year, commenced an action against him for the breach. *Held*, the damages for failure to take the fourth year's crop was the difference between the contract price and the value of the ice sold and left unsold.

3. Where a vendor, on a breach by a vendee in the third year of a contract for the purchase of the annual ice crop for five years, sues for damages for the years subsequent to the breach, evidence of the harvesting and quality of the crop for those years is admissible.

4. A vendor, on a breach by a vendee in the third year of a contract for the purchase of the annual ice crop for five years, may recover

loss of profits for the years subsequent to that of the breach, without specially pleading them.

Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by the Tahoe Ice Company against the Union Ice Company for breach of contract. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Wilson & Wilson, T. C. Coogan, and P. F. Simonds, for appellant. Knight & Heggerty and T. S. Ford, for respondent.

MCFARLAND, J. This action was brought to recover \$45,982.99, damages for alleged breaches of a certain written contract between the parties. The jury returned a verdict in favor of plaintiff, and assessed the damage at \$23,123.72, for which amount judgment was rendered. Defendant appeals from the judgment, and from an order denying a motion for a new trial.

The respondent and appellant are both corporations; and, for several years prior to the commencement of this action, they had both been engaged in the ice business. The respondent harvested and stored ice near Truckee, in Nevada county, where it had its ponds, ice houses, etc. The appellant was engaged in selling ice, at wholesale and retail, at numerous places throughout California, Arizona, and New Mexico, and had its principal place of business at San Francisco. On the 2d day of January, 1889, the respondent and appellant entered into a written contract by which respondent sold to appellant all of respondent's crops of ice, to the extent of 14,000 tons per annum, for five years; commencing on January 1, 1889, and ending on January 1, 1894. And appellant contracted to pay for said ice for said five years \$2.25 per ton. It was provided therein "that, in the event of any breach of contract by either party or neglect to comply with terms of this agreement, then the same may be terminated by either party upon its giving reasonable notice in writing to the other party." And the clause of the contract which is chiefly important in this litigation is the following: "It is further agreed by said Tahoe Ice Company that all ice sold and to be delivered to said Union Ice Company under this agreement shall be good, merchantable ice, and suitable for the general trade at the points of delivery from the cars." The parties seem to have carried out the contract in a manner satisfactory to both for the first three years; but in the third year (1892) the appellant, about April of that year, commenced complaining to respondent that the ice was not of as good quality as that provided for in the contract. However, appellant continued to receive the ice until the 14th day of June, 1892; but on that day it served a written notice upon respondent that, on account of the latter's alleged breach of the said contract, the appellant had elected to, and thereby did, terminate the con-

tract; and afterwards appellant refused to receive any more ice.

This action was commenced on December 17, 1892. The damages claimed were: (1) A certain amount of money due for ice delivered and received before said notice; (2) ice wasted by the refusal of appellant to take or pay for any more ice after said notice; (3) the difference between the price which appellant was to have paid for the ice of the crop of 1892 left in the ice houses and the amount which it brought at public auction after notice of the sale to appellant; and (4) the difference between what respondent should have received from appellant for the ice crop of 1893 and its actual value during that year. There was scarcely any conflict of evidence as to the amounts of the several items of damages above stated; and the verdict of the jury, so far as the sum of money assessed as damages is concerned, was clearly justified by the evidence, provided respondent was entitled to recover at all.

But appellant contends that respondent was not entitled to recover at all, because the ice furnished by respondent in 1893 was not "good, merchantable ice, and suitable for the general trade at the points of delivery from the cars"; and nearly all of its testimony was directed to that point. There is some discussion by appellant as to the proper construction of this clause of the contract; that is, as to the places at which the ice was to be "good, merchantable," etc.; but we do not understand respondent to differ with appellant on that point. The ice was loaded on the cars at Truckee, as required and requested by appellant; but it was to be good, merchantable, and suitable for the trade "at the points of delivery from the cars." In the rulings of the court upon the admissibility of evidence as to the character of the ice, we see no error. Therefore, the question whether the ice was of the character required by the contract was a pure question of fact for the jury. Upon that question a great many witnesses testified. Their testimony was, in a great measure, conflicting; but without stating the evidence here, which would be a useless task, it is sufficient to say that there was a mass of testimony to the point that the ice was good, merchantable, and suitable for the trade at the points of delivery from the cars. It appeared incidentally that, at the time when appellant commenced to complain, a new competing ice company, called the "National," had come into existence, and had reduced the price of ice; and it is suggested by counsel for respondent that this reduction in the price of ice was the main reason why appellant desired to terminate the contract; but, apart from that suggestion, the evidence upon the direct subject of the character of the ice was amply sufficient to justify the verdict, and brings the case fully within the rule which governs in cases where there is a substantial conflict of evidence.

It is contended by appellant that respondent was not entitled to recover anything for profits which would have accrued to it on the ice crop of the last year covered by the contract (1893), because such profits are merely speculative, conjectural, etc. The rule, no doubt, is that profits too remote, contingent, and speculative to be brought within any safe or reasonable estimate of damages cannot be allowed; as, for instance, profits too much depending upon fluctuations of markets and business, supposed successful speculations by the vendor with moneys that would have been realized out of the contract had it been performed, a good bargain of resale by the vendee of the thing bought if it had been delivered, etc. But such was not the kind of profit sought by and awarded to respondent; it was "a direct and natural result which the law will presume to follow the breach of the contract." *Burrell v. Salt Co.*, 14 Mich. 34, and cases there cited. The case at bar is identical in principle, upon this point, with *Hale v. Trout*, 35 Cal. 229, where *Sawyer, C. J.*, reviews the subject very elaborately. In that case there was a contract by which plaintiff agreed to manufacture upon defendants' premises, and deliver to defendants, 2,000,000 feet of "merchantable and clean sawed lumber," a certain amount of the lumber to be delivered each month, so that the contract would run through two or three years; and defendants agreed to pay therefor \$10 per thousand. The plaintiff had delivered to defendants, according to the contract, about 320,000 feet, a part of which had not been paid for when defendants notified plaintiff that they would not receive or pay for any more lumber, because, as they claimed, the lumber delivered was not merchantable, etc. The action was brought "to recover the price of the lumber delivered but not paid for, and damages for breach of the contract by the defendants in declaring the contract at an end, and refusing to receive any more lumber under it." The court below refused to allow any prospective damages, and the judgment was reversed. The court held that the plaintiff was entitled "to recover, firstly, the contract price for the lumber actually delivered and received under the contract; and, secondly, upon the breach, to recover the entire damages resulting from the breach on the part of defendants in putting an end to and refusing to receive any more lumber under the contract." The opinion of the court in that case, and the many authorities therein cited, furnish answers to the arguments of appellant in the case at bar, and the court say: "The foregoing cases show that he [plaintiff] may so sue and recover the whole damage sustained in consequence of the breach without waiting for the time of performance to elapse, or repeating an offer to perform from month to month as the time of delivery arrives, and that the rule of damages upon the breach is the clear profit which the plaintiff would have made;

that is to say, the difference between the contract price and what it would have cost the plaintiff to manufacture and deliver the lumber according to the terms of the contract." The rule of damages thus stated was correct in that case, because there the plaintiff never owned the lumber, but merely manufactured it out of the timber of the defendants. In the case at bar the respondent harvested the crop of 1893, and at the time of the trial had sold some of it at the highest market price to other persons, and had the residue of the crop on hand; and the court instructed the jury, as to the crop of 1893, that if the ice was merchantable, etc., "then the measure of damages for said year is the difference between the contract price and the value of the ice sold and left unsold." This instruction was correct, and as favorable to appellant as it could have hoped for. Civ. Code, § 3311.

Appellant was not injured by the introduction of evidence showing the harvesting, quality, etc., of the ice crop of 1893. A large part of it had been harvested when the action was commenced; and it had all been harvested, and all the facts had occurred, long before the trial, which took place in the latter part of May in that year. If respondent had not harvested any crop for 1893, its damages would have been the same, although proof of them might not have been made with quite as much certainty. Respondent did nothing to increase the damages or make them more onerous to appellant.

Appellant contends that, as to the profit for 1893, the complaint is insufficient, and that evidence was erroneously admitted on that subject, because such profit was in the nature of special damages which were not specially pleaded. This contention cannot be maintained. Loss of profits which, like those claimed in the case at bar, are the direct and natural results of a contract, and which the law implies from such breach, are recoverable without special allegations. *Burrell v. Salt Co.*, 14 Mich. 34; *O'Connell v. Hotel Co.*, 90 Cal. 515, 519, 27 Pac. 373; *Ennis v. Publishing Co.*, 44 Minn. 105, 46 N. W. 314; *Shaw v. Hoffman*, 21 Mich. 157; *Masterton v. Mayor, etc.*, of Brooklyn, 7 Hill, 61; *Laraway v. Perkins*, 10 N. Y. 371.

We see no material errors in the instructions to the jury or in rulings upon admissibility of evidence. The exceptions to these rulings are covered by the general views above expressed. The court told the jury that certain things were "admitted." This expression should be avoided in charges to juries when there is any doubt on the subject; but in the case at bar we can see no injury to appellant from the use of the expression, for there was no doubt as to the matters to which it referred. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

109 Cal. 228

SMITH et al. v. GREEN. (No. 18,413.)
(Supreme Court of California. Sept. 27, 1895.)

WATER RIGHTS—ABANDONMENT—EASEMENT BY PRESCRIPTION.

1. The open, notorious, exclusive, and adverse use of water from a stream for a period of five years establishes title in the user.

2. Upon abandonment by a mere appropriator of the use of the water of a certain stream, such waters became subject to a new appropriation.

3. An executed parol license to use the waters of a certain stream is irrevocable.

Department 2. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by Minerva Smith and another to restrain O. V. Green from diverting more than half of the waters of a certain water course. From a judgment for plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Geo. H. Maxwell and L. F. Coburn, for appellant. James F. Farragher and Gillis & Tapscott, for respondents.

McFARLAND, J. This action was brought to restrain defendant from diverting more than one-half of the waters of a certain water course, called "Crystal Creek." Judgment went for plaintiffs, from which judgment, and from an order denying a motion for a new trial, the defendant appeals. The appellant claims under one David H. Lowery, and the respondents under one Joseph F. Lowery, a brother of said David. The facts found by the court are (briefly) these: In the year 1852 said David Lowery settled upon said Crystal creek, which runs from the west down towards the east. At that time it ran through unsurveyed United States public lands, and there was no way of getting power title to said lands. There was what was called the "possessory law" of California, and under this David marked out a piece of land, or "claim," and had it regularly recorded with the county recorder of Siskiyou county. This claim embraced 160 acres, and Crystal creek ran, from west to east, nearly through the center of the claim. He built a dwelling house on the north side of, and near the bank of, the creek; and in 1853 he built a short flume and ditch to a point about 50 yards above his upper line, and therein diverted the waters of the said creek to his house for domestic use and stock, and for irrigating and dairy purposes. In the latter part of 1853 he went back to his former home, in Illinois, and induced his brother Joseph to come with his family to California, and settle beside him on Crystal creek; and Joseph arrived there in February, 1854. It was then and there agreed between David and Joseph that the latter should take up a claim immediately east, below and adjoining David's claim, embracing 160 acres lying on both sides of the creek; that they should divide the two claims by a line running east and west through the centers of the claims; that Joseph should

build his dwelling house on the said original claim of David, on the south side of the creek, and opposite to the house of David; and that they should divide the waters of Crystal creek equally between them. The brothers immediately proceeded to carry out and execute said agreement. Joseph located a claim of 160 acres immediately below the original claim of David, and they divided the two claims by a division line running east and west through the middle of the two claims, upon which they afterwards built a fence. Joseph built his house at the place designated on the upper or original David claim, at a point on the south side of the creek opposite the house of David. They divided the waters of the creek equally by running a flume from the flume of David to the house of Joseph, and, later on, by dividing the waters equally in ditches taken out lower down on the stream for irrigating purposes. Joseph occupied his half of said two claims, with one-half of all the waters of the creek, from February, 1854, until March, 1871. Joseph's half conformed very closely with what was afterwards designated in the United States surveys as the "N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 17, and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 16, T. 42 N., R. 9 W., M. D. M.," which Joseph subsequently purchased from the state, as hereinafter stated. During that time he used half of the said waters for irrigation, domestic purposes, for stock, and for churning and dairy purposes; and the court finds "that during all that time [from 1854 to 1871] he used the one-half of the waters of said creek under an open and notorious claim of right; that said use was hostile, continuous, uninterrupted, and exclusive, and was under a claim of right, and was well known to, and acquiesced in by, the parties occupying and claiming the premises now claimed and held by defendant, to wit, the premises of said David H. Lowery, as hereinabove described; and that during the whole of said time no one in any manner interfered with the said claim, or with the use as aforesaid of said waters." David occupied his half of the land until 1862, using and claiming only one half of the water, while Joseph used and claimed the other half. About January, 1859, Joseph located his half of said land as state school lands, and a certificate of location was issued to him by the state for said lands, and about the same time David located a part of his half as school lands, and received a certificate of location; and all payments required by law were made on all of said locations on or prior to the year 1865. In November, 1859, one Cotton obtained a money judgment in the district court against said David Lowery; and in November, 1861, by virtue of an execution issued on said judgment, the sheriff sold a tract of land, the description of which included David's half of the premises as above described, to one Churchill, and gave him a certificate of sale. No water rights were mentioned in the cer-

tificate, and the premises sold "were bounded on the south by the premises of Joseph F. Lowery, and for a considerable portion of the distance the line ran along the center of said Crystal creek." There is no evidence that any deed, or evidence of title other than said certificate, was ever given to Churchill. In the spring of 1865, Churchill executed a quit-claim deed of said premises to the appellant, Green, at which time appellant went into possession, and has since remained in possession. He afterwards acquired a United States patent to adjoining land, not being part of said Joseph's premises. In March, 1871, said Joseph Lowery conveyed all his said land and water rights, and his said certificates of location, to John Henry Smith, who then went into possession thereof, and remained in possession until his death, which occurred September 2, 1890. It was found that about the year 1865 or 1866 said Joseph "changed the upper place of diversion by taking down said flume, and running a flume up the said creek, a distance of about 350 yards above, into which he diverted said water by means of a dam and ditch and flume, and, while he remained on the said place (and, after him, said John H. Smith), continued to divert said waters at said point, and by means of said dam, ditch, and flume, and also by means of ditches further down said stream, and east of the public road, up to the time of the death of said Smith, viz. September 2, 1890; that said use was the full one-half of the waters of said creek, and was continuous, open, notorious, and under claim of right, and with the full knowledge and acquiescence of defendant and his predecessors at said place; that, for three or four years before the death of John H. Smith, defendant needed some more water than he had prior thereto, by reason of having sown a large amount of alfalfa grass, and, during the irrigating seasons of said years, defendant, at times, repaired his dam, and turned down to his place more than one-half of said waters, but he never claimed of said Smith the right to more than one-half of said waters, and Smith would turn said waters back and down to his place, and asserted his right to one-half of said waters; and that said diversions of said waters were for but a very short period, and were never of all of said waters of said creek flowing at said point." Up to a short time before the commencement of this action, there was just about enough of water in said creek to supply the needs of the two farms. They are similar in character and soil, and require about the same amount of water for irrigation, and both require artificial irrigation for successful cultivation. The court finds "that on or about the 14th day of June, 1891, defendant diverted all the waters of said Crystal creek from plaintiffs, and thereby deprived them of all the waters for household and domestic purposes, and for watering stock and irrigating purposes, and that he continued during all the balance of the irrigating season of

1891 to divert, at times, all, and the rest of the time the larger portion, of the waters of said creek claimed by plaintiffs," and that said diversion was to the damage of respondents in the sum of \$500. And it is further found that appellant threatens to continue said diversions, and that the continuance of such diversions would cause great and irreparable damage, etc., to respondents, who are the successors in interest of said John H. Smith, deceased. The court found that respondents are entitled to one-half of the waters of said stream, and rendered judgment for an injunction, etc., as prayed for.

The foregoing are the material facts of the case, and it is apparent that, upon these facts, the judgment is a just and equitable one. It is exactly in accordance with the intent and executed purpose of the two pioneer brothers, upon whose acts the rights of the present contesting parties are based. It should stand, therefore, unless there be some inexorable legal, technical obstacle in the way of its affirmance.

It is argued that Joseph Lowery acquired no right to the waters of Crystal creek, because there was no written instrument to him from David, and a parol grant of an easement is void. The general rule, no doubt, is that one who rests his claim to an easement on a verbal contract alone, unexecuted and unaccompanied by any other facts, has no rights thereto which he can enforce. But there are many cases where a mere parol license which has been executed, and where investments have been made upon the faith of it, has been held irrevocable (Gould, Waters, §§ 323, 324, and cases there cited); and, if the case at bar is to be determined alone upon the law governing parol grants, the rights of respondents, under the facts found, would be established by that law. But, really, whatever rights David Lowery had to the land or the water in 1853-54, like all rights on the public domain in early days, depended upon possession, and ceased with the relinquishment of possession without intent to resume. His right as an appropriator depended upon continued use, and, upon abandonment of the use of any part of the water, that part was subject to new appropriation. Therefore, when David relinquished his possession of one-half the land and water, and possession thereof was taken by Joseph, who continuously thereafter kept such possession, there was no interest left in David to be conveyed seven years afterwards by execution sale. The possessory title was then in Joseph, to which had been added his state certificate for the land. Furthermore, under any view of the law, respondents and their predecessors have, and since 1859 had, a perfect title to the water by prescription.

Appellant argues quite strenuously that some of the material findings of fact are not supported by the evidence. It would be useless to give here the evidence in detail; but, in our opinion, there is no warrant for us to

hold that there is no evidence to justify the findings which are attacked.

Quite a number of questions are argued by appellant, with much learning and ability, which we do not deem it necessary to discuss. The above general view of the case is all that we deem needful for its determination. It should be said, perhaps, that while appellant's criticism of the complaint, considering the latter as a work of art, has some foundation, still we think that for the purposes of a pleading it is sufficient. The original complaint would look more like the handiwork of an accomplished pleader if it contained the averment that respondents were entitled to the use of the waters involved, instead of the averment that they are the "owners of" said waters, but the context clearly shows what was meant. Moreover, the amendment to the complaint seems to obviate this partially defective averment. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(109 Cal. 22)

FUDICKAR v. EAST RIVERSIDE IRR. DIST. (No. 19,519.)

(Supreme Court of California. Sept. 5, 1895.)

PLEADINGS—QUIETING TITLE—WHEN LIES—PROPERTY—CONVEYANCE BY CORPORATION—DESCRIPTION.

1. Defects in a complaint not going to the gist of the action are cured by judgment.

2. Where the complaint in an action to quiet title contains a general allegation of ownership, and also sets out an abstract of title, merely for purposes of description, the former will control.

3. When a water right consisting of a continuous flow of water and the canal or pipe line through which it passes are owned by the same person, a finding that the canal or pipe line is real property is a sufficient finding that the water right, being appurtenant thereto, was real property, to quiet title to which an action would lie.

4. Under Civ. Code, § 654, declaring property to be that of which there may be ownership; section 802, allowing a right of way to be held and granted; and section 1044, making all property transferable,—a right of way for conducting water over land is transferable.

5. A deed of property of a corporation by its president to a partnership of which he is a member, which recites that a full board of the directors of the corporation ordered the conveyance, is not void on its face as against public policy.

6. One who claims under a deed without a seal, executed by the president of a corporation to himself, must show that it was executed under a resolution of the directors, entered on the records of the corporation, or ratified by such a resolution.

7. One claiming under a quitclaim deed without seal executed by the president of a corporation to himself need not prove that it was executed under a resolution of the directors, entered on the records, or ratified by such a resolution, unless actual fraud be shown.

8. A contract by which a director obtains from a corporation its property or an advantage to himself is voidable only at the instance of the corporation or its stockholders.

9. A description in a deed which may be made certain by evidence of the facts referred to therein is not void for uncertainty.

Department 1. Appeal from superior court, San Bernardino county; G. B. Otis, Judge.

Action by Harriet S. Fudickar against the East Riverside Irrigation district to quiet title. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Chas. R. Gray, for appellant. R. H. F. Varfel and Goodcell & Leonard, for respondent.

VAN FLEET, J. This is an action to quiet plaintiff's title to a certain water right, and to certain rights in a pipe line and canal used for the carrying of the same. No demurrer was interposed to the complaint, but the defendant answered, disclaiming any title or interest or adverse claim in or to the alleged water right, asserting absolute title in defendant to the pipe line and canal, and denying any interest therein in plaintiff. The pleadings were not verified. The plaintiff had judgment as prayed for, and the defendant appeals from the judgment, and from an order denying its motion for a new trial. The appellant contends (1) that the complaint fails to state a cause of action; (2) that the findings do not support the judgment; (3) that the evidence is insufficient to justify the findings; and (4) that certain rulings of the court were erroneous.

1. No demurrer having been interposed to the complaint, mere defects in the manner of stating the facts relied on cannot now be considered. If a cause of action be stated, though defectively, the complaint must be sustained, notwithstanding any ambiguity or uncertainty that may exist therein; and, in aid of the judgment, the complaint must now receive as favorable an interpretation as its general scope will warrant. Tested by these rules, we think the complaint sufficient. It is certainly not a model of good pleading, and might have been obnoxious to a special demurrer; but, taking all the allegations together, it may fairly be construed as showing that the property claimed is real property, and that the plaintiff is the owner of that property.

The allegations of the complaint are, in substance, that plaintiff is the owner in fee of "that certain real property" described in two certain instruments annexed to and made a part of the complaint, and being—First, a certain undivided interest in 42 inches of water measured under a 4-inch pressure, flowing through a certain canal and pipe line "from" certain described lands; second, "the right of way for carrying the said 42 inches of water" through said canal and pipe line; third, the right to use said water for certain purposes; and, fourth, the right, in aid of such use, of making connections with said canal and pipe line. The instruments annexed to the complaint describe

the property as follows: First, "the following described water and water rights, * * * being forty-two inches of water, continuous flow, * * * being part of that water and water right * * * on and flowing from" certain lands described; second, a right of way through a certain pipe line and canal, for the carrying of said water, "together with a proportionate interest in said pipe line and canals in the proportion that the said 42 inches bears to the whole carrying capacity thereof." The complaint further alleges that the property in question was conveyed by the Vivienda Water Company, a corporation, by said instruments, to G. A. Fudickar (plaintiff's grantor) and one F. C. Howes, and that said instruments, "together with certain transfers from G. A. Fudickar * * * to plaintiff, constitute the foundation of the plaintiff's claim, right, and title to the aforesaid water rights and rights of way." It is further alleged that the defendant claims adversely to plaintiff some estate or interest in the property, under a conveyance from said Vivienda Water Company subsequent to plaintiff's conveyance therefrom. This latter allegation, so far as relates to the canal and pipe line, is admitted by the answer.

Appellant first contends that the plaintiff has attempted to set forth a dereliction of the title, which must be considered as controlling the general allegation of her ownership, and that this dereliction is insufficient, because (a) no title is alleged in the Vivienda Water Company; (b) the alleged right is mere personal property, which cannot be the subject of an action to quiet title; and (c) the alleged rights granted by the Vivienda Water Company in the canal and pipe line constitute merely a servitude in gross, and were not transferable to plaintiff.

(a) As both the complaint and the answer show that plaintiff and defendant claim under a common grantor, it was not necessary to allege the title of that common grantor. We do not, however, consider the complaint as setting forth a dereliction of title. The reference to the instruments annexed to the complaint appears rather to be for purposes of description, and as more clearly defining the nature of the rights claimed. The allegation of the ultimate fact of ownership must therefore be deemed to control, unless inconsistent with the facts specially alleged.

(b) The answer disclaimed any interest in the water right, and we therefore could not reverse the judgment on account of any defect in the complaint in that particular. But, as we construe the complaint, the water right claimed is real property. For the purpose of ascertaining its nature, the terms of the instrument annexed to the complaint may be examined. *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327. From them it is seen to consist of a continuous flow of water on certain land, and from thence through a canal and

pipe line. Such a right is, or at least may be, real property. So long as the water flows in its natural channel it is undoubtedly real property; and, while flowing by right through a canal or pipe which is real property and owned by the owner of the water, it is appurtenant to the canal or pipe, and therefore real property. Civ. Code, §§ 658, 662. The canal and pipe in this case were real property, and appellant concedes that they were such. If, therefore, plaintiff has any estate in the canal and pipe line, the water right is entirely real property. There is nothing in the cases of *Mining Co. v. Hoyt*, 57 Cal. 44, and *Bloom v. West* (Colo. App.) 32 Pac. 846, cited by appellant, which conflicts with this doctrine, and the latter case clearly recognizes its correctness.

(c) Appellant contends that neither the instruments of conveyance nor the allegations of the complaint contain anything to show that the rights claimed were appurtenant to any land of the plaintiff; that the complaint claims only a "right of way" in the canal and pipe line; and that such a right is one of the servitudes in gross mentioned in section 801 of the Civil Code, and is not transferable. It is true that, at common law, servitudes merely in gross were not assignable, though this doctrine was so far looked on with disfavor that many nice distinctions were invented to limit it. But the Civil Code of this state has swept away both the rule and the distinctions. By sections 654 and 802,¹ this class of servitude is declared to be property; and by section 1044 every species of property, except a mere possibility not coupled with any interest, may be transferred. *Rice v. Whitmore*, 74 Cal. 625, 16 Pac. 501. It is true that in *Painter v. Water Co.*, 91 Cal. 73, 84, 27 Pac. 539, it was said that the servitudes named in section 802 are not assignable. That remark was, however, merely dictum; and that question was not argued in that case, nor the attention of the court directed to section 1044. In *Bloom v. West*, supra, cited by appellant, such rights were expressly held to be assignable. But what the complaint claims is not a mere "right of way." It is so denominated by the pleader, but the language of the conveyances, which are part of the complaint, and which control as to description, shows that it is a definite interest or estate in the canal and pipe line. By those conveyances an undivided interest, equal to the grantee's proportionate share of the water, was conveyed. That interest is a corporeal estate, and not an easement or servitude at all; and to that estate the water right is appurtenant. The complaint alleges that a certain undivided portion of this interest has been con-

veyed to plaintiff, and she is therefore entitled to sue with respect to that interest.

2. The findings are sufficient to support the judgment. Most of the objections urged to them by appellant are covered by what we have said respecting the pleadings. Appellant also contends that the deed from the Vivienda Water Company to Fudickar and Howes is void on its face, as against public policy, because executed by Fudickar, as president of the corporation, to himself as grantee. But this deed purports to have been made under authority of a resolution of the board of directors, directing its execution by the president and secretary, and recites that a full board was present at that meeting. On the face of the deed, therefore, the president acted, not as a trustee, but as the mere instrument of the board of directors, and the doctrine relied on does not apply.

3. Appellant's contention that the evidence does not justify the findings embraces many particulars; but, in the view which we take of the case, it is necessary to consider only one of them. As we have said, the only issue in the case is as to plaintiff's ownership of an interest in the canal and pipe line, and, under the pleadings, that interest must be regarded as real property. If it be not real property, this action cannot be maintained, for no action will lie in this state merely to quiet the title to personal property.

Plaintiff seeks to deraign her title to this real property through the Vivienda Water Company, a corporation, the title of which corporation is now held by defendant, unless it was previously conveyed to plaintiff. In actions of this character the plaintiff must establish a legal, as distinguished from a mere equitable, title. *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518; *Nidever v. Ayers*, 83 Cal. 39, 23 Pac. 192; *Bryan v. Torrey*, 84 Cal. 126, 24 Pac. 319; *Harrigan v. Mowry*, 84 Cal. 456, 22 Pac. 658, and 24 Pac. 48. Being real property, the interest sued for could be conveyed only by deed; and, to support the deed of a corporation (when, as in this case, it does not bear the corporate seal), it is incumbent on the party relying on it to show affirmatively that it was executed by authority of a resolution of the board of directors, entered on the records of the corporation, or that it was ratified by such a resolution. *Salfeld v. Reclamation Co.*, 94 Cal. 546, 29 Pac. 1105. In the present case the deeds relied on by plaintiff were neither authorized nor ratified by any such resolution. The only resolutions of the board of directors on the subject were the following: November 7, 1887: "Moved and seconded that the company gives and exchanges with Messrs. Howes and Fudickar forty-two inches of water from the Raynor supply for the forty-two inches now owned by them from the Vivienda Well supply, and that the forty-two inches so received from Messrs. Howes and Fudickar be sold by the company, and the proceeds thereof to represent the proceeds of the forty-

¹ Civ. Code, § 654, declares ownership of a thing to be the right of one or more persons to use it to the exclusion of others. Section 802 provides that a servitude of a right of way, though not attached to land, may be granted and held.

two inches so exchanged from the Raynor supply, and be diverted with Mr. Raynor's consent according to the contract with him, the said water to be given and taken in exchange at the common point of meeting, the north-east corner of the Goldkoffer property. Motion carried." May 11, 1888: "It was moved and seconded that the president and secretary be authorized to carry out the terms of that certain resolution heretofore made by this company for exchange with G. A. Fudickar and F. O. Howes of forty-two inches of water, and that the president and secretary be authorized to execute and deliver and receive deeds in accordance with the above." March 12, 1889: "Resolved, that the forty-two inches of water deeded to Fudickar and Howes be carried free of charge by this company to the lands of Fudickar and Howes, in section 32, township 1 south, range 4 west, S. B. M., on the East Riverside Mesa. Motion seconded by Mr. Howes, and carried." We do not discover anything in the transcript to show that the second of the above-quoted resolutions was ever adopted by the board. But, however this may be, it is evident that none of these resolutions purport to grant any authority to convey any interest in the canal or pipe line of the corporation. At the most, they authorize only a conveyance of the water right (not in dispute in this action), and an agreement on the part of the corporation to deliver that water at a certain point or points. The deeds executed by the president and secretary, so far as they purport to convey any interest in the canal and pipe line, were therefore unauthorized and void. They were not, as respondent contends, merely voidable. They were not the acts of the corporation at all, and the parol acts of ratification and acquiescence relied on by plaintiff did not validate them (Civ. Code, § 2310), and therefore cannot aid the plaintiff in this action.

These considerations dispose of plaintiff's right to recover under the pleadings as now framed, and necessitate a reversal. But the evidence tends strongly to suggest that, though the legal title is in defendant, plaintiff is equitably entitled to a conveyance from defendant, as a purchaser from the Vivienda Water Company, with notice of plaintiff's equities. As the case appears to have been tried on both sides upon a wrong theory, the evidence is not clear on this point, and it would not be proper to express at this time any opinion as to its sufficiency for that purpose. But as it appears that, under pleadings properly framed for that purpose, plaintiff might be entitled to a specific performance of the contract between the corporation and Fudickar and Howes, or some other equitable remedy, we think the ends of justice will be best subserved by permitting the plaintiff to amend so as to avail herself of her equities, if any. In this view it is probable that many of the questions discussed on this appeal will not arise upon a new

trial; and we will therefore briefly state our conclusions on such points only as appear to be necessary for the guidance of the court below.

A contract between a corporation and one of its directors by which such director obtains property of the corporation, or some other advantage to himself, is not absolutely void, but is voidable only at the instance of the corporation or of its stockholders. The corporation, as well as its stockholders, may moreover be estopped from questioning its validity, either by express ratification, or by their laches or acquiescence. On these points the burden of proof is upon the director claiming the benefit of the contract. The right to avoid such a contract must be exercised by the corporation itself (or a stockholder acting for it), and cannot be transferred to another. *Sanborn v. Doe*, 92 Cal. 153, 28 Pac. 105. If, however, in a purely equitable action, the rights of the plaintiff depend entirely upon such a contract, the plaintiff must show the existence of the facts upon which the validity of the contract depends, even though the defendant is not the corporation, but merely its assignee, because a plaintiff must come into a court of equity with clean hands. But if the defendant claims only under a quitclaim deed from the corporation, and does not otherwise connect himself with the rights of the stockholders, this rule will not apply, unless the case of the plaintiff discloses actual, as distinguished from constructive, fraud. The defendant in such a case, not having been injured by the transaction, cannot be heard to complain of it.

The deed to plaintiff from Fudickar is not void for uncertainty. It contains a description which might, by appropriate evidence of the facts therein referred to, be shown to apply to the property here in controversy. Nothing more is required of any deed.

The other points made cannot be properly decided upon the present record, and no reference to them is necessary.

The judgment and order denying a new trial are reversed, and the cause remanded to the court below, with directions to permit the parties to amend their pleadings, as they may be advised, and for such further proceedings as shall not be inconsistent with this opinion.

We concur: HARRISON, J.; GAROUTTE, J.

109 Cal. 275

PEOPLE v. HICKEY. (Cr. 28.)
(Supreme Court of California. Sept. 30, 1895.)
SODOMY — CONVICTION FOR ASSAULT — QUESTION
FOR JURY — CONSENT.

1. When, on prosecution for felonious assault and the commission of sodomy, evidence of two different occasions is given, one of which fails to show a felonious assault, but might show a simple assault, it is error to refuse to charge that defendant might be convicted of a

simple assault; Pen. Code, § 220, recognizing the offense of assault with intent to commit the crime charged.

2. On prosecution for assault on a human being, to commit sodomy, the question whether the assault was committed with consent of the other party is a question of fact, for the jury.

3. On prosecution for assault on a human being, with intent to commit sodomy, proof of consent of the other party relieves the case of the element of simple assault.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Thomas Hickey was convicted of a felony, and from an order granting a new trial the people appeal. Affirmed.

Atty. Gen. Fitzgerald, for the People. W. F. Aram, for respondent.

GAROUTTE, J. The defendant was convicted of the crime of sodomy, and his motion for a new trial was subsequently granted. The motion was granted upon the ground that the trial court committed error in not instructing the jury, at the request of the defendant, that under the evidence he might be convicted of a simple assault. There is some question made by defendant's counsel that the information charged specifically the offense of assault, in addition to the felony; but, in the absence of a special demurrer upon that ground, we think the matter of little importance. The offense of simple assault may or may not be an element in the felony designated as "sodomy." It is not an element of the offense where the crime is not committed with or upon a human being; and, secondly, it is not an element in the offense where the act is done or attempted with the consent of the other party. It therefore follows that in many cases the trial court is justified in refusing to instruct the jury as was here requested. This case is not one coming within the first class stated; and, as to the evidence of consent, we think it may well have been submitted to the jury, as a question of fact.

It is further argued that the evidence discloses either a commission of the felony, or establishes that the defendant is wholly innocent. Possibly the evidence might support such conclusion, if the prosecution had confined itself to facts occurring at a single time; but, for reasons not here perceptible, evidence was introduced as to circumstances of guilt arising upon two different occasions, and upon different days. The evidence failed to disclose the commission of a felony upon one of these occasions, at least, but possibly disclosed a simple assault. By reason of these facts the principle of law presented is enveloped in some confusion. But section 220 of the Penal Code in terms recognizes the offense of assault with intent to commit the crime here charged, and a simple assault is a necessary element in the offense named in said section 220. From all the facts here disclosed, we conclude the question of consent was an open one, which should have

been presented to the jury, and also that the case was such that the question of assault, likewise, should have been submitted to the jury. For these reasons the order is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

109 Cal. 211

CHAFFEE et al. v. BROWNE et ux. (No. 19,430.)

(Supreme Court of California. Sept. 26, 1895.)
MORTGAGES—DESCRIPTION OF PREMISES—CONSIDERATION.

1. A complaint to foreclose a mortgage showing that, at the time the mortgage was given, the debt was due and unpaid, need not further allege the nonpayment of the sum demanded.

2. A mortgage by a legatee of all her interest in the estate of the testator, executed after distribution, but referring to the administration files and records for a more complete description of the mortgagor's interest, authorized the court to decree a sale of land which afterward is vested absolutely in the mortgagor by reason of deeds of release from other legatees interested therein.

3. A mortgage by one of her interest in an estate "as child and heir at law" will cover the property she took under a will.

4. A promise made by a debtor, after being discharged in insolvency proceedings, to pay a debt contracted prior thereto, is binding on him.

5. A mortgage executed by a wife on her separate property to secure an antecedent debt for family supplies is without consideration where she, at the time the debt was contracted, lived with her husband, and her individual credit was not pledged, though the mortgage recited that she and her husband were jointly and severally indebted for the goods.

Commissioners' decision. Department 2. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by W. S. Chaffee and others against A. W. Browne and wife to foreclose a mortgage. Plaintiffs had judgment, and defendants appeal. Reversed.

H. L. Poplin, for appellants. W. H. Wilde, for respondents.

BRITT, C. Action for the foreclosure of a mortgage made by defendants, A. W. Browne and his wife, Neotia Browne, in favor of plaintiffs, who are copartners in business under the firm name of Chaffee, Gilbert & Bonestel. The mortgage bore date December 10, 1890, but was not in fact executed until May 28, 1891. It recited that the mortgagors, residents of the county of Ventura, are jointly and severally indebted to the mortgagees in the sum of \$1,442.47 for goods, wares, and merchandise theretofore had and received by them (the mortgagors) from said mortgagees; that said Neotia is a child and heir at law of Peter Rice, deceased, "whose estate is in administration in said Ventura county, and, as such heir at law, is the owner of an undivided interest in the estate of said deceased, and therein is and will be entitled to her share in said estate when the

same shall be settled and distribution thereof made, reference being had to the proceedings, files, papers, documents, and records of the administration of the estate of said deceased in the superior court in and for the county aforesaid, for a more full and complete description of property, rights, and credits of said estate, and the interest of said Neotia Browne therein"; that said Neotia desires to give to the mortgagees a mortgage lien upon her interest in said estate to secure payment of said indebtedness. It is then declared that in consideration "of the premises and of the indebtedness hereinabove named, justly due from the said A. W. Browne and the said Neotia Browne to the said Chaffee, Gilbert & Bonestel, I, the said Neotia Browne, the mortgagor, hereby * * * mortgage to the * * * mortgagees all and singular my estate, right, title, interest, claim, or advantage, of whatsoever kind or nature, that I have or may or can have in the estate of said Peter Rice, deceased, as a child and heir at law of the said Peter Rice, deceased, now being administered, * * * as aforesaid, to secure the indebtedness hereinabove named, together with the interest accrued and to accrue thereon." It was further provided that, in default of payment, the mortgagees might foreclose the mortgage, and have the interest of said Neotia in the property coming to her from the said estate sold to pay the amount due to them, etc.

The fact was that Peter Rice left a will, which was probated in said superior court, and the interest which Mrs. Browne had in his estate was under the will, and not as heir at law in the technical sense; and previously to the execution of the mortgage, viz. on February 3, 1891, the estate of said Rice had, by decree of said court, been distributed to the persons entitled under the terms of the will in undivided shares. The decree was filed on said February 3d, and it specifically described the property distributed. Thereby a first interest of \$1,000 in value was set over to one Lucretia Bell, and to Mrs. Browne was allotted an undivided one-fourth of the residue. Among the tracts of real estate thus distributed was a certain lot in the town of San Buenaventura. On March 17, 1893, plaintiffs, at request of the Brownes, released from the mortgage a part of the lands mentioned in said decree. Such release was signed by Browne and wife, as well as plaintiffs, and recited the indebtedness to plaintiffs much the same as in the mortgage. On April 4, 1893, the distributees named in such decree, for the purpose of making partition of the lands set over to them by the terms thereof, executed deeds among themselves, by virtue of which Mrs. Browne became and is yet the owner of the whole of said town lot as and for her share of the lands before held in common. The court below decreed that this lot be sold for the payment of the expenses of the action and the amount due plaintiffs as provided in

the mortgage, and that plaintiffs have execution for any deficiency against Browne and wife. Defendants pleaded, among other alleged defenses and partial defenses, that the mortgage was executed by Mrs. Browne without consideration. The court found that, in the year 1889, A. W. Browne was indebted to plaintiffs in the amount of \$593.93, for provisions, wearing apparel, and other family necessities, which plaintiffs "had theretofore sold and delivered to said A. W. Browne and Neotia Browne, his wife"; that on June 26, 1889, said A. W. Browne made a transfer of certain property to plaintiffs and others, and plaintiffs, in consideration thereof, released the said indebtedness of A. W. Browne to them; that about July 1, 1889, A. W. Browne was adjudged an insolvent debtor, and thereafter, with his approval, plaintiffs delivered to his assignee for the benefit of his creditors all the property transferred to them as above stated on June 26, 1889, whereby their release of said sum of \$593.93 owed by him was "made null, void, and no effect"; that after his discharge as such insolvent (which was granted April 21, 1890) said A. W. Browne promised to pay plaintiffs said sum of \$593.93, notwithstanding his discharge in insolvency; that after July 1, 1889, and thenceforward until October, 1890, A. W. and Neotia Browne purchased of plaintiffs goods, etc., consisting of groceries, provisions, wearing apparel, and other family necessities to the amount of \$848.54, which goods were charged in account upon the books of plaintiff to A. W. Browne, but the greater portion thereof were in fact purchased by said Neotia; that on December 10, 1890, plaintiffs presented to A. W. Browne a memorandum containing the figures denoting the amount then due from him and his said wife, viz. \$1,442.47, consisting of said sums of \$593.93 and \$848.54, and thereupon and thereafter Browne and wife promised to pay plaintiffs the sum of \$1,442.47, "upon the account so stated between them"; that the mortgage in suit was executed to secure the payment of said sum last named, and was made for a good and valuable consideration.

At the trial the evidence regarding the question of consideration was in substance this: Mr. Chaffee, one of the plaintiffs, testified that the indebtedness was for "goods, wares, and merchandise furnished Mr. Browne and family, nine-tenths of it, at least, to Mrs. Browne. * * * The item of \$593.93 was for merchandise sold A. W. Browne prior to July 1, 1889; and the books were balanced as to that account * * * on the 2d day of July, 1889, when the receipt was given on the 1st of July, 1889; and the account of A. W. Browne was continued right along until October 8, 1890. I never had any conversation with Mrs. Browne about it at any time. I had charge of the business during all that time. We never had any account on our books against Mrs. Browne. The account is A. W. Browne,

charged up to him. It was his family expenses. Q. Did Mrs. Browne ever authorize you to charge anything to her? A. Yes; by reason of her purchase of it. Q. Why did you put it to Browne's account and charge it to him? A. Because it was all in the family." Mr. Gilbert, also one of the plaintiffs, testified that in the fall of the year 1890 he presented to A. W. Browne a statement of the amount due the firm; this consisted of two items,—\$593.93 and \$848.54,—making \$1,442.47; that Browne seemed satisfied, and said his wife had agreed to transfer her interest in her father's estate to secure the debt; that about December 10, 1890, he (the witness) saw Mrs. Browne, and she said "that Mr. Chaffee had been kind to them, and she was going to see that we didn't lose a cent by them." A. W. Browne testified that for some time after July 1, 1889, he had purchased supplies and provisions for his family from plaintiffs; that he knew his wife was purchasing goods of plaintiffs on his account after the insolvency proceedings. Mrs. Browne testified that she never had any conversation with plaintiffs about the indebtedness; that, after her husband's insolvency, she continued to purchase goods of plaintiffs,—groceries and provisions and dry goods and supplies for herself and children and family.

The appellants urge very many objections upon the record, and the case is prolific of disputed points. Since, in our opinion, a new trial should be had, some of these questions, not necessary to the determination of the appeal, may be here noticed. Thus, the objection to the complaint that it does not allege nonpayment of the sum demanded is not tenable. It does show with reasonable certainty that, at the time the mortgage was given, the debt recited was already due and unpaid. There was no occasion to reiterate the fact in terms. The description in the mortgage of the property to be charged with the intended lien was sufficient to warrant the action of the court in directing the sale of the real estate which, in virtue of the common deeds of release executed by the devisees of Peter Rice, became the property of Mrs. Browne in severalty. Although, at the time of the execution of the mortgage, the estate of Rice had been distributed, and so withdrawn from administration (*Bates v. Howard*, 105 Cal. 183, 38 Pac. 715), yet the mortgage refers to the files and records of the administration for a more complete description of the interest to be incumbered, and among such files was the decree of distribution, which showed the specific property in which Mrs. Browne took an interest and the extent of her right. The recitals and references contained in the mortgage make it manifest that by mention of Mrs. Browne's interest "as child and heir at law" was meant whatever property she took in the estate of her deceased father. We do not understand that *Emerick v. Alvarado*, 90 Cal.

461, 27 Pac. 356, is opposed to this conclusion.

So we see no error in overruling the partial defense of Browne's discharge in insolvency. The demand in suit, to the extent of \$593.93, accrued before the commencement of the insolvency proceedings, but it clearly appeared that after his discharge Browne promised to pay the same. The promise was binding on him. *Chabot v. Tucker*, 39 Cal. 437. The release given to him June 26, 1889, seems to have been rescinded for failure of consideration. It appears unnecessary to inquire how those matters concern Mrs. Browne, if at all. Nor do we think that the plea of the statute of limitations (Code Civ. Proc. § 339, subd. 1) was sustained. The action was begun July 12, 1893; and as late as the month of March previous the appellants had signed, with the plaintiffs, the instrument releasing from the mortgage a part of the incumbered property. Such instrument referred to the alleged indebtedness in such terms as, fairly considered, constituted an acknowledgment thereof. The running of the statute was thus interrupted. *McCormick v. Brown*, 36 Cal. 180.

It may be that the personal liability of A. W. Browne for the whole amount claimed is made out, but we are unable to see how the judgment against Mrs. Browne and her property can stand, unless we are to depart from rules of law which have been regarded as well established. The law justly imposes upon the husband the duty to maintain his wife and children, and does not absolve him of this duty save under exceptional circumstances. The evidence here shows only the ordinary case where the wife living with the husband obtains on his credit the supplies needed in the conduct of their common domestic establishment. For such purposes she is his agent and incurs no personal liability. This is matter of common knowledge, and, when persons furnishing to families supplies of the character appearing here expect to charge the wife therefor, they must take care that they have a contract for her personal credit. This will not be implied from the mere circumstance that she personally obtains the goods. In a case arising in the state of Michigan, the dealer had charged the goods to the wife, and sued her for the price. The court said: "If he knew that she was a married woman, living with her husband, and the goods were not of a character to indicate that they were bought for other than family use in the husband's family, and she did not claim affirmatively to be purchasing them on her individual account, the natural inference would be that she was purchasing them on her husband's account and for the use of his family, and she could not be made individually liable without an express agreement to become so, or that the goods should be charged or the credit given to herself." *Powers v. Russell*, 26 Mich. 184. *Flynn v. Messenger*, 23 Minn.

208, 9 N. W. 759, is yet stronger in the same direction. Before such a demand can be charged in equity upon the wife's separate estate, there must be clear proof that she contracted the debt in her own behalf, or intended to bind her separate estate for its payment. The fact that the husband is insolvent, or unable to sustain the whole charge of the family's support, does not affect the rule. *Dodge v. Knowles*, 114 U. S. 430, 5 Sup. Ct. 1108, 1187; *Magee v. White*, 23 Tex. 180; *Haynes v. Stovall*, Id. 625. The intention to extend the credit to the wife, and not to the husband, must be expressly declared or otherwise communicated to her. *Rushing v. Clancy*, 92 Ga. 769, 19 S. E. 711. In the present case the goods were all charged to the husband's account, and the wife's personal responsibility therefor was neither offered nor required before the whole debt had accrued.

But respondents claim that defendant Neotia is concluded by the recitals in the mortgage to the effect that she and her husband are jointly and severally indebted to plaintiffs for goods, etc., had and received by them from plaintiffs. *Coles v. Soulsby*, 21 Cal. 47, and other cases of like nature are cited in support of the proposition. The doctrine of those cases has no application here. It was always limited to the protection of the operative words of conveyance in a grant of property (*Feeney v. Howard*, 79 Cal. 530, 21 Pac. 984), and never extended to executory covenants even in the same instrument. To allow it effect as contended by respondents would be to forbid inquiry into the consideration of every promissory note recited in a mortgage given for its security, which is not the law. *Jones v. Jones*, 20 Iowa, 388. Said recitals, relating, as they do, to the consideration of the mortgage, do not estop. Code Civ. Proc. § 1962, subd. 2. Compare *Moffatt v. Bulson*, 96 Cal. 103, 30 Pac. 1022; *Rosenberg v. Ford*, 85 Cal. 610, 24 Pac. 779; *Bayler v. Com.*, 40 Pa. St. 37.

It follows that in the execution of this mortgage the defendant Neotia Browne undertook to assume and secure her husband's antecedent debt. "No new consideration was given at the time it was executed. The wife received nothing. The husband received nothing. The creditor parted with nothing. The instrument was therefore no more than a collateral security given for an old debt of the husband" (*Bayler v. Com.*, 40 Pa. St. 37), and was not obligatory in the absence of a new consideration (Civ. Code, §§ 2792, 2831, 2844; *Bohm v. Hoffer*, 2 Colo. App. 146, 29 Pac. 906). The judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

109 Cal. 236

VERMONT MARBLE CO. v. BROW, Constable. (No. 18,397.)

(Supreme Court of California. Sept. 27, 1895.)
SALE OR CONSIGNMENT—LEVY OF EXECUTION—NOTICE OF CLAIM BY THIRD PERSON.

1. A shipment of goods "on consignment" to one to whom plaintiff had previously been selling, to be held as the property of plaintiff and subject to its order until sold, the price at which they were listed to the consignee to be remitted as fast as they were sold, and, when he took notes in lieu of cash, these notes to be remitted as collateral for his account, does not constitute a sale.

2. A consignment of monuments under an agreement that the consignee should keep an account of their sale in a book, and send such book to the consignor on the first of each month, and, "as fast as * * * sold and erected, * * * pay to" the consignor the list price to the consignee "of each piece sold by him," either by cash or customer's note, the same to be placed to his credit as fast as cash should be received, the monuments to be paid for when sold, and remaining the property of the consignor "until paid for as above," and at all times subject to its order, does not constitute a sale.

3. A written claim of property in goods about to be levied upon under execution, which states that the claimant is the owner of the property, and had delivered it for purposes of sale, and that it was so held when seized by the sheriff, and not otherwise, sufficiently complies with Code Civ. Proc. § 689, as to the manner of "setting out the title" and "stating the grounds" of title.

Commissioners' decision. Department 2. Appeal from superior court, Yuba county; E. A. Davis, Judge.

Action by the Vermont Marble Company, a corporation, against E. Brow, as constable, to recover the value of certain monuments sold by defendant under writ of execution against the property of one Plymire. There was judgment for plaintiff, and defendant appeals. Affirmed.

Forbes & Dinsmore, for appellant. W. H. Carlin, for respondent.

BRITT, C. Defendant was constable of Marysville township, in Yuba county, and was sued in this action by plaintiff, a corporation, for the value of certain marble monuments sold by him July 10, 1893, under writs of execution issued from the justice's court of said township against the property of one Plymire, upon judgments obtained there by creditors of Plymire. The chief question involved is whether the marble when levied upon and sold was the property of plaintiff or of said Plymire. The latter had a marble shop at Marysville, and was a dealer in funeral stones and monuments. He had been accustomed for several years to purchase from plaintiff unfinished monuments and other marble needed in his business, and on July 19, 1892, he was in plaintiff's debt some \$2,500 for such materials purchased previously to that time, and plaintiff was apprehensive that further sales to him outright would involve loss. To prevent this, Plymire agreed in writing with the marble company, on the date last mentioned, that, in consider-

ation of its sending to him certain specified monuments "on consignment," he would hold the same as the property of the company until sold, and subject to its order; that, as fast as he sold the monuments, he would remit the money (the cost price at which each was listed to him); and, when he took notes in lieu of cash, he would remit the notes as collateral for his account. Subsequently, in May, 1893, Plymire agreed with plaintiff for a further consignment of goods, specifically described, written memoranda of which agreement provided in substance that he should keep an account of the sale of the monuments described in a book, and send such book to the marble company on the 1st of each month, and, "as fast as said work is sold and erected," pay to the company the list or cost price to him of each piece of marble sold by him, "either by cash or customer's note," the same to be placed to his credit as fast as cash should be received; that he held the marble merely on consignment, to be paid for when sold; and that it remained the property of the marble company "until paid for, as above," and at all times subject to its order. Ten monuments, of the value of \$683, were converted by defendant, as the court found; and of these three had been delivered to Plymire under his arrangement with plaintiff of July, 1892, and seven under that of May, 1893. By the terms of an oral agreement, not embodied in said written memoranda, Plymire promised that, whenever he received payment from a customer for a monument, he would pay plaintiff an additional sum of 25 per cent. on the cost price charged him for the same by plaintiff, which further percentage was to be applied on his indebtedness of \$2,500 existing before July, 1892. The debts on which the judgments mentioned were recovered against Plymire accrued prior to the receipt by him of any part of the goods in controversy. Plymire, it was further understood, would take orders for and sell the marble in his own name. He had the right to fix the selling price and the terms of sale. He was to bear the cost of transporting the marble from San Francisco to Marysville. Apparently the marble company exercised no control over his business. The monuments, when seized by defendant, were in the same condition as when received by Plymire from plaintiff, he having done no lettering or other work on them. Plymire testified at the trial: "I was not to sell these monuments in the same condition that I received them. * * * I have to sell them first, and then put on the inscription. * * * If a man wanted a design, I showed him a style of monument, and told him what it would come to when finished and set up; found out how he wanted it lettered, whether he wished any further design carved on it, and then fixed it up, put a bottom base on it, set it up, and then took the money for it." Before the execution sale, plaintiff demanded the property of defend-

ant, the particulars of which demand appear in another connection.

Appellant contends that the facts stated evidence a sale on credit, in which the title to the goods passed at once to Plymire, and they thus became liable to execution for his debts; and it is said that it is "unmeaning for parties to a contract to say it shall not amount to a sale when it contains every element of a sale." This latter proposition is doubtless correct. The transaction must be judged by the intent of the parties to it, gathered from the whole scope and effect of their language and their explanatory conduct. Mere verbal formulas are to be disregarded if inconsistent with a specific intent thus manifested. But, looking at the facts in the light of this principle, we find no transmission of title to Plymire. "Mere transfer of possession, without the agreement, express or implied, that such transfer is a sale, on the one hand, and a purchase, on the other, will not be a sale or have the effect to transfer the title." *Borland v. Bank*, 99 Cal. 94, 33 Pac. 737. We consider that the true nature of the transaction was that of a sale upon condition; the condition being, as to each monument, that Plymire should sell the same to some third person. Until then he was under no obligation to pay plaintiff the cost price, and until then he was compellable to surrender the goods to plaintiff upon demand. When he sold a monument, he was precisely within the case put by Mellish, L. J., in *Ex parte White*, 6 Ch. App. 397, 405: "If A. hands over his goods to B., and B. is to pay him a certain price if he sells, but is at liberty to sell on what terms he pleases, and B. then sells to C., the natural inference from these facts is, beyond all doubt, that there is a sale made to B. and another sale from B. to C." But obviously there is no completed sale to B. until he sells to C. This is illustrated in *Nutter v. Wheeler*, 2 Low. 340, Fed. Cas. No. 10,384. There W. & Co. were in the habit of sending their manufactured goods to one Gear, in Boston; and Gear sold them at such prices and on such terms as he pleased, not less than the trade prices fixed by W. & Co. Whenever he made a sale, he was to pay W. & Co. in 30 days the prices shown in their list to him, less an agreed discount. After a sale was made by him, his credit only was looked to by W. & Co. Gear became bankrupt, and W. & Co. took back the goods of their manufacture in his shop unsold. The court said: "Until a sale was made, the property in the goods remained in the defendants [W. & Co.], and they were well justified in reclaiming those which remained on hand at the time of the failure of Gear." So, in our opinion, at the time of the levy and sale by defendant here, the monuments were the property of plaintiff, and not liable to execution for Plymire's debts.

As suggested by appellant, there may be impolicy in allowing a severance of title and

possession where an ultimate sale is designed by the parties. But this consideration is for the legislature, and not the courts. The common-law right of the seller, by appropriate contract, to retain the title until performance of some valid condition on the part of the buyer, has been long recognized in this state, as almost universally elsewhere. *Putnam v. Lamphier*, 36 Cal. 151; *Kohler v. Hayes*, 41 Cal. 455; *Hegler v. Eddy*, 53 Cal. 597; *Sere v. McGovern*, 65 Cal. 244, 3 Pac. 859; *Benj. Sales* (Bennett's 6th Ed.) pp. 255, 282, et seq. That the property is to be resold by the first (conditional) purchaser does not affect the rule. *Hirsch v. Steele*, 10 Utah, 18, 36 Pac. 49, and cases cited.

Appellant further argues that the written claim to the marble in question served on him by plaintiff prior to the execution sale, under section 689, Code Civ. Proc., is defective in the manner of "setting out the title," and in "stating the grounds of such title," as provided in that section. Waiving the question whether the statute referred to imposes a condition precedent to the right to maintain the action, we think the objection is not tenable. The writing stated, among other things, that plaintiff is the owner of the property, and had delivered it to Plymire for purposes of sale, and that he held it when seized by defendant for those purposes, and not otherwise. The phrase "grounds of such title," in the Code section, is not very definite, but we suppose it has reference to the reasons why the claimant avers himself to have a title superior to that of the execution debtor; and the explanation in this instance of the manner in which such debtor acquired possession of the property from the claimant, coupled with a statement of the claimant's ownership, seems to be all that should be required in such a case. Some other points are made concerning rulings on matters of evidence at the trial, but they are unimportant. If all were determined in appellant's favor, we cannot see that the result could be affected. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

109 Cal. 250

TRUMPLER v. COTTON et al. (No. 18,319.) (Supreme Court of California. Sept. 27, 1905.)

PROBATE PRACTICE — JURISDICTION — SERVICE BY PUBLICATION — GUARDIAN AND WARD — COMPELLING ACCOUNT — LIABILITY OF SURETIES.

1. Code Civ. Proc. tit. 11, § 1773, providing that the court may, "on application made for that purpose by any person, compel the guardian to render an account to the court of the estate of the ward," authorizes an order to a guardian to present his account on the application by the brother of the ward.

2. Code Civ. Proc. § 1808, applying the pro-

visions relating to the estates of decedents and proceedings thereon in the superior court to proceedings in regard to guardians; section 1718, providing that the accounts of guardians and their settlement shall be governed by the provisions concerning the estates of decedents; section 1709, requiring that citations be served in the same manner as the summons in a civil action; and section 412, authorizing service by publication where the person to be served resides out of the state,—confer on the probate court power to notify by publication a guardian residing in a foreign country of its order on him to submit his accounts for settlement and allowance.

3. Under Code Civ. Proc. § 639, the probate court, having acquired jurisdiction of a nonresident guardian by publication of its order on him to present his accounts for settlement and allowance, may, on his nonappearance, refer the account to some proper person to state and present it.

4. Where the complaint in an action on a guardian's bond avers that a demand of payment was made on the sureties after a date named, "and previous to the filing of this complaint," the allowance of interest on a judgment for the amount of the bond from the date first named, instead of from the date on which the complaint was filed, is error.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Action by Eva C. Trumpler against A. T. Cotton, E. Lathrop, and J. Goldman, upon an undertaking executed by defendant Cotton, as principal, and his codefendants, as sureties, conditioned for the faithful performance by defendant Cotton of his duty as guardian of the person and estate of plaintiff. There was judgment for plaintiff, from which defendants Lathrop and Goldman appeal. Modified.

Armstrong & Platnauer, for appellants. Holl & Dunn, for respondent.

SEARLS, C. This is an action upon an undertaking executed by the defendant A. T. Cotton, as principal, and by defendants E. Lathrop and J. Goldman, as sureties, conditioned for the faithful performance by said Cotton of his duties as guardian of the person and estate of Eva C. Trumpler, the plaintiff herein, in the penal sum of \$1,250. The cause was tried by the court without a jury and judgment rendered in favor of plaintiff for \$1,250, and legal interest thereon from October 3, 1892, and costs. Defendants Lathrop and Goldman appeal from the judgment, and from an order denying their motion for a new trial.

Defendants demurred to the complaint, which demurrer was overruled by the court, and the ruling is assigned as error. The essence of defendants' objection is not fully disclosed by the allegations of the complaint. The same question arose, however, repeatedly, in the course of the trial, and is embodied in the bill of exceptions or statement on motion for a new trial, and a proper disposition of the case requires it to be met and determined. The following facts constitute the principal factors in the problem: A. T.

Cotton was duly appointed the guardian of the person and estate of Eva C. Trumpler, an infant, by the probate court of Yolo county, on the 4th day of October, 1886, and duly qualified and filed an undertaking, with the other defendants as sureties, for the faithful discharge of his duties as such guardian. Cotton caused to be made and filed on the 11th day of February, 1888, an inventory and appraisal of the estate of his ward which had come to his possession, and showing its value to be \$3,513.21. On the 11th day of July, 1891, the plaintiff reached her majority. Prior thereto, and on the 24th day of March, 1890, said Cotton filed an account as guardian, showing that there was in his hands as such guardian of plaintiff, the sum of \$4,539.35, in cash, as well as certain property, real and personal, which account was duly settled and allowed by said probate court. In January, 1891, the said A. T. Cotton, guardian, absconded from the state of California, and ever since has remained without and absent from the state, and has never filed any other or final account. Under these circumstances, on the 30th day of March, 1892, Harry F. G. Trumpler, a brother of plaintiff, made and filed a petition, duly verified, in the superior court of the county of Yolo, setting forth the facts, and showing that the said guardian had failed to file his final account, and praying a citation to said guardian, requiring him to appear and render his account, etc. Thereupon a citation in due form was ordered by the said court, requiring said guardian to appear and file his account on June 27, 1892; and upon an affidavit showing that said guardian was a non-resident of the state of California, and a resident of Victoria, British Columbia, dominion of Canada, etc., an order was made in due form for publication of said order requiring said guardian to appear and file his account. The order was duly published, and a copy duly deposited in the mail, directed to said guardian at Victoria, etc. Cotton, the guardian, failed to appear, and, upon proof of service of the order as aforesaid, the superior court by order appointed one E. B. Mering, Esq., a referee to prepare, render, and present for allowance the final account of said guardian. The account was made and presented by the referee, due notice of the settlement thereof given; and on the 1st day of September, 1892, defendants Lathrop and Goldman appeared by counsel, filed a demurrer to the jurisdiction of the court, and an answer, objections and exceptions to the ruling of the court and to its jurisdiction. The court overruled the objections, settled the account, and by its decree adjudged that there was in the hands of said guardian of the funds of his ward, the plaintiff herein, the sum of \$4,705.51, which was decreed to be paid to plaintiff.

The points made by appellants may be stated in condensed form thus: (1) In probate matters, and in proceedings relating to

guardians, the superior courts can only exercise such special jurisdiction as is conferred upon them by statute; and their powers, and the mode of their exercise, can only be exercised in the cases and in the mode provided by statute. (2) The superior court has no jurisdiction to settle and allow an account of a guardian, except when presented by him; and there is no authority for any other person to return, file, or swear to an account for him. (3) The rendering and filing of an account by a guardian is jurisdictional, and without it the court has no power in the premises, except to attach the guardian and remove him from office. (4) In a case where the guardian has absconded, and is without the jurisdiction of the court, and has failed to render his account, the case is like that where the guardian is deceased, and the sole jurisdiction is in equity. (5) The liability of the surety is dependent upon the liability of the principal, and does not attach until that of the latter is determined by a court of competent jurisdiction. (6) Harry F. G. Trumpler had no interest in the estate of plaintiff. He was a stranger to the proceeding, and his petition could confer no jurisdiction on the court to take action in the matter. The contentions of appellants, as embodied in the foregoing propositions, will be considered without reference to the consecutive order of their statement.

Title 11 of the Code of Civil Procedure, commencing at section 1294, relates to proceedings in the probate court, and relates to the proof of wills, appointment of executors and administrators, the various proceedings for the settlement of the estates of deceased persons, and cognate matters connected with or relating thereto, and also contains a chapter in reference to guardians and wards, the manner of the appointment of such guardians, their duties, etc. Section 1773 provides that every guardian must return to the court an inventory of the estate of his ward within three months after his appointment, and annually thereafter, and further provides that "the court may, upon application made for that purpose by any person, compel the guardian to render an account to the court of the estate of his ward." By section 1774 the guardian is required, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, to present his account to the court for settlement and allowance. It will be observed from the language of section 1773, *supra*, that the court is authorized to compel the guardian to render an account upon the application of any person. It is not necessary that the person making such application shall have an interest in the estate. The application on the part of Harry F. G. Trumpler, the brother of plaintiff, was therefore sufficient, and the order or citation to the guardian to present his account for settlement and allowance was properly made upon such application.

Was the service of the citation sufficient to give the court jurisdiction? Under section 1808, "The provisions of this title [title 11] relative to the estates of decedents, so far as they relate to the practice in the superior court, apply to proceedings under this chapter"; that is to say, to proceedings in regard to guardians. It is further provided by section 1789 that accounts and the settlement of accounts of guardians must be had and made as required by the provisions concerning estates of decedents, unless otherwise specially provided. Turning to section 1709, Code Civ. Proc., and we find that citations must be served in the same manner as a summons in a civil action. In a civil action, when a person to be served with a summons resides without the state, service may be made by publication. Code Civ. Proc. § 412.

The affidavit for publication was such as is required in cases of publication of summons in a civil action, and must be held sufficient. The court having thus, by substitute service, obtained jurisdiction of the person of the guardian, and possessing, under the statute, jurisdiction of the subject-matter of the settlement of his account, and the guardian being without the jurisdiction of the court, and not amenable to process of attachment, and having failed to file his account, it was within the province of the court to (as was said in *Graff v. Mesmer*, 52 Cal. 637) cause "the account to be made up, audited, and settled upon such evidence as should be adduced on behalf of the ward." Where jurisdiction is conferred upon a court by the constitution or a statute, all the means to carry it into effect are also given; and, if the course of proceedings is not specifically designated by the Code, any suitable mode may be adopted which may appear most conformable to the Code. Code Civ. Proc. § 187. *Spencer v. Houghton*, 68 Cal. 82, 8 Pac. 679, is to the point that a guardian is bound to settle his accounts whenever directed by the probate court, and that the guardian who receives his appointment under the law which prescribes that notice may be served by publication is to be regarded as assenting in advance that, upon leaving the state, service may be made upon him by publication. See, also, *Ashurst v. Fountain*, 67 Cal. 18, 6 Pac. 849; *Estate of Aveline*, 53 Cal. 260; *Graff v. Mesmer*, 52 Cal. 637. As the court could take and state the account, so it could refer it to some proper person to state it. Code Civ. Proc. § 639; *Hidden v. Jordan*, 28 Cal. 309. Counsel for appellant liken a case like the present to that of *Chaquette v. Ortet*, 60 Cal. 594, where the administrator of an estate died before rendering his account, and this court held that jurisdiction to compel an accounting vested in a court of equity, and that an adjustment of the account by that court was a prerequisite to an action against the sureties on the administrator's bond. The decision proceeds upon the theory that "there is no provision of the statute providing for the set-

tlement of the account of an administrator who dies before rendering an account." In *re Allgier*, 65 Cal. 228, 3 Pac. 849, was a similar case, and was decided upon like grounds. The reason of the rule does not prevail in a case like the present. Here the court not only has jurisdiction of the subject-matter, but the statute designates specifically the means by which it shall obtain jurisdiction of the person of the guardian, and such guardian cannot thwart the object of the law by failing or refusing to present his account. It was said in *Graff v. Mesmer*, from which we have quoted supra: "It is the peculiar province of the probate court to settle the accounts of guardians, and, as we have seen, it has authority to do so even after the letters are revoked. The statute contemplates that its power in this respect shall be exclusive in those cases in which the necessary authority has been conferred, as in this case. If the rule were otherwise, a suit against the sureties on the official bond would often involve the settlement of a complicated account before a jury, instead of a probate court, which possesses peculiar facilities for scrutinizing the accounts and holding the guardian to a proper accountability." That was an action against the sureties on the bond of a guardian, without a previous settlement of his account by the probate court; and the court held that the action could not be maintained until such settlement had been had, and, as hereinbefore quoted, that if the guardian could not, from any cause, be compelled to present his account, the court could order it made up from the evidence at hand. We conclude that the account, as settled by the court, was adjusted within the lines of the law, and is binding upon the sureties of the guardian, the appellants here, and hence that the various objections going to the validity of the account as settled were properly overruled by the court below, and the several errors assigned upon such rulings cannot be upheld.

The court gave judgment against the defendants, as sureties, for the sum of \$1,250, the amount of their undertaking, with legal interest thereon from October 3, 1892, the date of the decree settling the account and adjudging its payment. The general rule is that judgment cannot be rendered against sureties for a greater amount than the penalty of the bond, and they "cannot be held liable for interest beyond the penalty of the bond, except for such interest as accrued from their own default in unjustly withholding payment after having been notified of the default of their principal." *Murfree, Off. Bonds*, § 689, and cases cited. In the absence of a notification, interest is only allowed from the issuance of the writ. The complaint avers a demand of payment from the sureties "after October 3, 1892, and previous to the filing of this complaint." The complaint was filed October 22, 1892. Under such an allegation in the complaint,

we are not at liberty to assume that the demand was made until the last moment before filing the complaint. It follows that the interest for some 19 days was improperly allowed. The amount is less than \$5,—a trifle scarcely worthy of an appeal. The point being made, however, we must hold that there was error in allowing interest prior to October 22, 1892. The order denying a new trial should be affirmed, and the cause remanded to the court below, with directions to modify the judgment by striking therefrom the allowance of interest from October 3, 1892, to October 22, 1892, and as so modified the judgment should be affirmed. Each party to pay his own costs on this appeal.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying the motion for a new trial is affirmed, and the cause remanded to the court below, with directions to modify the judgment by striking therefrom the allowance of interest from October 3, 1892, to October 22, 1892, and as so modified the judgment is affirmed. Each party to pay his own costs on this appeal.

TRUMPLER v. COTTON et al. (No. 18,318.) (Supreme Court of California. Sept. 27, 1895.)

Department 2. Appeal from superior court, Sacramento County; Matt. F. Johnson, Judge.

Action by Harry F. G. Trumpler against A. T. Cotton, E. Lathrop, and J. Goldman, on an undertaking executed by defendant Cotton, as principal, and his codefendants, as sureties, conditioned for the faithful performance by said Cotton of his duties as guardian of the person and estate of Eva C. Trumpler. There was judgment for plaintiff, from which defendants appeal. Modified.

Armstrong & Platnauer, for appellants. Holl & Dunn, for respondent.

PER CURIAM. This appeal involves the same questions, and is submitted upon the same briefs, as in *Trumpler v. Same Defendants* (No. 18,319) 41 Pac. 1033. Upon the authority of that case, the order denying a new trial is affirmed, and the cause is remanded to the court below, with directions to modify the judgment by striking therefrom the allowance of interest from October 3, 1892, to October 22, 1892, and as so modified the judgment is affirmed. Each party to pay his own costs on this appeal.

5 Cal. Unrep. 159

CASTLE et al. v. HICKMAN et al. (No. 18,391.)

(Supreme Court of California. Sept. 28, 1895.)

PLEDGE—SUBSTITUTION OF COLLATERAL—TRIAL BY COURT—FINDINGS—WRITTEN INSTRUMENTS—PROOF OF EXECUTION.

1. The delivery by the payee of a note, to the maker thereof, of a life insurance policy held by him as security for the payment of the note, which delivery was conditioned on the return of a paid-up policy to be thereafter issued, does not divest such payee of his lien on the security.

2. Failure of the court to make a finding is not reversible error, in the absence of a showing that there was evidence to justify a finding.

3. A copy of a decree of discharge in insolvency is not a "written instrument," within Code Civ. Proc. § 448, providing that "when the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, the genuineness and due execution are deemed admitted, unless the plaintiff file an affidavit denying the same."

Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by George H. Castle, Jr., and others, as executors of the last will and testament of George H. Castle, deceased, against Edward Hickman and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

J. G. Swinnerton and White & Dunlap, for appellants. Nicol & Orr and F. T. Baldwin, for respondents.

HARRISON, J. The defendants, Edward Hickman and Hepsabeth Hickman, his wife, executed their promissory note to George H. Castle, February 23, 1889, for the sum of \$4,343, and on the 22d of April, 1890, for the purpose of securing the same, assigned to him a certain policy of insurance that had been issued by the Equitable Life Assurance Society, payable to Edward Hickman. In January, 1891, Edward Hickman was desirous that the policy should be surrendered for a paid-up policy, and thereupon he and Castle made an agreement to that effect, and that the paid-up policy, when issued, should be held by Castle in lieu of the other, and with like effect and purpose. The policy was thereupon delivered to Hickman, and the insurance company was directed by him to issue therefor a paid-up policy, and, when issued, to forward it to Castle's attorney. The company made the paid-up policy payable to the defendant Hepsabeth Hickman, and, in case of her death, to her children, and, instead of forwarding the policy to Castle's attorney, forwarded it to Hickman, who afterwards delivered it to the attorney. The present action was brought by the executors of Castle to obtain judgment for the amount of the promissory note, and declaring that the claim of the defendants upon the paid-up policy is subordinate and subject to the claim of the plaintiffs therein. Judgment was rendered in favor of the plaintiffs, and the defendants have appealed.

It was shown at the trial that the defendant Hepsabeth signed the promissory note as an accommodation to her husband, subsequent to its execution by him, and that her assignment of the policy was without any consideration. She claimed in her answer that her husband had previously agreed that he would hold the policy as a security for the payment of certain money that he had borrowed from her, and that, when he exchanged it for the paid-up policy, the lat-

ter was made payable to her for the purpose of carrying out this agreement, and that its subsequent delivery by him to Castle was without her knowledge. At the trial, however, after the plaintiffs had produced the assignment of the original policy executed by her, she testified that she executed it at the request of her husband, who informed her that Castle wanted it as security for the note that had been made to him. There was no evidence that the policy had ever been assigned by her husband to her, and the only evidence in support of her claim to it as security for her husband's debt was her statement that he had made a verbal promise to give it to her; but there was no evidence that he had ever carried out his agreement with her. She testified that, when she signed the assignment, she thought it was of another policy, but she also testified that she did not read the assignment, although it was placed in her hands. Nor did she testify that her husband had made any misrepresentation of the contents of the instrument when he asked her to sign it. Her testimony on this subject is as follows: "The paper my husband wanted me to sign was given to me. He did not tell me not to read it. He did not tell me about the contents of it. He said Mr. Castle wanted more security. I signed it because I was willing to give him more security. I was willing to aid my husband in giving Castle more security. I was desirous that Mr. Hickman should make such arrangements as might be satisfactory to Mr. Castle at the time. I signed this paper, of course, at his request." The court found that the assignment by her to Castle was not executed by mistake, or without any intention to assign it to him, and that it had not at any time prior thereto been assigned or pledged with her as security for any debt of her husband. The testimony before the court was ample to support these findings, and, upon the facts thus found, the court was authorized in holding that her claim to the policy is subordinate to that of the plaintiffs.

The agreement between Castle and Hickman that the paid-up policy should be held "in lieu of the other" gave Castle the same right to it as security for Hickman's note as if the paid-up policy had been originally delivered to him. The delivery to Hickman, for the purpose of procuring a paid-up policy to be issued in lieu thereof, did not divest the lien under which it was held by Castle. *Palmtag v. Doutrick*, 59 Cal. 154; Civ. Code, § 2913. Whether the paid-up policy was issued in favor of Mrs. Hickman by the direction of Mrs. Hickman, or without any directions, is immaterial. Mrs. Hickman testified that it was done without her knowledge, and there was no evidence that any directions upon the subject had been given to the company. The fact, however, that it was so issued without the consent of Castle, is all

that it was necessary for the plaintiffs to show.

The failure of the court to find upon certain issues does not constitute a reversible error. It does not appear that there was any evidence in support of the affirmative defense of Edward Hickman, and it has been frequently held that it is not error for the court to omit to make a finding, unless it shall be made to appear that there was evidence which will justify such finding. The copy of the decree of discharge in insolvency, which is set forth in his answer, is not a "written instrument," within the meaning of section 448, Code Civ. Proc.

We find no error in the record, and the judgment is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

109 Cal. 294

PEOPLE v. EPPINGER. (Cr. 54.)

(Supreme Court of California. Oct. 1, 1895.)

CRIMINAL LAW—FORMER JEOPARDY—MINUTES OF TRIAL COURT—VERDICT—ISSUE OF PRIOR CONVICTION.

1. An arrest of judgment operates as an acquittal only when no evidence has been shown sufficient to charge an offense.

2. An arrest of judgment for defects in the information does not operate as a bar to the filing of an indictment for the same offense.

3. A mere ministerial irregularity in the minutes of the trial court will be disregarded.

4. On the trial, under a plea of not guilty, of an indictment charging defendant with forgery, and with having suffered a prior conviction of larceny, the jury must specifically find on the issue of prior conviction.

5. On the trial of an indictment charging defendant with forgery, and with having suffered a prior conviction of larceny, a general verdict of "guilty as charged" will be treated as an acquittal of the charge of prior conviction.

6. Where, on the trial of an indictment charging defendant with forgery and with having suffered a prior conviction of larceny, the jury return a verdict of "guilty as charged," and the court imposes the maximum penalty for forgery, it will be presumed that the court treated the verdict as a finding against defendant on the issue of prior conviction.

Department 2. Appeal from superior court, San Francisco county; William T. Wallace, Judge.

W. L. Eppinger was convicted of making, uttering, and passing a fictitious check, and appeals. Reversed.

W. M. Cannon, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

HENSHAW, J. Defendant was convicted under an indictment charging him with making, uttering, and passing a fictitious check (Pen. Code, § 476), and with having suffered a prior conviction for petty larceny. He pleaded jeopardy, former acquittal, and not guilty. Under instructions from the court to that effect, the verdicts of the jury upon the first two pleas were for the people. The instructions and the verdicts were proper.

The circumstances are that defendant had been convicted of the same offense under an information which this court held to be defective. *People v. Eppinger*, 105 Cal. 36, 38 Pac. 538. Upon issuance of the remittitur, the trial court, adjudging that evidence had been produced sufficient to charge him with an offense, recommitted defendant to the custody of the sheriff to await the action of the grand jury, which in due time returned this indictment. The defendant, upon the first trial, at the time of his arraignment for sentence, moved in arrest of judgment upon the ground of defects in the information, and now contends that the ruling of this court sustaining him in his motion, operates as an acquittal under section 1188 of the Penal Code. But the arrest of judgment operates as an acquittal only when no evidence has been shown sufficient to charge the defendant with any offense. It is not necessary that the evidence should be sufficient to convict him. If, for example, the people had failed to lay or prove the venue, the evidence would not be sufficient to convict, but it still might establish to a certainty that somewhere the defendant had committed the particular crime charged. And it was never intended to be nor is it the law that, under such a state of facts, the mistrial should operate as an acquittal or as a bar to further proceedings.

The minutes of the court show that defendant was arraigned upon an information charging him with forgery, whereas, in fact, it was upon an indictment charging him, with uttering a fictitious instrument. But these ministerial irregularities do not affect any of the substantial rights of the defendant, who was in fact arraigned upon an indictment a copy of which was given to him, and who was thus fully informed of the nature of the charge against him, and answered to it by his pleas. The trial court has the power to correct its minutes to make them import verity, and the irregularity must be disregarded. Pen. Code, § 1258; *People v. Ah Sing*, 95 Cal. 654, 30 Pac. 796.

A more serious objection is found in the form of the verdict returned by the jury upon the general issue. The defendant, having pleaded not guilty, put the prosecution to proof upon all material averments, of which that of prior conviction was one. The jury did not find specifically upon this issue, as they were required to do by section 1158 of the Penal Code, but returned a verdict finding the defendant guilty as charged. Had the prior conviction not been charged, or had it been found that the charge was not true, the court, in pronouncing sentence, could have exercised its discretion, and imprisoned the defendant for any period from 1 to 14 years. Had the prior conviction been found as true, the statute then deprives the judge of this discretionary power, and makes the sentence an absolute one of fourteen years. Pen. Code, § 667, subd. 2. In this

case the sentence imposed was 14 years. It is impossible to say whether this term was fixed by the judge in the exercise of his discretion, or without the exercise of discretion, in accordance with the mandate of the statute upon prior conviction found. But it is not necessary to determine this. It was unquestionably error for the jury to have failed to find upon the issue. The error being shown, the injury will be presumed, unless the contrary is clearly made to appear. *People v. Ybarra*, 17 Cal. 166; *People v. Williams*, 18 Cal. 187; *People v. Stanley*, 47 Cal. 113. In other words, it must be presumed that the trial judge treated the general verdict as including a finding in favor of the truth of the charge of prior conviction, and thus sentenced under section 667 of the Penal Code. Had the sentence been for any less period than 14 years, the difficulty would have been obviated, for it would then certainly have appeared that the court treated the verdict as favorable to the defendant upon the charge of prior conviction. Not having done so affords additional ground for the belief that it felt compelled to sentence under section 667. But, in so doing, the judge incorporated into the verdict a finding of fact which the jury did not make, and sentenced the defendant under an issue upon which the jury did not pass.

The verdict rendered should be treated as a finding against the defendant upon the crime charged, and in favor of the defendant upon the question of prior conviction. The judgment must therefore be reversed, with directions to the trial judge to pronounce a judgment and sentence upon defendant in the exercise of his discretion upon the facts and circumstances of the case, as provided for by section 476 of the Penal Code. And at the same time the judgment should designate the offense as the making, passing, and publishing a fictitious check with intent to defraud. *People v. Johnson*, 71 Cal. 384, 12 Pac. 261.

The foregoing are the only contentions which, in our view, merit consideration.

We concur: McFARLAND, J.; TEMPLE, J.

109 Cal. 299

HILDRETH v. JAMES et al. (No. 18,353.)
(Supreme Court of California. Oct. 1, 1895.)

EJECTMENT—BY WHOM MAINTAINED.

A mortgagor cannot maintain ejectment against his mortgagee in possession until the debt is paid.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Ejectment by Laura J. Hildreth, as administratrix of the estate of Thomas Hildreth, deceased, against J. G. James and others. There was judgment for defendants, from which plaintiff appeals. Affirmed.

J. C. Black, for appellant. W. C. Graves and L. D. McKisick, for respondents.

McFARLAND, J. This is an action of ejectment to recover certain parcels of land, containing about 13,000 acres. The superior court rendered judgment for defendants, and plaintiff appeals.

We see no reason for reversing the judgment, or the order denying appellant's motion for a new trial. We pass over respondents' contentions that the title to the land passed to Charles McLaughlin by the deed to him from Burr, Shotwell, and the decedent Thomas Hildreth; that all demands of the estate of said Hildreth against respondents were compromised with William Dunphy, administrator of said estate, with the approval of the probate court; and that, even viewing the deed to McLaughlin as a mortgage, this action must fail, because a mortgagor cannot maintain ejectment against a mortgagee in possession until the debt is paid. There are other points made by respondents which we do not deem it necessary to review. We pass these points and contentions, because, in our opinion, the appellant is estopped and debarred from the prosecution of this action by the judgment rendered in the action of Kate McLaughlin, executrix of the will of Charles McLaughlin, deceased, against Laura J. Hildreth et al., to quiet title to the lands involved in the present action. The nature of that action, and the facts concerning it, are fully set forth in the transcript, and it would serve no useful purpose to recite them here. The judgment and order denying appellant's motion for a new trial are affirmed.

We concur: **HARRISON, J.; GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.**

VAN FLEET, J., deeming himself disqualified, did not participate in the foregoing.

100 Cal. 201

HILDRETH et al. v. JAMES et al. (No. 18,385.)

(Supreme Court of California. Oct. 1, 1895.)

JUDGMENT—ACTION TO SET ASIDE—LACHES.

An action to set aside a judgment will not be entertained, five years after the entry thereof, on the ground that plaintiff can now prove from court records then on file that the title to certain realty determined by that judgment to be in defendant was in fact held by her, as mortgagee, the deed under which she claimed being in fact a mortgage; defendant having simply averred in the former action, to quiet title, that, as the successor of her husband, she owned the land in fee.

In bank. Appeal from superior court, Fresno county; **M. K. Harris, Judge.**

Action by **Laura J. Hildreth** (administratrix with the will annexed of **Thomas Hildreth**, deceased) and others against **J. G. James** and others, to have canceled and set aside the judgment rendered in a certain action, in which **Kate D. McLaughlin** was plaintiff and plaintiffs herein were defendants, quieting the title of plaintiff therein to certain land. There

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was judgment for defendants, from which plaintiffs appeal. Affirmed.

J. C. Black, for appellants. **W. C. Graves** and **L. D. McKisick**, for respondents.

McFARLAND, J. This is an action to have canceled and set aside a judgment rendered in a certain action, in which **Kate D. McLaughlin**, executrix of **Charles McLaughlin**, deceased, was plaintiff, and **Laura J. Hildreth** (plaintiff herein) and others were defendants, rendered on the 2d day of February, 1888, quieting the title of plaintiff therein to certain land. This present action was not brought until more than five years after the entry of the judgment sought to be canceled. A general demurrer to the amended complaint was sustained, and, plaintiffs failing to further amend, judgment was rendered for defendants. Plaintiffs appeal.

The demurrer was properly sustained. In the complaint no facts are averred showing any diligence on the part of appellants, at the time of the pending of said action of **Kate D. McLaughlin v. Laura J. Hildreth et al.**, to discover what they now allege to have been a defense to said action. One of the principal averments is that a certain deed to **Charles McLaughlin**, absolute on its face, was in fact a mortgage, and that the plaintiff in said action concealed the fact that it was a mortgage from the defendants therein (appellants herein). The only concealment consisted in the fact that **Mrs. McLaughlin** averred in her complaint that she, as successor to **Charles McLaughlin**, owned the land in fee. The defendants therein demurred to the complaint, and, the demurrer being overruled, they failed to answer; and there is no averment in the complaint in the present action that they took any steps to inform themselves as to what they now aver to have been the real facts. Indeed, it affirmatively appears from the complaint that they were guilty of gross carelessness. They aver, for instance, that they can now prove by the records of the probate court, then in existence, that, in the inventory of the estate of **Charles McLaughlin** filed by **Mrs. McLaughlin**, she stated that the only interest which the estate of said **Charles** had in the land in contest was a mortgage interest, secured by a deed absolute on its face, but given as a mortgage. If this be true, there was a public record at the time of said action which would have been evidence of the fact claimed to have been concealed. We think that the averments of the complaint are totally insufficient to warrant a decree setting aside a solemn judgment of the court of record, especially after it has stood for so long a period unchallenged. The judgment is affirmed.

We concur: **HARRISON, J.; GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.**

VAN FLEET, J., deeming himself disqualified, did not participate in the foregoing.

109 Cal. 255

PEOPLE v. FULTZ. (No. 21,194.)

(Supreme Court of California. Sept. 27, 1895.)

JURY — DEFENDANT'S CHALLENGES — RAPE — EVIDENCE.

1. Where a juror stated that he had an opinion as to defendant's innocence, not based on public rumor, and it would require considerable evidence to change it, the court properly sustained a challenge for cause.

2. Pen. Code, § 1070, provides that, if the offense charged be punishable with death or with imprisonment for life, defendant is entitled to 20 and the state to 10 peremptory challenges. On a trial for any other offense defendant is entitled to 10 and the state to 5 peremptory challenges. *Held*, that on a trial for rape defendant is limited to 10 challenges.

3. Where prosecutrix, on the trial of her father for rape, was asked on cross-examination whether she heard her mother say anything "bad" to her father, and answered that she called him a certain name "when he hit her," it was not error to refuse to strike out the answer, as the testimony would have been admissible on redirect examination to show the circumstances under which the language was used.

4. On the trial of a father for rape of his daughter, evidence of prior rapes is admissible to account for there having been no outcry, and to explain the absence of laceration.

5. It was not error to permit a witness for the state to testify without objection merely that she was defendant's wife, that she resided at the place where and at the time when the crime charged was alleged to have been committed, where the time and place were not disputed, and defendant testified to the same facts.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

George W. Fultz was convicted of rape, and appeals. Affirmed.

Daney & Wright, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

VANCLIFF, C. The defendant was convicted of the crime of rape, committed upon his own daughter, under the age of 12 years, in the county of San Diego, and was sentenced to imprisonment in the state prison for the term of 15 years. He appeals from the judgment and from an order denying his motion for a new trial.

1. It is contended for appellant that the trial court erred in permitting the prosecuting attorney to challenge the juror Chambers for cause, for the alleged reason that no lawful cause for the challenge was shown. The statements of the juror upon his examination warranted the court in finding that he had formed, and still had, the opinion that the defendant was not guilty; that such opinion was not based upon public rumor, common notoriety, nor statements of newspapers; that it would require considerable evidence to change that opinion, although he would try to act fairly and impartially in this case, and thought he could do so. While the statements of the juror were not very explicit, and hardly self-consistent, they clearly tended to prove a state of his mind which would prevent him from acting as a juror in this case with entire impartiality and without prejudice to the

rights of the people, and therefore justified the court in so finding, under the rule announced in *People v. Wells*, 100 Cal. 227, 34 Pac. 718.

2. Counsel for appellant contend that the court erred in restricting the defendant to 10 peremptory challenges of jurors. Such restriction was in strict accordance with the decision of department 1 of this court in the case of *People v. Clough*, 59 Cal. 438, which was approved and adhered to by the court in bank in *People v. Riley*, 65 Cal. 107, 3 Pac. 413. It is urged, however, that those cases should be overruled, but without assigning any reason therefor which could have been overlooked or not considered by the court in those cases; therefore I think the construction put upon section 1070 of the Penal Code in those cases should be adhered to until that section is changed by the legislature, although, were the question *res integra*, I would be inclined to concur with counsel for appellant.

3. It is claimed that the court erred in permitting testimony that the defendant on one occasion struck his wife, the mother of the prosecuting witness. The only foundation for this objection appears in the testimony of Lizzie Fultz, the prosecutrix, and that of her brother, Fred. Fultz, given under the following circumstances: On the cross-examination of those witnesses for the prosecution the attorney for the defendant endeavored to show that the wife of defendant was hostile to him and favorable to the prosecution. On the cross-examination of Fred. Fultz he testified that he had heard his mother and father quarrel lots of times. "I have heard my mother call my father bad names. * * * I heard my mother call my father the devil once." On redirect examination by the district attorney the witness was asked and answered the following questions: "Q. You said one time you heard your mother call your father a devil. Do you know what that was for? A. No, sir; I do not remember. Q. Had your father struck her before that? A. No, sir; I do not think he had struck her before. Q. When did he strike her, then? A. After she had called him a devil." Objections to those questions by the district attorney, on the grounds of incompetency and irrelevancy, were overruled. On the cross-examination of Lizzie Fultz counsel for defendant asked and she answered as follows: "Q. Do you remember your mama saying anything bad about your papa to you? A. She called him a devil when he hit her." Thereupon counsel for defendant moved that her answer be stricken out as not responsive to the question. This motion was denied, and defendant excepted. Strictly, the question called for no further answer than "Yes" or "No"; but, supposing that she had so answered, and that counsel for defendant had not further asked her what bad thing her mother said about her father (which is very improbable), still it would have been relevant and proper for the district attorney, on redirect examination, to ask such further question, and also to ask what were the cir-

circumstances or provocation under which her mother said such bad things about her papa, as he did in the case of Fred. Fultz as above stated, and it is highly probable that he would have done so in the case of this witness. But, whether any further question touching the subject of that particular inquiry would have been asked by either party or not, the answer objected to was relevant to that particular subject, and was competent and material evidence, and the defendant could not have been injured by it; whereas the cause of the people and the reputation of defendant's wife might have suffered injury from the mere answer of the witness that she had heard her mother say something bad about her papa, without saying what it was, or stating any of the circumstances under which it was said. Besides, the mere opinion of the child witness that what her mother said was bad should not have been given without informing the jury what her mother said that was considered by the witness bad. On this ground the question itself was objectionable, and the mere answer it called for was inadmissible under a proper objection to it. The answer given, however, being relevant and competent evidence, was not subject to objection on the mere ground that it was not so; and there was no objection on the ground that the question was leading. Under these circumstances I think the court properly refused to strike out the answer of the witness. If the foregoing under this head is correct, it also answers the objection to the testimony of Fred. Fultz. On the redirect examination of this witness the district attorney was properly permitted to ask him to explain the circumstances under which his mother called the defendant a devil.

4. It is insisted that the court erred in permitting evidence of rapes and acts of lewdness committed by the defendant upon and with his daughter, other than that charged in the information. But I think such evidence was properly admitted, under the peculiar conditions of this case, to account for there having been no outcry and no pain suffered by the child, as she testified, when the particular act charged was committed; and also to account for the absence of laceration and the abnormal capacity of the vagina at the same time, as shown by the testimony of the physician who examined her person soon after the alleged commission of the act charged in the information; and, as it was important that the prosecution should account for the existence of these facts and conditions at the time and immediately after the commission of the act charged upon some other hypothesis than that of the innocence of the defendant, the evidence was admissible, even though it tended to prove the commission of other crimes than that for which the defendant was on trial. *People v. Lane*,

101 Cal. 513, 36 Pac. 10; *People v. Tomlinson*, 102 Cal. 24, 36 Pac. 506. It is true that it does not appear that the court instructed the jury that the evidence in question should be considered only for the purpose above stated, as would have been proper; but, since it does not appear that the defendant asked for such an instruction, he is not in condition to complain of the omission here; and, indeed, does not complain of it, but broadly contends that the court erred in admitting the evidence for any purpose whatever.

5. Mrs. Margaret V. Fultz was called and sworn as a witness for the people, and after she had testified, without objection, merely that she was the wife of the defendant, and that she had resided at the place where and at the time when the crime charged was alleged to have been committed, the defendant and his attorney were asked whether or not they consented that she should further testify in the case; whereupon defendant's attorney expressly declined to answer, and instructed the defendant not to answer the question; yet the defendant answered that he did not consent, and thereupon the witness was withdrawn, and testified no further. It is insisted by counsel for appellant that the court erred in permitting the defendant to be asked whether he consented that his wife should testify, and also in permitting her to testify to the extent she did as to the place of her residence at the alleged time of the commission of the act charged, for the reason that such testimony corroborated and strengthened that of her daughter as to the alleged time and place of the commission of the crime. But the testimony of the defendant also corroborated that of the daughter, not only as to time and place, but as to many other much more material circumstances. There was no question or dispute as to the time or place. Further than this, I think that the bare statement of the questions under this head is a sufficient refutation of plaintiff's contention.

6. It is finally urged that the evidence is insufficient to justify the verdict of the jury. Without stating the revolting details of the evidence, I think it enough to say that, if the jury believed the testimony of the daughter, corroborated, as it was, in respect to all material circumstances, by the testimony of Arvilla Coats and the defendant, it was amply sufficient to justify the verdict, and that it bears upon its face the impress of truthfulness. I think the order and judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

(28 Or. 147)

STATE v. BROWN.¹

(Supreme Court of Oregon. Oct. 14, 1895.)

GRAND JURORS—SERVICE AS JUROR WITHIN A YEAR—JURY—OPINION—HOMICIDE—EVIDENCE—INSTRUCTIONS—REVIEW.

1. Hill's Code, § 947, subd. 4, making it a sufficient cause of challenge to a juror that he has served as a juror within a year, does not apply to grand jurors.

2. Under Hill's Code, § 187, providing that the fact that a juror has formed an opinion as to the merits of a case is not sufficient to sustain a challenge unless the court is satisfied from all the circumstances that the juror cannot disregard such opinion and try the case impartially, a clear abuse of discretion in allowing one to act as juror who has stated that he has formed an opinion must be shown to procure a reversal of the judgment on that ground.

3. On a prosecution for murder, evidence that defendant, as he rode away from the place of the shooting, with a pistol in his hand, shouted "I am the toughest son of a ——— that ever struck this town," is admissible as part of the *res gestæ*.

4. Where a witness on a murder trial states that defendant was drunk on the day of the murder, and that she was excited when before the grand jury, and on being asked whether she did not, "before the grand jury" on a certain date, testify that defendant was not drunk, answers "No," the grand jurors are competent witnesses to contradict her.

5. In such a case, evidence by the grand jurors as to the witness' condition when before them is admissible.

6. On a trial for murder, evidence that a witness stated at the coroner's inquest that she would color her testimony to help defendant is admissible, when a proper foundation has been laid.

7. Where the record does not contain all the evidence, it will be presumed that a proper foundation for the introduction of impeaching evidence has been laid.

8. Where, on a murder trial, the audience applauds the remarks of the prosecuting attorney in closing the argument, the fact that the jury were not in the charge warned against being influenced by such applause is not ground for reversal, where it appears that the court promptly checked the applause and defendant requested no warning.

9. The instruction on a murder trial that there is evidence "to the effect" or "tending to show" a certain fact, and allowing the jury, if they found it to be a fact, to consider it in determining the degree of defendant's guilt, does not, as being a presentation of facts by the court, violate Hill's Code, § 200, prohibiting the court from presenting the facts of a case to the jury.

10. A requested instruction already covered by previous instructions is properly denied.

11. Where it appears that the record does not contain all the evidence, a refusal of an instruction in a criminal case will be presumed to have been proper.

Appeal from circuit court, Douglas county; J. O. Fullerton, Judge.

Samuel G. Brown was convicted of murder, and appeals. Affirmed.

W. R. Willis and A. M. Crawford, for appellant. C. M. Idleman, Atty. Gen., and L. Loughary, for the State.

MOORE, J. The defendant, having been indicted, tried for, and convicted of the crime of murder in the first degree, by shooting and killing William Alfred Kincaid, in Doug-

las county, moved for a new trial, which having been denied, he was sentenced to be hanged. From this judgment he appeals, and assigns as error the denial of a motion to set aside the indictment; the refusal to sustain challenges submitted to trial jurors; the admission of improper evidence; and the giving and refusal of certain instructions. The record discloses that the defendant at the proper time submitted a motion to set aside the indictment, for the reason that it had not been found as required by law, and filed therewith the following affidavit: "I, A. M. Crawford, being duly sworn, say I am attorney for Samuel G. Brown, the above-named defendant, and that Theodore Andrews, who is now a member of the grand jury which found the indictment in this case against said defendant, Samuel G. Brown, has been summoned and served as a juror in a cause tried in this court within less than one year prior to the finding of the indictment against said defendant, Samuel G. Brown, and is, and was when this indictment was found, not competent to act as a juror." In disposing of this motion, the following order was made: "And the court, after hearing the arguments of counsel, and being fully advised in the premises, overrules and denies said motion,"—to which ruling an exception was saved. It is contended on behalf of the defendant that the grand juror was incompetent, and, having challenged his competency and submitted evidence showing the want thereof, the court erred in not setting aside the indictment; while in behalf of the state it is insisted that his competency was a question of fact to be tried by the court, and as the record is silent as to the means adopted to reach the conclusion announced, it cannot be ascertained whether the court found the statements contained in the affidavit untrue or the motion insufficient in law. Without attempting to discuss the proposition contended for, but treating the facts stated in the affidavit as admitted, we shall examine the grand juror's competency as a question of law. In the formation of the grand jury, the statute in general terms provides that from a list containing the names of 200 persons made from the last preceding assessment roll of the county by the county court, denominated the "Jury List" (Hill's Code, §§ 952-956), 31 names shall be drawn (Id. § 958), from which number, so selected and in attendance upon the circuit court, the names of 7 shall be drawn, to act as grand jurors (Id. § 943); and it is made the duty of the court, before accepting a person so drawn as a grand juror, to be satisfied that he is duly qualified to act as such (Id. § 1233); and no challenge is allowed to the panel from which the grand jury is drawn, or to an individual juror, unless when so made by the court for want of qualification (Id. § 1234). Section 947 provides that: "A person is not competent to act as a juror unless he be,—1. A citizen of the United States; 2. A male inhabitant of the

¹ Rehearing pending.

county in which he is returned and who has been an inhabitant thereof for the year next preceding the time he is drawn or called; 3. Over twenty-one years of age; 4. In the possession of his natural faculties and of sound mind. Nor is any person competent to act as a juror who has been convicted of any felony, or a misdemeanor involving moral turpitude. No person shall be summoned as a juror in any circuit court more than once in one year, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within one year prior to the time of such challenge, or that he has been summoned from the bystanders or body of the county, and has served as a juror in any cause upon such summons within one year prior to the time of such challenge." The correct interpretation of this section must be decisive of the alleged error of which the defendant complains. The object of the legislative assembly in the passage of the latter part of this section was manifestly two-fold: First, to relieve a person from performing more than his share of jury duty; and, second, to prevent persons who make a business of sitting on juries, known as professionals, from being called to act as jurors in any cause before the circuit court at intervals of less than one year. The affidavit in support of the motion fails to show that Andrews did not possess all the qualifications prescribed by the statute, or that he had ever been convicted of any felony or misdemeanor involving moral turpitude; so that if he was disqualified to act as a grand juror, his incompetency must have existed by reason of the latter clause of the section under consideration. The phrase "in any cause," as used in this section, evidently means a civil or criminal action at issue and ready for trial in a circuit court of this state; and a person "called" to serve as a juror in any such cause would be subject to challenge if he had served as a juror in said court in the trial of any action within one year prior thereto, or had been summoned and attended as a juror within the same period, and a challenge upon that ground must be held sufficient. *Wiseman v. Bruns* (Neb.) 54 N. W. 858. But this provision cannot apply to one who has been drawn as a grand juror, because neither his duty nor oath requires him to be sworn "in any cause," nor is he required to try an issue of fact before the circuit court. The portion of the section above quoted providing that no person shall be summoned as a juror in any circuit court more than once in one year furnishes an exemption which would doubtless entitle the person drawn as a grand juror to be excused from serving as such upon his own application showing prior service within the year, if made before being sworn; but, as we view the statute, such prior service cannot be made a ground of challenge against him as a grand juror. Nor is this conclusion

in contravention of the spirit or purpose of the statute, which is intended to provide impartial and disinterested jurors for the trial of causes; for a grand juror otherwise qualified may have a bias for or prejudice against a person charged with the commission of a crime, and might have entertained and freely expressed an opinion concerning the guilt or innocence of the accused, and yet under our statute neither his bias, prejudice, nor opinion would be a ground of challenge even by the court when impaneling the grand jury. The enumeration of the persons who, under the statute, are incompetent, and the insertion of the phrase "in any cause," lead us to believe that the challenge prescribed on account of the prior service of a juror is limited to persons called to be sworn as trial jurors, and has no application to members of the grand jury.

2. The court having denied challenges for actual bias submitted by the defendant to James Byron, John Price, L. Ash, John Hancock, L. L. Hurd, J. A. McCallister, J. B. Caulfield, and L. L. Marsters, who were called as jurors, he peremptorily challenged the first four, thereby exhausting his right to that class of challenges; and the others having been impaneled, it is contended that the court erred in denying the said challenges for cause. The evidence of the qualification of these persons to act as jurors, having been taken before the court and incorporated in the bill of exceptions, renders an examination of it necessary. James Byron on his voir dire said he had heard what purported to be a statement of the facts in the case, which he believed to be true, and from this he had formed an opinion as to the guilt or innocence of the accused; that if the facts were as he had heard them, he had a rather decided opinion, which it would require some evidence, at least, to remove. But when asked by the court if he thought he could lay aside any opinion he might have, and decide the case upon the evidence produced at the trial and the law as given him by the court, he answered, "Yes, sir." The questions propounded to the persons so challenged, and their answers thereto, are almost identical with the questions put to and the answers made by Mr. Byron, except that each had derived his information from the newspaper accounts of the homicide; J. B. Caulfield and L. L. Marsters adding that they had heard others express opinions in reference to the merits of the case. Section 187, Hill's Code, provides that on the trial of a challenge for actual bias, "although it should appear that a juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied from all the circumstances that the juror cannot disregard such opinion, and try the issue impartially." In *State v. Saunders*, 14 Or. 300, 12 Pac. 441, Thayer,

J., in speaking of the effect produced upon persons called to act as jurors by what they had read or heard of the merits of a case, said: "This depends much upon the credulity of the persons, and the tenacity with which they adhere to preconceived notions,"—so that, if it were not for what was elsewhere said in the opinion, the inference would follow that if a person never believed anything he read or heard, or was incapable of retaining an opinion, he would be a competent juror, notwithstanding he had at one time formed or expressed an opinion concerning the merits of the case. But, further on in the opinion, the learned justice said: "The point to be determined is whether there exists such a state of mind upon the part of the juror in reference to the party challenging that he cannot try the case impartially and without prejudice to the party's substantial rights; and this, the statute says, must be determined by the exercise of a sound discretion. The evidence in this case upon the question of the qualification of the jurors challenged showed that they had, to some extent, formed an opinion as to the guilt or innocence of the accused, which they said would require evidence to remove, but thought they could try the case impartially. The trial judge heard their testimony, had an opportunity to observe their manner, and deemed them qualified to sit in the case. Unless, therefore, we conclude there has been an abuse of discretion, we have no right to interfere in the decision upon that point. It was a question of fact to be determined. The impression or opinion the jurors had formed was from newspaper accounts and general rumor, and the circuit court had a better understanding of the extent of the opinion than we can obtain from the bill of exceptions. This court ought not to reverse a judgment upon such grounds, unless the evidence of the juror's incompetency is pretty clear and certain; at least, shows some cogent circumstances against it,—circumstances of a nature calculated to impress upon the mind of the juror a conviction, such as having heard the testimony in the case, read a detailed statement of it, or been told it by some one claiming to know." In *Kumli v. Southern Pac. Co.*, 21 Or. 505, 28 Pac. 637, Bean, J., in discussing this question, said: "It is ordinarily more safe and just to the juror and the cause of truth to trust to the impression made upon the trial court, which heard his testimony, and noticed his manner and appearance while under examination, subject to the scrutiny of counsel, than to any written or reported statement of his testimony. His tone, temperament, and personal peculiarities, as exhibited on his examination, and which do not appear in the written report of his testimony, are important factors in determining his competency as a juror. If a person called as a juror, on his examination, when challenged, discloses that he has a fixed and definite opinion in the case, on

the merits, and nothing further is shown, the court ought, as a matter of law, to reject him as incompetent. Such a juror necessarily does not stand indifferent between the parties; and it matters little from what source he received the information upon which his opinion is based. If, however, he has no fixed belief or prejudice, and is able to say he can fairly try the case on the evidence, freed from the influence of such opinion or impression, his competency becomes a question for the trial court, in the exercise of a sound discretion, and its findings ought not to be set aside by an appellate court unless the error is manifest." When a crime has been committed, the local newspapers usually publish an account of it, and sometimes express opinions concerning the guilt or innocence of the person supposed to be the author of it; and the accounts, being read by subscribers to these publications, produce upon their minds impressions which are in proportion to the confidence reposed in the newspaper giving them circulation. No person of average intelligence can read such an account in his local newspaper without being more or less influenced by its perusal. From his home paper and his associates, with whom he discusses the history of a crime, he forms an opinion which is predicated upon the assumption that the information obtained is true; and it may be safe to say that the person who, after having read or heard an account of the commission of a crime in his neighborhood, has not formed an opinion concerning the guilt or innocence of the person accused of it, might with propriety be challenged for incompetency. The fact that he entertains such an opinion does not, under our statute, necessarily render him incompetent to try the accused as a juror. His mind may be so constituted that he will be able to eliminate the information he has received, together with the impressions and opinions derived therefrom, and impartially determine the fact in issue. If he can do this, he is competent; and it is the duty of the court, when a person is called to act as a juror and challenged for actual bias, to interrogate him and ascertain the condition of his mind, and from the facts elicited determine his competency. The decision must necessarily depend largely upon what he says, but it is not always a safe guide; for his answers may show, and he may think, he is competent, when in fact he is not. Nor will he be allowed to judge his own competency. While he is willing to trust himself, the court should not be willing to trust him, unless it is satisfied he can lay aside his information, impressions, and opinions, and fairly and impartially hear and decide. His intelligence, manner, tone, and bearing manifested during the examination are elements which enter into and form a part of the evidence from which the court determines his competency; and where he is in possession of the facts, knows them to

be such, and upon them has formed an opinion, the challenge for actual bias ought to be sustained; for every person accused of a crime is presumed innocent. But where a juror is in possession of the facts, and from them has formed an opinion, in advance of the trial, it necessarily reverses this presumption, and compels the defendant to establish his innocence, instead of requiring the state to maintain its charge against him. There are, in an issue raised by a challenge for actual bias, many elements connected with the examination and settlement of the question which cannot, from their very nature, be made or become a part of the bill of exceptions, and hence the trial court must be presumed, in the exercise of a sound discretion, to have done its full duty; and, having done so, its judgment should not be reviewed, unless such discretion has been abused. An examination of the evidence offered upon the challenges submitted fails to disclose any abuse of this discretion.

3. Robert Dear was called as a witness on behalf of the state, and (after testifying that he was not acquainted with the defendant, that he saw him on the day of the homicide about two or three minutes after it occurred, that he was running up the street with his pistol in his hand, waving it around) was asked, and, over the defendant's objection and exception, was permitted to answer, the following question: "What did he say?"—to which he answered: "He said, 'I am the toughest son of a ——— that ever struck this town.'" T. L. Kimball, another witness on behalf of the state, said that he was not acquainted with the defendant; that on the afternoon of August 13, 1894, he was in Oakland; that he saw the defendant near the depot hotel; and being asked what the defendant said at that time, was permitted to answer the question, over the defendant's objection and exception, which he did, as follows: "He came up the street waving the pistol, with his finger on the trigger, and he was talking, and all I heard him say, as he passed the hotel, was, 'the toughest son of a ———.' That is all I heard him say." It is contended that the answers to these questions were inadmissible, and tended to prejudice the minds of the jurors. The question here presented is whether the statements of the defendant, made after the homicide, were admissible as a part of the *res gestæ*. This species of evidence is not admissible, as a general rule, unless it grows out of the principal transaction, illustrates its character, and is contemporaneous with it. 1 Greenl. Ev. § 108. "*Res gestæ*," says Dr. Wharton, in his work on Criminal Evidence (section 262), "are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events." The authors of the American Decisions, in their notes to *People v. Vernon*, 95 Am. Dec. 49, upon this subject, say: "Where the state of a person's mind, his sentiments,

or disposition at a certain time is the subject of inquiry, his statements and declarations at that period are admissible." The indictment charged malice, and hence the condition of the defendant's mind at the moment of the homicide was an issue in the case, and any evidence which tended to show the state of his mind with reference to the deceased at that time was admissible. In *McManus v. State*, 36 Ala. 285, the evidence showed that the defendant had an altercation with the deceased, resulting in a fight, in which the defendant threw a piece of a brick at the deceased, hitting him on the head, from the effects of which he died. About one-half hour after the blow had been given, and after the fight was entirely over, the defendant, with a pistol in his hand, went to the place where the deceased was, and said that "he had come to kill the damned old rascal," meaning the deceased. An exception having been saved to the introduction of this statement in evidence, the court, in rendering its decision upon the question, said: "The circuit court did not err in admitting evidence, against the prisoner, of his acts, declarations, and conduct, when he returned, a half-hour after the blow was stricken, to the scene of the engagement. The indictment was for murder, and such declarations and menacing acts tended to show the hostile feelings of the accused towards the deceased. Armed, as he was, with a deadly weapon, and threatening to take the life of the man he had just before assaulted with great violence, this, in the absence of sufficient provocation, was a circumstance for the jury to weigh in determining whether he had not acted with a formed design to take life. It tended to repel the idea that the fatal blow had been struck in a sudden transport of passion—pending the *furor brevis*—which, in a proper case, will mitigate homicide to manslaughter." In *Clampitt v. State*, 9 Tex. App. 27, the proof showed that the deceased, having been wounded by the defendant, was taken to the home of a witness, who on the succeeding night heard some one near the house say, "I wish I had a double-barreled shotgun; I would turn both barrels loose in that room," and, looking out, saw the defendant. This evidence having been admitted, over the defendant's objection, it was held to be competent as tending to show malice, the court saying: "With reference to the testimony objected to, and set out in the bill of exceptions, we are of opinion, in view of the other evidence, that the testimony was admissible, as tending to show the malice of the defendant towards the deceased. It was properly allowed to go to the jury for that purpose." In these cases, the statements of the accused, though made some time after the assaults, clearly tended to show malice towards the persons injured by them; but in the case at bar, while the statement of the defendant may not have referred to the deceased, it was so clearly connected with the

homicide as to be, in our judgment, admissible as a part of the *res gestæ*, and tended to show such a state of mind at that moment as would authorize the jury to infer the presence or absence of malice towards the deceased.

4. Hattie Mattoon, a witness on behalf of the defendant, testified that on the day of the homicide the defendant was drunk; and that when a witness before the grand jury, in the examination of this case, she was excited; whereupon the question was asked her, "Didn't you testify in the grand-jury room before the grand jury on the 3d day of December, 1894, that he was sober at the time of the killing?" and she answered, "No, sir; I did not." Question: "Didn't you testify in the grand-jury room, in the presence of the grand jurors, on the 3d day of December, 1894, that Brown was not drunk?" Answer: "No, sir." The several members of the grand jury were called as witnesses for the state, and, over the defendant's objection, were permitted to testify that when Hattie Mattoon was before them as a witness she did not appear to be excited, and that she there said the defendant was not drunk on the day of the homicide. It is contended that the court erred in permitting the grand jurors to testify; but the foundation having been laid by calling her attention to the time, place, circumstances, and persons present, and her denial of the statements there made, rendered the evidence competent for the purpose of contradicting her; and the condition of her mind when a witness before the grand jury being a subject of inquiry, there was no error in permitting the jurors to testify upon that question. A witness, without being an expert, may be asked whether a person appeared excited or otherwise at a given time. *Rog. Exp. Test.* § 3. W. C. Underwood, as a witness for the state, testified that he was present at the coroner's inquest held over the body of Alfred Kincaid, when Hattie Mattoon was there as a witness, and he was permitted to answer the following question: "What, if anything, did Hattie Mattoon say about stretching her testimony in order to benefit the defendant, Samuel G. Brown?"—to which he responded by saying: "She said that she would stretch her testimony or color it in any way, so as to help Mr. Brown." The defendant insists that the court erred in permitting this question to be answered. The record before us does not show that any foundation was laid for asking this impeaching question; but it does not purport to contain all the evidence, and hence it must be presumed that the proper preliminary questions were asked and answered before the witness was permitted to answer it.

5. The district attorney, during the closing argument, offered to read to the jury the evidence as transcribed by the reporter, which the court denied, but permitted him, over the defendant's objection, to refresh his memory

therefrom, when he remarked, "I am going to refresh my memory," at which remark the audience applauded, whereupon the court ordered the bailiffs to either keep order or clear the court room. The defendant assigns as error the failure of the court to instruct the jury that they should not be influenced in their verdict by any applause made by the audience in approval of the remarks of the district attorney in his closing argument. No request was made by the defendant for such instruction, and while it is very unfortunate that the solemnity of any judicial proceeding should be interrupted by applause, it was particularly so in a trial of this character; but the court very promptly set its mark of disapproval thereon, and would without doubt have given the instruction had it been requested.

6. Exceptions were taken to the following instructions: "No. 30. There has been some evidence to the effect that it was the defendant who sent for the deceased, and not the mother of the deceased. If you find from the evidence that such is the fact, you have a right to consider that in connection with the evidence which tends to show that the deceased was shot by the defendant soon after he reached the spot near the house where the defendant was standing when the deceased reached there, as tending to show the purpose for which the defendant sent for the deceased, and also in determining whether the act of killing was done with premeditation and deliberation." "No. 31. There is some evidence tending to show that the defendant, a short time before the killing, and after he had some trouble with the mother of the deceased at her home, where the killing is alleged to have occurred, went out in the town of Oakland and endeavored to borrow a pistol from several parties, and to one or more of them he stated that he had some difficulty with the Deardorff family, or something to that effect; and there is evidence tending to show that after he failed to borrow a pistol he purchased one, and had the same loaded. This purchase was made, according to the evidence, only a short time before the killing is alleged to have occurred. This fact, if you find it to be a fact, you have a right to consider, in connection with the circumstances and the time of the alleged killing, in determining the degree of the crime, under the instructions I have heretofore given you, if you find from the evidence that a crime was committed." It is contended that these instructions are in violation of section 200, Hill's Code, which provides that, "In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact." The record shows that the court, in another instruction, said to the jury, "You are the exclusive judges of all the

facts in the case, as well as the weight of the evidence and the credibility of the witnesses;" and having so instructed, it cannot be justly said that the court presented the facts of the case to the jury. In *People v. Vasquez*, 49 Cal. 560, the trial court, in charging the jury, stated that, "Testimony has been introduced before you tending to show that the defendant, Vasquez, and others were engaged in the robbery of one Snyder, at Tres Pinos, and that while so engaged, and in furtherance of the common purpose of Vasquez and his associates to accomplish this robbery, the deceased was slain by the defendant, or by some of the parties with whom he was then engaged in the robbery." An exception to the instruction having been taken, it was contended that it was an expression of the opinion of the judge as to the effect of the evidence adduced at the trial; but the court, in rendering the opinion, say: "The instruction is not subject to that objection. It does not charge the jury with respect to the weight or effect of the evidence, nor as to what facts are thereby established. An instruction is not pertinent, nor in any sense proper, unless given in view of the evidence, as tending or not tending to prove some fact in issue; and it could not be erroneous for the court to state to the jury, correctly, as was done in this case, the state of the evidence in respect to which the instructions were given." The court in the instructions complained of did not assume even that the facts had been established. It stated that evidence had been introduced tending to show that certain facts existed, but, in the first instruction, said: "If you find from the evidence that such is the fact;" and in the second, "this fact, if you find it to be a fact,"—thus leaving to the jury the determination of the particular facts, besides charging them generally upon the duty of ascertaining each fact in issue.

It is also contended that the court erred in refusing to give, at the request of the defendant, the following instructions: (1) "To constitute murder in the first degree there must be some other proof of malice than the mere proof of killing, unless the killing was effected in the commission or attempt to commit a felony; and premeditation and deliberation, when necessary to constitute murder in the first degree, and it is necessary, except the killing was effected in the commission or attempt to commit a felony, must be proven by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily upon the occasion; and if there is a reasonable doubt in your mind that the intent was so formed, you cannot find murder in the first degree." (2) "If you find from the evidence that the accused acted in the shooting from fear of great bodily injury to himself, and not from premeditated design to kill, then you cannot find the defendant guilty of murder in any degree." (3) "If you find from the evidence that the ac-

cused did the shooting in the belief that it was necessary to preserve his life or to save himself from suffering great bodily harm from the deceased, and that he had reasonable grounds for such belief, then the accused is justified in the killing, and you cannot find him guilty of any crime under the indictment."

(4) "If you find from the evidence that the defendant bought a pistol a short time before the killing, and that the defendant had no trouble or quarrel with the deceased, the fact that the defendant bought said pistol is no proof of malice." (5) "I instruct you that in this cause the evidence is not sufficient to warrant a conviction of murder in the first degree." The tenth instruction given by the court is as follows: "The law provides that there shall be some other evidence of malice than the mere proof of killing, to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony. And deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood." It will be observed that this instruction differs from the first request in that it omits the words, "and not hastily upon the occasion"; but in the eighth instruction the court defined this clause by saying, "No particular time is necessary within which to form the design; but in order to constitute deliberation the design to do the act charged must exist in the mind of the party charged with its commission." The court in the second instruction defined a reasonable doubt, and, after referring to the defendant's plea, said, "By this plea of not guilty on the part of the defendant the burden is placed on the state of Oregon to prove every material allegation in this indictment to your satisfaction, beyond a reasonable doubt." In *State v. Morey*, 25 Or. 241, 35 Pac. 655, and 36 Pac. 573, it was held that an instruction similar to the eighth correctly interpreted the law. From the second, eighth, and tenth instructions above set out it clearly appears that the defendant's first request has been substantially complied with. A part of the twenty-seventh instruction is as follows: "And if you find any evidence to the effect that the deceased made any demonstrations toward the defendant, from which the defendant had reasonable grounds to believe, acting as a reasonable and prudent man, that his life was in imminent danger, or that he was in danger of great bodily harm at the hands of the deceased, then the defendant would be justified in defending himself, and, if necessary, would have the right to take the life of the deceased to preserve his own life or to prevent great bodily harm to himself." This instruction substantially embraces the propositions of law contained in the second and third requests. The fourth request is fully covered by the thirty-first instruction given above. In considering the fifth request, it is sufficient to

say that the record does not purport to contain all the evidence, and hence it must be presumed the court properly denied it.

The bill of exceptions contains other alleged errors, which we have examined; and having considered those presented by the defendant's brief and relied upon in the argument, we feel that he has had an impartial trial in the manner prescribed by law, and there being no error in the record, the judgment is affirmed.

(1 Kan.A. 737)

POPE v. BOWZER.

(Court of Appeals of Kansas, Southern Department, W. D. Oct. 9, 1895.)

EVIDENCE — ADMISSIONS — REPLEVIN AGAINST SEIZING OFFICER.

1. The declarations of a party to the suit are, against such party, admissible in evidence.

2. In an action of replevin against an officer by a third party and stranger to an execution, who had the goods in her possession at the time of the levy by such officer, and where the officer justifies under such execution, in order to maintain his possession he must show by competent proof his authority for such seizure.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. Abbott, Judge.

Action in replevin by Angeline S. Pope against P. M. Bowzer. Defendant had judgment, and plaintiff brings error. Reversed.

A. J. Hoskinson, for plaintiff in error.

COLE, J. This was an action in replevin brought by the plaintiff in error, Angeline S. Pope, for the recovery of certain cattle which she claims were wrongfully and unlawfully detained by P. M. Bowzer. The defendant in error, in answer to the petition of plaintiff in error, denies that plaintiff in error was the owner of the property, or was entitled to the possession of the same, and alleges that he was a constable of Garden City, Finney county, Kan., and that one L. E. Payne was a justice of the peace in and for Garden City, Finney county, Kan.; that said justice of the peace issued to defendant in error, as constable, an execution against E. S. Pope and Jacob Sarver on the judgment theretofore rendered by him in an action against said E. S. Pope and Jacob Sarver. And the answer further alleges that by virtue of said execution, and to satisfy the same, he levied upon and took possession of the property described in plaintiff's petition. This cause was tried before the judge of the district court of Finney county without a jury, and the court rendered a judgment in favor of the defendant in error, P. M. Bowzer, and made certain findings of facts and conclusions of law.

A number of errors are assigned, the first being that the court erred in the trial of said cause in permitting the defendant to introduce evidence under the second defense set up in this case; and the second error alleged is that the court erred in permitting

incompetent and immaterial evidence, over the objection of the plaintiff. These two errors may be considered together. The evidence objected to was certain statements alleged to have been made by Angeline S. Pope to the defendant, Bowzer, at the time said Bowzer took the property in question into his possession, and it is urged by counsel for plaintiff in error that these were offered in the nature of an estoppel, and were therefore incompetent, because no such defense was set up in the answer. This position is not well taken. It is a well-established rule that the statements of parties to an action made against their interests may always be introduced in evidence, and this is especially true where the statements are made in connection with the transaction which was the basis of the suit, as in this case. Nor do we think the answer states two separate defenses. The answer contains no general denial, but attempts to plead the specific grounds upon which defendant claims the right of possession. The sixth assignment of error is that the court erred in modifying its findings in said cause, over the objection of the plaintiff. The record discloses that, after making his findings of fact in this case, the court found, in substance, as a conclusion that the defendant was entitled to a judgment for costs and for the recovery of the property or the value thereof in the sum of \$300. Evidently, at the time of making this conclusion the court had forgotten for the moment that the special interest claimed by the defendant did not amount to the full value of the property; and there can be no doubt that, when the attention of the court was called to that fact, he had a right to make the correction, which was clearly one in favor of the plaintiff in error.

The other assignments of error are practically directed towards the same point, and may be considered together. As before stated, the defendant in this case attempted to justify as a constable holding said property under an execution issued upon a judgment rendered by a justice of the peace of Garden City; and if he so claims, it was necessary for him to specifically plead this justification, and, if the facts were not admitted, to offer proof upon each and every one of them; because without such proof he would be a mere naked trespasser, and the possession of the property by the plaintiff would be sufficient title to recover as against him. *Drake, Attachm.* (6th Ed.) § 185a; *Thornburg v. Hand*, 7 Cal. 554; *Williams v. Eikenbury* (Neb.) 34 N. W. 373, 41 N. W. 770; *Schars v. Brand* (Neb.) 42 N. W. 906.

A careful examination of all the evidence in this case discloses that no proof was made or attempted to be made either of the rendition of the judgment or the issuance of the execution, and the record discloses no admission upon these points. Without evidence of the rendition of the judgment or the amount of the execution, the court could not

find any interest whatever in the defendant; and for that reason the conclusion of law was erroneous, and the judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

(1 Kan.A. 781)

ATCHISON, T. & S. F. R. CO. v. HUITT.
(Court of Appeals of Kansas, Southern Department, W. D. Oct. 1, 1895.)

**RAILROAD COMPANIES—FIRES—INSTRUCTIONS—
REVIEW OF EVIDENCE.**

1. In an action brought under the provisions of section 1321, Gen. St. 1889, where the court instruct the jury that the plaintiff must, before he can recover, prove "that said fire was set out by reason of the negligence or carelessness of the company, or some of its employes, or in the operating of defendant's engine over its road," held not error prejudicial to the defendant.

2. An instruction given or refused, predicated upon the theory that the engine was properly constructed, in good order, and skillfully and carefully managed, could neither mislead nor aid the jury, when they fail to find the facts upon which the instruction was predicated.

3. If there was conflicting evidence upon the question of negligence, and the jury found in favor of the plaintiff upon any of the special questions submitted in this case, this court cannot say that the district court erred in refusing a new trial because the findings of the jury were against the evidence. This court will decide as to whether evidence is properly introduced, but we do not weigh it. That is the duty of the jury, and their finding, if approved by the trial court, will not be disturbed by this court.

(Syllabus by the Court.)

Error from district court, Barton county; J. H. Bailey, Judge.

Action by J. F. Huitt against the Atchison, Topeka & Santa Fé Railroad Company. Plaintiff had judgment, and defendant brings error. Affirmed.

A. A. Hurd, O. J. Wood, W. Littlefield, and Wm. Osmond, for plaintiff in error. G. W. Nimocks and E. L. Hotchkiss, for defendant in error.

DENNISON, J. This was an action brought in the district court of Barton county, Kan., by said Huitt against the Atchison, Topeka & Santa Fé Railroad Company to recover the value of certain personal property which was kept in a livery barn in the city of Ellinwood, Barton county, Kan., claimed by said Huitt to have been set on fire by said railroad company in the operation of its road.

The first error complained of is in the following instruction given by the court: "(4) I instruct you that the burden of proof in this case is on the plaintiff, and before he can recover against the defendant he must, by a preponderance of the evidence, prove every material allegation in his petition, except the allegation that defendant is a corporation, that being admitted; among which material allegations are the following: First, that the plaintiff was the owner of the property sued

on; second, that the defendant set out the fire and burned said property while operating its said railroad; third, that said fire was set out by reason of the negligence or carelessness of the company, or some of its employes, or in the operating of defendant's engine over its road; fourth, the value of the property destroyed by the fire." The portion of this instruction objected to is the third subdivision thereof. Stripped of all unnecessary words, this instruction says to the jury that the burden of proof is on the plaintiff, and before he can recover he must, by a preponderance of the evidence, prove that said fire was set out by reason of the negligence or carelessness of the company, or some of its employes, or in the operating of defendant's engine over its road. The first part of subdivision 3 is not the law, and the latter part, which is the part objected to, is clearly the law, although it might be considered a repetition of subdivision 2. Section 1321 of the General Statutes of 1889 reads as follows: "That in all actions against any railroad company organized or doing business in this state, for damages by fire, caused by the operating of said railroad, it shall be only necessary for the plaintiff in said action to establish the fact that such fire complained of was caused by the operating of said railroad, and the amount of his damages, (which proof shall be prima facie evidence of negligence on the part of said railroad,) provided, that in estimating the damages under this act, the contributory negligence shall be taken into consideration." If any one has a right to complain of the instruction given it was the plaintiff below, and not the railroad company.

The second error complained of is in the sixth instruction given by the court. Said instruction reads as follows: "(6) If you find from all the evidence that the defendant's engine did set the fire that burned the plaintiff's property, then the burden of proof is upon the defendant to prove that the engine was in good condition, furnished with all the necessary improved appliances, and was skillfully and carefully operated, and that there was no negligence on the part of the defendant,—then the presumption of negligence would be rebutted." The fourth error complained of is the refusal of the court to give the following instruction: "If you believe from the evidence that the engine was properly constructed, and supplied with the most approved appliances to prevent the escape of the fire, and that such appliances were in good order, and that the engineer in charge of the engine managed it skillfully and carefully, then I instruct you that you must find for the defendant." The second and fourth assignments of error may be treated together. They are both based upon the hypothesis that the jury find that the engine was properly constructed, supplied with the necessary improved appliances to prevent the escape of fire, and that it was skillfully

and carefully operated. The jury made the following special findings to the questions submitted at the request of the defendant: "(3) Was the engine, at the time of the fire, in good condition, so far as all the appliances for preventing the escape of fire are concerned?" "No." "(4) If not, in what respect were any of the appliances out of order?" "The jury are not familiar with the technical description of the appliances, but find from the evidence that said appliances were so defective as to be capable of and did emit fire and sparks that were carried by the wind over three hundred feet, and believe that the defect was in the netting." "(5) Was the engineer who managed the engine at the time of the fire a competent, skillful, and careful engineer?" "No." "(6) If not, in what respect was he incompetent, unskillful, or lacking in care?" "By opening the throttle too wide, and starting his engine at an unusual rate of speed; thereby forcing a large amount of fire from the smokestack." "(7) Was the fire set out by any mismanagement on the part of the engineer?" "Yes." "(8) If so, how did he mismanage his engine so as to set out the fire?" "By using more steam than necessary in starting." These findings clearly show that the jury were not misled because of the giving of the one instruction, nor could the other have been of any benefit to them. The defendant was in no manner prejudiced by the action of the court. But did the court err? The defendant was bound to show that there was no negligence on its part. Counsel for plaintiff in error cite *Railroad Co. v. Riggs*, 31 Kan., on page 633, 3 Pac. 313, in the opinion of which Mr. Justice Valentine uses the following language: "Under the findings of the jury and the evidence, we must therefore consider that the engine was complete and perfect in every respect, so far as the appliances for preventing the escape of fire were concerned, and that the engineer was a competent, skillful, and careful engineer, and that there was nothing in the case tending to show that he was negligent in the management of his engine; and we cannot imagine where there could be any other room for negligence on the part of the railroad company in permitting the fire to escape which is supposed to have caused the injury." It is assumed that, although the supreme court could not imagine any other room for negligence, the jury might. It seems, however, that the supreme court have since been able to find other room for negligence, for in the case of *Railroad Co. v. Karracker*, 46 Kan. 511, 26 Pac. 1027, the opinion of which is written by Mr. Justice Valentine, they hold: "In an action against a railroad company for loss or damage suffered by the plaintiff by fire, caused by the defendant in the operation of its railroad, proof that the fire was so caused is, under the provisions of chapter 155 of the Laws of 1885, *prima facie* evidence that it was so

caused through the negligence of the railroad company; and it then devolves upon the railroad company to show, not only that its appliances to prevent the escape of fire were sufficient, and in good order, and that its engineer was a competent and skillful engineer, but also that there was no mismanagement or negligence on the part of any of its servants or agents, causing the fire." Our supreme court has held: "Where an erroneous instruction is given, but it clearly appears that the jury were not misled, and that the party excepting to the instruction was in no manner prejudiced, the error is an immaterial one, and the supreme court will not reverse the judgment of the district court therefor." *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 262. The same rule would apply where a proper instruction had been asked and refused.

The next error complained of is the giving of the seventh instruction of the court, which said instruction reads as follows: "(7) Railroad companies are not insurers against fires. They are liable only when guilty of negligence. If they are guilty of no negligence, no action could be maintained against them; and if any fire from their engines burned property it would be an accidental fire, it occurring without negligence or carelessness on the part of the company or its employees, for which the company would not be liable." We have carefully examined this instruction, and, while the latter part of it is somewhat inartistically framed, it certainly expresses the law, and all of it, favorable to the railroad company. It informs the jury that "railroad companies are not insurers against fires"; that they are liable only when guilty of negligence; that "if they are guilty of no negligence, no action could be maintained against them"; that "if any fire from their engine burned property it would be an accidental fire, it occurring without negligence on the part of the company or its employees, for which the company would not be liable." If the phrase, "it occurring without negligence or carelessness on the part of the company or its employees," had been placed at the end of the instruction instead of after the word "fire," so that the last sentence would have read, "If any fire from their engine burned property, it would be an accidental fire, for which the company would not be liable, it occurring without negligence or carelessness on the part of the company or its employees," the grammatical construction would be much better, but the jury could not have been misled by it. It cannot reasonably be said to have any other meaning.

The fifth and last error complained of is in the overruling of defendant's motion for a new trial because the above-mentioned special findings of the jury were against the evidence. If there was conflicting evidence upon the question of negligence, and if the jury found in favor of the plaintiff upon any of the questions submitted, this court cannot

say that the district court erred in refusing a new trial because the findings of the jury were against the evidence. There was evidence introduced tending to show that the appliances for preventing the escape of fire were not in good order, upon the theory that, if they were in good order, the fire could not have escaped as it was shown to have escaped at the time. There was also evidence introduced tending to show that the engineer was negligent in using more steam than was necessary in starting, and that he started his engine at an unusual rate of speed, and forced a great amount of fire from the smokestack. There was also evidence introduced tending to show that there was no negligence on the part of the defendant. This court will decide as to whether evidence is properly introduced, but we do not weigh it. That is the duty of the jury; and their finding, if approved by the trial court, will not be disturbed by this court. "The credibility of witnesses and the weight of their testimony, if competent, must rest with the trial court." *State v. Plum*, 49 Kan. 679, 31 Pac. 308.

No material error having been committed in the trial of this case, the judgment of the district court is affirmed. All the judges concurring.

(1 Kan.A. 788)

ATCHISON, T. & S. F. R. CO. v. HUITT
et al.

(Court of Appeals of Kansas, Southern Department, W. D. Oct. 1, 1895.)

PARTIES—SPLITTING ACTIONS—OPINION EVIDENCE—FIRES—NEGLIGENCE—DAMAGES—ATTORNEY'S FEES—COSTS.

1. Where parties are united in interest, they must be joined as plaintiffs or defendants, but persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs. Paragraphs 4112, 4114, Gen. St. 1889.

2. A single cause of action cannot be divided up so as to subject the defendant to the annoyance and expense of several suits. It must be litigated in a single suit.

3. Where a witness testifies that he knows the value of the barn; that he and another had built it less than two years prior to its burning; that he had built several buildings; that he could look over a barn, and tell something near its value; and where his testimony shows that he has an intimate knowledge of all the different parts of the barn in controversy,—his evidence was properly admitted to the jury, for them to weigh under proper instructions.

4. When the petition asks for an attorney's fee, as provided for in paragraph 1322, Gen. St. 1889, and for a judgment in favor of the owners of the property burned, and that other parties be subrogated to the rights of said owners to the amount of its claim, it is proper to admit evidence as to what is a reasonable attorney's fee, and to include the amount found by the jury to be a reasonable attorney's fee in the judgment rendered in favor of said owners.

5. The true measure of damages for negligently burning a barn is the value of the barn at the time of the burning thereof.

6. If the jury believed that the weather was dry, and a strong wind blowing, and that the engineer used an unusual and unnecessary amount of steam in starting out of the city, by

reason of which the fire was forced out of the smokestack, and without which the fire would not have occurred, they were justified in finding that the engineer was not careful, and that he mismanaged his engine.

7. The taxation of costs upon granting a continuance rests in the sound discretion of the trial court, but where there is a manifest abuse of such discretion, this court will make such a ruling as it thinks the trial court should have made.

(Syllabus by the Court.)

Error from district court, Barton county; J. H. Bailey, Judge.

Action by J. F. Huitt and Amos Johnson against the Atchison, Topeka & Santa Fé Railroad Company to recover damages resulting from fire set by defendant. The St. Paul Fire & Marine Insurance Company and the American Fire Insurance Company were afterwards made parties plaintiff. Plaintiffs had judgment, and defendant brings error. Affirmed.

This action was originally brought by Huitt and Johnson in the district court of Barton county, Kan., to recover the value of a barn situated on certain lots in Ellinwood, Barton county, Kan., claimed to have been set on fire by the said railroad company in the operation of its road. Under the petition and answer filed in this case it came on for trial on the 11th day of December, 1890. After the introduction of the plaintiffs' evidence and the overruling of a demurrer to the same, the judge suggested that certain insurance companies seemed to be necessary parties to a full determination of the different issues to be tried in this case. The plaintiffs, at their request, were allowed to file a new petition, and make other parties defendant or plaintiffs, as the present plaintiffs might elect; to file such amended petition within 20 days from that date. Said cause was continued. It was further ordered that the costs of the continuance abide the final result of the action, to which order and to all of said proceedings the defendant excepts. On January 23, 1891, an amended petition was filed, including the said insurance companies as plaintiffs in the case. The new petition is substantially the same as the original, except that the insurance companies set forth that they have each paid to the original plaintiffs the sum of \$500 because of policies of insurance upon the barn which was destroyed. They claim that when they paid such sums they entered into a contract with said Huitt and Johnson, whereby they became subrogated to the rights of said Huitt and Johnson to the extent of the payments, respectively, made to them; and ask that of the judgment rendered in favor of said Huitt and Johnson against the said railroad company for the burning of said barn they each be subrogated to the rights of said Huitt and Johnson in the sum of \$500 and interest thereon from the 19th day of October, 1890. To this amended petition said railroad company demurred generally, and because of misjoinder of actions and of parties plaintiff,

which demurrer was, November 16, 1891, overruled. Thereupon defendant filed its answer, consisting of a general denial. They claim that Huitt and Johnson had wholly parted with their right of action, if any they had, to their coplaintiffs; a plea of misjoinder; and a plea of the statute of limitations against the insurance companies as to the attorney's fee. Trial on March 25, 1891. Judgment for plaintiffs. The defendant brings the case here for review.

A. A. Hurd and Wm. Osmond, for plaintiff in error. E. L. Hotchkiss and G. W. Nimocks, for defendants in error.

DENNISON, J. (after stating the facts). The first error complained of by the plaintiff in error was the overruling of the demurrer to the amended petition for the reasons: (1) That the petition does not state facts sufficient to constitute a cause of action; (2) that several causes of action are improperly joined; (3) that there is a misjoinder of parties plaintiff. The petition in this case clearly sets forth facts sufficient to constitute a cause of action, and the plaintiff in error, in its brief, has nothing to say upon the first ground of the demurrer,—that the petition does not state facts sufficient to constitute a cause of action. Therefore no notice will be taken of it. As to the third ground of said demurrer,—that there is a misjoinder of parties plaintiff,—this is not a ground for demurrer according to the Kansas statutes. The only question, then, that we need to consider in said demurrer is the second ground thereof,—that several causes of action are improperly joined in said petition. The petition in this case clearly alleges but one cause of action. It alleges that the railroad company negligently set out a fire. It alleges that the fire did but one thing; that was, to burn the barn of said Huitt and Johnson. Is it in the power of Huitt and Johnson to divide that transaction into three different parts, and subject the railroad company to the annoyance and expense of defending three different suits? Certainly not. There being but one cause of action, the railroad company is entitled to have it litigated in one suit. The insurance companies do not, in the petition in this case, demand judgment against the railroad company, but simply demand that of the judgment obtained against the railroad company by Huitt and Johnson they each be subrogated to the rights of Huitt and Johnson to the amount of \$500 and interest. Paragraph 4103, Gen. St. 1889, says: "Every action must be prosecuted in the name of the real party in interest." Paragraph 4112: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs." Paragraph 4114: "Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be

obtained, he may be made defendant, the reason being stated in the petition." Paragraph 4492: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side as between themselves." By a study of these four paragraphs it will be seen that where the parties are united in interest they must be joined, but that persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs. Who are interested in the subject-matter of this action? The insurance companies to the extent of the amounts paid by them, respectively, and the interest thereon, and Huitt and Johnson for the remainder; and clearly all of them are interested in obtaining the relief demanded. The relief demanded was the judgment against the railroad company for the burning of the barn. The insurance companies were interested in obtaining the relief demanded, because without that they could not recover the amount they had paid as insurance upon the barn. Huitt and Johnson were interested in obtaining the relief demanded, because without that relief they would never obtain the balance of the judgment after the money had been refunded to the insurance companies which they had expended. We apprehend that under our statutes the insurance companies might have been made defendants, or that they might have been made plaintiffs, and Huitt and Johnson might have been made defendants; but, if they all desired to be joined as plaintiffs, our statutes say they may, because they all have an interest in the subject of the action and in obtaining the relief demanded. If the insurance companies had been plaintiffs, and Huitt and Johnson had been made defendants, the railroad company might have settled with the insurance companies for the amount of their claim, regardless of the rights of Huitt and Johnson. If Huitt and Johnson had been made plaintiffs, and the insurance companies defendants, the railroad company might have connived with Huitt and Johnson to have prevented a recovery. There was no misjoinder of causes of action, and the demurrer was properly overruled.

The second assignment of error is that the court erred in the admission of testimony as to value. The plaintiff in error complains because J. F. Huitt was permitted to testify as to the value of the barn without having shown that he was qualified. He testified that he knew the value of the barn; that he and Amos Johnson built the barn less than two years prior to its burning; that he had built several buildings, and that he could look over a barn and tell something near its value. His testimony also showed that he had an intimate knowledge of all the different parts of this barn. His evidence was properly admitted to the jury, for them to weigh under proper instructions.

The plaintiff in error also complains because of the refusal of the court to strike out the evidence of Amos Johnson as to value. Mr. Johnson testified that he was one of the owners of the barn, and that he knew its value, and the evidence in the case showed that he and Mr. Huitt built the barn less than two years prior to the time it burned. Upon cross-examination he stated that he had been offered \$2,000 for the barn, but that it was considered worth \$2,500, and that his only basis for fixing the value at \$2,000 was because he had been offered that for it. The ruling upon this question may be open to some criticism, but the defendants were not prejudiced thereby. The evidence of Johnson was cumulative, and could not have been given much weight by the jury. There was other testimony introduced showing the amounts and kinds of lumber of which the barn was constructed, the value of the hardware, the value of the foundation, the cost of painting, the value of the labor in constructing the barn, and the cost of much of the material. A plan of the barn was also shown to the jury, and explained to them. The jury found the value of the barn and interest thereon to be \$1,435.42. This would fix the value of the barn at about \$1,300. It is probable that in arriving at this amount they took the different items, and did some figuring themselves. We cannot say that there was any error prejudicial to the rights of the defendant. The counsel for plaintiff in error is evidently not relying upon this assignment of error, because out of the numerous adjudications involved therein not one authority is cited in its brief.

The third assignment of error is in the admission of testimony as to what was a reasonable attorney's fee; and to the question, "You may state what a reasonable attorney's fee for prosecuting this case would be," the defendant objected, and objected to the introduction of any evidence in regard to attorney's fee, for the reason that the interests of Huitt and Johnson and the insurance companies are so intermingled, and that the insurance companies are barred by the statute of limitations, more than one year having elapsed before the insurance companies brought their suit. No error was committed in overruling this objection. Paragraph 1322, Gen. St. 1889, reads as follows: "In all actions commenced under this act, if the plaintiff shall recover there shall be allowed him by the court a reasonable attorney's fee, which shall become part of the judgment." In this action the only persons who ask for a judgment against the railroad company are Huitt and Johnson. The judgment rendered must have been in their favor. The insurance companies simply ask that they have a lien upon, and be subrogated to the rights of Huitt and Johnson in, said judgment, to the amount of money paid by them upon the insurance policies, and the interest thereon. The testimony was properly admitted, and the judgment for the

value of the barn and the attorney's fee was properly rendered in favor of Huitt and Johnson, and the insurance companies were properly subrogated to the rights of Huitt and Johnson to the amount of their claim. The fire occurred July 19, 1889, and the original petition of Huitt and Johnson was filed on the 23d day of April, 1890; so that this action was commenced within one year from the time the cause of action accrued. Therefore, in deciding this case, it is not necessary to decide whether the attorney's fee is for an action upon a liability created by statute or for a penalty or forfeiture.

The fourth assignment of error is upon the giving of the following instructions by the court: "(5) You are further instructed that if you find from all the evidence that the defendant's engine did set the fire which burned the plaintiff's barn, then the burden of proof is upon the defendant to prove that the engine that set such fire or caused the same to be set was in good condition and repair, using all of the necessary and improved appliances for the purposes of preventing the escape of fire, and was skillfully and carefully handled, managed, and operated by competent, skillful, and careful hands or employes, and that there was no negligence on the part of the defendant; then the presumption of negligence raised by the fact that the engine set the fire will be rebutted, and you should find for the defendant." There was no material error committed in the foregoing instruction. See *Railroad Co. v. Huitt*, 41 Pac. 1049.

The fifth assignment of error is upon the refusal of the court to give the following instruction: "If you find for the plaintiffs, the amount of their recovery will be limited to such an amount as would be required to build the barn in July, 1889, and place it in substantially the same condition it was in before the fire, together with interest at 6 per cent. on such sum from July 19, 1889, up to the present time, and a reasonable attorney's fee." The eighth instruction given by the court is as follows: "If the plaintiffs, under the evidence in this case, are entitled to recover a judgment against the defendant, then I instruct you that their measure of damages under the pleadings is the value of the barn burned, at the time of the burning thereof; and if you find for the plaintiffs your verdict should be for such value, and such value only, as is proven by a preponderance of the evidence in this case, not to exceed two thousand dollars." The true measure of damages is the value of the barn at the time of the burning thereof. The facts stated in the instruction asked for by the defendant might have been considered by the jury, but the instruction given by the court states the correct measure of damages.

The sixth assignment of error is in overruling the motion of plaintiff in error for a new trial, because the amount of the gen-

eral verdict is not supported by the evidence; and because 20, 21, 22, and 23 of the special findings are not supported by the evidence. Counsel for plaintiff in error contend that, as Huitt and Johnson each placed the value of the barn at \$2,000, and Huitt said it cost \$1,625, and Spencer testified that it could be rebuilt for \$960, the jury should have given the amount testified to by one side or the other. As stated under the second assignment of error (which see), there was considerable conflicting testimony as to the value of the barn. There was abundant evidence to sustain the general verdict of the jury. The special findings are as follows: "(20) Was the engineer who managed the engine at the time of the fire a competent, skillful, and careful engineer?" "Competent and skillful, but not careful." "(21) If not, in what respect was he incompetent, unskillful, or lacking in care?" "By starting his engine at too great speed." "(22) Was this fire set out by any mismanagement on the part of the engineer?" "Yes." "(23) If so, how did he mismanage his engine so as to set out this fire?" "By starting his engine too rapidly." There was testimony introduced tending to prove that the train which set the fire was late; that the weather was very dry; that a strong wind was blowing; that the train started out much faster than usual; that within 600 feet of starting a speed of 15 or 20 miles an hour had been attained; that a shower of sparks the size of "birds' eggs" and "end of little finger" was thrown 25 or 30 feet high, and carried 300 or 400 feet, and remained alive one to two minutes; and much more along the same line. The speed of the train would not alone be sufficient to establish negligence, but in this case, if the jury believed that the weather was dry, and a strong wind blowing, and that the engineer used an unusual and unnecessary amount of steam in starting out of the city, by which the fire was forced out of the smokestack; and if they further believed that by using a little more care until the train was under motion the fire would not have been forced out of the smokestack,—they were justified in finding that the engineer was not careful, and mismanaged his engine.

The seventh assignment of error is in not awarding the costs of the term against the defendants in error Huitt and Johnson at the time of the first continuance. Paragraph 4689, Gen. St. 1889, reads as follows: "Unless otherwise provided by statute, the costs of motions, continuances, amendments and the like, shall be taxed and paid as the court in its discretion may direct." This section places the taxation of the costs of a continuance in the sound discretion of the court, but where there is a manifest abuse of such discretion this court will make such a ruling as it thinks the trial court should have made. The continuance of this case was had at the request of the plaintiffs, for

their benefit, and to supply a defect in the pleadings, for which alone they were responsible. It seems to us that the court should have required the plaintiffs to pay the costs of the continuance.

The last assignment of error is in rendering judgment for attorney's fees. The jury made the following special finding: "(29) How much attorney's fee do you allow in this case?" "\$200.00." "(30) Is this for the trial of the case for all of the plaintiffs, Amos Johnson, J. F. Huitt, and the insurance companies?" "Yes." This question has been fully discussed under the third assignment of error (which see). Huitt and Johnson obtained the judgment for the value of the barn. See paragraph 1322, Gen. St. 1889. The amount found by the jury to be a reasonable attorney's fee was properly made part of the judgment.

This case is remanded to the court below, with instructions to tax costs of the continuance against the plaintiffs Huitt and Johnson. In all other respects the judgment of the court below will be affirmed. The costs in this court will be equally divided between the Atchison, Topeka & Santa Fé Railroad Company and Huitt & Johnson. All the judges concurring.

(1 Kan. A. 163)

HENTIG v. REDDEN et al.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 18, 1895.)

APPEAL — TRANSFER TO APPELLATE COURT — EJECTMENT — IMPROVEMENTS — TAXES — RIGHTS OF DEFENDANT.

1. A party has no such vested right to a hearing by the supreme court of a case pending therein as will prevent the legislature from providing for a transfer of such case to another competent appellate tribunal.

2. The occupying claimant's law is based upon the broadest equity, and must be construed so as to effect an adjustment of the rights of the respective parties in the most equitable manner. The unsuccessful occupying claimant should be compensated for the full added value which his lasting and valuable improvements give to the land at the time such value is assessed, and he should be charged only with the value of the rents and profits of the land exclusive of the improvements.

3. When the defendant in an action of ejectment bases his claim of title on a tax deed which is adjudged invalid, and he is entitled to be repaid the taxes paid by him, as well as to have the benefit of the occupying claimant's act for his improvements, only such portion of the taxes paid should be repaid to him as were levied upon the assessed valuation of the land without the improvements for which compensation is made.

(Syllabus by the Court.)

Error to district court, Shawnee county; John Guthrie, Judge.

Action in ejectment by Emma Redden and others, heirs of J. W. Redden, deceased, against A. J. Hentig. From the judgment rendered, defendant brings error. Reversed.

F. G. Hentig, for plaintiff in error. A. L. Redden, for defendants in error.

GARVER, J. This case comes with familiar face into the appellate courts, having been before the supreme court at three different times prior to this, leaving its impress upon the records in 35 Kan. 473, 11 Pac. 398; 38 Kan. 500, 16 Pac. 820; and 45 Kan. 20, 25 Pac. 219.

The defendants in error urge upon the court a motion to dismiss, on the ground that defects in the record forbid a consideration of the assignments of error. We think the record is sufficient to fairly present the rulings of the district court of which complaint is made, the instructions to the jury, the findings of fact, and the judgment, all being consistent with one another, and clearly showing that the matters alleged as error entered into each of them. While the record should be full and complete concerning the questions to be reviewed, we will not encourage any unnecessary prolixity or burdensome addition of irrelevant details of the trial.

Objection is also made to the jurisdiction of this court for the reason, as stated by counsel, that, as the case was filed and pending in the supreme court when the act creating the court of appeals took effect, the parties had a vested right to a final hearing in the former court, which the legislature could not disturb. We do not think the objection is valid. A party has no such right to a hearing in a particular tribunal as will prevent the legislature from providing for a transfer of his case to another competent court. This question was very fully considered in *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98; *Elliot, J.*, saying: "There is no vested right in a remedy or in a tribunal. Remedies and tribunals may be changed by substitution without impairing vested rights. It may be granted that a remedy cannot be entirely swept away or rendered utterly ineffective by the destruction of a tribunal; but granting this will not authorize the conclusion that the substitution of the appellate court for the supreme court, in a class of cases falling within a limited jurisdiction, impairs a vested right, for parties have still a remedy and still a competent tribunal to administer that remedy." That decision was cited with approval, and the proposition now presented decided against the contention of defendants in error, by the supreme court of this state, in the case of *Rowe v. County Com'rs* (recently certified by that court to the Southern department of the court of appeals).¹

The errors assigned all depend upon the proper construction of the statute known as the "Occupying Claimant's Act." The plaintiff in error, Hentig, was defendant in an action of ejectment brought against her by J. W. Redden for the recovery of the possession of four lots in the city of Topeka, in which judgment was rendered for Redden. Hentig was recognized as an occupying claimant, with lasting and valuable improvements made by her previous to the commencement

of the ejectment suit. On the trial of her rights as occupying claimant, the district court held that, as against the assessed valuation of the improvements, the plaintiff was entitled to the rents and profits which the defendant may have received from the lots and improvements. The present controversy is upon this construction of the occupying claimant's act; the plaintiff in error claiming that the rents and profits recoverable should not be augmented by taking into consideration the added value given thereto by the buildings erected on the lots by her; while the defendants in error contend that the rents and profits must be estimated upon the lots in their improved condition. The several issues made by the pleadings in this case have apparently been taken up by sections, and a number of separate and distinct trials had of what should have been disposed of at the same time. It thus happens that, notwithstanding much of the controversy has arisen under the occupying claimant's law, the appellate court is now for the first time called upon to construe that act. Neither party is blameless for this situation, for the proceedings under the statute might have been instituted and forced to a conclusion by the plaintiff as well as by the defendant. Since the amendment in 1873 of the occupying claimant's act, the unsuccessful occupying claimant is protected in the possession of the disputed premises until paid the value of his lasting and valuable improvements; so that it seems to be as essential for the plaintiff in ejectment, to entitle him to actual possession, to satisfy the claim of the defendant for his improvements, as it is for him to sustain his own claim of title. *Gen. St. 1880, par. 4704; Sarbach v. Newell*, 28 Kan. 642. Consequently, little weight can be given to the complaint of the defendants in error because of this protracted litigation, for which both parties are responsible.

This statute shows the highest consideration for the unsuccessful occupying claimant, and evinces the greatest solicitude in providing for an adjustment of his rights as the possessor of the improvements, upon the most liberal principles of equity. At common law, the legal owner took everything; the lasting improvements going with the title as a mere incident to the land. The good faith of the occupant counted for nothing. Eviction followed judgment for possession, however ruinous the consequences. Equity, refusing to follow so harsh a rule, allowed the defeated occupant to set off the value of the lasting improvements made by him against the owner's claim for rents and profits, but limited the allowance for the improvements to the amount of the rents and profits. *Bright v. Boyd*, 1 Story, 478, Fed. Cas. No. 1,875; *Putnam v. Ritchie*, 6 Paige, 404; *Parsons v. Moses*, 16 Iowa, 444; *Newland v. Baker*, 26 Kan. 341; *Barton v. Land Co.*, 27 Kan. 634. The occupying claimant's act provides not only for the enforcement of this rule of equity, but goes further by saying that full com-

¹ No opinion filed.

pensation must be made to the owner of the improvements before his possession can be disturbed. There is a clear and expressed recognition of interest in and ownership of the premises in their improved condition, in common, by the owner of the land and the owner of the improvements. It is optional with the successful claimant whether he ever becomes the owner of the improvements. He may elect to take the assessed value of the land without the improvements, and execute a deed of conveyance to the occupant. Paragraph 4713. In that event, the occupant, upon payment of the value of the land, becomes the legal owner of both land and improvements, and the owner of the land never acquires any interest in the latter. If such election be not made by the owner of the land, he must pay the assessed value of the improvements before he can claim possession of, and right of ownership in, them. Who will in the end be owner of the improvements is not determined until after there has been an assessment of their value, as well as of the value of the rents and profits. Such is our interpretation of the letter and spirit of the statute under consideration; its whole aim and purpose being to give to each one, as nearly as possible, his own. That this end may be attained, it is the duty of the court, in any case, to give to the law a liberal construction, and apply it upon the broadest principles of equity. *Stebbins v. Guthrie*, 4 Kan. 353; *Newland v. Baker*, 26 Kan. 341.

When the defendant took possession of the premises, they were naked city lots. She erected on them three small dwelling houses, and made other improvements, all valued at the time of the trial at \$418, though they probably had originally cost a considerably larger sum. The annual rental value of the naked lots was trifling, perhaps not to exceed \$5; while the annual rental value of the lots in their improved condition was found to be \$120. The total value of the rents and profits of the land and improvements received by the defendant from the time of the commencement of the action until the trial, and with which she is charged, was \$928.87; not to exceed \$50 of this was the value derived from the naked lots. Is the successful claimant entitled to this entire sum? We think not. In such a proceeding the occupant is not repaid for his actual expenditures made upon the premises. The improvements must be valued only according to the added value they give to the land. However costly they may have been, unless they add actual value to the land at the time the assessment is made, they are valueless to the occupying claimant, and he goes out empty-handed. By him is borne all the depreciation of value from use or otherwise, as well as loss from the total destruction of buildings during the pendency of the action. The jury assesses values on a present view, and fixes them, of necessity, as of the time when the view is had; the successful claimant being required to pay only the added value which he ac-

quires upon eviction. *McMurray v. Day*, 70 Iowa, 671, 28 N. W. 476; *Fletcher v. Brown*, 35 Neb. 660, 53 N. W. 577; *Nixon v. Porter*, 38 Miss. 416; 2 Story, Eq. Jur. 799; 3 Suth. Dam. 349, 350.

The construction contended for by counsel for defendants in error puts upon the unfortunate occupant who has made lasting improvements upon the strength of his defective title, a double loss,—he not only loses the difference between his expenditures and the actual added value given to the land by his improvements, but he is made to pay interest on such expenditures, in the way of rents. The mere statement of the proposition is sufficient to convince any one of its utter lack of equity; and unless the statute clearly so requires, a construction will not be adopted which would enforce so unjust a rule. The language of the statute is: The jury "shall also assess the damages, if any, which said land may have sustained by waste, together with the net annual value of the rents and profits which the occupying claimant may have received from the same, after having received notice of the plaintiff's title by service of summons. * * *" Code Civ. Proc. § 604. If this must be held to mean rents and profits of the land, and improvements, simply because permanent improvements become a part of the real estate upon which they are placed, the same argument would require the occupying claimant to be assessed with the damages which the premises may have sustained by waste that consists in injury to buildings erected by him. So that, in the matter of waste, there would be the anomalous condition of requiring him to pay the damages done to the improvements, whether it be a partial or total destruction, and at the same time only allow him for the value of the improvements in their depreciated condition. It will hardly be claimed that an occupying claimant can in that manner commit waste for which he is chargeable; but to this result the argument of counsel logically leads, the property involved being "the same."

In *Deitzler v. Wilhite*, 40 Pac. 272, recently decided by the supreme court of this state, Mr. Justice Allen very cogently expressed the views of that court upon the equity of this proposition, as applied to rents prior to the commencement of the action, in the following language, which is equally apt in this case: "We think the provisions of the occupying claimant's law in accordance with sound equitable principles, and that no reason can be found in ethics why the occupying claimant should not have the full value of his improvements, as well when the value exceeds the mesne profits as when it does not. The substance of the plaintiff's claim is not merely that she is entitled to the value of the use and occupation of her property,—the bare lot,—which the court finds was one dollar per year, and concerning which the plaintiff makes no complaint, but she claims

the rental value of the house constructed by the defendant, which, in equity and good conscience, never was her property at all. The equity—the ethics—of such a claim finds no favor with us. On the contrary, we think the claim grossly inequitable. The defendant's money paid for the improvements. No allowance could be made for the interest on his investment, but he has had the use of it. We know of no sound reason why one should be charged for using his own property, no matter what the form of action may be." Both upon the better reason and ample authority, we are of the opinion that when the occupant of real estate shows himself entitled to the benefit of the occupying claimant's act for his improvements, the assessment against him under that act for rents and profits should be made exclusive of the added value given them by his improvements. Supporting this conclusion are the following cases: *Elliott v. Armstrong*, 4 Blackf. 421; *Pacquette v. Pickness*, 19 Wis. 221; *Dungan v. Von Phul*, 8 Iowa, 268; *Dean v. Feely*, 69 Ga. 822; *Haskins v. Spiller*, 3 Dana, 573; *Pugh v. Bell*, 2 T. B. Mon. 125; *Oil Co. v. Henshaw* (Ala.) 7 South. 700; *Sarbach v. Newell*, 28 Kan. 642.

We do not think, as claimed by counsel for defendant in error, that the supreme court, in *Deltzler v. Wilhite*, to which reference has been made, has placed a construction on the statute in question not in accord with the views expressed in this opinion. True, in that case the court below gave judgment for the rents and profits of the land and improvements. No complaint, however, was made of that ruling; and the supreme court did not pass upon its correctness, and was not called upon to do so. We do not read the opinion of the court, as delivered by Mr. Justice Allen, to mean that the court approved of the ruling as a correct application of the statute.

It is also objected that as the defendant below held under a defective tax deed, and was entitled to be repaid the taxes paid by her with interest, it would be unjust to allow the amount of the taxes to be increased by the greater value given to the property by the improvements, and not assess the rental value of the property in like condition. The record does not disclose in what manner the amount of the taxes paid was estimated. The questions affecting the payment of taxes, rents, and profits, and value of improvements, should all have been disposed of by the court at the same time, all being matters which regularly follow the judgment for possession, and are to be adjusted upon equitable principles, before the defendant is dispossessed. The tax laws provide for a separate assessment of the value of lands and the improvements thereon, for the purpose of taxation; and there is no difficulty in this case in ascertaining the amount of taxes paid by Hentig on these lots exclusive of the improvements. Only

the amount so paid should, with interest and legal charges, be repaid to her. The taxes paid on improvements should be held to be paid on her own property, of which she had full use and benefit. If, in the piecemeal trial of this case, there has been a repayment to the defendant of a greater sum for taxes than she is equitably entitled to, upon the final hearing and adjustment of the respective rights of the plaintiff and the defendant, that portion of the amount repaid which represents the taxes on the improvements, should be taken as a payment to that extent on the assessed value of the improvements. In no other way can complete equity be done.

In an adjustment of the rights of parties under the occupying claimant's law, the following general rules should be observed as nearly as possible: (1) In assessing the value of lasting and valuable improvements, the jury should consider and find only the added value which the improvements so made give to the land at the time the premises are viewed, or when the successful claimant obtained possession. (2) Damages for waste should be assessed with reference to the condition of the premises at the time they came into the possession of the defendant, or into the possession of those through whom he claims. (3) The net annual value of the rents and profits charged against the occupying claimant, should be estimated upon the use of the land without the improvements, for which compensation must be made. (4) The occupying claimant should have credit for only such portion of the taxes paid by him during his occupancy, as were paid upon the land without his improvements.

As there was no assessment of the rental value of the lots without the improvements, this court cannot determine what judgment should be entered. The judgment will be reversed, and the case remanded for a new trial in accordance with this opinion.

(1 Kan. A. 173)

HENTIG et al. v. COLLINS.

(Court of Appeals of Kansas, Northern Department, E. D. Sept. 18, 1895.)

EJECTMENT—RIGHTS OF DEFEATED DEFENDANT—APPEAL BOND—FAILURE OF PRINCIPAL TO SIGN.

1. The defendant in an action of ejectment who is defeated in his claim of title to real estate, and who is entitled to the benefit of the occupying claimant's law for his lasting and valuable improvements, is liable, under that law, for only the value of the rents and profits which he may have received from the land, without his improvements.

2. When a supersedeas bond is executed by sureties on behalf of the defendant in such an action, conditioned for the payment by him of the value of the use and occupation of the real estate, pending an appeal to the supreme court on a question of taxes, the sureties are liable on the bond only for the value of the use and occupation of the land, without the improvements of their principal, when, during the time of such use and occupation, there had been no assessment or payment of the value of the im-

provements, and proceedings under the occupying claimant's law had not been delayed or prevented by the defendant or his sureties.

3. A supersedeas bond signed by the sureties alone, the principal not joining therein, is valid and binding as to the sureties.

(Syllabus by the Court.)

Error from district court, Shawnee county; John Guthrie, Judge.

Action on a bond by M. D. Collins, assignee of J. W. Redden, against F. G. Hentig and others. Plaintiff had judgment, and defendants bring error. Modified.

F. G. Hentig, for plaintiffs in error. A. L. Redden, for defendant in error.

GARVER, J. In an action of ejectment brought in the district court of Shawnee county, Kan., by J. W. Redden against Mrs. A. J. Hentig, for the recovery of the possession of certain lots in the city of Topeka, the defendant was defeated in her claim of title founded on a tax deed, and judgment for possession rendered in favor of Redden, February 18, 1885. The court also found that Mrs. Hentig was entitled to a repayment of taxes, and to the benefit of the occupying claimant's law for her improvements, before the judgment for possession should be enforced. Different trials were subsequently had on the question of taxes and of the rights of the parties under the occupying claimant's act. In 1888 there was a second trial, to determine the amount of taxes to be repaid to the defendant; further proceedings under the occupying claimant's law being apparently, for the time, abandoned. Judgment on the question of taxes was rendered September 18, 1888, from which Hentig again appealed to the supreme court. Pending this appeal, a supersedeas bond was executed by F. G. Hentig and W. W. Manspeaker as sureties for Mrs. Hentig, she not joining in the bond, conditioned: "If the judgment be affirmed, she will pay the value of the use and occupation of the said lots from the date of this undertaking until the delivery of the possession, pursuant to the judgment, and all costs." The bond was executed October 4, 1888; the judgment appealed from was affirmed (45 Kan. 20, 25 Pac. 219) December 9, 1890; and the possession of the premises given to Redden by the sheriff, under legal process, December 10, 1890. On June 22, 1891, Redden made a request in that case for a sheriff's jury under the occupying claimant's law. The jury was drawn, and the respective values of the lots, the improvements, and the rents and profits, were assessed, and judgment rendered accordingly. From that judgment an appeal was again taken by Mrs. Hentig, and for the fourth time the case appeared in the supreme court, this time upon a question concerning the valuation of rents and profits, and has just been decided by this court, to which it was transferred. 41 Pac. 1054.

This is an action upon the supersedeas bond above mentioned, and presents the

question: Are the sureties liable on this bond for the value of the use and occupation of the land and improvements, or only for that of the lots exclusive of the improvements? The trial court found the value of the use and occupation of the lots, for the time covered by the bond, to be \$10.95 without the improvements, and \$393 with the improvements, made by Mrs. Hentig, and rendered judgment for the latter sum. In this we think the court erred.

It is a general rule that the extent of the liability of the surety is measured and limited by that of the principal. The sureties of Mrs. Hentig cannot be held liable for something that she is not answerable for. We held in the case of *Hentig v. Redden*, 41 Pac. 1054, that Mrs. Hentig was not chargeable, under the occupying claimant's law, with the increased rental value given to the lots by her improvements. Much that is said and the authorities cited in that case are applicable in this case, and will not be repeated. During all the time covered by the bond, she was, under that statute, in rightful occupancy of the premises, protected therein until paid the value of her lasting and valuable improvements, or, at least, until such value had been assessed. Gen. St. par. 4704; *Sarbach v. Newell*, 28 Kan. 459. The improvements were still hers, and, at the option of Redden, might never be owned by him. She was only answerable for the use and occupation of that which was Redden's property. The disconnected method of trial adopted in the principal case is largely responsible for the prolonged litigation. For this, however, one party seems as much at fault as the other. The delay of the proceedings under the occupying claimant's law was not caused by any act of the defendant, nor by these sureties; nor was the right to the occupancy of the premises changed or enlarged by the execution of the bond. We, therefore, hold that the same measure of liability for the use of the premises must be applied to the sureties on this bond as is applied to the principal, independently of the bond, for the same period of time; that is, that the value of the use and occupation of the lots should be estimated exclusive of the improvements.

It is claimed that this bond is not a legal obligation of the sureties, because not signed by the principal. Such claim is without merit. The mere fact that the undertaking was not signed by the principal cannot affect its validity as to the sureties, who executed it on her behalf. She was not a necessary party to it. *State v. Eggleston*, 34 Kan. 714, 10 Pac. 8.

The record brought to this court does not purport to be a full statement of all that may have taken place bearing upon the ruling of the court giving personal judgment against Mrs. Hentig; and, in the absence of a full record, every presumption is in favor of the correctness of the decision of the trial court.

No objection is made by the defendant in error to the findings of facts. This court can therefore direct such judgment to be entered as should have been rendered by the lower court on the facts found. The judgment of the circuit court of Shawnee county will be modified in accordance with this opinion, and the district court of said county, to which the case has been transferred, directed to enter judgment on the findings of fact in favor of defendant in error, and against A. J. Hentig, as principal, and F. G. Hentig and W. W. Manspeaker, as sureties, for the sum of \$10.95, and interest at 6 per cent. per annum from December 10, 1890.

(2 Kan. A. 237)

MODELL TP., OF NORTON COUNTY, v. KING IRON-BRIDGE CO.¹

(Court of Appeals of Kansas, Northern Department, W. D. Oct. 9, 1895.)

CONTRACT—PERFORMANCE—PAYMENT.

Where a party, by an express contract, undertakes to furnish material and to perform labor, he is only entitled to payment according to its terms, and the law will not make for him a contract different from that which the parties have entered into. The implied liability arises, if at all, from the subsequent transaction or conduct of the parties; and if there is a substantial nonperformance of the contract, and the party for whom the materials are furnished and labor performed refuses to accept, and does not receive or retain, any of the benefits of the contract, no such liability will arise.

(Syllabus by the Court.)

Error from district court, Norton county; G. Webb Bertram, Judge.

Action by the King Iron-Bridge Company against Modell township, of Norton county. Judgment for plaintiff, and defendant brings error. Reversed.

John R. Hamilton & Son, for plaintiff in error. L. H. Thompson, for defendant in error.

GILKESON, P. J. This action was brought by the King Iron-Bridge Company, plaintiff, against Modell township, of Norton county, Kan., defendant, in the district court of said Norton county to recover the contract price, viz. \$400, with interest thereon from January 25, 1891, for the erection of three bridges for and in said township. The petition in the case states, in substance: That on the 15th of September, A. D. 1888, the bridge company entered into a contract in writing (a copy of which is attached to the petition) with the officers of said township, agreeing that the said bridge company should build, paint, and make, complete, and have ready for use by the 15th day of November, 1888, for the said defendant township, three certain bridges. That they were to furnish all the material for said bridges, with bents, and that the material furnished was to be of good and suitable quality. That they would do all the work in a thorough and workmanlike manner. That they were to receive in payment for

said work four township warrants, of \$100 each, to draw 7 per cent. interest, and to be due as follows: March 1, 1889; August 1, 1889; March 1, 1890; August 1, 1890. That they did perform, all and singular, the conditions precedent on their part required to be done and performed by the terms and conditions of said contract. Specifications were attached to and formed a part of the contract. That in January, 1891, they presented their sworn voucher to the said township, and the township refused to issue the warrant. And prayer for judgment for the sum of \$400, with the interest from the 25th day of January, 1891, with 7 per cent. interest thereon. The answer of the defendant consists of eight paragraphs. The first four are admissions of immaterial matters, and then a denial of every allegation not admitted. The fifth specially denies that said plaintiff has done and performed, all and singular, the conditions precedent upon its part required to be done and performed, as provided for in said contract. The sixth alleges that the plaintiff did pretend to erect all three of the bridges provided for in said contract, but that the material and lumber of which they were constructed was not of a good and suitable quality, and the work thereon was not done in a workmanlike manner, and that none of the bridges were ever completed,—were never made safe for public travel; that on account of the inferior quality of the lumber, and the poor manner in which the work was done, the defendant never accepted or received any of said bridges, but at once notified the plaintiff that they would not accept or receive them, until made to comply with the provisions of the contract. The seventh alleges that some time in May, 1889, the defendant notified the plaintiff, by letter, that the bridges would be taken down, for the reasons above set forth, and that they would be subject to their orders. The eighth alleges that in February, 1890, the defendant took said bridges down, piled the same up, subject to the disposal of the plaintiff, and notified the plaintiff of such fact; and prayed judgment for \$100, their damages. To which the plaintiff filed a reply, denying generally and specially the sixth, seventh, and eighth allegations contained in the answer, and asked judgment as prayed for in the petition. Trial had by court and jury. General verdict and special findings of fact returned by jury. Judgment rendered in favor of the plaintiff, and against the township, for the sum of \$220 and interest. Defendant brings case here for review on petition in error and case made.

The plaintiff and the court below evidently adopted the theory, in the trial of this cause, that a recovery could be had in this action upon a quantum meruit, if not upon the contract. And this is the contention presented for our consideration. We do not think that the theory can be sustained, upon any known authority, and certainly not in view of the decisions of the supreme court of this state.

¹ Rehearing denied.

While it is true that the common-law rule that the express stipulations of the contract were required to be strictly performed, and a substantial compliance with the terms was not sufficient, has been greatly relaxed by late decisions of the supreme court of this and other states, yet we do not think that they have gone to the extent contended for by the plaintiff. "It is well settled that where one party has entered into a special contract to perform work for another and furnish material, and the work is done and material furnished, but not in the manner stipulated in the contract, yet, if the work and materials are of any value and benefit to the party, he may recover for the work done and materials furnished. This upon the principle that, if the other party has derived a benefit from the part performed, it would be unjust to allow him to retain that without paying anything." 2 Pars. Cont. (6th Ed.) 523; *Duncan v. Baker*, 21 Kan. 99; *Barnwell v. Kempton*, 22 Kan. 317; *Quigley v. Commissioners*, 24 Kan. 300. Mr. Justice Johnson, in commenting upon the rule laid down in *Duncan v. Baker*, *supra*, says: "That case and the authorities there cited declare the doctrine now generally recognized,—that where contracts for personal services, or to furnish materials and perform labor, are not fully performed, but the parties for whom the work is done and the materials are furnished accept the fruits of the contract, and receive and retain the benefits of that which has been performed and furnished, they are bound to pay what the same is reasonably worth. The law implies a promise on the part of him who elects to accept partial performance, that he will pay the value of that which he receives and retains. This, however, is the extent to which the rule has been extended." But this rule does not apply to the case at bar. The jury, in their answers to special questions, found that neither of the three bridges contracted for were erected so as to substantially comply with the provisions of the contract; that the defendant township never accepted any of the bridges; that the township did not waive its right to demand a substantial compliance with the provisions of the contract as to any of the bridges; that none of the bridges were ever used by the township or the public. So that under the facts in this case, as found by the jury, it does not come within the rule laid down in *Duncan v. Baker*. And, as was further said in that case: "Of course, in all cases where the employer can refuse to accept the work, and does refuse to accept it, or returns it, he is not bound to pay for it, unless it exactly corresponds with the contract; but where he receives it and retains it, whether he retains it from choice or necessity, he is bound to pay for the same what it is reasonably worth, less any damage that he may sustain by reason of the partial nonfulfillment of the contract. Of course, he is not bound

to pay anything unless the work is worth something,—unless he receives, or may receive, some actual benefit therefrom." It is clearly shown in this case that these bridges were never accepted or received by the township, and that the township or the public never used or derived any benefit from the bridges, as constructed; that they were not constructed in substantial compliance with the provisions of the contract; and that there was never any waiver of the conditions of the contract by the township. In the case of *Denton v. City of Atchison*, 34 Kan. 438, 8 Pac. 750, which was an action brought against the city to recover the sum claimed to be due upon contract for furnishing material and constructing sidewalks, the defendant denied the performance of the contract, and refused payment; and the only difference between the contract for material and that furnished was that the contract called for oak subaills 2x6 inches in dimensions, and those furnished were pine, and only 2x4 in size. Mr. Justice Johnson, in speaking for the court, says: "The more equitable rule has been generally adopted, which permits a recovery by one who in good faith attempts to perform his contract, and does so substantially, although there may be a slight deviation, or some technical and unimportant omission or defect. A substantial performance, however, is still indispensable to a recovery, and a failure to carry out any material part of the contract will not amount to a substantial performance." And again, in *Denton v. City of Atchison*, it is said: "And where a party, by an express contract, as in this case, undertakes to furnish material and perform labor, he is only entitled to payment according to its terms, and the law will not make for him a contract different from that which the parties have entered into. The implied liability arises, if at all, from the subsequent transaction or conduct of the parties, and if there is a substantial nonperformance of the contract, as there is here, and the party for whom the materials were furnished and the labor performed refuses to accept, and does not receive or retain, any of the benefits of the contract, no such liability will arise." The case at bar is not only fairly within the rule thus laid down in *Denton v. City of Atchison*, but, under the findings of the jury, a much stronger case has been made. We are therefore of the opinion that the plaintiff is not entitled to the application of the rule which he invokes, and that no right of recovery has been established by him; that the court below should have sustained the defendant's motion and application for judgment upon the special findings. The judgment of the district court will therefore be reversed, and cause remanded, with instructions that the court enter judgment therein for plaintiff in error (defendant below) upon the special finding of the jury. All the judges concurring.

(2 Kan. A. 260)

McLENNAN et al. v. HOPKINS.

(Court of Appeals of Kansas, Northern Department, W. D. Oct. 9, 1895.)

CORPORATIONS—VALIDITY OF ORGANIZATION—LIABILITY OF PROMOTERS AS PARTNERS.

1. An association of persons cannot have even a de facto corporate existence under a general law which provides for the formation of corporations, unless there has been such a bona fide attempt to comply with the requirements of the law as resulted in giving at least a color of legal authority to act in a corporate capacity.

2. An entire failure to execute or file articles of incorporation, as required by the statute before persons can associate and do business as a corporation, precludes any claim to a de facto corporate existence.

3. Where certain persons subscribe for stock, and organize for the transaction of a banking business by the election of a board of directors, a president, and cashier, intending to incorporate as a bank under the general laws of this state, and thereafter pay in a part of the capital subscribed, and a regular banking business is conducted by such persons, through their officers, in the belief that they are incorporated, but there has been, in fact, no such compliance with the law concerning corporations as to make such organization even a de facto corporation, those interested in the bank as organizers and owners of its capital and business are liable as partners for the debts contracted by the officers of such bank in the due course of its business.

(Syllabus by the Court.)

Error from district court, Russell county; W. G. Eastland, Judge.

Action by Minnie Hopkins, assignee, against A. N. McLennan and others. Plaintiff had judgment, and defendants bring error. Affirmed.

Ira E. Lloyd, for plaintiffs in error. Sutton & Dollison, for defendant in error.

GARVER, J. Minnie Hopkins, as assignee of Smith & Hopkins, brought this action against the plaintiffs in error to recover the sum of \$761.54, alleged to be due on account of a deposit of money made by Smith & Hopkins in the Bank of Dorrance, which was owned and controlled by plaintiffs in error, and for which deposit it is claimed they were liable as partners. The defendants answered the petition by a verified answer, consisting of a general denial, and the further allegation that "all of the dealings and transactions stated in said plaintiff's petition were had, if at all, with the Bank of Dorrance, the same being a duly organized and existing corporation under the laws of Kansas." No reply was filed to this answer, but a trial was had the same as if issue had been formally joined upon all material facts in dispute, and judgment was rendered against the defendants (now plaintiffs in error), holding them individually liable as partners for the full amount of the claim.

The record shows that about April, 1886, A. N. McLennan and his codefendants, with others, agreed to establish a bank for the transaction of a banking business at Dorrance, Kan., with a capital of \$50,000, di-

vided into shares of \$100 each. Pursuant to such agreement, the several parties interested signed a paper, each agreeing to take certain shares of stock. Certain ones of their number were chosen to act as directors, and W. Z. Smith was elected president, and L. B. Hall cashier. The full amount of the capital stock was subscribed, and two assessments, of 10 per cent. each, paid in by the subscribers shortly after the subscriptions were made, and thereafter a dividend of the profits of the business was made of from 2 to 5 per cent., which was applied by the bank as a further payment on the stock. A seal was provided and used, and a regular banking business of discount and deposit was carried on under the name of the Bank of Dorrance until December, 1889. About the time of the organization of the bank, under the direction of the president, articles of incorporation of some kind were drawn up, the record not disclosing what such articles contained; neither does it show by whom they were signed, though the evidence tends to show that they were signed by some of the directors, and thereafter delivered by the president of the bank to the cashier. No articles of incorporation or statement of any kind concerning the organization of said bank were filed or recorded in the office of the register of deeds of Russell county, where said bank was located, nor any copy or other instrument filed in the office of the secretary of state. With the exception of the president, none of the stockholders seem to have given any attention to the incorporation of the bank, and allowed the business to be carried on, believing that it was duly incorporated, and not intending at any time to assume any liabilities other than such as might attach to them as stockholders in a corporation organized under the laws of Kansas. Smith & Hopkins, in their dealings with the bank, regarded it as a corporation, and knew nothing to the contrary, until about the time of the failure of the bank in 1889, and after the deposits sought to be recovered were made.

The main question to be decided in this case is, whether one having a claim as depositor in this bank, for the recovery of an unpaid deposit, can hold the several persons who own the bank individually liable as partners, or whether, having dealt with the bank as a corporation, he is estopped from claiming any other than a corporate liability. It is contended for plaintiffs in error that the bank was at least a de facto corporation, and that one dealing with it as such cannot, in this collateral way, attack the validity or regularity of its incorporation. On the trial of the case an objection was made by the defendants to the introduction of any evidence by the plaintiff, on the ground that "upon the pleadings filed there were no issues formed to be tried, and that the plaintiff was entitled to recover nothing herein." It is argued that this objection was well taken, for the

reason that the answer alleged that the dealings alleged to have been had by plaintiff's assignors with the Bank of Dorrance, were with such bank as a duly organized and existing corporation under the laws of the state of Kansas. We cannot agree with counsel in this view of the pleadings. By the denial under oath of the allegations of the petition, the plaintiff was put upon proof of the alleged fact that defendants were doing business as partners, and thus was joined the principal issue upon which the liability of the defendants was to be determined. This issue was not changed or broadened by the averment of the answer that the Bank of Dorrance was a corporation; and in this respect the whole answer, taken together, amounted to nothing more than a general denial. If plaintiff failed to show that the defendants sustained such a relation to the business of the Bank of Dorrance as in law would make them liable as partners, it was quite unimportant whether such failure was because the bank was a corporation, or for other sufficient reason. When an answer, though containing special denials or affirmative allegations of facts inconsistent with the petition, amounts to no more than a general denial, no reply is necessary. *City of Burton v. Savings Bank*, 28 Kan. 390.

Were the defendants liable as partners? It must be conceded that they were jointly interested in the business carried on in the name of the Bank of Dorrance, and jointly concerned, though perhaps in different degrees, in the profits and losses of that institution. The business, for the conduct of which the bank was organized, was such as could very properly and legally be carried on by one or more persons, without regard to laws for the incorporation of such enterprises. Incorporated banks do not have, either in law or in fact, an exclusive right to engage in the business of receiving deposits, loaning funds, selling exchange, and the like, such as was conducted by the Bank of Dorrance. Being thus jointly engaged in such business, there is no presumption of individual nonliability. Persons engaged in business as a corporation, whether their charter rights and privileges are conferred by a special or general law, are relieved from individual liability for the acts of the association with which they are connected. The law pertaining to incorporated bodies clothes the individual with an immunity from liabilities which otherwise would fall upon him. Hence, it follows that to enable one to avoid such individual liability for a transaction with which he is connected, on the ground that it was the act of a corporation in which he was only a stockholder, it must appear that such steps have been taken to incorporate as will give those concerned in it at least a legal semblance of corporate existence. When the question arises collaterally, as it does in this case, it is not necessary that the various steps prescribed by law should have been

fully and regularly taken, or that the corporation should exist *de jure*; it is sufficient that enough has been done to make it a corporation *de facto*. To this extent, we agree with counsel for plaintiffs in error.

The question still remains, was the Bank of Dorrance a corporation *de facto*? We think not. It is difficult, and perhaps unnecessary, to attempt to reconcile the many decisions bearing on this question. Between some of them there is an irreconcilable conflict, so that, when we come to determine what is a *de facto* corporation, we are met by a diversity of authority. The rule recognized by the supreme court of this state is thus stated by Mr. Justice Brewer in *Pape v. Capital Bank*, 20 Kan. 440: "When parties have associated themselves together for the purpose of organizing a corporation under a general law, and have proceeded in good faith to take all the steps supposed necessary to complete such incorporation, and on the faith thereof engage in business as a corporation for a series of years, a party who has repeatedly dealt with them as such corporation will not, when sued on a note and mortgage held by it, be permitted to show, as a defense to the action, that there was some mere technical omission in the steps prescribed for incorporation. The corporation is one *de facto*; and only the state can then inquire—and that in a direct proceeding—whether it be one *de jure*. * * * There must in such cases be a law under which the incorporation can be had. There must also be an attempt in good faith on the part of the incorporators to incorporate under such law. And when, after this, there has been for a series of years an actual, open, and notorious exercise, unchallenged by the state, of the powers of a corporation, one who is sued on a note held by such corporation will not be permitted to question the validity of the incorporation as a defense to the action. No mere matters of technical omission in the incorporation, no acts of forfeiture from misuser after the incorporation, are subjects of inquiry in such an action." The attempt to incorporate, referred to in that case, must be something more than the mere physical organization, or formal arrangement into a working force, of the promoters of the enterprise. Something must be done beyond the mere transaction of business in the manner and form usually adopted by corporations. There must also be something more tangible and effective than a mere mental operation in the direction of what is intended. The steps taken and the attempt made must, to some extent and in some degree, have resulted in the effecting of those things which the law designates as a prerequisite to a corporate existence, however informal and irregular such proceedings and results may be. Had the articles of incorporation been prepared and recorded or filed as required by the statute, and the organization had been otherwise effected as shown in this case, no

question could be thus raised as to the fact of a corporate existence because of defects and irregularities in the attempted organization, or in the articles of incorporation. But, an entire failure on the part of the officers of the bank to prepare and execute the certificate or articles of incorporation required by law, and an entire failure to file a certificate or statement of any kind whatever in the office of the register of deeds of the county, or in the office of the secretary of state, left the organizers of this bank without a shadow of legal corporate existence. There was no substantial compliance with the law, and there could be no *de facto* corporation. We are supported in this conclusion by the following cases: *Bigelow v. Gregory*, 73 Ill. 197; *Kaiser v. Bank*, 56 Iowa, 104, 8 N. W. 772; *Sheble v. Strong*, 128 Pa. St. 315, 18 Atl. 397; *Hill v. Beach*, 12 N. J. Eq. 31; *Stout v. Zulick*, 48 N. J. Law, 599, 7 Atl. 362; *Abbott v. Smelting Co.*, 4 Neb. 416; *Society Perun v. Cleveland*, 43 Ohio St. 481, 3 N. E. 357; *Railroad Co. v. Cary*, 26 N. Y. 77; *Hurt v. Salisbury*, 55 Mo. 310; *Smelting Co. v. Richards*, 95 Mo. 106, 8 S. W. 246; *Whipple v. Parker*, 29 Mich. 369. In the cases cited, there was a failure on the part of the organizers of the claimed corporation to do some act, generally the neglect to file the articles of association or incorporation, made by the statute a prerequisite to corporate existence; and the rule clearly and forcibly laid down is that in such cases there is no *de facto* corporation, and that the claimed corporate existence may be attacked collaterally. An exception to this rule exists in cases where one is sued by the alleged corporation upon a contract in which the corporate capacity is recognized. To this effect are *Jones v. Foundry Co.*, 14 Ind. 89; *Meikel v. Fund Soc.*, 16 Ind. 181; *Irrigation Co. v. Warner*, 72 Cal. 379, 14 Pac. 37; *Massey v. Building Ass'n*, 22 Kan. 379. In those cases another principle is invoked, which does not permit a party to avoid the obligation of his contracts upon the mere technical objection that the party with whom he contracted had not the legal capacity to enter into the contract of which he has had the benefit. The distinction between that class of cases and the case under consideration is obvious. It is equally well settled that a substantial, though imperfect and irregular, compliance with the law, in a bona fide attempt to incorporate, followed by a user of corporate rights, will create a *de facto* corporation, and the corporate existence cannot be collaterally questioned by one dealing with it as a corporation. To this effect are *Baker v. Neff*, 73 Ind. 63; *Williamson v. Ass'n*, 89 Ind. 389; *Rice v. Railroad Co.*, 21 Ill. 93; *Railroad Co. v. Cary*, 26 N. Y. 75; *Mining Co. v. Woodbury*, 14 Cal. 424; *Oroville, etc., R. Co. v. Pumas Co.*, 37 Cal. 361; *Swartwout v. Railroad Co.*, 24 Mich. 389.

We think the facts shown by the record justified the trial court in holding the plain-

tiffs in error liable as partners for the debts of the bank. Other questions are suggested by the record as to the right of the plaintiff below to recover in this case; but, as they are not presented by the pleadings nor in the briefs, we shall not consider them. The judgment will be affirmed. All the judges concurring.

(2 Kan. A. 269)

McLENNAN et al. v. ANSPAUGH.¹

(Court of Appeals of Kansas, Northern Department, W. D. Oct. 9, 1895.)

UNINCORPORATED BANK—LIABILITY OF PROMOTERS.

1. The promoters and organizers of an unincorporated bank are liable as partners for debts contracted in the course of business. The case of *McLennan v. Hopkins* (recently decided by this court) 41 Pac. 1061, followed.

2. Where the gist of the plaintiff's cause of action, as stated in the petition, is the failure of defendants to pay or provide for the payment of a draft issued by the defendants as a bank, a recovery cannot be had without evidence to prove the dishonor of the draft.

(Syllabus by the Court.)

Error from district court, Russell county; W. G. Eastland, Judge.

Action by Samuel Anspaugh against A. N. McLennan and others. Judgment for plaintiff, and defendants bring error. Reversed.

Ira E. Lloyd, for plaintiffs in error. Sutton & Dollison, for defendant in error.

GARVER, J. The petition alleges that the plaintiff, having a deposit of \$702.91 in the Bank of Dorrance, on the 22d day of April, 1889, gave a check for that sum to said bank, and obtained therefor a draft in like amount, drawn by L. B. Hall, as cashier of said bank, payable to B. McAllister, or order, on a Kansas City, Mo., bank, and that the draft was not paid. The petition admits the subsequent payment to the plaintiff of the sum of \$350 on account of said indebtedness, and asks judgment against A. N. McLennan and others, as partners and owners of said bank. Judgment was rendered as prayed for. The defendants filed a verified answer, denying the allegation of partnership, and alleging that the Bank of Dorrance was a corporation, and that whatever business the plaintiff transacted with said bank was with it as an incorporated bank. A verified reply was filed, denying the allegations of the answer.

The questions arising as to the attempted incorporation of the Bank of Dorrance, and the relations sustained by said defendants to said bank and to one another, are substantially the same as those considered and just decided by this court in the case of *McLennan v. Hopkins*, 41 Pac. 1061. For the reason stated in the opinion filed in that case, we think whatever cause of action existed in favor of the plaintiff in this case was against the defendants as partners. The evidence fails to show any such condition of things as would make the Bank of Dorrance a *de facto* corpo-

ration, or estop this plaintiff from denying its existence as such.

We think, however, that the judgment rendered is without support from the evidence. Defendants' liability rests upon the nonpayment of the draft. The only evidence introduced concerning it was that given by the plaintiff himself. He testified to the buying of the draft at the bank on the 22d day of April, 1889, from one L. B. Hall, who was acting as cashier; that the draft was drawn by Hall, as cashier, in favor of B. McAllister, of Omaha, Neb., on said bank's correspondent bank at Kansas City, Mo.; that, at plaintiff's request, Hall put the draft in an envelope, addressed to McAllister at Omaha, and said he would mail it. The draft was intended as a payment due from Anspaugh to McAllister on certain railroad land contracts. There is no evidence tending to show what became of the draft,—whether it reached McAllister, or whether it was ever presented to or paid by the bank on which it was drawn. The only evidence having any bearing whatever on the matter is the testimony of Anspaugh, giving a conversation which he had in January or February, 1890, with one E. M. Coleman, who was at that time acting as cashier of another, newly incorporated "Bank of Dorrance." He states that at that time Coleman spoke of the draft, and said: "We will pay it, or I will pay it, as soon as we can collect the money in for the notes of the old bank." And either then, or soon after, Coleman paid him \$200 that was collected from the notes of the old bank, and said, as fast as they could collect the money in, they would pay their debts, but they would have to collect the money that was owing to the old bank to pay their debts. This evidence was introduced over the objection of defendants. Coleman was not a party to the action, and there is no pretense of authority in him to speak for or to bind the defendants in this action. It was clearly incompetent.

Before a recovery can be had upon the allegations of the petition, "that said draft never reached said McAllister, was never presented to or paid by the bank on which the same was drawn, has never been paid by the defendants or any or either of them, and is now lost and wholly unpaid; * * * that said Bank of Dorrance does not now have, and for a long time prior hereto has not had, any funds on deposit with the bank on which said draft was drawn, and has no means or provisions whatever with said bank at Kansas City, Mo., with which to pay said draft,"—there must be at least some evidence tending to prove some of such allegations. The last known of said draft, it was intrusted to Hall, to be forwarded to McAllister. Hall was thus made Anspaugh's agent, for there is nothing to show that it was any part of his duty as cashier to forward this draft, or to do an act which was for the mere accommodation of Anspaugh. The draft is, under the evidence, thus left in the hands of Anspaugh's

agent. The presumption, in the absence of evidence to the contrary, is that the draft was paid. *Watkins v. Parsons*, 18 Kan. 426. The judgment will be reversed, and the case remanded for a new trial. All the judges concurring.

(2 Kan. A. 243)

MOORS v. SANFORD et al.

(Court of Appeals of Kansas, Northern Department, W. D. Oct. 9, 1895.)

**ACTION ON NOTE—VALIDITY OF COLLATERAL MORTGAGE—HOMESTEAD—TRIAL—OPINION
EVIDENCE—REVIEW.**

1. In an action upon a note and a mortgage securing the same, the plaintiff is entitled to judgment for the amount of the note, regardless of the decision of the court as to the validity of the mortgage, when it is conceded that the note was executed by the defendant, that the plaintiff is the owner and holder thereof, and that it is due and unpaid.

2. An objection cannot for the first time be made in this court that the plaintiff failed upon the trial to show that he was the owner and holder of the note sued on, though such fact was put in issue by the pleadings, when the defendant, without objection, took upon himself the burden of proof upon other issues, and when the whole trial proceeded upon the assumption that the plaintiff was the owner and holder of the note, and that whatever cause of action existed thereon was vested in him.

3. Whether a tract of land not actually occupied as a residence by the owner and his family should be held to be their homestead, and protected as such, because of a claimed intention to return thereto as a place of residence, is dependent largely upon the bona fide intention of the owner, and is a mixed question of law and fact, to be determined by the trial court.

4. When the issues submitted to a jury are not such as entitle the parties to a jury trial as a matter of right, the court may consider the answers which the jury returns to special questions of fact submitted to it as merely advisory, and it is not error for the court in such case to set aside a finding which is contrary to the evidence, and substitute a finding of its own.

5. A nonexpert witness should not be permitted to give his opinion as to the sanity or insanity of one of the signers of a mortgage, when the mental condition of such signer and the validity of the mortgage are material facts to be tried, unless the witness first states his opportunity for observation, and the facts observed as the basis of his opinion.

(Syllabus by the Court.)

Error from district court, Graham county; Charles W. Smith, Judge.

Action by Francis J. Moors against Ephraim Sanford and others on a note and collateral mortgage. Defendants had judgment, and plaintiff brings error. Reversed.

Rossington, Smith & Dallas and F. D. Turck, for plaintiff in error. M. C. Reville and W. M. Roberts, for defendants in error.

GARVER, J. Plaintiff, alleging that he is the owner and holder of a note and mortgage executed by Ephraim Sanford and Mary E. Sanford, his wife, in favor of the Guaranty Investment Company, and transferred to the plaintiff, brought this action, seeking a personal judgment against Sanford and a foreclosure of the mortgage secur-

ing the same. The petition was filed April 18, 1892. S. N. Coder was made a party defendant, and answered, setting up title in himself by deed of conveyance executed by Ephraim Sanford (Mary E. Sanford being dead) subsequently to the execution of the mortgage, and alleged that the mortgage was invalid for the reason that at the time it was executed the land embraced therein was the homestead of the mortgagor, Sanford, and that the execution of the mortgage by Mary E. Sanford was void because she was at the time insane. The case was tried by the court and a jury upon the agreed theory that the plaintiff was vested with whatever rights any one could have under the note and mortgage, and that the only issues to be considered and tried were the homestead character of the land, and the insanity of Mrs. Sanford at the time the mortgage was executed. Sanford admitted the execution of the note and mortgage, but denied the other allegations of the plaintiff's petition, and alleged that the land mortgaged was the homestead of himself and family, and that his wife was insane at the time the mortgage purports to have been executed by her. The jury returned a general verdict and special findings of facts in favor of the defendants, upon which judgment was rendered against the plaintiff for costs. Various errors are assigned by the plaintiff and urged upon this court, but we shall content ourselves with a consideration of only such of them as in our opinion require a reversal of the judgment complained of, passing by such questions as may not arise upon another trial.

Was the plaintiff entitled to judgment against Sanford on the note? The pleadings admitted the execution of the note and mortgage by Sanford, and no defense of any kind was set up to his liability for the payment thereof. True, the petition alleged the transfer of the note to plaintiff, and that he was then the holder and owner thereof; and, in the face of the general denial of the defendants, it devolved upon the plaintiff, in the first place, to prove the truth of this allegation of transfer and ownership. At the commencement of the trial, however, it was admitted that the note and mortgage had been transferred to the plaintiff, and the entire trial was conducted upon the assumption that whatever liability existed upon the note was to the plaintiff, and that he was also entitled to the benefit of any lien created by the mortgage. Without objection, the defendants assumed the burden of proof, and the case was submitted to the jury by counsel and by the court upon the theory that the only question to be tried was as to the validity of the mortgage. Under these circumstances, we cannot conceive how the jury could find generally against the plaintiff's right to recover the amount due on the note, or why such a verdict should be sustained. In this there was not

only manifest error, but great injustice. The record shows that the note in question was executed by Sanford in consideration of a loan to him of \$800; that he received the money; and that the whole amount thereof is due and unpaid. The only defense offered to defeat the recovery of this sum is that which aims to wipe out the security of the mortgage upon which the loan was negotiated. The invalidity of the mortgage security, however, cannot affect the maker's liability on the note.

The jury found that the land mortgaged was the homestead of Sanford and family at the time the mortgage was executed. The evidence upon this question was quite conflicting, and, in our opinion, clearly preponderates against the conclusions of the jury. The land was located near the town of Hill City, and had, for some years prior to the making of this mortgage, been occupied as a residence by Sanford and his family; but three or four months before November 1, 1888 (the date of the mortgage), Sanford had removed from the land, and taken up his residence in Hill City, where he continued to reside until some time in 1890, when his wife died. The defendant Coder purchased the land from Sanford about the time or shortly after the mortgage was made, and took actual possession early in 1889, but a deed from Sanford to Coder was not executed until about February, 1893, after the commencement of this action. About January, 1889, Sanford and wife executed a deed of conveyance of the land in which Coder's mother was named as grantee. For some reason, not clearly disclosed, this deed was afterwards either returned or destroyed. Sanford claims, and testified on the trial, that his removal from the farm to Hill City was occasioned by the ill health of his wife; that it was a mere temporary absence; and that he intended to return to the farm as soon as her health would permit. The evidence tends strongly to show that prior to November 1, 1888, there was an understanding between Sanford and Coder that Coder would buy the farm for the price of \$1,200, and that the obtaining of this loan of \$800 by a mortgage of the land was a part of the arrangement, so as to require Coder to pay only the additional sum of \$400. The homestead idea seems to be largely an afterthought, and is brought forward at this time for the purpose of avoiding the collection of this debt,—an object entitled to no equitable consideration. However, under well-established rules, whether the homestead claim should, in any particular case, be sustained, is a mixed question of law and fact; and, upon conflicting evidence, the facts must be determined by the trial court or jury. To have the homestead character, the land must be "occupied as a residence by the family of the owner." When occupancy is actual, no difficulty usually arises; but when it is merely construct-

ive, as in this case, it is a question largely of intention on the part of the owner. Apart from the claimant's own testimony, this intention must be judged of by the facts and circumstances surrounding the removal from the homestead, and the apparent object and conditions of the subsequent residence elsewhere.

Having determined the homestead question in favor of the defendants, the jury further found that Mary E. Sanford, the wife, was insane at the time she signed the mortgage, and that the plaintiff had knowledge of that fact when he became owner thereof. The finding of the jury as to the plaintiff's knowledge of the insanity was set aside by the court, and an answer substituted for it, to the effect that there was no evidence to show whether he had such knowledge or not. Error is assigned upon this action of the court, setting aside a finding of the jury, and substituting one of its own. As this case was submitted and tried, we think the court was not concluded by either of the findings of the jury. There was no issue submitted to the jury upon the right of the plaintiff to recover a money judgment. They were simply asked to pass upon the validity of the mortgage. Neither party could demand, as a matter of right, a jury trial for the determination of that question; and, when an issue of that character is submitted to a jury, the answers returned to special questions may be accepted by the court as merely advisory, to be approved or set aside as the court may deem proper. *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 262; *Stickel v. Bender*, 37 Kan. 457, 15 Pac. 580; *Franks v. Jones*, 39 Kan. 236, 17 Pac. 663. In this case the court might, with great propriety, have exercised the same authority with reference to other findings of the jury which are inconsistent with each other, and some of them clearly against the weight of the evidence.

It is further claimed that the court erred in admitting incompetent testimony upon the question of the alleged insanity of Mrs. Sanford. No inquisition had ever been had as to her insanity, and this fact was left for determination by the jury solely upon the testimony given by the witnesses upon the trial. Sanford himself testified that she was insane, and wholly unable to comprehend or understand any business transaction, at the time the mortgage was signed by her. Other nonexpert witnesses testified to an acquaintance with her, and expressed the opinion that she was insane. Some of the witnesses testified to seeing her several times during the period of three or four years prior to her death in 1890, and gave it as their opinion that she was insane, without designating any particular time when, in their judgment, such insanity existed, and without attempting to state a single fact, circumstance, or act indicative of her mental condition. Even Sanford

himself does not pretend to mention a single act or word of his wife which would suggest an unhealthy or abnormal mental state, or which he claimed led him to consider her insane. She was sick and weak physically, at times being almost helpless. About June or July, 1888, Sanford, with a view to benefit his wife's health, took her on a trip to Utah, and was absent for some weeks. After their return and removal to Hill City, a married daughter was with them much of the time. Sanford was present when he and Mrs. Sanford signed the note and mortgage, in the presence of the notary public. The notary testifies that he explained the mortgage to her; that she seemed to understand what it was; and that he saw nothing out of the way or unusual in her conduct or actions, except that she was weak physically, and needed assistance in moving about the room. The jury were undoubtedly influenced to find that Mrs. Sanford was insane largely, if not entirely, by the testimony of the witnesses who came before them and said that they knew her, and that in their judgment she was insane, without the statement of any facts or circumstances as a basis for such opinions. Such testimony is not admissible. Before the opinions of nonexpert witnesses should be received on such a question, they should disclose, not only their opportunity for observation, but should also state the facts which they observed, and which are the basis of their opinions. *Baughman v. Baughman*, 32 Kan. 538, 4 Pac. 1008; *Grant v. Thompson*, 4 Conn. 203; *Clapp v. Fullerton*, 34 N. Y. 180; *Rambler v. Tryon*, 7 Serg. & R. 90; *Pidcock v. Potter*, 68 Pa. St. 342; *Insurance Co. v. Lathrop*, 111 U. S. 612, 4 Sup. Ct. 533. The mere opinion of a nonexpert witness upon a question of sanity or insanity is, at best, of very uncertain value. When it is unaccompanied by a statement of facts which would enable the trial court or jury to judge of the correctness of, and the weight to be given to, such opinion, it should not be permitted to rise to the dignity of competent evidence in any case. It can only tend to mislead or confuse the jury, and has no proper place in the just and legal determination of personal or property rights. The judgment will be reversed, and the case remanded for a new trial. All the judges concurring.

(2 Kan. A. 251)

HILL et al. v. ALEXANDER et al.

(Court of Appeals of Kansas, Northern Department, W. D. Oct. 9, 1895.)

MORTGAGE—ORAL ASSIGNMENT—LIEN ON HOMESTEAD—FORECLOSURE.

1. A nonnegotiable note and mortgage may be transferred by a mere oral assignment, followed by delivery; and a petition which alleges generally that the note and mortgage sued on were assigned and transferred to the plaintiff,

without stating whether in writing or not, states facts sufficient to constitute a cause of action, and is not open to attack by an objection to the introduction of evidence.

2. The lien of a mortgage executed by the owner and his wife on the family homestead is not affected by a prior deed of conveyance executed by the husband alone, the wife not consenting thereto nor joining therein.

3. When the petition filed in a case brought to foreclose a mortgage executed by the owner and wife on the homestead, alleges priority of the lien of the mortgage over the title or interest claimed under a deed previously executed by the husband alone, and a subsequent conveyance by the grantee therein, and prays that the mortgage be adjudged to be a prior lien on the land, and the only issue as to the validity of the deeds is joined between the holder of the mortgage and the grantees in said deeds, the court should not direct the cancellation of the deeds of record, but should merely give priority to the mortgage lien.

(Syllabus by the Court.)

Error from district court, Graham county; Charles W. Smith, Judge.

Action by Charles Alexander against W. R. Hill and others. Judgment for plaintiff. Hill and others of the defendants bring error. Modified.

Z. C. Tritt and H. M. Baldwin, for plaintiffs in error. M. C. Reville and W. A. Fal-laa, for defendants in error.

GARVER, J. This was an action brought by Charles Alexander, plaintiff below, on a note and mortgage executed by J. C. B. Lewis and wife to G. W. Jones, and by Jones transferred to the plaintiff. The note was non-negotiable, and the petition alleged its execution by Lewis and the transfer by the payee, Jones, to Alexander. The plaintiffs in error claimed title to the premises under a deed executed by J. C. B. Lewis to W. R. Hill, and a deed from Hill to Pomeroy. These deeds were executed prior to the execution of the mortgage by Lewis and wife to Jones, but the wife of Lewis did not join in the conveyance to Hill. On the trial of the case, Alexander's ownership of the note and mortgage was not disputed; and it was agreed that the only issue to be tried was whether the land described in the mortgage was, at the time of the execution of the deed from Lewis to Hill, the homestead of Lewis, and the deed consequently void, because not joined in or consented to by Nora Lewis, the wife of J. C. B. Lewis. The court found generally in favor of the plaintiff below, and rendered judgment upon the note and for the foreclosure of the mortgage, and adjudged the deeds from Lewis to Hill, and from Hill to Pomeroy, to be null and void, and ordered them to be canceled of record. The errors assigned are in overruling the objection made by Hill to the introduction of evidence on the part of the plaintiff, on the ground that the petition did not state facts sufficient to constitute a cause of action in favor of the plaintiff; in directing a cancellation of the deeds to Hill and Pomeroy; and in overruling the motion for a new trial.

The only thing urged against the sufficiency

of the petition is that it contains only a general allegation of the assignment and transfer of the note to plaintiff, without alleging that such transfer was in writing. We know of no law that requires a written transfer of a note, whether it be negotiable or nonnegotiable, in order to vest title and the right to sue in the assignee who thus becomes possessed of it. An oral assignment followed by delivery is all that is necessary. Even if a written assignment were required, the allegations of the petition were sufficient as against a mere objection to the introduction of evidence. The whole trial proceeded upon the assumption that the plaintiff was the owner and holder of the note and mortgage sued on, and that the only matter in dispute was whether the mortgagor, Lewis, was the owner of the land when the mortgage was executed, or whether, by reason of the previous conveyance to Hill, a mortgage from Lewis created no lien. Upon ample testimony, the court found that the land in question was, at the time of the execution of the deed to Hill, occupied as a residence by the family of the owner, J. C. B. Lewis; that his family consisted of himself, his wife, Nora Lewis, and a daughter; and that the wife did not join in, or in any manner consent to, such conveyance. It necessarily follows from this finding that the lien created by the mortgage, subsequently executed by Lewis and wife to Jones, was in no way affected or prejudiced by the prior deed to Hill. The homestead can be alienated or conveyed only by the joint consent of the husband and wife when that relation exists. Const. art. 15, § 9.

Did the court err in directing that the deeds be canceled of record? Lewis and wife made default in the case, and did not in any way attack the validity of the conveyances under which Hill and Pomeroy claimed title. Hill and wife conveyed to Pomeroy by a deed of general warranty, purporting to convey the fee-simple title to the land, free and clear of all incumbrances. Between them it certainly was a valid instrument, whatever may be its legal effect. Whether the deed from Lewis to Hill can, under any circumstances, be of any force and effect as between the parties to that instrument, or whether its validity may be open to further controversy between them, it is not now necessary to decide. The plaintiff did not in his petition ask for the cancellation of these deeds, but merely that the title or interest, if any, of Hill and Pomeroy, be held to be inferior and subject to the lien created by the mortgage. This is, we think, as far as the court should have gone, and the order directing the cancellation of the deeds of record should not have been made.

The judgment will be affirmed, except as to that part which directs the cancellation of the deeds to Hill and Pomeroy. In that respect the judgment is modified, and the trial court directed to enter the judgment so as to conform to the views expressed in this opinion. All the judges concurring.

(3 Kan.A. 246)

BRONSON v. ASHLOCK et al.

(Court of Appeals of Kansas, Northern Department W. D. May 25, 1895.)

PLEADING—VERIFICATION OF DENIAL—WAIVER—AUTHORITY OF AGENT.

1. When, under the Code, the allegation of the existence of a fact is to be taken as true, unless denied under oath, the necessity to verify a denial will be deemed to have been waived, when the whole trial proceeded, without objection, upon the assumption that issue was properly joined thereon; and objection cannot for the first time be made in this court that the denial was not under oath.

2. Evidence of authority of one as agent to collect for the holder the semiannual interest on a negotiable note, as the interest matures, does not show authority in such person to accept a payment of the principal of the note long before its maturity, when he is not shown to have possession or control of the note.

(Syllabus by the Court.)

Error from district court, Graham county; Charles W. Smith, Judge.

Action by Austin H. Bronson against Mary Ashlock and others. Judgment for plaintiff. Defendants bring error. Reversed.

Waggener, Horton & Orr and Z. C. Tritt, for plaintiffs in error. H. M. Baldwin, for defendant in error.

GARVER, J. Under date of September 1, 1887, Mary Ashlock, for herself and as guardian of certain heirs of D. C. Ashlock, deceased, executed a negotiable note and mortgage in favor of the Guaranty Investment Company, for the sum of \$300, due in five years thereafter, with interest at the rate of 7 per cent. per annum, to be paid semiannually, both principal and interest being made payable at the Exchange National Bank, Atchison, Kan. On December 20, 1887, the note and mortgage were transferred to Austin H. Bronson, who commenced this action on November 21, 1892, in the district court of Graham county, against the makers of the note and others, for the recovery of the principal and unpaid interest of the note, and for the foreclosure of the mortgage. The makers of the note and mortgage were served by publication, and made default. W. R. Hill, one of the defendants, appeared, and answered the plaintiff's petition by alleging that he was the owner in fee simple of the land upon which the mortgage was sought to be foreclosed, having derived his title thereto by conveyance executed by Mary Ashlock in February, 1880; that about February 4, 1889, "said defendant Mary Ashlock, widow of D. C. Ashlock, deceased, and guardian of the said minor heirs of the said D. C. Ashlock, deceased, paid to the Guaranty Investment Company the amount in full of said note and the interest due thereon; and said Guaranty Investment Company was duly authorized in fact and in law to receive the same, and said payment was then and there received in full settlement of said note and mortgage." The plaintiff filed a reply to the answer of Hill, consisting

of a general denial, unverified. The trial was had by a court and a jury, resulting in a verdict in favor of Hill, upon the issues joined between him and the plaintiff, on which judgment was rendered against the plaintiff for costs. The evidence tends to show that, early in 1889, Hill purchased the land mortgaged from Mrs. Ashlock, and received from her a deed of conveyance purporting to convey to him the fee-simple title to the premises, free and clear from all incumbrances; that Mrs. Ashlock provided for the discharge of the mortgage by having Hill remit \$300 of the purchase money for the payment thereof; that Hill obtained a draft for \$300 from a bank in Hill City, and sent the same to one of the officers of the Guaranty Investment Company at Atchison, where said company had its main offices. There is no evidence tending to show what became of this draft, or that the plaintiff, who was then the holder and owner of the note and mortgage, received any benefit therefrom.

The case was tried, and is now presented, upon the theory, that the Guaranty Investment Company, at the time of the payment to it of the \$300, was the agent of the plaintiff, Bronson, duly authorized to receive payment of the principal and interest of this note, and, consequently, that a payment to said company would bind the plaintiff. Evidence was introduced to prove the alleged agency of the Guaranty Investment Company, and that question was treated all through the trial as a material controverted fact to be determined, and was so submitted by the court to the jury. Counsel for Hill claim, in this court, that the fact of agency was admitted by the pleadings,—that the failure of the plaintiff to deny under oath the allegation contained in Hill's answer that "Said Guaranty Investment Company was duly authorized in fact and in law to receive the same" left that fact admitted. Whether this was such an allegation of authority, within the meaning of the Code, as should be denied under oath, in order to put it in issue, is not necessary to decide; for, the trial having proceeded as if that fact was in issue, the necessity for any such denial under oath will be deemed waived, and it is too late now to raise the objection for the first time. *Ciesielski v. Nowacki*, 39 Kan. 340, 18 Pac. 282.

The only evidence of agency offered was that payments of the interest coupons due, respectively, March 1, 1888, September 1, 1888, March 1, 1889, and September 1, 1889, were made by remittances to the Guaranty Investment Company at Atchison, and the several interest coupons were by said company returned to Mary Ashlock soon after the respective payments were made, marked "Paid." The court upon this question instructed the jury as follows: "The evidence in this case shows that it [the alleged payment] was not made to the plaintiff, Bron-

son, personally, and that, if any payment was made at all, it was made to the Guaranty Investment Co., or their representatives, the original payees of the note, and mortgagees in the mortgage. So that, the evidence showing that Mr. Bronson was the owner of the paper and the owner of the mortgage at the time the payment was made, to permit Mr. Hill to receive the benefit of that payment, it is necessary that he should show that these parties had authority to receive such payment in the first instance, or that such payment was ratified by the holder of the paper, or that such a state of the evidence is disclosed here as would estop the plaintiff from claiming that the Guaranty Investment Co. had no right or authority to receive payment for this mortgage. But if you should find in this case that the Guaranty Investment Co. had been collecting the interest on this indebtedness,—this mortgage,—and paying it over to the plaintiff here, and that the plaintiff had been permitting them to collect interest for him, and the payment of this note and mortgage was made to the Guaranty Investment Co., and this thing occurred both before and after the transfer of the note and mortgage to the plaintiff, then that would constitute the Guaranty Investment Co. the agent of the plaintiff for the collection of the paper; and any payments made, by any one liable on the paper, to the Guaranty Investment Co., under these circumstances, would be a payment to the plaintiff. At least, the plaintiff, having treated the Guaranty Investment Co. as his agent for the collection of the interest,—permitted it to collect the interest,—would be estopped from claiming that they had no authority to do so." In so instructing the jury, we think, the court erred. The mere collection of past-due interest coupons on a note long before the time of its maturity is not, of itself, sufficient to show authority in such person to receive payment of the principal before it is due. We have been cited to no decision going to that length in holding the owner of a negotiable note responsible for a payment to a third person under such circumstances, long before payment according to the terms of the contract can be demanded, and where the evidence falls to show that the person to whom payment was made had possession or control of the note. The case of *Shane v. Palmer*, 43 Kan. 483, 23 Pac. 594, cited by counsel for Hill, does not support such a proposition, as in that case there was evidence of express authority to receive the payment made. In this case there is nothing to show that the Guaranty Investment Company had possession, or claimed possession or control, of the note and mortgage after their transfer to Bronson in 1887. The payment under such circumstances was made wholly at the risk of the payor. In these views we find support in the following cases: *Best v. Crall*, 23 Kan. 482; *Cowles v. Burna*, 28 Kan. 38; *Smith v. Kidd*, 68 N.

Y. 130; *Crane v. Gruenewald*, 120 N. Y. 274, 24 N. E. 456; *Lumber Co. v. Littlejohn*, 31 Neb. 606, 48 N. W. 476; *Keohane v. Smith*, 97 Ill. 156; *Biggerstaff v. Marston*, 161 Mass. 101, 36 N. E. 785; *Watson v. Wyman*, 161 Mass. 93, 36 N. E. 692; *Mulcahy v. Fenwick*, 161 Mass. 164, 36 N. E. 689; *Williams v. Walker*, 2 Sandf. Ch. 325; *Lee v. Clark*, 89 Mo. 553, 1 S. W. 142.

It is objected by the plaintiff that there is a variance between the evidence offered as to payment and the allegation of payment in the answer; that the answer alleges payment by Mrs. Ashlock, while the evidence tends to show that, if payment was made, it was made by Hill. We think, however, that there was no substantial variance; that, under the agreement between Mrs. Ashlock and Hill, it might be considered as a payment made by her through him.

For the errors mentioned in this opinion, the judgment rendered upon the issues joined between Bronson and Hill will be reversed, and a new trial ordered. The decision of the district court upon the issues joined between the other parties to this suit is not disturbed. All the judges concurring.

(1 Kan. A. 754)

SMITH v. BRYANT.

(Court of Appeals of Kansas, Southern Department, W. D. Oct. 9, 1895.)

INCOMPETENT EVIDENCE—EFFECT ON JUDGMENT.

While a judgment based upon incompetent testimony may be sustained where such testimony relates to a proper measure of damages, and is received at the trial court without objection, yet, when the record clearly discloses that the damages with regard to which testimony was given are such as cannot be recovered in an action of the character being tried, a judgment for damages, based upon such testimony, is erroneous, and cannot be sustained.

(Syllabus by the Court.)

Error from district court, Ford county; A. J. Abbott, Judge.

Action of replevin by George F. Bryant against H. D. Smith. Plaintiff had judgment, and defendant brings error. Reversed.

Sutton & McGarry, for plaintiff in error.
B. F. Milton, for defendant in error.

COLE, J. This was an action in replevin, brought in the district court of Ford county by the defendant in error, George F. Bryant, to recover from the plaintiff in error, H. D. Smith, the possession of certain groceries which it is claimed were unlawfully detained by said Smith, and which were alleged to be of the value of \$327.93. The plaintiff in error (defendant below) justified in his answer by alleging that he was a constable of Spearville, in Ford county, and that he held said property by virtue of an order of attachment and sale issued by a justice of the peace of said county. The cause was tried

by the court without a jury, and a judgment rendered in favor of Bryant for the possession of the goods, and for damages in the sum of \$800. It appears from the evidence that in December of 1887 the firm of Weston & Byrns, who were doing business at Ford, in Ford county, Kan., gave two chattel mortgages upon their stock of goods, and afterwards executed a bill of sale to Bryant for the entire stock, subject to the mortgages above referred to, and placed Bryant in possession of the stock. The attachment which gave rise to this action was made by some of the creditors of Weston & Byrns. The petition in this case does not allege any damages, but upon the trial of the cause the court permitted evidence to be given of damages arising out of the loss of business and of probable profits claimed to have been sustained by Bryant by reason of the attachment having been made, and also of certain expenses claimed to have been incurred by Bryant for the same reason. These expenses consisted of \$70, paid out by Bryant in making a trip to St. Joseph, Mo., for the purpose of conferring with the holders of the mortgages; and \$750, paid by the mortgagees to a salesman sent by them to take charge of the stock when the creditors of Weston & Byrns began making their attachments. The plaintiff in error contends that the court erred in admitting any evidence of damages under the allegations of the petition, and that the court further erred in admitting testimony of speculative damages arising from the loss of business and the probable profits of business. In answer to this it is contended by the defendant in error that the evidence now objected to was received upon the trial without specific objection, and he further claims that counsel for plaintiff in error tried this case in the lower court upon the theory that the possession of the officer under his writ of attachment was good, for the reason that it was claimed that the sale by Weston & Byrns to Bryant was not in good faith, and that the mortgages given by Weston & Byrns were fraudulent; and that, having tried his case upon the one theory in the court below, the plaintiff in error must be held to that theory in this court. It is somewhat difficult to determine from the record in this case upon just what theory the trial proceeded in the court below. The evidence of Bryant upon the different items of damages which are here objected to seems to have been received without objection in the trial court, although specific objection was made to the same line of testimony offered by him through other witnesses. But, conceding that this incompetent testimony was admitted without objection, yet the conclusion which is arrived at by defendant in error is an erroneous one. The court could render judgment for no greater sum than was claimed by the allegations of the petition; and while a judgment might be sustained upon competent testimony, where that testimony related

to a proper measure of damages, yet, when the record clearly discloses that the damages with regard to which this testimony was given were such as could not be recovered in an action of this character, a judgment of the court for damages would be erroneous, and cannot be sustained. No claim is made in this case of any malice upon the part of the officer making the levy, and the rule is well settled that in such a case the measure of damages is the value of the property, together with interest and costs, in case the same be retained by the officer, and for the retention of the property and costs in case the possession of the property remains with the plaintiff. When the evidence was concluded in this case it became the duty of the court to determine whether the plaintiff was entitled to the possession of the property in question, and, if so, to what amount of damages he was entitled. And this must be allowed, not for all sums which the admission of testimony may establish, but for such items of damage established by the evidence as the law permits a party to recover in such an action. *Cobbey, Repl. 792; Riley v. Littlefield, 84 Mich. 22, 47 N. W. 576; Railway Co. v. Bell (Kan. App.) 41 Pac. 209.* We have examined the authorities cited by counsel for defendant in error, and do not think they support the position taken in his brief. As the judgment of the court was based upon a measure of damages which was clearly erroneous, this case must be reversed, and remanded for a new trial. So ordered. All the justices concurring.

(1 Kan. A. 770)

ATCHISON, T. & S. F. R. CO. v. DICKEY.
(Court of Appeals of Kansas, Southern Department, W. D. Oct. 9, 1895.)

ACTION FOR PERSONAL INJURIES—PLEADING—SUFFICIENCY OF PETITION—EVIDENCE—VERDICT.

1. Where the plaintiff in an action for damages arising from injuries received through the alleged negligence and carelessness of a railroad company relies upon the common-law action, and not upon a statutory right to recover, it is unnecessary for the petition to show that the action could be maintained in the state where it is alleged the injury occurred, even when the action is commenced in this state and the injury is alleged to have occurred in another state.

2. In an action brought by the husband to recover damages arising from loss of services of his wife, which, it is alleged, arose from certain injuries received by her through the negligence and carelessness of a railroad company, the petition must not only allege the marital relation, but also such other facts as indicate that at the time of the injury the relations of the plaintiff and his wife were such as to entitle him to her services.

3. Where certain special findings, answered by the jury and returned with their general verdict, are inconsistent with each other, and are contrary to the evidence, a new trial should be granted.

4. Where, in an action for damages, the answers to the special findings disclose that a large part of the verdict was rendered under the influence of prejudice and passion, it must

be presumed that the whole verdict was rendered under like influence, and in such a case a new trial should be granted.

5. Where, in an action for damages, the answer sets up certain acts, which, it is claimed, show contributory negligence, the evidence under such answer is properly restricted to the particular acts so alleged.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. Abbott, Judge.

Action by T. M. Dickey against the Atchison, Topeka & Santa Fé Railroad Company. Plaintiff had judgment, and defendant brings error. Reversed.

A. A. Hurd and M. W. Sutton, for plaintiff in error. George E. Morgan, for defendant in error.

COLE, J. This was an action brought in the district court of Finney county, Kan., by T. M. Dickey, as the husband of Jane Dickey, in which he seeks to recover from the railroad company for alleged loss of services consequent upon the injury of Jane Dickey through the negligence and carelessness of said company. There was a verdict and judgment for the plaintiff below, and the railroad company brings the case here for review.

The petition alleges that for a long time previous to the 29th of October, 1888, and at the time of filing said petition, the plaintiff and said Jane Dickey were husband and wife. It then alleges the corporate existence of the defendant company under the laws of the state of Kansas, and that said company was engaged in the business of operating a railroad and carrying passengers for hire upon its cars, in the states of Kansas and Colorado; that on or about the 29th day of October, 1888, Jane Dickey purchased from defendant's agent at Garden City, in the state of Kansas, a ticket from Garden City to Pueblo, Colo., and entered one of the regular passenger cars provided by the defendant for transporting passengers from Garden City to Pueblo, and that she remained in said car until the train reached the town of La Junta, Colo., at which point, it is alleged, she was requested by the agent of the defendant to leave said car, and enter another, and that while she was endeavoring to comply with said request, and while upon the steps, the said car was, by the servants of the defendant, negligently and without any warning, suddenly and violently moved, by which she was thrown to the ground, between the platform and the track, and that while in such position she was, by the motion of the car, bruised and lacerated, and that the bones of her lower leg and ankle were crushed, and that by reason of such fall and injuries, and the fright occasioned thereby, her nervous system was severely shocked; that the injuries complained of were permanent, greatly impaired the use of the limb so injured, and rendered her a permanent cripple. The petition then alleges that, by reason of such inju-

ries so inflicted on his wife, the plaintiff has been compelled to expend large sums of money for medical attendance, medicine, and nursing, and for other purposes, in caring for her during the illness caused by said injury, and that, by reason of the nature and permanent character of the injuries so inflicted upon his wife, plaintiff has been and will be put to great expense for the proper care of his wife, and has been and will be deprived of her services, to his damage in the sum of \$5,000, for which sum he prays judgment. To this petition the defendant railroad company filed its general demurrer, which was by the court overruled, which ruling is assigned as the first error in this case. The grounds urged by the counsel for plaintiff in error, upon which it is claimed the demurrer should have been sustained, are: First, that the petition should have alleged, not only that the plaintiff and Jane Dickey were husband and wife at the time the injuries were alleged to have been received by her, and at the time the action was commenced, but should also show that the plaintiff and Jane Dickey lived and cohabitated together during such time, and that such actual relations existed between them as would indicate that plaintiff was entitled to her services; and, second, that the petition shows that the injuries were received in the state of Colorado, and fails to show that this action could have been maintained in the state of Colorado, and that it must appear in the petition that the injury was actionable in Colorado, where it occurred, before the action could be maintained for such injury in the state of Kansas.

The second of these propositions is without merit. The plaintiff in this action was pursuing, not a statutory remedy, but a common-law right of action, transitory in its nature, and which could be maintained in this state. The case cited by the counsel for plaintiff in error was where a statutory right alone had been invoked, and the decision therein given plainly proceeds upon that theory.

The other objection raises a more serious question. It is true that the rule formerly was that husband and wife are one person, and that he has the exclusive right to the labor, services, and earnings of the wife; and, if this rule still obtains, it would follow, as a natural result, that an allegation of the marital relation would be sufficient. But this old rule has been radically—and, we think, wisely—changed. Many of the restraints and disabilities of coverture have been removed by positive legislative enactment, so that to-day, in this state, a married woman may carry on any trade or business, perform any labor or service, and her earnings from said trade or business, labor or service, are her sole and separate property; and she may sue, both to protect and enforce her rights, in the same manner as if she were unmarried. It follows from this, as was said in an opinion of Justice Johnston in *City of Wyandotte v. Agan*, 37 Kan. 530, 15 Pac. 529, "that the time and

services of the wife do not necessarily belong to the husband, nor does an injury which causes the loss of such time and service necessarily accrue to him. At least a portion of her time may be given to the labor done on her sole and separate account. The profits or earnings of such labor or business are her sole and separate property, and cannot be appropriated or controlled by her husband without her consent. So far, then, as she is deprived of these, she suffers a loss which is personal to herself, for which she alone can recover. The fact that she is partially or wholly dependent upon the husband for support does not abridge her right of action, nor transfer to him that which accrued solely to her." In *Townsdin v. Nutt*, 19 Kan. 282, an action was brought by the wife to recover damages for an alleged assault and battery. The petition was in the usual form, and did not disclose that the plaintiff was a married woman. It did state that she was hindered and prevented from performing her necessary work from the injuries which she received, and that she had been compelled to pay, and had paid, a certain sum, to be cured of such injuries. The defendant, in answer to this petition, set forth, as a separate defense, that at and before filing said petition the plaintiff was a married woman,—intermarried with William Nutt,—and that she was still a married woman. Upon the motion of the plaintiff the trial court struck out this defense, as irrelevant and immaterial matter; and, this being alleged as error, the supreme court, in an opinion written by Chief Justice Horton, say: "No error was committed thereby. Even if the husband be liable in some cases for medical aid furnished the wife, and, under some conditions, is the party to recover for the loss of the services of the wife, in this case the pleading struck out was not sufficiently specific and full to tender a defense. The injuries were alleged to have occurred about the 1st of February, 1876; the petition was not filed until March, afterwards; and, as to the coverture at the time of the assault and battery, nothing is asserted. Neither does the attempted answer set forth any circumstances showing that, within the decisions of this court, the husband was responsible for the medical treatment of the wife, or entitled to her earnings. Not only should the marriage have been stated as of the time prior to the payment of the money for medical treatment and loss of services, but the pleading should at least have shown that the plaintiff and her husband lived and cohabited together, and possibly it should also have appeared that the wife was not engaged in performing labor and services on her separate account. * * * The plaintiff in error seems to have contented himself with the old plea of 'feme covert,' and to have disregarded the provisions of the laws which authorize a married woman to sue and be sued in the same manner as if she was unmarried, and to perform labor and services on her sole and separate account,

and make the earnings therefrom her sole and separate property." From the doctrine announced in these two cases, it plainly appears that a pleading which simply alleges the marital relation does not tender an issue, as regards the services of the wife, either as a cause of action or as a defense. Nor do we think that the further allegation contained in the petition in this case—that by reason of the injuries complained of the plaintiff "has been and will be deprived of her services"—is sufficient to remedy this defect. This latter allegation is a statement of a conclusion alleged by the pleader to be the natural result of the injuries sustained, and not the result of any relationship existing between the plaintiff and the injured party, by reason of which plaintiff was entitled to such services. It could only have the force contended for by the defendant in error by invoking the aid of the old rule of law which the later decisions and statutory enactments have so radically changed. Upon the first objection urged by the plaintiff in error, the demurrer should have been sustained.

Plaintiff in error further urges that the trial court erred in overruling the motion for a new trial made by the plaintiff in error below for the reason that the answers to the special questions of findings submitted to the jury at its request were inconsistent, contrary to the evidence, and the amount awarded excessive. The questions and answers to which our attention is especially directed are as follows: "(7) How much do you allow plaintiff for loss of services of his wife? Ans. \$400. (8) Did you allow anything for loss of society of his wife? If so, how much? Ans. \$1,200." "(12) How much do you find the plaintiff was required and obligated to pay for help employed to perform the ordinary services that would have been performed by Mrs. Dickey but for the injury complained of? Ans. Nothing." The court, in instructing the jury as to the measure of damages in case the plaintiff should recover, carefully set forth its views, specifying exactly what damages the jury were entitled to allow in a case of this kind. First, as to expenses, the court instructed, in substance, that, if the plaintiff was entitled to recover at all, he was entitled to recover for the pecuniary loss sustained by him by reason of the injury of his wife, and that such loss was the actual amount necessarily incurred by him for medicines, medical attendance, and such necessary appliances as he purchased; also, the actual amount paid or obligations incurred by him for the necessary services and labor substituted for the ordinary services of his wife. And the court instructed, in substance, that, as to services, in a case of this character, there was included whatever of aid, assistance, comfort, and society the wife was expected to render to or bestow upon her husband under the circumstances in which they were placed, and that, as applied to husband and wife, loss of services means loss of society, assistance, comfort, and aid which the

wife only could bestow, and not simply those mental services which could be measured in value by the money required to pay for them, or to purchase their substitute. Clearly, under these instructions, the court intended, in case the jury should find for the plaintiff, they should find—First, such actual expenses as he had incurred by reason of the injury, and which were specifically named; and, second, as a compensation for the loss of services, such sum as would remunerate plaintiff, not only for the actual service which the wife might have rendered, but also, as included by the court in the term "services," a recompense for the loss of her society, aid, and comfort, as explained by the court. A necessary deduction from these instructions is that whatever was allowed for loss of services and society should be included in the one sum, and that whatever further sum was allowed should be simply to cover the actual monetary loss incurred by the plaintiff. The evidence in this case, and the finding of the jury in answer to the twelfth question submitted to them, shows that the plaintiff had been damaged in no sum whatever by reason of the loss of the ordinary services that would have been performed by his wife but for the injury complained of, and, if this was the case, he was not entitled to recover for any loss; yet the jury allowed him \$400 for the loss of services of his wife. These two findings are plainly inconsistent with the answer to the eighth finding, on which plaintiff was allowed to recover \$1,200 for the loss of his wife's society.

Counsel for the defendant in error contends that this court ought not to sanction the employment of special questions for the purpose of tricking jurors into an apparent disregard for the instructions of the court. We do not so consider these questions. They were plainly framed, and the instructions of the court plainly directed the manner in which they should be answered. And the defendant below had a right, by plain questions, to have indicated to it the grounds upon which the jury granted damages to the plaintiff below.

The plaintiff in error further contends that the court erred in excluding certain evidence offered on the trial of said cause by said plaintiff in error. The character of the testimony offered was to prove that a portion of the injuries complained of resulted from a lack of care and attention on the part of plaintiff and his wife, and from a failure to procure, within what was claimed to be a reasonable time, medical attention for said injuries; and the defendant also attempted to show that the treatment first given by the physician called was unskillful, and, in a great measure, caused the permanency of such injury. The court properly excluded such evidence. The defense tendered by the railroad company attempted to set up certain contributory negligence, by alleging that the injuries complained of by Mrs. Dickey were the result of her own carelessness, and that

only for the reason, as they allege, that she stepped from the train while it was yet moving, and after, as it was claimed, she had been directed by the servants of the defendant company, to retain her seat until the train had stopped. The plaintiff had a right to assume that this would be the only act of contributory negligence which he would be called upon to meet, and the evidence was therefore properly restricted to that point.

A further reason urged by the plaintiff in error why a motion for a new trial should have been sustained is that the damages are excessive, and appear to have been given under the influence of prejudice and passion. It is the duty of courts to see that exact justice is meted out to all litigants alike, and whenever either the letter of the law, entirely lacking its spirit, is invoked, upon the one hand, or a blind prejudice, upon the other, the success of either being the destruction of law and society, courts should use their power to protect litigants, thereby maintaining the rights of society at large, and subserving the true purposes for which they were formed. It is plain from the evidence in this case that the wife of plaintiff was injured, and there is an abundance of evidence to sustain the proposition that this injury was the result of the negligence and carelessness of the servants of the plaintiff in error; but because this is true, and because, under the evidence, plaintiff may have been entitled to recover some amount, it does not follow that this court should sustain a judgment based upon a verdict that not only entirely disregards the instructions of the trial court, but assesses large sums for damages which are based upon no evidence whatever. This was not an action brought by the party injured, but was one accruing to a third party, who was a person standing in a peculiar relation in life to the injured person. As before stated, the court clearly instructed the jury as to what measure of damages the plaintiff in this action was entitled to recover; but, notwithstanding these instructions, the jury find the sum of \$500 for mental distress and anxiety, and \$266 for personal service of the plaintiff in nursing and caring for his wife. No testimony whatever was given to form a basis for these items of damage, and, under the instructions of the court, they could not properly be recovered, even if testimony had been admitted, and upon the hearing of the motion for a new trial they were stricken out by the court; but the fact that the jury allowed these amounts in connection with the other amounts which were allowed, and the further fact that, when the trial court required the plaintiff below to remit the two sums referred to, it must have been because the court believed that said sums had been allowed under the influence of prejudice and passion, compels the belief that the whole sum must have been allowed under the same influence, and, such being the case, no part of the verdict should be allowed to stand. As

supporting these views, attention is directed to *Railway Co. v. Peavey*, 34 Kan. 478, 8 Pac. 780; *Railroad Co. v. Cone*, 37 Kan. 567, 15 Pac. 499; *Steinbuechel v. Wright*, 43 Kan. 307, 23 Pac. 560.

Plaintiff in error further contends that the court erred in instructing the jury in regard to the meaning and scope of the word "services," when employed to indicate the ground on which the husband is allowed to maintain an action. From the views expressed in this opinion, we deem it unnecessary to decide whether the term "services," when used in such connection, includes society, or not, or to discuss any other errors alleged on the part of plaintiff in error. For the errors above indicated the judgment in this case is reversed, and the cause remanded for further proceedings in accordance with this opinion. All the justices concurring.

RONNOW et al. v. DELMUE et al. (No. 1,439.)

(Supreme Court of Nevada. Oct. 22, 1895.)

PLEADING—TIME OF VERIFICATION—DECREE—
SUFFICIENCY—DIVERSION OF WATERS—
REVIEW ON APPEAL.

1. In an action for the diversion of water, the complaint, filed April 11, 1894, was sworn to November 17, 1893; and it was objected that it did not, for this reason, state a cause of action existing at the time of the commencement of the action. *Held*, that the allegations of the complaint should be construed as referring to the time of the commencement of the action, and that it was sufficient.

2. A decree is not void because it refers to the complaint for a description of the property affected by it, does not contain the stipulation upon which it was based, does not strictly conform to the stipulation, and was not entered against all the parties defendant in the action.

3. Although parties having separate interests in the water of a stream cannot unite in an action for damages for its past diversion, they may unite in an action to restrain future diversions.

4. Where there is no exception to the want of a finding, or because the finding upon some issue is defective, a finding must be presumed, in support of the decree; and where the evidence upon the point is conflicting the appellate court will not interfere.

5. Where the title to water has been obtained by prior appropriation, a decree enjoining one from wrongfully diverting it is not erroneous merely because the party so enjoined owns the land through which the water naturally flows.

(Syllabus by Bigelow, C. J.)

Appeal from district court, Lincoln county; A. E. Cheney, Judge.

Action by C. P. Ronnow and others against Joseph Delmue and others. Judgment for complainants, and defendants appeal. Affirmed.

George S. Sawyer, for appellants. T. J. Osborne and Henry Rives, for respondents.

BIGELOW, C. J. Action to recover damages for the diversion of water to which the plaintiffs claim title by virtue of prior ap-

propriation, and for an injunction to restrain the future diversion thereof.

The complaint was filed April 11, 1894, but it was verified November 17, 1893, and for this reason it is claimed that it does not state a cause of action existing at the time of the commencement of the action. It would seem, however, that, wherever the complaint alleges the existence of a fact in the present tense, it should be construed as referring to the time of the commencement of the action, and not to the time when it was sworn to. It was not necessary that it should be verified at all, and, if it had not been, that certainly would be the proper construction to be put upon such an allegation. If the fact that it was verified so long beforehand has any effect whatever, it should be to nullify the verification, and leave the complaint the same as though it had never been verified. Such a verification might be stricken out on motion, or, if treated as a nullity, the only consequences that would follow would be that defendants would not be required to make specific denials, nor to verify their answer.

2. The complaint alleges the plaintiffs' prior appropriation of the water, which does not appear to have been seriously questioned upon the trial, except as to four acres, and then pleads, by way of estoppel, the recovery by the plaintiffs' predecessors in interest, against the defendants' predecessors in interest, of a decree for the possession of the water. Upon the trial this decree was admitted in evidence, and several assignments of error are predicated upon this ruling. The decree was rendered upon stipulation, and is defective in several respects, but we do not think it is void. It appears from it that the right, title, and right to the possession of all the water in the stream, except enough to irrigate four acres, was decreed to be in the plaintiffs in the action; and, although it contains no description of the water so awarded, it refers to the complaint for that purpose, where the description is ample. While this is bad practice,—for a decree should be complete in itself, without reference to other documents or records,—such a decree is not void. 1 Freem. Judgm. § 50c; *Kelly v. McKibben*, 54 Cal. 192. It is no more necessary that the decree should contain the stipulation upon which it was based than that it should contain the pleadings or findings. It was clearly intended to conform to the stipulation, and, if it does not, it is an error to be corrected in that case, and does not render the decree void. Nor is it any objection that it was rendered against but one of the defendants in the action. The action may have been dismissed as to the others, but, whether it was or not, it is not void as to the one against whom it was entered. Gen. St. §§ 3170, 3171.

3. Upon the trial the claim for damages was dismissed, and the action continued simply upon the equitable side, for an injunction. The defendants then moved to dismiss the

action entirely, "upon the ground that the interests of the parties were not in common,—that they owned separate interests." This motion was correctly overruled. The question of misjoinder was not raised by either demurrer or answer, and consequently was waived. Gen. St. §§ 3062, 3066, 3067. But really there was no misjoinder. The plaintiffs owned separate tracts of land, but they were joint owners of the ditch through which the water was diverted, and of the water itself. Even had they owned separate ditches and separate water rights, though they could not maintain a joint action for damages, they could maintain such an action for an injunction against future diversion or obstruction of the stream. Bliss, Code Pl. § 76; *Foreman v. Boyle*, 88 Cal. 290, 26 Pac. 94.

4. As the decree was for the plaintiffs, we must presume that all the material issues upon which there were no findings, or upon which the findings were defective, as being merely conclusions of law, were found in the plaintiffs' favor; and consequently, there being no exception to the findings upon these points, nor request for further findings, that the court found that the acts of the defendants did diminish the amount of water flowing to the plaintiffs, and also that the defendants' use of the water had not been open, peaceable, uninterrupted, under claim of right, etc., for the time necessary to create a prescriptive title in them. The most that can be said in defendants' favor upon these points is that the evidence was conflicting,—that of the plaintiffs' tending to prove that there had been no such user, and that their acts had diminished the quantity of the water; and under these circumstances the appellate court cannot disturb the findings, either express or implied, of the trial court.

5. If the plaintiffs have a right to the uninterrupted flow of the water, except as to enough to irrigate four acres of land, the defendants have no more right to interfere with it upon their own land, except to take that quantity, than they have upon any other land, and the decree enjoining them from so doing is unobjectionable. If the law were otherwise the right to the use of water would rest upon a very frail foundation. No prejudicial errors appearing, the judgment is affirmed.

BONNIFIELD and BELKNAP, JJ., concur.

STATE ex rel. PYNE v. LA GRAVE, State Comptroller. (No. 1,445.)

(Supreme Court of Nevada. Oct. 16, 1895.)

MANDAMUS TO STATE COMPTROLLER—EXPENSES OF MILITIA—APPROPRIATION.

1. St. 1895, p. 109, § 11, provides that a county shall provide an armory for militia companies therein, and that all claims for expense therefor be audited by the board of military au-

ditors, and, on approval of such claims, they shall be presented to the state comptroller, who shall draw his warrant on the state treasurer for the amount so approved; that on its presentation the treasurer shall pay the same out of the general fund; such expenses not to exceed \$75 per month for each company. Held not to constitute an appropriation, hence mandamus will not lie to compel the comptroller to draw his warrant to pay expenses of maintaining an armory.

2. Should such act be construed as an appropriation, it would conflict with Gen. St. § 1812, forbidding the comptroller to draw any warrant on the treasury except there be an unexhausted "specific" appropriation, and requiring him to keep an account of all warrants drawn on the treasury, and a separate account under the head of each specific appropriation, so as to show the unexpended balance of each appropriation.

Original application for mandamus, on the relation of George D. Pyne, against C. A. La Grave, state comptroller, requiring him to draw his warrant in favor of relator, as secretary of Company B, first regiment, Nevada National Guard, for the rent of an armory for the company. Writ denied.

J. Poujade, for relator. Atty. Gen. Robt. M. Beatty, for respondent.

BELKNAP, J. A former application for mandamus was dismissed upon the ground of insufficiency of the petition. 22 Nev. —, 41 Pac. 115. The application has been renewed upon a corrected statement. The question now is whether an appropriation of the public funds has been made. It is claimed that it is made by section 11 of the act of 1895, as follows: "Sec. 11. It shall be the duty of the board of county commissioners of any county in which public arms, accouterments, or military stores are now had or shall hereafter be received for the use of any volunteer organized militia company to provide a suitable and safe armory for organized militia companies within said county. All claims for the expense of procuring and maintaining armories shall be audited and approved by the board of military auditors, and upon approval of such claims they shall be presented to the state controller who shall draw his warrant upon the state treasury for the amount so approved, and upon presentation of said warrant, the state treasurer shall pay the same out of the general fund. Such expenses shall not exceed seventy-five (\$75) dollars per month for any company except that each company regularly drilling with field pieces or machine guns, and using horses therewith, may be allowed an additional sum not to exceed twelve and ⁵⁰/₁₀₀ (\$12.50) dollars per month for each piece or gun." St. 1895, p. 109. It is said that fixing the maximum amount to be paid each company, and directing the comptroller to draw his warrant for the amount, and the treasurer to pay it, constitutes an appropriation. These matters alone do not accomplish that end. To constitute an appropriation, there must be money pla-

ced in the fund applicable to the designated purpose. The word "appropriate" means to allot, assign, set apart, or apply to a particular use or purpose. An appropriation in the sense of the constitution means the setting apart a portion of the public funds for a public purpose. No particular form of words is necessary for the purpose if the intention to appropriate is plainly manifested. In *Ristine v. State*, 20 Ind. 339, the court said: "An appropriation of money to a specific object would be an authority to the proper officer to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such amount, if he has appropriated money in the treasury. And such an appropriation may be prospective,—that is, it may be made in one year of the revenues to accrue in another or future years,—the law being so framed as to address itself to such future revenues." In *McCauley v. Brooks*, 16 Cal. 28, the court said: "To an appropriation, within the meaning of the constitution, nothing more is requisite than a designation of the amount and the fund out of which it shall be paid." The authorities to which we are referred do not support the relator's contention. Except the case of *Reynolds v. Taylor*, 43 Ala. 420, all are cases in which an appropriation of money had been expressly made in terms. In *Reynolds v. Taylor* it was said that, if the salary of a public officer is fixed, and the time of payment prescribed by law, no special annual appropriation is necessary. Under existing facts it is improbable that the provisions of the statute were intended as an appropriation, because the number of military companies that could have received its benefits was indefinite and uncertain. These facts are: The law permits one company in each of the fourteen counties of the state, and excepts from this provision companies existing at the time of the passage of the act. St. 1893, p. 96. We understand that at present there are eight companies in the state, but that number may be increased up to the maximum at any time. If an appropriation had been intended, the act would conflict with the provisions of the law of 1866, defining the duties of state comptroller. Among these duties he is forbidden to draw any warrant on the treasury except there be an unexhausted specific appropriation to meet the same. And it is made his duty, among other things, to keep an account of all warrants drawn on the treasury, and a separate account under the head of each specific appropriation, in such form and manner as at all times to show the unexpended balance of each appropriation. Gen. St. §§ 1812-1831. The foregoing requirements cannot be observed if the act of 1895 be construed as making an appropriation, because there is no specific appropriation upon which a warrant could be drawn, and also the accounts cannot show the unexpended balance as re-

quired. "By a specific appropriation we understand an act by which a named sum of money has been set apart in the treasury, and devoted to the payment of a particular claim or demand. * * * The fund upon which a warrant must be drawn must be one the amount of which is designated by law, and therefore capable of definitive exhaustion,—a fund in which an ascertained sum of money was originally placed, and, a portion of that sum being drawn, an unexhausted balance remains, which balance cannot thereafter be increased except by further legislative appropriation." *Stratton v. Green*, 45 Cal. 149. The law of 1866 was intended to prescribe a uniform rule for the comptroller; that of 1895, to provide a method by which armory rent may be obtained when an appropriation shall have been made. Thus construed, there is no repugnancy between the two acts, and both may well subsist together. "Repeals by implication are not favored," said Judge Field, speaking for the court, in *Crosby v. Patch*, 18 Cal. 438. "Such is the universal doctrine of the authorities. 'Whenever two acts,' says the supreme court of Pennsylvania, 'can be made to stand together, it is the duty of a judge to give both of them full effect. Even where they are seemingly repugnant they must, if possible, have such a construction that one may not be a repeal of the other, unless the latter one contain negative words, or the intention to repeal is made manifest by some intelligible form of expression.' *Brown v. County Com'rs*, 21 Pa. St. 43. 'The invariable rule of construction,' says the supreme court of New York, 'in respect to the repealing of statutes by implication is that the earliest act remains in force, unless the two are manifestly inconsistent with and repugnant to each other, or unless in the latest act some express notice is taken of the former, plainly indicating an intention to abrogate it. As laws are presumed to be passed with deliberation, and with full knowledge of existing ones on the same subject, it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable.' *Bowen v. Lease*, 5 Hill, 226. 'It is a rule,' says Sedgwick, 'that a general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. The reason and philosophy of the rule,' says the author, 'is that, when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction in or-

der that its words shall have any meaning at all. So, where an act of parliament had authorized individuals to inclose and embank portions of the soil under the river Thames, and had declared that such land should be free from all taxes and assessments whatsoever.' The land-tax act, subsequently passed, by general words embraced all the land in the kingdom. The question came before the king's bench, whether the land mentioned in the former act had been legally taxed, and it was held that the tax was illegal."

Mandamus denied.

BIGELOW, C. J., and BONNIFIELD, J., concur.

In re LEWIS.

(Supreme Court of Utah. April 15, 1893.)

PETIT LARCENY — PUNISHMENT — JURISDICTION OF JUSTICE.

2 Comp. Laws 1888, § 3023, gives a justice of the peace jurisdiction over petit larceny cases, and section 4645 provides that "petit larceny is punishable by a fine in any sum less than \$300, or by imprisonment in the county jail not exceeding six months, or both." *Held*, that a justice of the peace, after sentencing defendant to imprisonment for six months, and to pay a fine of \$290, had no jurisdiction to order his further imprisonment for default in paying the fine.

Original application of Ed. Lewis for a writ of habeas corpus. Writ allowed, and prisoner discharged.

On the 13th day of April, 1892, petitioner pleaded guilty to the charge of petit larceny in the police court of Salt Lake City. He was sentenced by Fred Kesler, city justice of the peace, "to be imprisoned at labor in the county jail for the term of six months, and to pay a fine in the penal sum of \$290, and to be imprisoned at hard labor until the said fine be paid; said imprisonment, however, not to exceed one day for each dollar of fine." The organic act, establishing territorial government for Utah, provides that jurisdiction of justices of the peace shall be limited by law. 1 Comp. Laws Utah 1888, p. 44. 2 Comp. Laws Utah 1888, § 3023, provides that "justices' courts have jurisdiction of the following public offenses committed within the respective counties: Petit larceny, assault and battery, * * * breaches of the peace, * * * and all misdemeanors punishable by a fine less than \$300.00, or imprisonment in the county jail or city prison not exceeding six months, or by both such fine and imprisonment." Section 5343 provides that, "when the defendant pleads guilty or is convicted either by the court or a jury, the judgment may require the defendant (1) to pay a fine, or (2) to be imprisoned, or (3) to pay a fine and the costs of prosecution, or (4) to pay a fine and also be imprisoned, or (5) to pay a fine and the costs of prosecution and also to be imprisoned." Section 5344 provides that

"a judgment requiring the defendant to pay a fine, or a fine and the costs of prosecution, may also direct that he be imprisoned at hard labor until such fine, or until such fine and costs, as the case may be, are paid in the proportion of one day's imprisonment for every dollar of the fine and costs." Section 5345 provides that "a judgment that the defendant pay a fine, or a fine and costs, may be enforced by execution, as in civil cases." Section 5113 provides that "a judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which can not exceed one day for every dollar of the fine." Section 4645 provides that "petit larceny is punishable by a fine in any sum less than \$300.00, or by imprisonment in the county jail not exceeding six months, or both."

S. P. Armstrong, for petitioner. Walter Murphy, Co. Atty., for the People.

ZANE, C. J. (orally). The court is of the opinion the justice of the peace, having reached the limit of his jurisdiction in adjudging that the defendant be imprisoned in the county jail for a period of six months, had no valid authority to adjudge that the defendant be further imprisoned, in default of payment of the fine imposed, and to that extent the judgment is void. It appears that the petitioner has already been imprisoned for a period of more than six months, and is consequently entitled to be discharged. The writ is allowed, and the petitioner discharged.

MANTLE v. LARGEY.

(Supreme Court of Montana. Nov. 8, 1894.)

NOTICE OF APPEAL—SERVICE ON APPELLEE.

Code Civ. Proc. § 492, provides generally that, where a party has an attorney in an action, service of papers shall be upon the attorney. Section 422 provides that the notice of appeal may be served "on the adverse party or his attorney." Section 631 provides that, when a general and a particular provision of a statute are inconsistent, the particular provision will prevail. *Held*, that service of a notice of appeal on the appellee is sufficient.

Appeal from district court, Silver Bow county.

Action by Mantle against Largey. Judgment for defendant, and plaintiff appeals. Motion to dismiss appeal. Denied.

F. T. McBride, for the motion. Corbett & Wellcome, opposed.

PER CURIAM. Respondent moves the dismissal of this appeal, because the notice of appeal was not served on respondent's attorney of record in the action, but, instead, was served on respondent personally. Section 492 of the Code of Civil Procedure provides that: "In all cases where the party has an attorney in the action or proceeding the service of papers, when required, shall be upon the attorney instead of the party, except of sub-

poenas, writs, and other process issued in the suit, and of papers to bring him into contempt." But as to service of notice of appeal there is a special provision of statute to the effect that the notice shall be served "on the adverse party or his attorney." Code Civ. Proc. § 422. A familiar rule of construction is that, when a general and particular provision of statute are inconsistent, the particular provision will prevail, and this rule of construction is incorporated in the Code of Civil Procedure by the provisions of section 631. Therefore, in our judgment, the particular provision of section 422, relating especially to the service of the notice of appeal, and providing that service thereof may be made on the adverse party personally, or on his attorney, would make the service in this case of notice of appeal on respondent sufficient. Motion to dismiss is therefore denied. All concurred.

STATE ex rel. TOI v. FRENCH, County
Treasurer.

(Supreme Court of Montana. Oct. 14, 1895.)

CONSTITUTIONAL LAW — OCCUPATION TAX — UNIFORMITY—LICENSE TO CONDUCT LAUNDRY—DISCRIMINATION AGAINST CHINAMEN.

1. In the absence of constitutional restrictions, the legislature need not tax all property and occupations equally or uniformly.

2. Const. art. 12, § 1, provides that the legislature shall levy a uniform rate of assessment and taxation, and, in another sentence, provides that the legislature shall impose a license tax on persons or corporations doing business in the state. Section 11 provides that taxes shall be uniform. *Held*, that such licenses need not be uniform.

3. The license taxes provided by Pol. Code, §§ 4079, 4080, providing that every person carrying on a steam-laundry business shall pay a license of \$15 per quarter, and that every male person engaged in the laundry business, other than the steam-laundry business, shall pay a license of \$10 per quarter if engaged in business by himself, but \$25 if employing other persons, are not taxes, within Const. art. 12, § 11, requiring the assessment and levy of taxes to be uniform.

4. Pol. Code, § 4079, requiring a laundryman with an assistant to pay a license fee of \$25 per quarter, while persons engaged in the steam-laundry business are required to pay a fee of only \$15 per quarter, does not violate Const. U. S. Amend. 14, providing that no state shall deny to any person the equal protection of the laws.

5. The objection that Pol. Code, §§ 4079, 4080, requiring a license fee of \$25 from a male laundryman with an assistant, while allowing steam laundries to be conducted with a license of only \$15 per quarter, was meant to affect Chinamen only, is without merit, since the act itself expressly relates to every male laundryman.

Appeal from district court, Lewis and Clarke county; H. N. Blake, Judge.

Petition by Sam Tol for a writ of mandamus to compel E. S. French, treasurer of Lewis and Clarke county, to issue a license to conduct a laundry. From a judgment granting the writ, defendant appeals. Reversed.

This is an appeal from the judgment of the

district court upon an application for a writ of mandate requiring the appellant to accept \$10 as a license fee from the respondent, and to issue to respondent a license to conduct a laundry. Sections 4079 and 4080 of the Political Code are as follows:

"Sec. 4079. Every male person engaged in the laundry business, other than the steam laundry business, must pay a license of ten dollars per quarter; provided, that where more than one person is engaged or employed or kept at work, such male person or persons shall pay a license of twenty-five dollars per quarter, which shall be the license for one place of business only.

"Sec. 4080. Every person who carries on a steam laundry must pay a license of fifteen dollars per quarter."

The respondent here, Sam Tol, appeared in the district court, and filed a petition praying for a writ of mandamus, in which petition he set forth as follows: That appellant is the treasurer of Lewis and Clarke county, and that it was his duty to issue licenses, when tendered the fees therefor; that respondent is a male person, a resident of the county, and engaged in the laundry business, other than a steam laundry, and that he is employing male persons other than himself in such business; that he tendered to the said treasurer the sum of \$10, and demanded that the treasurer issue to him a license for the conduct of the laundry business; that the treasurer refused to issue said license unless the respondent paid him the fee of \$25, as required by section 4079, Pol. Code. The county attorney filed a demurrer to this petition, upon the ground that it did not set up facts sufficient to warrant the issuing of the writ of mandamus. The demurrer was overruled, and the writ was issued, commanding the treasurer to receive from the respondent the sum of \$10, and issue to him a license for the conduct of said laundry business. From this judgment the respondent below appeals. There are some other matters set up in the petition for the writ, which will be noticed as the subject is treated in the opinion below.

H. J. Haskell, for appellant. A. C. Botkin and J. M. McDonald, for respondent.

DE WITT, J. (after stating the facts). It appears that the legislative assembly divided laundry licenses into three classes, as follows: Steam laundry, \$15; one male laundryman, \$10; male laundryman employing one or more other persons, \$25. The respondent contended in the lower court—a contention which prevailed—that this legislation is unequal and not uniform, and therefore void, under the constitution. The legislature is not required to tax all property and occupations equally or uniformly, unless so commanded by the constitution. Cooley, Tax'n, p. 570, c. 6, quoting Butler's Appeal, 73 Pa. St. 448; Mayor, etc., of Rome v. McWilliams, 52 Ga. 251; Decker v. McGowan, 59 Ga. 805. See, also, Manufacturing Co. v. Wright, 33 Fed. 121.

Constitutions of a state are distinguished from the constitution of the United States, in this: "The government of the United States is one of enumerated powers; the national constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess. In this respect it differs from the constitutions of the different states, which are not grants of powers to the states, but which apportion and impose restrictions upon the powers which the states inherently possess." Cooley, Const. Lim. p. 10. Therefore a state legislature is not acting under enumerated or granted powers, but rather under inherent powers, restricted only by the provisions of their sovereign constitution. We therefore inquire whether our constitution restrains the legislature from enacting such a law as sections 4079, 4080, Pol. Code.

The respondent contends that the restraint is found in the following provisions of the constitution:

"Section 1. The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in this state." Article XII.

"Sec. 11. Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." Article XII.

The respondent argues that under these provisions the imposition of a license fee of \$25 upon him, as a laundryman with a helper, while the laundryman without a helper and the steam laundryman pay a less license, is unconstitutional, in that it is not uniform and equal. We shall not decide whether this law is or is not a classification of the laundry business for license purposes, which the legislature may make, even if it were held that the uniformity clause in the constitution applied to such a license. Many cases might be cited upon this question. We shall decide this appeal without reaching a consideration of that point. A license fee is a tax sometimes, and for some purposes. Sometimes, and for some purposes, it is not a tax. Cooley, Tax'n, pp. 572, 573, 592, 596, 600, 601; *People v. Martin*, 60 Cal. 153; *City of Santa Barbara v. Stearns*, 51 Cal. 499; Cooley, Const. Lim. p. 245; *Desty, Tax'n*, p. 305. The particular distinctions as to when a license fee is a tax and when it is not, we shall not discuss, further than to give the reasons for our opinion that this license fee under consideration is not a tax, as falling within the equality and uniformity provisions

of the constitution. The constitution provides that the legislature shall levy a uniform rate of assessment and taxation, and secure a just valuation for taxation of all property (article XII, § 1), and that taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax (Id. § 11). In a separate sentence in said section 1 it is provided that the legislative assembly may also impose a license tax both upon persons and upon corporations doing business in the state. But neither in this sentence of section 1, nor elsewhere, is it stated that licenses shall be uniform. If the constitution does not require that licenses shall be uniform, they need not be. Judge Cooley says, in his work on Taxation: "It has been seen that the sovereignty may, in the discretion of its legislature, levy a tax on every species of property within its jurisdiction, or, on the other hand, that it may select any particular species of property, and tax that only, if, in the opinion of the legislature, that course will be wiser. And what is true of property is true of privileges and occupations, also. The state may tax all, or it may select for taxation certain classes, and leave the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice, unless one is imposed by constitution. In another chapter it has been shown that constitutional provisions requiring the taxation of property by value have no application to the taxation of other subjects, and do not, therefore, by implication, forbid the taxation now under consideration." Page 570. These remarks of Judge Cooley are taken from the opening sentence of his chapter entitled "Taxation of Business and Privileges." See, also, chapter VI of the same work, as to a general discussion of the impossibility of absolute uniformity.

In the case of *People v. Coleman*, 4 Cal., we find, on page 54, that the counsel arguing in favor of the uniformity and equality of license fees makes the following remarks: "'How is this to be done,' says the learned counsel, 'is no part of our province to decide; nor are we to say whether it is possible to devise an occupation tax which would be equal and uniform, unless it be a tax levied equally, and for the same amount, upon all occupations. All that we maintain is that an occupation tax which is not equal and uniform violates the constitution.'"—In reply to which the court remarks: "Is, then, the clause under consideration so vague as to be wholly unsusceptible of a practical meaning, and the force of the provision to be defeated from a want of some indefinable equality and uniformity, existing in the imagination of learned counsel, but so subtle in its character as to defy the ordinary use of language in its description? In construing this section, force and meaning must be given to every part of it. We cannot sup-

pose the convention intended to enact, as a part of the fundamental law of this state, a provision so doubtful and ambiguous, and at the same time so completely calculated to paralyze the energies and prostrate the resources of the state government. * * * The occupation of the humblest artisan, with no capital but his labor, the reward of whose toil secures to him only a scant subsistence, must be taxed equally with the [occupation of the] richest merchant, banker, or broker, or, if not equally, at least the state has no right to release the miserable pittance so cruelly wrung from his hard earnings." In that case it was held that the uniformity clause of the constitution did not apply to license fees upon occupations. We do not concur in all that was said in deciding that case. We have omitted a portion of the remarks from our quotation, and added a parenthesis which the language seems to need. The California supreme court has not followed that case, in whole. *People v. McCreery*, 34 Cal. 433. But the principle that the uniformity clause does not apply to license fees has been maintained in California. *Ex parte Hurl*, 49 Cal. 557. It was again said in *City of Santa Barbara v. Stearns*, 51 Cal. 499: "A license charge or fee for the transaction of business is, in our opinion, a tax, within the meaning of the term 'tax,' as employed in those sections [referring to sections other than the uniformity clause]. It is not a tax within the meaning of section 13 of article 11 of the constitution [which is the uniformity section of the California constitution]. * * * *People v. Coleman*, 4 Cal. 46; *People v. Raymond*, 34 Cal. 492; *City and County of Sacramento v. Crocker*, 16 Cal. 119; *Taylor v. Palmer*, 31 Cal. 240; *Emery v. Gas Co.*, 28 Cal. 345; *Emery v. Bradford*, 29 Cal. 75; *Ex parte Hurl*, 49 Cal. 557; *Cooley, Const. Lim.* 201." See, also, *San José v. San José & S. P. R. Co.*, 53 Cal. 475; *Ex parte Mirande*, 73 Cal. 375, 14 Pac. 888; *Ex parte Li Protti*, 68 Cal. 635, 10 Pac. 113; *People v. Thurber*, 13 Ill. 554; *City of East St. Louis v. Wehrung*, 46 Ill. 392; *Slaughter v. Com.*, 13 Grat. 767; *Baker v. Cincinnati*, 11 Ohio St. 534; *Kleizer v. State*, 15 Ind. 449.

The alleged inequality or nonuniformity of this classified laundry license does not seem to be such as to grant a monopoly, or such as to be prohibitory of a legitimate trade or occupation. We are of opinion that the first sentence of section 1, art. XII., and the whole of section 11, art. XII., are upon the same subject, and must be read together, and that they refer to taxation, and the equality and uniformity thereof, and that the last sentence of section 1, art. XII., upon licenses, does not fall within the uniformity provision.

The laundry license fee is not obnoxious to the provisions of section 1 of the fourteenth amendment to the constitution of the United States. *Home Ins. Co. v. New York State*, 134 U. S. 194, 10 Sup. Ct. 593; *Ex-*

press Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250.

It is also set up in the petition for the writ of mandamus, and, of course, admitted by the demurrer, that the relator below, and respondent here, is a subject of the emperor of China, and that the provision of the law requiring a fee of \$25 from a male laundryman with one assistant was meant and intended to affect only Chinamen; that Chinamen are engaged in the class of laundry business falling within the \$25 fee; that steam laundries employ a large number of persons, and make greater profits than the petitioner or his countrymen; and that he will not be able to conduct his business in competition with the steam laundry, if he is required to pay the license fixed by the laws cited. The fact that Chinamen are engaged in the hand-laundry business is purely fortuitous. *Manufacturing Co. v. Wright*, 33 Fed. 121. The law, in its terms, applies to all male laundrymen, of every condition and nationality. If the equality and uniformity provisions of the constitution do not apply to the license fee under consideration, the subjects of the emperor of China are certainly in no different or better condition to make complaint than the subjects of any other foreign power who may be residing within this state, or even the citizens of the United States themselves.

We are of opinion that the district court erred in issuing the writ of mandate. The questions which we have determined in this opinion are the only ones presented upon the appeal, and upon them is rested the decision. It is ordered that the judgment be reversed, and the case be remanded, with directions to dismiss the writ.

PEMBERTON, C. J., and HUNT, J., concur.

(5 Cal. Unrep. 171)

HEALEY v. NORTON. (No. 15,938.)

(Supreme Court of California. Oct. 11, 1895.)

SUFFICIENCY OF FINDING.

A finding that all the allegations of the complaint are true, and all the allegations of the answer untrue, is sufficient.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by C. S. Healey against William H. Norton on promissory notes. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Ash & Mathews, for appellant. James H. Creeley, for respondent.

PER CURIAM. Action against the defendant, an indorser, on three promissory notes. The complaint was unverified, and the answer was a general denial, and that the notes had been theretofore transferred to one Cerini, who brought an action to recover:

thereon, which was dismissed; and the judgment in that action is pleaded in bar of this. The court made general findings that all the allegations of the complaint were true, and all the allegations of the answer untrue, and rendered judgment against defendant, from which, and an order denying him a new trial, he appeals.

There is no substantial merit in the appeal. The objection that the findings are insufficient to cover the issues is untenable (*Pralus v. Mining Co.*, 35 Cal. 34; *Carey v. Brown*, 58 Cal. 184; *Moore v. Waterworks Co.*, 68 Cal. 146, 8 Pac. 816); and the further objection that the findings are unsupported by the evidence equally so. The only particular suggested under the latter point is as to the sufficiency of the demand and notice, and of that there is no question. Judgment and order affirmed.

109 Cal. 493

BLOSS v. LEWIS, Clerk of Superior Court.
(No. 18,417.)

(Supreme Court of California. Oct. 10, 1895.)

CONSTITUTIONAL LAW—FEES OF COUNTY CLERK—
LOCAL ACTS.

1. Act March 31, 1891, § 162, creates counties of the thirty-third class, and section 195 allows the clerk of each of such counties a salary of \$3,000, and authorizes him to collect fees for services in settlement of estates based on the value thereof. Const. art. 11, § 5, authorizes a classification of counties for the purpose of regulating the compensation for county officers according to duties. *Held*, that section 195, in fixing a fee for official services in counties of the thirty-third class different from that in other counties, violates Const. art. 11, § 4, directing the legislature to establish a system of county government which shall be uniform throughout the state.

2. And also violates Const. art. 1, § 11, requiring all laws of a general nature to operate uniformly.

3. And also violates Const. art. 4, § 25, subd. 33, forbidding local or special laws in all cases where a general law can be made operative.

Commissioners' decision. Department 1. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Petition by George S. Bloss against J. A. Lewis, clerk of the superior court of the county of Stanislaus, for a writ of mandamus to compel defendant to file an inventory of an estate of which the plaintiff was executor. From a judgment denying the writ, plaintiff appeals. Reversed.

James F. Peck, for appellant. L. W. Fulkerth, for respondent.

VANCLIEF, C. This appeal is from a judgment of the superior court of the county of Stanislaus denying a peremptory writ of mandate petitioned for by appellant. The verified petition for the writ shows that the petitioner was one of the two executors of the will of John W. Mitchell, deceased, who at the time of his death, in November, 1893, was a resident of said county, and left estate

therein, and in the counties of Madera, Fresno, and Merced, an inventory and appraisement of which had been made according to law, said estate, real and personal, having been appraised at \$1,364,367.65. That in May, 1894, the petitioner and his coexecutor returned such inventory and appraisement in due form to the superior court of the county of Stanislaus, in which court said will had been proved, and in which proceedings for the settlement of said estate were then pending, and offered the same to the defendant, clerk of said court, and demanded that he receive and file the same, and then and there tendered to said clerk \$25 in payment of the lawful fees for filing said inventory and appraisement, and at the same time requested that the surplus of said \$25, if any there should be, over and above such fees, be credited on account of fees thereafter to accrue in the matter of said estate; but the defendant clerk then refused, ever since has refused, and still refuses, to receive or to file said inventory or appraisement, by reason whereof said executors have been prevented from making return of said inventory to said court as required by law. Wherefore petitioner prays for the writ of mandate commanding the clerk to receive and file said inventory. An alternative writ was ordered, issued, and served; and the defendant showed cause for not having obeyed it by demurring to the petition on the sole ground that it does not state sufficient facts to entitle petitioner to the writ, or any relief whatever. The court sustained the demurrer, and upon the refusal of petitioner to amend his petition rendered judgment denying a peremptory writ.

Under the classification of counties for the purpose of regulating the compensation of county officers by the county government act of March 31, 1891, the county of Stanislaus belongs to the thirty-third class, the county clerk of which, by section 195 of said act (St. 1891, p. 397), is entitled to a salary of "three thousand dollars per annum; provided, that such clerk shall collect and pay into the county treasury, for the use and benefit of the county, the following prescribed fees, to wit." Here follows a list of fees, other than those allowed in probate proceedings, as to which that section makes the following provision: "For filing papers and issuing letters testamentary, or of administration, guardianship, or special administration, in any case, two dollars. For services up to and including the final settlement of the case, in which the value of the estate does not exceed five thousand dollars, except as hereinafter provided, ten dollars, and one dollar for each additional one thousand dollars in value, as shown by the inventory."

Respondent contends that the demurrer was properly sustained, on the ground that the petition does not state nor show that the executors tendered to the clerk \$1 for each \$1,000 valuation of the estate, as shown by the inventory, additional to \$5,000, which, in this

case, amounted to \$1,358; and it is not claimed that the petition is otherwise deficient, nor that the tender of \$25 was not sufficient to pay all fees which could have been lawfully demanded, except the \$1 for each \$1,000 valuation of the estate over \$5,000, as shown by the inventory. Therefore, the only question presented for decision is whether or not the clerk was authorized to demand a fee, equal to the amount of \$1 for every \$1,000 in excess of \$5,000 of the appraised value of the estate, as a condition precedent to his duty to accept and file the inventory. If the 195th section of the county government act of March 31, 1891, is not repugnant to the constitution of the state, it is perfectly clear that it authorized the clerk to demand and collect the fee in question, and that he properly refused to accept or file the inventory without the payment or tender of such fee by or on behalf of the executors of the estate. But the appellant contends that, in so far as said section 195 purports to authorize or require the clerk to demand or collect a fee of \$1 on each \$1,000 valuation of estates of deceased persons in excess of \$5,000, it is repugnant to the state constitution, and therefore void; and, in so contending, I think he is fully warranted by the authorities.

In thus fixing a fee for the official service of the clerk, the provision in question violates section 4, art. 11, which commands the legislature to establish "a system of county governments which shall be uniform throughout the state" (*Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66); and also violates section 11, art. 1, requiring that "all laws of a general nature shall have a uniform operation," since there is no perceptible or conceivable reason why the fee or tax in question should be exacted in any one county rather than in any other (*Dougherty v. Austin*, 94 Cal. 620, 28 Pac. 834, and 29 Pac. 1092). It is also repugnant to subdivision 33, § 25, art. 4, forbidding local or special laws, "In all other cases where a general law can be made applicable," for surely the provision of section 195 of the county government act in question can be made general, and uniformly applicable to all counties in the state, laying aside, as we may for the purpose in hand, all considerations relating to the necessity or policy of such a general law. The only ground upon which the provision in question is claimed to be a general law is that it operates uniformly upon a class of counties authorized by the constitution itself. But the constitution (section 5, art. 11) authorizes a classification of counties only for the purpose of regulating the compensation of county officers according to duties, which purpose is not promoted nor affected in any degree by the provision in question. In the county of Stanislaus the county clerk and all other county officers, except coroner and public administrator, are compensated by fixed salaries, to be paid from the county treasury, the payment of which is no more dependent upon the tax or fee in question than it is upon any

other source of an equal amount of county revenue. This tax or fee required to be collected from estates of deceased persons, like all other fees collected by the clerk and other county officers, is to be paid into the county treasury for the use of the county, and thence applied to the payment of any lawful demand against the county. True, they are primarily to be apportioned to the salary fund, but subdivision 20 of section 25 of the county government act, which authorizes the establishment of a salary fund and such other funds as deemed necessary, also authorizes the board of supervisors "to transfer moneys from one fund to another as the public interest may require"; so that, when the salary fund is deficient, money from other sources than fees may be transferred to it, and when there is a surplus in the salary fund, it may be transferred to the county bond fund, or any other fund, "as the public interest may require." Therefore, from no view of the subject does it appear that the tax or fee in question has the slightest tendency to regulate the compensation of the county clerk, or that of any other officer of the county, according to the duties of such officer, unless it can be seen that the performance of the duty of filing an inventory of the estate of a deceased person in the county of Stanislaus should be paid 5,000 times as much as is required to be paid for the performance of the same duty in the adjoining county of Merced.

Should it be suggested that the classification of counties, authorized by the constitution, for the purpose of regulating the compensation of county officers according to duties, is also appropriate for the purpose of apportioning uniform taxation, or for the purpose of regulating fees for services of county officers whose compensations are regulated by fixed salaries, and which fees are to be paid, as part of the county revenue, into the county treasury, a full and satisfactory answer to such suggestion may be found in the following cases: *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Dougherty v. Austin*, 94 Cal. 601, 28 Pac. 834, and 29 Pac. 1092; *Welsh v. Bramlet*, 98 Cal. 219, 33 Pac. 66; and *Darcy v. City of San Jose*, 104 Cal. 642, 38 Pac. 500. These cases evolve from the authorities the principle upon which classification for legislative purposes must be based. The conclusion reached in the first of these cases is expressed as follows: "That, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." In *Darcy v. City of San Jose*, *supra*, it was said: "It will not be presumed that it was intended to deprive the legislature of all pow-

er to adapt its laws to the varying conditions of its inhabitants. From necessity it has been held that the legislature may classify, in order that it may adapt its legislation to the needs of the people. If this cannot be done, laws will not always bear equally upon the people. This classification, however, must be founded upon differences which are either defined by the constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification, that legislation really local or special may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation." What is the difference in the condition of the people or their property in the county of Stanislaus from that of the people or property of other counties, which requires or justifies a law compelling estates of deceased persons in that county to pay more for filing a paper in the office of the clerk of the superior court than is required to be paid by such estates for the same service in any other county in the state? The obvious reason for classifying counties, for the purpose of regulating the compensation of officers according to service, is that much more official service is required in some counties than in others, the purpose of the classification being to effect equality of compensation for like services of county officers throughout the state; whereas the effect of the law in question is diversity and inequality of official fees for like services, without affecting the compensation of officers in any way.

I think the judgment should be reversed and the cause remanded, with instruction to overrule the demurrer.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with instruction to overrule the demurrer to the petition.

(109 Cal. 268)

SOUTHERN PAC. R. CO. v. WHITAKER
et al. (No. 18,320.)

(Supreme Court of California. Sept. 28, 1895.)

ADVERSE POSSESSION—TITLE TO RAILROAD LAND—
LIMITATION OF ACTIONS—TRIAL—
HARMLESS ERROR.

1. Act Cong. July 27, 1866, granting lands in aid of the construction of a railroad, operated to vest title as soon as the map locating the proposed route was filed in the general land office, and said lands then became subject to the laws of adverse possession, and the effect of such possession was not interrupted by the subsequent issuance of a patent therefor to the railroad company.

2. Code Civ. Proc. § 325, provides that to establish adverse possession it must be shown that the land has been occupied and claimed for a period of five years continuously, and that the party has paid all the taxes which have been assessed on such land. *Held*, that a finding of

adverse possession need not show that defendant paid taxes up to the time of suit, where he had held adversely and paid taxes for more than five years continuously, and the fact that one claiming under plaintiff paid taxes for one year will not defeat the title so acquired.

3. The failure to find on an ultimate fact is not prejudicial where the evidence shows that, if there had been such finding, it would have been against the party complaining.

4. The commencement of a contest in the United States land department will not stop the running of the statute of limitations of the state.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Ejectment by the Southern Pacific Railroad Company against Horace Whitaker and others. Defendants had judgment, and plaintiff appeals. Affirmed.

Joseph D. Redding, for appellant. E. O. Larkins, for respondents.

BELCHER, C. This is an action of ejectment to recover possession of 160 acres of land. The complaint was filed January 21, 1892, and it alleges that plaintiff is the owner and entitled to the possession of the same land, and that on or about the 1st day of December, 1891, while plaintiff was in possession and entitled to the possession of the same, the defendants wrongfully entered thereon, and wrongfully and unlawfully ousted the plaintiff from the possession thereof. The defendant Daniel Rhoads disclaimed having any interest in the demanded premises. The defendants Horace Whitaker and Nathan H. Garretson answered, and, among other defenses set up, pleaded in bar of the action sections 319-322 of the Code of Civil Procedure. The case was tried by the court without a jury, and the findings were in substance as follows: That the plaintiff was the holder of a United States patent for the land described in the complaint, which was duly issued to it on November 1, 1891, under and by virtue of the act of congress of July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast, by the southern route." That the road was located and constructed in conformity with the provisions of the granting act. That on January 3, 1867, plaintiff duly located its line of route opposite the land in controversy, and on that day filed in the office of the commissioner of the general land office at Washington a map definitely locating the route of the railroad to be built by plaintiff. That the lands in controversy were shown to be agricultural lands, and within 20 miles of the definite line of the road as laid out and constructed; and that under said act of congress plaintiff became the owner in fee of said lands, and entitled to the possession thereof, upon the filing of the map of definite location on January 3, 1867. That on April 9, 1867, the defendant Whitaker duly swore to a possessory claim including the land in controversy,

setting up that he claimed the land under and by virtue of the act of the legislature of the state of California approved April 20, 1852. That Whitaker settled on said land in 1865, and built a cabin thereon in 1866, and commenced the cultivation thereof; and that up to 1876 he used said land for stock and farming purposes, and claimed the right to the possession of the same as his own under color of title adverse to the plaintiff and to the whole world. That such possession was hostile to the plaintiff, and was open and notorious, and plaintiff during said time had knowledge of his adverse claim. That in October, 1875, a certificate of purchase for said land was issued to Whitaker by the United States land office, and the purchase price therefor was duly paid by him to said land office. That on April 29, 1876, defendant Whitaker executed a grant, bargain, and sale deed of said land to defendant Garretson, and that immediately after the transfer Garretson went into possession of said land under said deed, and ever since has used the same for farming and stock purposes. That the possession of Garretson has been open, notorious, and continuous, under color and claim of title, to the exclusion of plaintiff and the whole world, for a period of more than five years; and that during the whole of said time plaintiff has had knowledge of the claim of Garretson, but has never in any way interfered with his possession or occupation before the filing of the complaint in this action. That the land was surveyed in 1869, and was withdrawn for the plaintiff May 21, 1867. That on February 28, 1872, Whitaker filed a declaratory statement for the land, alleging settlement thereon in 1865. That on November 4, 1872, he submitted his pre-emption proof, and tendered payment for the land, but his application to enter was rejected by the local officers of the United States land office, whose action was sustained by the commissioner of the general land office in June, 1874, and again by the secretary of the interior in April, 1875. That upon a motion for review the secretary of the interior, in September, 1875, allowed Whitaker to complete his entry by making payment of the land, and the former decision was revoked, and Whitaker's entry was allowed upon the proof offered by him in 1872. That after the payment of the said purchase money the railroad company moved for a new trial, which was granted July 1, 1876, and on February 27, 1877, the trial was had at the local land office at Visalla, and resulted in favor of the plaintiff, and a patent was finally issued to plaintiff in 1891, as before stated. As conclusions of law the court found that plaintiff became the owner in fee of said land, and entitled to the possession thereof, upon filing said map of definite location on January 3, 1867; and from the stipulation as to the facts and from the evidence the court concluded that the government of the United States has not had any interest in said land since January 3, 1867, and that

Garretson has acquired the ownership of the land by adverse possession, and is now the owner thereof as against the plaintiff, and that plaintiff's rights thereto are barred by the statute of limitations. Judgment was accordingly entered in favor of the defendants, from which, and from an order denying its motion for a new trial, the plaintiff appeals.

That the grant to the railroad company was a grant in present, and operated to vest in the grantee a perfect title to the granted lands when the map of the definite location of the road, opposite the lands, was filed in the office of the commissioner of the general land office, is no longer an open question. It has been so held by numerous decisions rendered in similar cases by the supreme court of the United States and by this court. And thereafter the grantee could have maintained an action for the possession of any such lands, without waiting for the issuance of a patent therefor. *Curtner v. U. S.*, 149 U. S. 675, 13 Sup. Ct. 985, 1041, and cases cited; *Forrester v. Scott*, 92 Cal. 402, 28 Pac. 575; *Jatunn v. Smith*, 95 Cal. 154, 30 Pac. 200. In the case last cited it is said: "When the legal title to land is granted by act of congress, the title of the government is as effectively divested as it would be by the issuance of a patent therefor by the executive department, under authority of law; and such land then becomes subject to the limitation laws of the state in which it is situated; and an adverse possession thereof after the date of such grant for the requisite period fixed by such laws will ripen into a legal title in favor of the adverse possessor, and the effect of such possession is not interrupted or defeated by the subsequent issuance of a patent therefor, in pursuance of such act of congress,"—citing cases. But, conceding the law to be as above stated, still it is earnestly insisted for appellant that the findings are insufficient to support the judgment, because there is no finding that after 1878 defendants paid all the taxes, state, county, or municipal, which were levied and assessed upon the land, as required by section 325 of the Code of Civil Procedure, as amended in that year. The section referred to provides "that in no case shall adverse possession be considered established, under the provision of any section or sections of this Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county or municipal, which have been levied and assessed upon such land." It was clearly proved that defendants held possession of the land and claimed title thereto adversely to all the world continuously from the time plaintiff acquired its title in 1867 up to the time of the trial, and that Garretson paid all taxes levied and assessed upon the land up to 1891, when a claimant under the plaintiff paid them for that year. If, therefore, the statute ran in

favor of defendants after 1872, Garretson acquired a perfect title in fee to the land long before 1891. And the rule is that a defendant in ejectment, who relies on the statute of limitations, makes a complete defense if he shows a continued adverse possession for five years, and a payment of all taxes after 1878, although not the five years next preceding the commencement of the action; and, when the fee is once acquired by a five years' adverse possession, it continues till conveyed by the possessor, or till lost by another adverse possession of five years. *Arrington v. Liscom*, 34 Cal. 365; *Cannon v. Stockmon*, 36 Cal. 535. Whether, then, Garretson paid the taxes assessed on the land for the year 1891 was wholly immaterial, as his failure to pay them could not divest or in any way affect a title already acquired. *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431. The ultimate fact to be determined was whether or not Garretson had acquired title to the demanded premises under and by virtue of the statute of limitations; and to establish that fact the burden was upon him to show that he or his grantor had held possession of the property adversely, and had paid all taxes levied and assessed thereon, for a period long enough to vest the title in him under the provisions of the statute. Whether he had paid all the taxes or not was a mere probative fact, which it was not necessary to allege (*Ball v. Nichols*, 73 Cal. 193, 14 Pac. 831), and which was necessarily covered by the finding as to the ultimate fact. It is well settled that findings should be statements only of the ultimate facts in controversy, and not of the probative facts, though findings of probative facts, where the ultimate facts necessarily resulted from them, have been held sufficient. *Mathews v. Kinsell*, 41 Cal. 512; *Biddel v. Brizzolara*, 56 Cal. 374; *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696; *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873. *Ross v. Evans*, 65 Cal. 439, 4 Pac. 443, cited by appellant, was an action of ejectment in which the defendant pleaded the statute of limitations. The court found an adverse possession by defendant and his grantors from 1862 to the trial, in 1883, and that the lands had never been assessed to defendant or his grantors since the year 1877, nor had they paid the taxes thereon. The plaintiff had judgment, and the defendant appealed. The court said: "The defect in the findings is that it is not made to appear by them whether any taxes were levied and assessed on the land in suit. If none were assessed, of course he is not bound to prove that he paid them. But, as said above, if the taxes were levied on the land, and assessed to any one, defendant must, to make out the defense set up, show that he or his grantors paid them." And for this defect and other errors the judgment was reversed. That case is clearly distinguishable from this, and we conclude that the findings here complained of were sufficient. But, conceding that there should have been a specific finding

as to the assessment and payment of taxes, still it clearly appears from the evidence that, if such a finding had been made, it must have been in favor of defendants. And, this being so, the plaintiff was in no way prejudiced by the failure, and the judgment cannot be reversed on this ground. *Hutchings v. Castle*, 48 Cal. 152; *People v. Center*, 66 Cal. 551, 5 Pac. 263, and 6 Pac. 481; *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. 738; *Winslow v. Gohransen*, 88 Cal. 450, 26 Pac. 504.

It is further contended that, while the contest between the plaintiff and defendants in regard to the title to this land was pending in the land department of the government,—from 1872 down to near the time when the patent was issued, in 1891,—the statute of limitations did not and could not run in favor of defendants. No authorities in support of this contention are cited, and we know of none that uphold it. The time within which actions must be commenced is a matter of statutory regulation. Under our statute no action for the recovery of real property or the possession thereof can be maintained unless such action is commenced within five years after the cause of action accrues. Sections 318, 319, Code Civ. Proc. There are some exceptions to this rule, as provided in section 328, Code Civ. Proc., but there is no such exception as that claimed here. The plaintiff's cause of action accrued when it acquired its title in 1867, and we know of no statute or rule of law which could have prevented or stopped the running of the statute thereafter. It follows that the judgment and order appealed from should be affirmed.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

109 Cal. 290

JENNINGS v. BROWN. (S. F. 181.)

(Supreme Court of California. Oct. 1, 1895.)

ELECTION CONTEST—RECORD ON APPEAL—CERTIFICATION OF BALLOTS AS EVIDENCE.

In an election contest the court refused to allow ballots introduced in evidence to be incorporated into the bill of exceptions, on the ground that he had not ordered them to be marked as exhibits in the case. It appeared elsewhere in the bill of exceptions that the ballots were marked as exhibits, with the knowledge of the court, and that the court had ordered the clerk to preserve the ballots, and seal them up. *Held* that, since the ballots could be identified with certainty, plaintiff is entitled to have them certified to the supreme court.

Department 2. Appeal from superior court, San Mateo county; George H. Buck, Judge.

Action by J. T. Jennings against J. J. Brown to contest defendant's election as county supervisor. Judgment for defendant, and plaintiff appealed. Appellant petitioned to have certain ballots introduced in evi-

dence certified to the supreme court. Granted.

Geo. C. Ross and Knight & Heggerty, for appellant. Sullivan & Sullivan, for respondent.

McFARLAND, J. The above-entitled action is an election contest for the office of supervisor of the second supervisor district of San Mateo county. The judgment of the superior court was in favor of Brown, and Jennings has taken an appeal from said judgment to this court. The present proceeding here, now under consideration, is a petition by the appellant, Jennings, under section 632 of the Code of Civil Procedure, to prove certain exceptions taken at the trial, which he alleges the judge of the superior court refused to allow.

At the trial the appellant—there the contestant—objected to 11 ballots which were counted by the court for the respondent, and which were marked "Contestant's Exhibits from No. 1 to 11." His objections were overruled, and he excepted. When the bill of exceptions came to be settled, the appellant requested the judge of the court to certify to the said 11 ballots, or photographs thereof, and he refused to do either. In his answer to the petition here he says that said ballots "were not marked by affiant as exhibits or otherwise, and affiant further avers that he did not order the clerk of said superior court to mark any of said ballots as exhibits"; and he further says "that, if it was right and proper for him to do so, he would, at the hearing of said matter in the supreme court, properly identify said ballots, if he could identify them, and found them in the same condition as the ballots used on the hearing and determination of this matter in the lower court." He says that he refused to certify the photographs presented by appellant because they were not correct reproductions of the ballots, and "were not, in size and general appearance, correct copies of any ballots cast at said election." He does not aver that he cannot identify said ballots. It is averred in the petition here that the clerk marked all of said 11 ballots as contestant's exhibits, and in the answer there is, upon this point, merely the averment, "upon and according to his information and belief, that none of said ballots last aforesaid were marked as exhibits by said clerk at the time same were counted as aforesaid." But the bill of exceptions which the judge allowed consists entirely of the reporter's notes of the trial, and is certified by the judge as "full, true, and correct"; and in those notes it is said of the first ballot objected to by appellant, "It is marked on the back 'Counted Contestant's Ex. No. 1,'" and of the second ballot objected to, "It is marked 'Contestant's Ex. No. 2, Counted for Brown.'" It appears, also, from said notes, that, when the third ballot to which appellant objected was counted for Brown, coun-

sel for appellant said: "We except, and ask that it be marked 'Contestant's Ex. No. 3,'" and the same appears as to the fifth ballot objected to by appellant. As to all the rest of the 11 ballots, the reporter's notes read, "It is marked 'Contestant's Ex. No. —'" (giving the number). The notes show that the same course was taken with certain exhibits of the opposite party. They also show that at the close of the evidence the following occurred: "The Court (to the clerk): Reserve these exhibits very carefully, and see that they are sealed up." It seems, therefore, that there can be no difficulty in identifying and certifying the 11 exhibits of appellant. Counsel ought to be able to stipulate to their genuineness. The reporter's notes show that they were marked with the knowledge and consent of the court, which is equivalent to an express order of the court to that effect.

In *Lay v. Parsons*, 104 Cal. 661, 38 Pac. 447, which was a case like the one at bar, the court said: "In instances involving defects like the one here complained of, in order to put this court, as nearly as possible, in possession of the facts as they appeared to the lower court, either the original ballots, authenticated and identified in some appropriate manner, and properly referred to in the bill of exceptions, should accompany the record, or a copy, by photographic or other process by which the fac simile can be produced, should be in the bill of exceptions." There can be no proper determination of the validity of a ballot, under our present election laws, without an inspection of the ballot itself; and the appeal in this case would be an empty proceeding, without the presence here of the ballots to which the appellant objected. To grant petitioner's request to have said ballot certified for the inspection of this court would not be inconsistent at all with the rulings in *Hyde v. Boyle*, 86 Cal. 352, 24 Pac. 1059; *Vance v. Superior Court*, 87 Cal. 390, 25 Pac. 500; and kindred cases. It cannot be said, in the case at bar, that the judge of the trial court has allowed an exception to a ruling admitting a certain ballot in evidence, when the ballot itself—the very thing objected to—is excluded from the bill. Of course, where the question is whether or not certain evidence was actually introduced, the determination of the judge, evidenced by the bill or statement settled by him, is conclusive; but there is no such question here. There is no doubt that the ballots were marked at the trial as alleged by petitioner, and that they can be easily identified. They are presumed to be in the same condition as when the court ordered the clerk to seal them up and take care of them. If it shall be contended that they are not in the same condition, that matter can be inquired into here. It is ordered that the judge of the superior court of the county of San Mateo direct the county clerk of said county to bring into his court the said ballots introduced in evidence at the trial

of said action of J. T. Jennings v. J. J. Brown, and that said judge do certify the said 11 ballots marked "Contestant's Exhibits from No. 1 to No. 11" as the originals of said ballots referred to in the bill of exceptions herein, and send the same, sealed, to the clerk of this court.

TEMPLE and HENSHAW, JJ. We concur in the judgment and in the opinion, except that in our judgment the right to prove an exception involves the right, when necessary, to prove upon what it was based.

(109 Cal. 304)

HIGGINS v. CALIFORNIA PETROLEUM & ASPHALT CO. (No. 19,524.)

(Supreme Court of California. Oct. 2, 1895.)

MINING LEASE — CONSTRUCTION — ROYALTIES — WHAT CONSTITUTES "GROSS TON."

1. A joint lease for mining purposes, executed by owners in severalty of two adjoining tracts, provided that the lessee should pay as royalty a certain sum monthly to the lessors. One of the lessors subsequently conveyed his separate tract to the lessee. *Held*, that the remaining lessor was entitled to royalty thereafter in an amount equal to the value of his distinct tract as compared with that conveyed to the lessee.

2. Where a mining lease, executed jointly by owners in severalty of adjoining tracts, provided that the lessee could extract asphaltum from any part of the leased premises, and the share of one lessor was subsequently conveyed to the lessee, it is no defense, to an action by the remaining lessor for royalties, that no asphaltum was taken from his separate tract.

3. Under Pol. Code, § 3215, providing that 20 hundredweight constitute a ton, the words "gross ton," as used in a mining lease as the basis for payment of royalties, means a ton of 2,000 pounds.

4. Under a mining lease of "a deposit of bituminous rock," and a "deposit of liquid asphaltum," providing that the lessee should pay a royalty "for each and every gross ton of bituminous rock and liquid asphaltum which he may have mined, taken, or removed from said premises," the words "mined," "taken," or "removed," were used in the same sense, and do not mean that the royalty shall be paid on a basis of the crude rock, or the refined product, after being shipped from the premises.

5. In a mining lease of a deposit of bituminous rock, and also of a deposit of liquid asphaltum, a provision that the lessee should pay a certain royalty per ton on liquid asphalt applies only to the asphalt taken from the liquid deposit, and not to liquid asphalt extracted from the crude rock.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county; W. C. Cope, Judge.

Action by O. P. Higgins against the California Petroleum & Asphalt Company to recover royalties under a mining lease. Judgment for plaintiff, and defendant appeals. Affirmed.

R. B. Canfield, for appellant. Wright & Day, for respondent.

VANCLIEF, C. On June 4, 1887, the plaintiff and Mary A. Ashley executed a written lease to Joseph Scheerer, for the term of

20 years of the following described property: "That certain deposit of bituminous rock which lies between the Carpinteria creek on the west, and the east line of the lands of said C. P. Higgins on the east, and the S. P. Branch R. R. Co's railway line on the north, and the Pacific Ocean on the south; also that certain deposit of liquid asphaltum which crops and flows out of the earth within 200 yards of the palm tree standing S. E. of the old Olmstead ranch house,—all in Carpinteria valley, in the county of Santa Barbara, state of California." In consideration of the lease, the lessee, among other things, promised to pay "to the parties of the first part" (lessors), on the first day of each and every month thereafter, during said term, "the sum of 50 cents per ton for each gross ton of bituminous rock and liquid asphaltum which he may have mined, taken, or removed from said premises during the calendar month then next preceding, and at the same time and place of such payment to deliver to the said parties of the first part a full and true statement in writing of the number of gross tons of bituminous rock and liquid asphaltum mined, taken, or removed from said premises during the calendar month for which such payment is then being made." It was mutually agreed that the lessee should have "the right of ingress and egress to and from said deposits, over the lands owned by the said parties of the first part, upon such line as may be agreed upon between the parties hereto; the party of the second part to have the privilege of erecting such building upon the land adjacent to such deposits as may be necessary for the accommodation of his workmen and the prosecution of his work." The lease contains other covenants and conditions not relevant to any question to be considered on this appeal. On December 16, 1891, the defendant became the sole owner of the lease by assignment. It appears, and is undisputed, that, at the date of the lease, the lessors were not tenants in common of any part of the land described in the lease, nor of any part of the "deposit of bituminous rock" leased, but that each severally owned a definite part of both, adjoining each other, and the "deposit" leased extended, horizontally, through the contiguous lands of both lessors as described in the lease. On June 22, 1892, Mary A. Ashley conveyed all that part of the land described in the lease, which she severally owned, to the defendant, by a definite description. Since this conveyance the tract so conveyed has been known as the "Ashley Tract," and the remainder of the land described in the lease as the "Higgins Tract," and by these names they will be distinguished in this opinion. During the first seven or eight months immediately after the conveyance of the Ashley tract to defendant, the plaintiff claimed, and was paid by defendant, one-half of the stipulated rent or royalty (25 cents per ton) upon statements regu-

larly made by defendant to plaintiff, as per lease; and during the same period, and ever after, Mary A. Ashley treated the lease, so far as she was interested, as extinguished or merged in her deed of her land, and no rent or royalty has ever been demanded by or paid to her. In February, 1893, differences arose between plaintiff and defendant as to the proper construction of the lease in the following particulars: (1) Whether or not payment on rock merely mined, and not removed from the premises, was due before the rock was shipped away from the mine; (2) whether a ton should consist of 2,240 pounds, or only 2,000 pounds; and (3) whether, when the bituminous rock was reduced to liquid asphalt before removed from the premises of the mine, the royalty was to be paid on each ton of the crude rock, or only on each ton of the liquid asphalt. But defendant continued to pay the royalty on all rock mined, estimated at 2,000 pounds for a ton, until April 1, 1893, after which date it refused to make further payment on rock not shipped from the mine, or per ton of less than 2,240 pounds, or upon rock reduced to liquid asphalt at the mine, except per ton of the liquid extracted therefrom. The object of this action is to recover from defendant \$1,000, unpaid royalty on 4,000 tons of rock at 25 cents per ton, alleged to have been mined from the deposit (whether reduced to asphalt or shipped from the mine or not) during the months of April, May, June, and July, 1893. The court found that 2,685 tons (of 2,000 pounds) had been mined from the deposit by defendant during those four months, on which there was due and unpaid to plaintiff a royalty of 25 cents per ton, amounting to \$671.25, for which judgment was rendered against the defendant. Defendant appeals from the judgment, and from an order denying its motion for a new trial.

1. It appears that no bituminous rock has ever been mined from that part of the deposit lying within the Higgins tract, by the lessee, or by any assignee of the lease, and that all the rock mined under the lease, including that mined by defendant during April, May, June, and July, 1893, has been mined from that part of the deposit lying within the boundaries of the Ashley tract, which was conveyed to defendant on June 22, 1892, as aforesaid; and for this reason the appellant contends that he is not obligated by the lease to pay any royalty to plaintiff on rock mined from that part of the deposit lying within the Ashley tract. No case has been cited, and I have found none, in which distinct contiguous properties of different owners have been jointly leased as in this case, though leases by tenants in common have been of frequent occurrence. Yet I have no doubt that the lease in question here was and is a valid lease, as seems to be conceded by both parties, who differ only as to its effect. It is to be observed that no part

of the land described in the lease, except the deposit of bituminous rock therein, and a right of way thereto, with the right to construct such buildings on the land as necessary to carry on the work of mining, was leased. Yet, such a lease of a mine, reserving a royalty as rent, is unobjectionable. *Gear, Landl. & Ten. §§ 73, 133*, and cases there cited; *Wolff v. Ralston*, 61 Cal. 238; *Waters v. Stevenson*, 13 Nev. 157. Had the lessors in this case been tenants in common of the demised premises, the effects of a conveyance by Ashley of her reversionary estate therein to the lessee would have been to merge her interest in the leasehold term in the reversion, and to extinguish pro tanto the covenant of the lessee to pay rent; yet, thereafter, Higgins would have been entitled to receive from the lessee the same portion of rent as before such conveyance. *Hill v. Reno*, 112 Ill. 154; *Van Rensselaer v. Bradley*, 3 Denio, 135; *Linton v. Hart*, 25 Pa. St. 195. And I perceive no reason why the effects of Ashley's conveyance of her separate part of the demised premises, of which she was sole owner, should not be substantially the same as they would have been if the lessors had been tenants in common of every part of such premises; the only possible difference being in the mode of apportioning the rent. Had they been tenants in common, Higgins would still be entitled to a part of the rent proportionate to his undivided portion of the demised premises; but, as they are not tenants in common, he is entitled, in the absence of an express or presumed agreement to the contrary, to a portion of the royalty proportionate to the comparative value of his distinct part of the demised premises. *Hill v. Reno*, supra. And in this case the terms of the lease warrant the presumption that each lessor was to receive one-half of the royalty, and such presumption is in perfect accord with the practical construction of the lease, by the parties thereto, up to April, 1893. The fact that, prior to the commencement of this action, the lessee had elected to mine only in that part of the "deposit" lying within the Ashley tract detracts nothing from the right of Higgins to demand his proper share of the royalty, nor from the obligation of defendant to pay it. The royalty of 50 cents on each ton of rock mined was, by the terms of the lease, to be paid to the lessors, not to the individual lessor from whose land the rock may have been mined. The lease does not restrict the mining to any particular part of the deposit at any time. The lessee has had the right, at all times since the execution of the lease, to mine any part of the deposit, and will continue to have such right until the expiration of the term of 20 years, only about 5 years of which had elapsed when this action was commenced; and more than one-half of the term is still in the future, during which defendant is at liberty to mine exclusively in that part of the deposit lying within the Higgins tract, and may completely exhaust it. The royalty per ton of

rock mined is but a mode of estimating the rent to be paid for the right to occupy exclusively the whole premises demised, and to mine any part or all parts thereof at any time during the term, at the election of the lessee.

2. I think the court did not err in holding that a "gross ton of bituminous rock" is equal to 2,000 pounds avoirdupois, and no more. Section 8215, Pol. Code, provides that "the hundred-weight consists of one hundred avoirdupois pounds, and twenty hundred-weight constitute a ton." No act of congress conflicting with this has been cited, and I know of none. The regulation of weights and measures by a state is valid, so far as not in conflict with any act of congress. *Weaver v. Fegely*, 29 Pa. St. 27. It may be true that the parties might have contracted for a ton constituted of 2,240, or of 3,000, pounds, but I find nothing in the lease indicating such intention; and the practical construction by the parties up to April, 1893, shows that they intended a gross ton to be 2,000 pounds and no more. If the word "gross" was intended to qualify the word "ton" in any way, I think it was to distinguish the crude, unrefined rock of which it was composed from the product of a process of refinement thereof by which it is reduced to pure asphalt, which product is only one ton from about seven tons of the crude rock. Such a use of the word would have been appropriate, as it appears that a portion of the crude rock was reduced to asphalt by the lessee before it was shipped away from the premises. The only thing that can be said against this construction is that the adjective is misplaced, as it often is; as, for example, when one asks for a good cup of coffee, meaning, and being perfectly understood to mean, a cup of good coffee.

3. It is contended that the royalty was not due until after the crude rock or the refined product thereof was shipped away from the premises. The lease provides that payment of the royalty should be made on the first day of each month "for each and every gross ton of bituminous rock and liquid asphaltum which he may have mined, taken, or removed from said premises" during the preceding month. The "premises" referred to are the demised premises,—“the deposit of bituminous rock,”—and the lessee is obligated to pay on each ton mined, or taken, or removed from that deposit. If the words "mined," "taken," and "removed," are used in different senses, then the royalty is due when the rock is simply mined from the deposit, as is plainly indicated by the disjunctive word "or." But I think those words were used in nearly the same sense, and that neither of them was used in the sense of transportation to market. Otherwise, the lessee might reduce the royalty from 50 cents to about 7 cents per ton of the gross rock, by reducing it to asphalt before shipping it for transportation to market, which, to say the least, was probably not intended. The words "taken" and "re-

moved" were probably intended to apply solely to the "liquid asphaltum which crops and flows out of the earth," near the palm tree, which could be taken without mining, but none of which, it is admitted, ever was taken or shipped by the lessee or by the defendant.

4. It is further contended, for appellant, that the provision of the lease that the lessee should pay 50 cents per ton royalty on liquid asphalt applies to and includes liquid asphalt extracted from the crude rock mined from the "deposit," as well as the liquid asphalt flowing from the earth near the palm tree; but I think the court did not err in holding that the royalty on liquid asphalt was intended to apply only to such as should be taken from the spring "within 200 yards of the palm tree." This construction alone gives harmonious effect to all the language of the lease. The flowing spring of liquid asphalt is wholly distinct from the deposit of bituminous rock; and as no liquid asphalt has been taken from it, nothing in relation to it need be considered, except for the purpose of construing the language of the lease as above.

I think the order and judgment appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment appealed from are affirmed.

109 Cal. 323

NICHOLS v. EMERY et al. (No. 19,517.)
(Supreme Court of California. Oct. 2, 1895.)

EXPRESS TRUST—VESTED RIGHTS—POWER OF
SETTLOR—CONSIDERATION.

1. Deceased conveyed land to plaintiff, as trustee; the deed providing that the grantee should sell the property within 10 months after the grantor's death, and divide the proceeds among his children, one of whom was plaintiff. The power of revoking the trust was expressly reserved. *Add*, that the instrument was a valid, express trust, passing a present interest, subject to divestiture only by revocation, though the enjoyment of such interest was to commence in the future.

2. In the absence of fraud, mistake, or some similar ground of relief, a settlor cannot, by failing to recognize the trust, or even by repudiating it, affect the rights of the trustee and beneficiary which have vested under the deed.

3. A voluntary settlement for the benefit of the settlor's children, which is fully executed, requires no other consideration for its support than that of parental affection and duty.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Walter R. Nichols against Adeline Emery and others. From a judgment for defendants, plaintiff appeals. Reversed.

B. F. Thomas, for appellant. O. A. Storke and Blackstock & Ewing (Victor Montgomery, of counsel), for respondents.

HENSHAW, J. Appeals from the judgment and order denying a new trial. The

plaintiff set up in his complaint the following facts: His father, Walter E. Nichols, during his lifetime conveyed to plaintiff, as trustee, a piece of real property, upon certain trusts expressed in the deed, which were to sell the land within 10 months after the death of the grantor, dividing the proceeds of the sale, one-fifth each to four named beneficiaries, the grantor's children, one being the trustee, while the remaining part was to be invested by the trustee, and the profits of the investment paid over to another child (a daughter) during the life of her husband, and upon his death, if she survive him, to her absolutely, with other provisions made in case she should die first, leaving surviving issue. Disposition was likewise made of the allotted interests in the event of any of the beneficiaries dying before sale and distribution. The power of revoking the trust was expressly reserved, but no form of revocation was prescribed. Plaintiff pleaded his acceptance of the trust, and the death of his father intestate; his inability to sell the land within the designated 10 months, but his present ability to do so, provided he obtain an order of court so directing. He also averred the consent of the beneficiaries to the proposed sale. The beneficiaries were made defendants. The court was asked to declare certain sums expended by the trustee to be charges upon the trust fund; to settle the trustee's account, fix his compensation, and decree a sale. Certain money claims of some of the beneficiaries against the property are asked to be determined, and decreed invalid. The defendant Adeline Emery answered, admitting that Walter E. Nichols did "make, execute, and deliver" the trust deed set out in the complaint, but denied that plaintiff accepted the trust, or ever held the land in trust. She averred a revocation by the grantor of the deed of trust; that the property was, at the death of Walter E. Nichols, a part of his estate; and that she, as heir at law, was entitled to one-fourth part thereof. By cross complaint she pleaded ownership in herself of one-fourth of the property, and asked for a decree accordingly. The defendant, Mary F. Foster, another daughter and beneficiary, and her husband, Fred A. Foster, answered, admitting the trust and its acceptance, and claimed under it; the husband averring that he had acquired the interest of William E. Nichols, a beneficiary and son of the grantor, and that the beneficiary, James M. Nichols, was dead. William Nichols made default, and the action was dismissed as to James, who was found to be dead.

The court found the execution and delivery to plaintiff of the deed of trust by Walter E. Nichols, and "that said Walter E. Nichols at no time made any other or further disposition of the land mentioned and described in the instrument." It then finds: "That it was not the intention of the said Walter E. Nichols when he executed the said instrument

and delivered the same, nor of said Walter E. Nichols when he received the same, that said instrument should pass any immediate interest in said lands to said Walter E. Nichols; but it was intended that said Walter E. Nichols, the grantor in said deed, might use, possess, and occupy said lands, and the products thereof, during his life, and might make, during his life, any disposition of said lands that he might choose, other and different from that determined upon in the said instrument; and said Walter E. Nichols did, from the date of said instrument up to his death, use and occupy said lands, and take to himself the entire product thereof. That no consideration ever passed to said Walter E. Nichols, grantor therein, for said instrument." Due exception is taken to these findings. The court concluded, as matter of law, that the instrument (the trust deed) is testamentary in character, and is to be judged by the laws of wills, and, so judged, that it is void for want of execution with the formalities prescribed for wills. No express finding was made upon the issue of revocation of the trust; the court apparently deeming it unnecessary, under its construction of the instrument. The only declaration touching the matter is the one above quoted,—that the grantor never made other disposition of the lands.

A formal, written acceptance of the trust, over the signature of the trustee, is embraced in the instrument, which was duly acknowledged by both grantor and grantee, and recorded at request of the latter. It was pleaded and proved at the trial that the beneficiaries, as beneficiaries under the trust, had executed and acknowledged to plaintiff, as trustee under the trust, an authorization to sell the property. No question of the invalidity of the trust is raised by the pleadings, the only claim in hostility to it being that presented by the averments of its nonacceptance and revocation. It is true that defendant Adeline Emery, by cross complaint, pleads ownership in fee of the undivided fourth part of the land; but nowhere in the pleadings, or in the arguments of her counsel upon the trial, as disclosed by the record, is it even suggested that the trust instrument is void because testamentary in character. The surprise which plaintiff urged as a ground for a new trial seems, under the circumstances, to have been quite natural. The court reached its conclusion from its interpretation of the instrument by the light of the evidence in the case. That evidence is brief, consisting only of the testimony of the trustee, and it may be well to quote it. He says, upon cross-examination: "The deed of trust was executed at its date. I did not go into the actual possession of the property until after the death of W. E. Nichols, who occupied the premises from the date of the deed to the date of his death. He farmed the place, and took all of its revenues. I took all of its revenues. I think he offered the prop-

erty for sale; advertised it in a newspaper for sale. He paid the taxes on the land. They were assessed to him. I knew that the deed of trust gave to my father the right to revoke the trust. In speaking of this land, W. E. Nichols spoke of it as his own land. He had cultivated the crop that was on the place at the time of his death. A part of the crop was his. He leased part of the land." At this point objection was made to "this testimony, and this line of testimony." And the attorney for Mrs. Emery stating that he sought to show that the grantor had remained in possession of the land and had not recognized the trust, and that he would claim that the grantor had "acquired a right to the land by adverse possession," and that, therefore, he had filed his cross complaint, the court, after discussion, sustained the objection. Returning to the evidence, it is to be noted at a glance that its statements are in some respects contradictory and ambiguous. "He farmed the place, and took all the revenues. I took all the revenues." "A part of the crop was his. He leased part of the land." Whether as lessor or lessee is not made plain. However, these matters need not further be considered, since, as has been said, there is no finding upon the question of the revocation of the trust, and since a settlor, in the absence of fraud, mistake, or some similar ground of relief, cannot, by failing to "recognize" the trust, or even by repudiation of it, affect the rights of the trustee and beneficiary, vested under his deed. The evidence must, by the court, have been considered as bearing upon the intent of the grantor in making the deed, and we proceed to review its decision in this regard.

It is undoubtedly the general rule enunciated by the leading case of *Habergham v. Vincent*, 2 Ves. Jr. 231, and oft repeated, that the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property, to accrue and take effect only upon his death, and passing no present interest. The essential characteristic of an instrument testamentary in its nature is that it operates only upon, and by reason of, the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights, and divested himself of no modicum of his estate; and, per contra, no rights have accrued to, and no estate has vested in, any other person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory. It acquires a fixed status, and operates as a conveyance of title. Its admission to probate is merely a judicial declaration of that status. Upon the other hand, to the creation of a valid express trust it is essential that some estate or interest should be conveyed to the trustee; and, when the instrument creating the trust is other than a will, that estate or interest must pass immediately. *Perry, Trusts*, § 92. By

such a trust, therefore, something of the settlor's estate has passed from him, and into the trustee, for the benefit of the cestui; and this transfer of interest is a present one, and in no wise dependent upon the settlor's death. But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the cestui may be made to commence in the future, and to depend for its commencement upon the termination of an existing life or lives, or an intermediate estate. *Civ. Code*, § 707. Did the grantor in the present case divest himself, by the instrument, of any part of the estate in the land which he had formerly owned and enjoyed? By the terms of the instrument, an estate was assuredly conveyed to the trustee. The language is appropriate to a conveyance, and the grantor's execution and delivery of the deed (both found), he being under no disability, and impelled by no fraud, operated to vest so much of his estate in the trustee as was necessary to carry out the purpose of the trust. The especial purpose was to sell and distribute the proceeds upon his death,—a legal purpose, authorized by section 857 of the *Civil Code*. The term of the duration of the trust,—the life of the settlor,—did not violate the provisions of section 715 of the same Code. We have, therefore, an estate conveyed to a named trustee, for named beneficiaries, for a legal purpose and a legal term,—such a trust as conforms, in all its essentials, to the statutory requirements. That no disposition is made by the trust of the interest and estate intervening in time and enjoyment between the dates of the deed and the death of the settlor, cannot affect the trust. The trustee takes the whole estate necessary for the purposes of the trust. All else remains in the grantor. *Civ. Code* § 806. In this case there remained in the grantor the equivalent of a life estate during his own life, and he was thus entitled to remain in possession of the land, or lease it and retain the profits. Nor did the fact that the settlor reserved the power to revoke the trust operate to destroy it, or change its character. He had the right to make the reservation. *Civ. Code*, § 2280. But the trust remained operative and absolute until the right was exercised in proper mode. *Stone v. Hackett*, 12 Gray, 232; *Van Cott v. Prentice*, 104 N. Y. 45, 10 N. E. 257. Indeed, this power of reservation was strongly favored in the case of voluntary settlements at common law, and such a trust, without such a reservation, was open to suspicion of undue advantage taken of the settlor. *Lewin, Trusts*, *pp. 75, 76; *Perry, Trusts*, § 104. We think, however, that the circumstances of the reservation of power to revoke, and the limitation of the trust upon the life of the settlor, have operated to mislead the learned judge of the trial court. If the life selected had been that of a third person, and if no revocatory power had been reserved, no one would question,

but that a valid express trust had been created. But the fact that the designated life in being was the settlor's could not operate to destroy its validity, for he had the right to select the life of any person as the measure of duration. And the fact that he reserved the right to revoke did not impair the trust, nor affect its character, since title and interest vested subject to divestiture only by revocation, and, if no revocation was made, they became absolute. A man may desire to make disposition of his property in his lifetime, to avoid administration of his estate after death. Indeed, in view of the fact, both patent and painful, that the fiercest and most expensive litigation, engendering the bitterest feelings, springs up over wills, such a desire is not unnatural. And when it is given legal expression, as by gifts absolute during life, or by gifts in trust during life, or voluntary settlements, there is manifest, not only an absence of testamentary intent, but an absolute hostility to such intent. The evidence above quoted does not militate against the establishment of the trust. At most, it was addressed to showing an attempted revocation by the settlor,—a revocation, however, which the court does not find. The deed, being a voluntary settlement for the settlor's children, and being fully executed, does not require other consideration for its support than that of parental affection and duty. *Lines v. Lines*, 142 Pa. St. 149, 21 Atl. 809. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: TEMPLE, J.; MCFARLAND, J.

109 Cal. 313

TULARE COUNTY BANK v. MADDEN
et al. (No. 18,446.)

(Supreme Court of California. Oct. 2, 1895.)

FORECLOSURE OF MORTGAGE—DEFICIENCY JUDGMENT—COSTS.

1. A deficiency judgment may be had against a grantee of mortgaged premises, who accepts the conveyance subject to the mortgage, and assumes the payment of the mortgage debt.

2. In an action against a mortgagor and his grantee, who has assumed the payment of the mortgage debt, judgment for costs is properly entered against them jointly.

Commissioners' decision. Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by Tulare County Bank against D. W. Madden, E. M. Root, and others, to foreclose a mortgage. From a judgment for plaintiff for foreclosure of the mortgage, and deficiency judgment against himself, as grantee of the mortgagor, defendant Root appeals. Affirmed.

W. Rigby and Aylett R. Cotton, for appellant. C. L. Russell, for respondent.

HAYNES, C. The plaintiff is the assignee of a note and mortgage executed by defendant Madden. Afterwards Madden conveyed the mortgaged premises to appellant, E. M. Root, and this action was brought against Madden and his grantee, and others, to foreclose said mortgage. Plaintiff obtained a decree for the sale of the mortgaged premises, with the provision that, if the sale thereof should not satisfy the amount found due, a judgment for the deficiency be docketed against the defendants Madden and Root; and from this judgment Root, the grantee of Madden, appeals upon the judgment roll and a bill of exceptions. The deed of conveyance from Madden to Root recites that it was made subject to the mortgage held by plaintiff; that said mortgage is a lien on said premises, "and said second party hereby assumes and agrees to pay the said amount due thereon, as a further consideration for this conveyance." The only questions arising in the case are: First, whether appellant is liable for any deficiency in case the premises should not satisfy the mortgage; and, second, whether he is liable for costs in the action.

It is well settled that the grantee of the mortgaged premises, who not only takes the land subject to the mortgage, but assumes its payment, is liable to the mortgagee for any deficiency which may remain after exhausting his security under the mortgage, though, as to the ground upon which this liability is placed, the authorities are by no means uniform. That he is so liable, see *Biddell v. Brizzolara*, 64 Cal. 358, 30 Pac. 609; *Pellier v. Gillespie*, 67 Cal. 583, 8 Pac. 185; *Thomson v. Bettens*, 94 Cal. 82, 29 Pac. 336; *Williams v. Nafziger*, 103 Cal. 438, 37 Pac. 411; *Keller v. Ashford*, 133 U. S. 622, 10 Sup. Ct. 494. Appellant seems to rely upon the point that he did not promise to pay the note secured by the mortgage, and that his promise was not made for the benefit of the mortgagee. It may be that there is no such privity of contract between the mortgagee and the grantee of the mortgagor, resulting from the acceptance of the deed, nor any such promise for the benefit of the mortgagee, as would sustain an action at law against him. The best-considered cases place the liability of the subsequent grantee of the mortgaged premises, who has assumed the payment of the debt, upon the ground that, as between him and his grantor, he becomes primarily liable for the payment of the debt secured by the mortgage, and his grantor becomes his surety; that though, as between the grantor, Madden, and the plaintiff, the mortgagee, Madden is the principal debtor, yet in equity the creditor is entitled to the benefit of all securities or collateral obligations that his debtor may have acquired for the payment of the debt, and the creditor may, in his action to foreclose the mortgage, treat the mortgagor's grantee, who has assumed the payment of the debt,

as a principal debtor, and hold him liable for any deficiency for which the mortgagor would be liable on his express promise. *Williams v. Naftzger*, 103 Cal. 440, 37 Pac. 411, and cases there cited. It results that the court did not err in authorizing the deficiency judgment to be docketed against the appellant.

That appellant is liable for costs in the action is also clear. He held the title to the land, and was therefore a necessary party to the action, and was the only defendant who answered or made any contest, and his only contest was based upon his desire to escape personal liability for a deficiency. Having failed in that defense, he, as well as Madden, the maker of the promissory note and mortgage, is liable for costs, and the court did not err in the judgment rendered in that regard. The appeal is without merit, and the judgment appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

100 Cal. 315

CITY OF SOUTH PASADENA v. LOS ANGELES TERMINAL RY. CO.
(No. 18,414.)

(Supreme Court of California. Oct. 2, 1895.)

STREET RAILWAY—REGULATION—FARES.

Under Const. art. 11, § 11, allowing any city to make and enforce "within its limits" any regulations not in conflict with the general laws; and Civ. Code, § 470, prohibiting a railroad from using a public street of a city unless the right so to use it is granted by two-thirds vote of the city authorities,—a provision in a city ordinance granting a railway right of way on its streets, regulating fares to be charged outside of the limits of the city, is void.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the city of South Pasadena against the Los Angeles Terminal Railway Company to have the franchise granted defendant by plaintiff declared void. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Burnett & Gibbon, for appellant. W. S. Knott and A. W. Hutton, for appellee.

BRITT, C. Plaintiff is a municipal corporation of the sixth class. It is situated in Los Angeles county, a few miles from the city of Los Angeles, and on a line of railway owned and operated by defendant, extending from Los Angeles, through said South Pasadena and beyond, to the city of Pasadena, in the same county. This, together with other tangible property and franchises pertaining thereto, was acquired by defendant in virtue of a consolidation effected about

September 26, 1890, under the laws of this state, with another railroad corporation, called the "Los Angeles, Pasadena & Glendale Railway Company," to which, until said consolidation, such railroad property, and franchises belonged. On July 22, 1889, the board of trustees of the plaintiff, the city of South Pasadena, passed an ordinance granting to said Los Angeles, Pasadena & Glendale Railway Company the right to construct, maintain, and operate a steam railroad in certain public streets of the city upon various conditions relating to the improvement of such streets, the maintenance of stations within the city limits, the number of trains to be run each day, etc. Among said conditions was the following: "That round-trip fares between any of the above-named stations (those within the city limits) and the business center of Los Angeles city, on the line of the Los Angeles cable railway, shall never exceed thirty cents, including the round-trip fare of said Los Angeles cable railway; * * * and that such round-trip tickets shall be on sale at all proper times within said city of South Pasadena." The ordinance further declared that "this franchise is especially granted upon each and all of the provisions and conditions herein contained, and, if said grantee or assigns shall fail in any particular to comply therewith, then and in that event all rights under this ordinance shall thereupon and immediately be forfeited, and this grant shall thereupon be null and void." The Los Angeles, Pasadena & Glendale Company, pursuant to the license thus granted, constructed the road above mentioned, and its rights and obligations under said ordinance passed to the defendant in virtue of said consolidation. Prior to September 1, 1891, the defendant and its said predecessor operated the road in conformity with the requirements of said ordinance relating to rates of fare, and carried passengers between stations in South Pasadena and the business center of Los Angeles at the round-trip rate of 30 cents, including the fare within that city on said cable railway; the defendant's road stopping short of such business center by the space of about one mile, and the intervening distance being covered by the cable railway which connected with the road of defendant. The fare on the cable road was five cents each way. The defendant's business proved unprofitable, the road not paying expenses of operation; and on August 24, 1891, the board of railroad commissioners of this state passed a resolution to the effect that the said Los Angeles Terminal Railway Company be, and it was thereby in terms, authorized to make the rate of single-trip tickets either way between Los Angeles and Pasadena 25 cents, and for round-trip tickets either way between the same places, good for two days, 35 cents, and to raise the rates to and from all intermediate stations in the same proportions. The stations within the limits of South Pasadena

dena are intermediate stations between the city of Pasadena and the city of Los Angeles. Accordingly, about September 1, 1891, the defendant raised its rate for round-trip tickets between its stations in South Pasadena and the business center of Los Angeles from 30 cents to 40 cents, including the cable-road fare; this was a net advance on the line of defendant's own road from 20 cents to 30 cents; and the last-mentioned sum—30 cents—was proportionate, as the charge between South Pasadena and Los Angeles, to the charge of 35 cents between Pasadena and Los Angeles, mentioned in the order of the railroad commission. The more important matters above stated appear from the findings and admitted allegations of the pleadings. Some others are shown by the undisputed evidence.

The plaintiff commenced this action November 30, 1891, alleging sundry violations by defendant of the conditions specified in said ordinance of July 22, 1889, including that concerning round-trip fares; but as the court found that defendant has fulfilled the requirements of the ordinance in the particulars complained of, except as to such fares, the other matters do not concern us. The prayer of the complaint was in the alternative: First, that defendant be required to fix and charge for its said round-trip fare a sum not exceeding 30 cents, including the fare on the Los Angeles cable railway; or, second, that defendant be enjoined from operating any portion of its road on the route allowed by the terms of said ordinance, and that its road now existing along or over said route be abated as a nuisance. The court below adjudged that said ordinance and all its conditions are binding upon defendant; that it has violated the condition thereof in respect to said round-trip fares; that by reason of such violation it has forfeited its right of way granted by such ordinance; that its line of track and other improvements in the streets of plaintiff are a nuisance; that the same be abated; and enjoined defendant from operating the road in the streets occupied by it.

It is by statute provided that "no railroad corporation must use any street, alley or highway, or any of the land or water within any incorporated city or town, unless the right to so use the same is granted by a two-thirds vote of the town or city authority from which the right must emanate." Civ. Code, § 470. By the terms of section 862 of the municipal corporation act (St. 1883, pp. 269, 270), plaintiff's board of trustees is given power: "Thirteenth. To permit, under such restrictions as they may deem proper, the laying of railroad tracks and the running of cars drawn by horses, steam or other power thereon * * * in the public streets." Somewhat advanced ground is taken on behalf of respondent upon the effect of these enactments. It is claimed by counsel that the "power thus granted is an

absolute one, the franchise to be granted or not, in the discretion of the city authorities"; that, "having this power to grant or refuse, it may annex such terms and conditions to its grant as to its authorities may seem proper, so long as such conditions do not conflict with any law." With the qualification stated,—viz. that such conditions do not conflict with any law,—we may accept the statement as correct for the purposes of this decision. The ruling in *Pacific Railroad Co. v. City of Leavenworth*, 1 Dill. 398, Fed. Cas. No. 10,649, was that the authorities of the city might prescribe in such a case, as conditions of their assent, "such lawful and proper terms as they deemed expedient." The authority of the city board of trustees, under the statutes referred to, is legislative in its nature. Primarily, it is of a piece with the power to enact municipal, police, and other ordinances,—local laws (*McCracken v. San Francisco*, 18 Cal. 620),—and is not referable for its support to the power of making contracts (*San Francisco v. Spring Valley Waterworks Co.*, 48 Cal. 529; *People's Railroad v. Memphis Railroad*, 10 Wall. 51; Dill. Mun. Corp. [4th Ed.] § 724; *Tied. Mun. Corp.* § 302). See *Town of Arcata v. Arcata & M. R. R. Co.*, 92 Cal. 639, 28 Pac. 676; *Reagan v. Trust Co.*, 154 U. S. 397, 14 Sup. Ct. 1062. If the city could make a valid agreement for rates of fare to Los Angeles, including the charges of a connecting line of street railway, then it might also stipulate for rates over connecting lines to San Francisco or elsewhere. And if, as claimed by respondent, the case is one of mere contract obligation, then we think it clear that some grant of authority mediately through the legislature,—and this would be of doubtful constitutionality,—or immediately through the constitution, from the people of the state, either in express terms or by necessary implication, must be exhibited to warrant such a contract; and, since none appears, we think the city was as destitute of capacity to bargain with a railroad company for rates of transportation to distant points for its inhabitants and other persons to whom it does not stand in loco parentis (*San Diego Water Co. v. City of San Diego*, 59 Cal. 620) as it was, for example, to bargain with a purveyor to supply them with entertainment. The city is not the agent of its inhabitants or of the public for such purposes. *Hodges v. City of Buffalo*, 2 Denio, 110; *Love v. City of Raleigh* (N. C.) 21 S. E. 503. And see *Wallace v. Mayor of San José*, 29 Cal. 186-188; *Herzo v. San Francisco*, 33 Cal. 143; *Aberdeen v. Honey*, 8 Wash. 251, 254, 35 Pac. 1097; *Tied. Mun. Corp.* § 169. Therefore, we must determine whether the ordinance under view transgresses any of the just and needful restrictions which the general law of the state imposes upon local legislation of this nature.

A municipal ordinance must consist with the general powers and purposes of the cor-

poration; must harmonize with the general laws of the state, the municipal charter, and the principles of the common law. *Ex parte Frank*, 52 Cal. 609; *Ex parte Kearney*, 55 Cal. 225. One of the limitations upon such ordinances is that they can have no extra-territorial force unless by express permission of the sovereign power. In the nature of things, this must be so unless intolerable confusion and evil is to result; and the constitution of the state, recognizing the necessity for such a restriction, has provided (article 11, § 11) that "any county, city, etc., may make and enforce within its limits all such local, * * * and other regulations as are not in conflict with general laws." Here was a road lying partly within the confines of at least three municipalities,—Los Angeles, South Pasadena, and Pasadena. Conceding the right of plaintiff to impose a limitation on the charges to be made for passage between stations within its limits and stations elsewhere, then the other cities named have, or might have, the same right. But suppose the city of Los Angeles, as a condition of the occupation of its streets by the railroad, had ordained that the round-trip fare between stations within its limits and South Pasadena should be more or less than that fixed by the ordinance of the latter city; or that the fare to Pasadena—a place more remote than South Pasadena—should be less than that to the latter point as fixed by its own ordinance. Is it not plain either that a conflict must arise and inevitable discrimination between the places ensue (expressly prohibited by Const. art. 12, § 21), or that the railroad company must charge only the lowest of the rates thus fixed by jurisdictions of equal authority, and so the ordinance prescribing the lowest rate be made operative in and between both places? Similar illustrations of possible confusion might be multiplied indefinitely. It is not disputed that the ordinance here has extra municipal effect, if any at all, but this is justified on the theory that it is a mere contract.

Respondent likens the case to one in which an individual grants the right of way for a railroad over his land, and in part consideration thereof receives a free pass on the road for himself and family. But the analogy fails in all essentials: (1) As we have seen, the city, unlike an individual, has no authority to provide free passes or other transportation for anybody, unless a convict or some such person to whom the city occupies a relation of guardianship. (2) The streets of the city are not held as corporate or municipal property, subject to the power of contractual disposition, like the property of an individual. *San Francisco v. Spring Valley Waterworks Co.*, 48 Cal. 529; *In re Philadelphia & T. R. Co.*, 6 Whart. 44. (3) The ordinance here does not confine its scope to any individual or number of individuals, but attempts to regulate the fares to be paid by the general public,—all persons, wherever

resident; in short, is of governmental character.

The views above expressed render it unnecessary to consider the questions presented by counsel concerning the power of the railroad commission to fix round-trip rates of fare, and whether, if it has the power, the order of the commission made August 24, 1891, was a sufficient exercise thereof to properly affect the rates involved here. It seems to us, however, that the usefulness of that commission for some of the principal purposes it was designed to accomplish—the prevention of discrimination between places, and the imposition of excessive charges by transportation companies—must be greatly impaired, not to say destroyed, if its action may be forestalled by local ordinances prescribing rates of fare to distant points passed by every city or town admitting a railroad into its streets. We incline to think that what Chief Justice Gibson called the "universality of the public sovereignty" over the entire subject (*In re Philadelphia & T. R. Co.*, 6 Whart. 44) is so manifest in the constitution of this state that probably even the legislature could not confer upon a municipality the power claimed by respondent. But this need not be decided; it is sufficient to say that the legislature has not attempted to do so.

We are of opinion that the clause of the ordinance found to have been violated by defendant was void for want of power in the municipality to enact it; and that the judgment and order appealed from should be reversed, and the cause remanded, with instructions to the court below to modify the conclusions of law contained in the findings so as to conform to this opinion, and thereupon to enter judgment for defendant.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded, with instructions to the court below to modify its conclusions of law contained in the findings so as to conform to this opinion, and thereupon to enter judgment for defendant.

109 Cal. 336

SPENCER v. BRANHAM, Justice of the Peace. (No. 18,395.)

(Supreme Court of California. Oct. 2, 1895.)

JUSTICE OF THE PEACE—OPENING DEFAULT.

A motion to open a justice's judgment on default cannot be made by simply filing a written motion within the 10 days prescribed by Code Civ. Proc. § 859, and giving notice of a hearing at a time after the period has expired.

Department 2. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Proceeding for a writ of prohibition, instituted by F. V. Spencer against James Bran-

ham. The writ was denied, and plaintiff appeals. Reversed.

Spencer & Raker and F. C. Spencer, for appellant. Goodwin & Goodwin, for respondent.

TEMPLE, J. Proceeding for writ of prohibition. April 20, 1893, plaintiff obtained a judgment by default before the respondent, who is a justice of the peace. On the 27th day of the same month Leonard, against whom the judgment was obtained, filed with the justice an application to have the default and judgment vacated, on the ground that it was obtained through his inadvertence, surprise, and excusable neglect. Several affidavits were filed with the written application, and plaintiff was notified that the court would be asked to grant the relief on Monday, May 1st, following. The motion was signed "Goodwin & Dodge, Attorneys for Defendant, by J. E. Pardee, at the Request of W. N. Goodwin." On Monday, May 1st, the parties appeared before the justice, and the plaintiff objected to the motion upon the ground that Pardee had no authority to act for Leonard. The objections were overruled. The further proceedings had in the justice court are stated in the docket of the justice of the peace as follows: "On motion of defendant, hearing and making of motion continued until Tuesday, the 2d, at 10 o'clock a. m. Motion not having been made." The parties again appeared before the justice on Tuesday, and the docket shows the following: "Counsel for defendant ask leave to withdraw motion and papers filed April 27th on application to set aside judgment by default, without prejudice to the hearing of any motion that may have been filed subsequent to the 27th day of April, 1893. Counsel for plaintiff object to withdrawal of the motion, on the ground that the only power and jurisdiction of the court is to disregard the motion entirely, and the court has no power to allow the motion to be withdrawn without prejudice, in that the 10 days within which this court can act have passed, no motion or application being made within that time to open the default." The objections were overruled, but nothing further was done on that day. On the next day, at the request of the attorney for the defendant in that action, the justice prepared and served the attorney for the plaintiff the following: "In Justice's Court, No. 1 Township, Lassen County, California. E. V. Spencer, Plaintiff, vs. J. G. Leonard, Defendant. Defendant in the above-entitled cause having on Monday, the 1st day of May, 1893, presented to me a written request to be relieved from, and have an order entered setting aside, the judgment by default entered against him on the 20th day of April, 1893, through his mistake, inadvertence, surprise, and excusable neglect, together with affidavits in support of the same, you are notified that I will take up the matter to be disposed of on Monday, the 8th day of

May, 1893, at 10 o'clock a. m. of that day, and that you have until that time to prepare and file counter affidavits. May 3, 1893. James Branham, Justice of the Peace, No. 1 Township." Indorsed: "Notice of time of hearing application to set aside judgment by default." Plaintiff then commenced this proceeding, and now appeals from the judgment denying his remedy, and from an order refusing a new trial.

Plaintiff claims that the justice had no power to grant the relief demanded, because the application was not made within 10 days from the entry of judgment, as required by section 859, Code Civ. Proc. As judgment was entered on the 20th, and the last day of April was Sunday, defendant had until May 1st within which to make his application. As he withdrew the proceedings inaugurated on the 27th, he must rely upon the motion filed on the 1st of May, the hearing of which was set for the 8th day of May. The written motion was handed to the justice on Monday evening, and the justice was told to file it. He was not asked to act upon it, and the counsel for the opposite party were not notified of any hearing, and were not present. Indeed, respondent's counsel seem to admit that the paper was handed to the justice at a time when no action could be expected. They say that a justice court is wherever you find the justice, and that "attorneys, like other human beings, are not above the customs of a country, and it is at least awkward, if not downright impoliteness, to stop the deal in a game of frog, and distract the attention of the 'swampers' from the contents of the 'widow,' by injecting into the proceedings, 'If your honor please, as attorney representing the defendant in Doe v. Roe, I respectfully move, etc.' How much better to respect the rights of all, and when the court is sipping the fruits of a well-earned victory (his own or someone else's), quietly hand him the paper, with a statement of the contents, and a request that it be filed, and if the 'victories' have not been so frequent but that he knows what he is asked for, and proceeds thereafter to act upon the request, it would seem that as much had been accomplished as could have been by the most formal viva voce motion." Although not able to determine from the language of the learned counsel what his honor was then doing, I understand the statement as an admission that he was not then engaged in judicial work, and was possibly not in a condition to do so. At all events, no present action was asked, and none could have been had in the absence of the opposite party without notice to him. The question then is, when a motion must be made upon notice within a given period can a party extend his own time by filing a written motion within the period, and giving notice of a hearing of the motion at a time after the period has expired? To ask the question is to answer it. The application for relief must be by mo-

tion, and "making and not filing a written application for such rule or order is not sufficient. The attention of the court must be called to it, and the court moved to grant it." *People v. Ah Sam*, 41 Cal. 645. Here, although the attention of the court may have been called to it, no present action was requested. If the motion had been made, had the court continued the hearing for argument or for further evidence, it would not have lost jurisdiction, for in such case the application would have been made in time. The judgment and order are reversed.

We concur: McFARLAND, J.; HENSHAW, J.

100 Cal. 277

PEOPLE v. MARONEY. (Cr. 26.)

(Supreme Court of California. Sept. 30, 1895.)

CRIMINAL LAW—REVIEW ON APPEAL—BURGLARY—CONVICTION OF LESSER CRIME—INDICTMENT.

1. In a criminal case the decision of a jury upon legal evidence is not subject to review.

2. A conviction of burglary in the second degree will not be reversed, though the crime, as disclosed by the evidence, could only have been burglary in the first degree, such error not being prejudicial to defendant.

3. Where an indictment charges defendant with having been convicted of several prior offenses under different names, the use of the alias is proper, for the purpose of identifying defendant as the person who had suffered those convictions; and the fact that the part of the indictment containing the averment of prior convictions is not read to the jury, because defendant admits them, does not make it error to read the pseudonyms.

Department 2. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

John Maroney was convicted of burglary in the second degree, and appeals. Affirmed.

Reel B. Terry, for appellant. W. F. Fitzgerald, Atty. Gen., and W. S. Barnes, Dist. Atty., for the People.

HENSHAW, J. The defendant was charged with the crime of burglary, and by the jury was found guilty of burglary in the second degree. Upon behalf of the people, it was shown that after midnight a police officer passing the barber shop of one Antonia Thomas heard a noise therein. The shop was in darkness. He attempted to open the door, but was prevented by some one within. An entrance was forced, and the person within ran into the back room, and hid under the bed. That person was the defendant. He appeared to be stupid from whisky or opium, but said, upon his arrest, that the barber had given him permission to sleep in the shop. This declaration was, upon the trial, supported by a witness for the defense, who testified that he, the defendant, Thomas, and others had been drinking at a neighboring saloon until about midnight, when they went together to the barber shop. There they drank a bottle of whisky, and, the defend-

ant being very drunk, Thomas suggested that he remain there, and sleep off his intoxication. The barber then took a number of razors to hypothecate for more liquor, and the party, after turning out the gas, left the shop with the defendant therein. They proceeded to the saloon of the witness' aunt, where more liquor was drunk. The razors were left with the witness as security, and upon the following day he returned them to Thomas. The defendant did not take the stand, and the other member of the party was reported as on his deathbed. The barber, Thomas, testified that he had been drinking upon the night in question, and had been drinking with these men; that he had taken 20 or 30 drinks, and was somewhat under the influence of liquor; but that he had not visited his shop that night with the defendant, or with any one else, had taken no razors from it, and had not given defendant permission to enter or stay in it. In this state of the case, it cannot be said that there was no evidence to warrant a conviction. If the jury believed the witnesses for the people, as, from the verdict, it seems they did, the evidence fully warranted a finding of the defendant's guilt. The power of a jury in determining the weight to be given to testimony is, within the rules of evidence, exclusive and supreme; and appeals to this court, in criminal cases, do not lie from the verdict of the jury upon controverted question of fact, but solely upon propositions of law. Const. art. 6, § 4; Pen. Code, § 1235. We are not by this to be understood as declaring that a verdict of guilty, unsupported by any evidence, could not be reviewed upon appeal. It could, for such a verdict would be contrary to law, and therefore subject to reversal, because the appeal would present a question of law, under the constitution. But we do mean to declare the rule—which is unquestionable, yet sometimes lost sight of by counsel—that the decision of a jury upon legal evidence, in so far as this tribunal is concerned, is absolutely final, and not subject to review upon appeal.

The jury found the defendant guilty of burglary in the second degree, and this is claimed to be error, in that the crime, as disclosed by the evidence, could only have been burglary in the first degree. This contention has however, been disposed of in the case of *People v. Barnhart*, 59 Cal. 381, where the court has said that it is a sufficient answer to such objection to say that the defendant is not prejudiced by the error complained of.

The indictment charged the commission of the crime against "John Maroney, alias James Forbes, alias Frank Moran, alias Frank Dolan"; and defendant claims that he was prejudiced, in the minds of the jury, by the reading to them of this list of pseudonyms. At ancient common law it was considered that no advantage could be taken of any error in the indictment as to the name

of the defendant; it being held that the accusation was directed against the prisoner, by whatsoever name called. But by the statute of 1 Hen. V. c. 5, it was made necessary to state correctly "the names, estates, degrees, mysteries, and places of residence of defendants, in all criminal proceedings." Under this rule of criminal pleading, and the similar rule which obtained in civil practice, serious consequences arose from misnomers. Pleas in abatement were sustained to indictments and declarations, and delay and difficulty, of course, ensued. In criminal cases, therefore, where it was uncertain by which of two or more names the defendant should be designated, it became usual to plead all, connected by an *alias dictus*. Then, if the defendant pleaded misnomer, "the prosecutor may reply that the defendant is known as well by one name as the other," and the defendant was not allowed to interpose a plea that he was not known by the *alias* name. Chit. Cr. Law, *pp. 203-446; Bish. Cr. Proc. § 681. Under the reformed procedure of our Code, no plea of abatement lies in case of misnomer, and no new indictment becomes necessary for such irregularity. Upon arraignment a defendant is called upon to give his true name, or be proceeded against by the name charged in the indictment. If he answers to another name, that name is entered in the minutes, and the subsequent proceedings are had against him under it. Pen. Code, § 989. And if, at any time, his true name is discovered, it is used in all future steps. Id. § 953. Our system, therefore, renders unnecessary, in most instances, the use of the *alias dictus*; and there can be no manner of doubt but that this formula, useful and proper in its day, may now be made an engine of oppression to a defendant. At common law the jury was composed of the litigants' neighbors and friends. The individual selection was made of men who knew the parties, and, so far as possible, of men who knew of the facts in dispute. In criminal matters, also, jurors were drawn from the vicinage, in order that the defendant, tried by his neighbors, might have the advantage of a good reputation, if he had earned one, and the crown, upon the other hand, might be aided by the jurors' knowledge that he was a bad man, if such were the fact. But under our system, where, in practice, at least, it is sought to obtain a jury knowing as little as may be of the offense and the alleged offender, it needs no reasoning to show that if an indictment be read to such a jury, charging with the commission of a crime "John Doe, *alias* Slippery Jack, *alias* Ticket of Leave Bill," etc., the defendant at once is prejudiced in their minds; and, if such an indictment were so framed without reason, we should not hesitate to declare that its reading would prevent the defendant from obtaining the fair and impartial trial to which the law entitles him. But such is not this case. While, for most

purposes, the need and use of the charging *alias* are done away with, it is still proper in some instances, an illustration of one of which is offered by this indictment. The indictment charged the defendant with conviction of prior offenses,—eight in number. The convictions in these cases were against this defendant, but under the different names charged. For the purpose of identifying him as the person who had suffered those convictions, the use of the *alias* was not only permissible, but proper. The indictment, upon its face, showed the reason; and the fact that the part of it containing the averments of prior convictions was not read to the jury, because the defendant admitted them, did not, under the circumstances, make it error to read the pseudonyms. It was the duty of the clerk to read all the indictment, excepting the portion withdrawn as an issue by the defendant's admission. The judgment and order are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

5 Cal. Unrep. 163
DE LA CUESTA v. CALKINS et al. (No. 19,588.)

(Supreme Court of California. Oct. 9, 1895.)

DISMISSAL OF APPEAL.

A motion to dismiss an appeal cannot be considered where it is uncertain to which of two notices of appeal it is directed.

Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Motion to dismiss an appeal. Denied without prejudice.

Garber, Boalt & Bishop and Boyce, Taggart & Wheeler, for appellants. Wright & Day, for respondent.

PER CURIAM. A motion has been made to dismiss "the appeal" herein upon the ground that it has not been perfected in accordance with the provisions of the Code. The transcript upon record contains a notice of two appeals, one from the judgment and another from the order denying a new trial. As the sufficiency of each of these appeals does not depend upon the same considerations, it is uncertain to which appeal the notice of the present motion is directed, and the motion is therefore denied, without prejudice to its renewal at the hearing of the cause.

5 Cal. Unrep. 163
STEINHART et al. v. COLEMAN. (No. 15,979.)

(Supreme Court of California. Oct. 4, 1895.)

REVIEW ON APPEAL—HARMLESS ERROR.

1. Where there is a substantial conflict in the evidence an order denying a new trial will not be disturbed.

2. Error in admitting testimony is harmless where the party complaining testified to the same facts.

Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by William Steinhart and others against L. C. Coleman. Plaintiffs had judgment, and defendant appeals. Affirmed.

Thos. F. Barry, for appellant. Rothchild & Ach, for respondents.

PER CURIAM. This is an action to recover from the appellant, Coleman, a certain amount of money, the same being an indebtedness from Peyser & Bro. to plaintiffs, and assumed by Coleman. The appeal is by Coleman from the judgment, and also from the order denying his motion for a new trial. It is insisted that the evidence fails to support the findings as to the assumption by Coleman of the aforesaid indebtedness. As to such contention, it is sufficient to say that there is a material and substantial conflict in the evidence upon this question of fact, and it follows that upon such grounds we will not disturb the order denying a new trial. Regarding the statements of Steinhart as to the declarations made by Coleman, if it be conceded that there was error in their admission as evidence, it was harmless error, for Coleman himself testified in effect to the same matters. For the foregoing reasons, the judgment and order are affirmed.

(109 Cal. 283)

ABBOTT v. SOUTHERN PAC. R. CO. (No. 19,431.)

(Supreme Court of California. Oct. 1, 1895.)

EMINENT DOMAIN—EVIDENCE OF DAMAGE.

Where a witness for plaintiff in an action to recover damages from the construction of a railroad testified that after the road was built plaintiff's land was worth a certain sum less than before it was built, but on cross-examination testified that this estimate might have been based partly upon the worth of the property had the road passed through the town upon some other street (which would have increased the value), defendant cannot have the testimony stricken out on the ground that the basis for the estimate was erroneous, as the objectionable evidence did not relate to the testimony given in direct examination, and was not prejudicial, where the court charged that in estimating damages the value of the land if the railroad had been constructed through some other part of the city should not be considered.

Commissioners' decision. Department 2. Appeal from superior court Santa Barbara county; W. B. Cope, Judge.

Action by Louisa Abbott against the Southern Pacific Railroad Company to recover damages to her premises, caused by the construction of defendant's road. Plaintiff had judgment, and defendant appeals. Affirmed.

R. B. Canfield, for appellant. B. F. Thomas, for respondent.

SEARLS, C. Plaintiff, the respondent herein, was the owner of a block of land in the city of Santa Barbara, Cal., bounded by four of the public streets of said city, along one of which, to wit, Gutierrez street, the defendant (a corporation) constructed in 1887 a railroad for the transportation of freight and passengers. This action is brought to recover damages sustained by plaintiff to her premises, for the erection, maintenance, and operation of such railroad. The answer of defendant put in issue the material allegations of the complaint, and for a further defense set up a grant to it, by the municipal authorities of Santa Barbara, of the right to lay, maintain, and operate its railroad upon, over, and through said Gutierrez street; and averred that the railroad was constructed and operated in a usual and proper manner, and in conformity with the requirements of the ordinance, and that the roadbed was made to conform as near as might be to the natural surface of said Gutierrez street and to the official grade thereof. The cause was tried by a jury, and a verdict for \$1,400 rendered in favor of the plaintiff, upon which judgment was entered. Defendant appeals from the judgment, and from an order denying its motion for a new trial.

The first error assigned by appellant is based upon the action of the court in refusing to strike out the testimony of A. O. Perkins, a witness on behalf of plaintiff. The witness, upon his examination in chief, testified in relation to the value of plaintiff's lot of land and the injury thereto by the construction of defendant's railroad along the street adjoining it, substantially, that he was a real-estate agent, and knew the block of land upon which Mrs. Abbott resided, bounded by Gutierrez, Haley, De la Vina, and Bath streets. Just prior to the time the railroad commenced work, in August, 1887, the block could have been sold for \$15,000. After the road was constructed and put into operation along the front of the property on Gutierrez street the lot was worth \$3,000 less. For about half the frontage on that street the grade was raised 12 to 15 or 18 inches, so that the lots would have to be filled to grade, and, taking into account that a railroad in front of that property naturally depreciated it, he did not think it worth so much by \$3,000 as before the road was built. The inconvenience and danger from the construction and operation of a railroad are considerations which naturally operate upon the minds of men in purchasing for a home. The lot is in the residence portion of the city, and outside of the business portion. Upon cross-examination the witness said he considered the block of land worth \$15,000 just prior to August 1, 1887, just before it was known the railroad was going through that street. There had been a marked improvement in prices of lands, a "regular boom." Could not tell just when it started. Prices ruled high. Whether

there was any marked improvement in prices before it was known the railroad was coming he could not say, as he had not given it a thought. San Francisco people and others came in and purchased land, which influenced people in purchasing. The cause of the boom might have been one thing or another, or a combination of things. Did not know that the coming of the road was the only cause. The fair value of the property just before the railroad company entered upon that portion of the street to construct its road was, according to his estimate, \$15,000. His estimate of the value was placed at the time when it became known the road would be constructed on that street. When that fact was known it declined. "After it was understood and known that the railroad was going there [through Gutierrez street], then the property assumed a market value depending on that fact." Before that, and when it was known the road was coming to Santa Barbara, property began to stiffen up in town. It helped to increase values, and, with other causes combined, helped raise the price of property. The witness further explained that when the city council granted the right of way through Gutierrez street the price of property on that street was depreciated, and continued so until the road was completed, although the road did not become a fixed fact until the ties and rails were down. Counsel for defendant then asked the witness the following question: "Mr. Perkins, your estimate of the difference of the value of this property before the road was constructed and afterwards, which you have made at the sum of \$3,000, I will ask you if that is not in fact based upon the consideration of what the property would have been worth if the road had gone through the town, but on some other street. Is not that a fact?" To which the witness answered: "Why, certainly; that is the damage to it; that is the cause of the damage. If the road had gone anywhere else, it would have benefited the property, in my judgment." At the request of the witness the last question was again read to him, and he then stated that he had not quite understood it, and that he intended to say that the road would naturally benefit the lot if it ran on another street, but that was not the basis upon which he made his statement of damages at \$3,000; that this estimate of the difference in value before and after the road was built might have been based partly upon the worth of the property had the road passed through town upon some other street, and partly upon other considerations; and that he could not say to what extent his estimate was upon each several consideration. The contention of appellant is that this evidence should have been stricken out upon his motion, and such contention is supported by reference to *Muller v. Railway Co.*, 83 Cal. 240, 23 Pac. 265, and cases there cited. That action was brought to recover damages for a strip of

land taken by this same defendant upon which to construct its railroad, and for damages to an abutting lot, not taken, situate on this same street, viz. Gutierrez street, in the city of Santa Barbara. The court held, among other things: (1) That as to damage to the lot not taken, the difference between the value of the lot when the defendant entered to construct its road and the value when the road was completed was the measure of damages. (2) At the trial, defendant (the railroad company) called as a witness one Barker, who testified as to the value of the abutting lot before and after the construction of the road. Upon cross-examination counsel for plaintiff was permitted, against the objection of defendant, to put the following question to the witness: "What would the property be worth if the railroad had been constructed on Montecito street?" The answer was: "I think that the lot or quarter of a block, irrespective of improvements, would have been worth about six hundred dollars more if the railroad had gone on some other street." Defendant also requested the court to instruct the jury in that case that, "in estimating the damage to the portion of plaintiff's land not taken by the railroad, you must not consider what the value of the land would have been if the railroad had been constructed through the city, but along some other street than Gutierrez street." The court refused to so instruct, and the admission of the evidence and refusal to instruct the jury as above indicated being assigned as error, the court, speaking through Thornton, J., said: "We cannot see on what view or principle this evidence was admitted. The damage to plaintiff must be estimated on the actual facts of the case, not on any speculative theory of what might have been the result if something had occurred which in fact did not occur. * * * The damage allowed is not a failure to realize a profit which, under another state of matters, might have been realized, but the loss actually suffered; and the defendant is only called on to make compensation for that loss," etc. And the court held that the admission of the evidence and the failure to instruct as requested were both erroneous, and the judgment in favor of plaintiff was reversed.

The rule as to the measure of damages enunciated is in consonance with the adjudicated cases in this state and elsewhere. If the decision is open to criticism, it must be upon the ground that under the wide latitude permitted on cross-examination the question propounded to defendant's witness was admissible for reasons other than those mentioned by the learned judge who wrote the opinion. We have no disposition to criticise the opinion, and shall not discuss it. The case at bar presents the question in a form so entirely different as to differentiate it from that case. Here the witness had testified in chief as to the market value of

the block of land before the railroad was constructed and as to such value after the road was built through the street, and had described the changes and inconveniences occasioned to the use of the street by the cut and fill thereon, and had fixed the reduction in the market value at \$3,000. The objectionable evidence was called out by the defendant on cross-examination. If it was objectionable, and injurious to the interests of his client, it would seem reasonable to say it was the fault of counsel and not of the plaintiff, and that the defendant cannot profit thereby. If a party to an action can invoke error, and then avail himself of it to work a reversal, we shall have no end of error. But it may be urged that this testimony on cross-examination showed the improper basis upon which the witness had predicated his statement of damages, and hence that all of his testimony should have been stricken out. The answer to this position is twofold: (1) The case of *Muller v. Railway Co.*, supra, holds that such evidence is improper as affecting the damages in just such a case. (2) It did not in any wise relate to the testimony given by the witness in his direct examination. The former was as to ultimate facts, viz. the market value at a given period of the block of land without a railroad in front of it, and the market value of the same land at a later period with such road in its front. "Market value" signifies a price established by public sales, or sales in the way of ordinary business. *Black, Law Dict.* The latter—that is to say, the value of the property if the road had gone upon some other street—related to a condition or state of things which never did exist, and, in the very nature of things, could not enter into the calculation. It is true that the witness in the course of his examination, and in answer to some of the questions on cross-examination made statements from which it might be inferred that the question of the value of the plaintiff's land, had the road been built on another street, entered into and became an element in his calculation of market value. An examination of his whole testimony, however, tends to convince us that he did what witnesses very often do, viz. stated facts quite accurately, and then gave wrong reasons for their existence. Conceding, however, that the cross-examination was proper, and that the effect of such examination was to show that the estimate of the value of the property was based in part upon its supposed value if the road had gone elsewhere, and it simply goes to the value of the testimony, and not to its admissibility; and, while a proper subject for comment before the jury, and for instructions from the court, does not require the court to strike out the whole testimony of the witness upon the given point. The court, at the instance of defendant, did instruct the jury, among other things, that "in estimating the

damage to the premises described in plaintiff's complaint you must not consider what the value of the land would have been if the railroad had been constructed through the city, but along some other street than Gutierrez street."

A like error is assigned upon a like motion to strike out the testimony of a like character elicited under like circumstances from the witness Edward Harper. The rulings of the court in these cases do not call for a reversal. Like considerations apply to the error assigned upon the ruling of the court in refusing the motion of counsel for defendant to strike out the testimony of its own witness. The evidence was sufficient to sustain the verdict, and the latter, in view of all the evidence, was moderate in amount. There are some other errors assigned in the record, but, as they are not urged by appellant, we need not comment upon them. The judgment and order appealed from should be affirmed.

We concur: BELOHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(109 Cal. 264)

In re AMBROSEWF. (Cr. 85.)

(Supreme Court of California. Sept. 28, 1895.)

SENTENCE—CONFINEMENT IN CITY JAIL—CONSTITUTIONAL LAW—DIFFERENT PUNISHMENTS FOR SAME OFFENSE.

1. St. 1885, p. 214, and St. 1891, p. 292, organizing police courts in certain cities, provide that, when imprisonment is ordered, it is to be suffered in the city jail. St. 1877-78, p. 918, relating to the practice of medicine, provides that a person violating the requirements thereof shall be punished by imprisonment in the county jail. *Held* that, for a violation of the act of 1878, such police court had power to impose a sentence of confinement in the city jail.

2. St. 1885, p. 214, and St. 1891, p. 292, organizing police courts in certain cities, and providing that, when imprisonment is ordered, it is to be suffered in the city jail, is not unconstitutional on the ground that an offense committed within the county, but outside of corporate limits, is punishable by imprisonment in the county jail, thus creating different punishments for the same offense.

In bank.

Application by S. A. Ambrosewf for writ against the police court of Oakland. Writ discharged.

W. Brassey, for petitioner. H. A. Melvin, Pros. Atty., for respondent.

HENSHAW, J. Petitioner was convicted in the police court of the city of Oakland of misdemeanor, and, by the judgment of that court, sentenced to pay a fine of \$100, and, in default of the payment of the fine, to be imprisoned in the city jail of the city of Oakland in the proportion of 1 day's imprisonment

ment for every \$2 of said fine. The charge against the defendant was for the violation of the act regulating the practice of medicine in the state of California. St. 1877-78, p. 918. The act provides that a violation of its terms shall constitute a misdemeanor, and that the person guilty thereof "shall be punished by a fine of not less than fifty dollars, or by imprisonment in the county jail for a period of not less than thirty nor more than three hundred and sixty-five days, or by both such fine and imprisonment." Defendant appealed to the superior court of Alameda county from this judgment, and, pending his appeal, was admitted to bail. Before the suing out of this writ he had been surrendered into custody, and, at the time of its issuance, was held in charge by the chief of police of the city of Oakland, and detained in the jail of said city. Since both his bondsmen had united in the surrender of his body before the issuance of this writ, the question of the right or power of one of the bondsmen so to surrender him is not here involved.

Petitioner contends, however, that the judgment of the police court was void in sentencing him to imprisonment, as an alternative for the nonpayment of his fine, in the city jail, instead of in the county jail. The police court of the city of Oakland is one created and organized by virtue of the so-called "Whitney Act" (St. 1885, p. 214; St. 1891, p. 292). By the provisions of this act, jurisdiction is conferred upon police courts in all cases of misdemeanor, and, when imprisonment is ordered, it is to be suffered in the city prison or jail. The contention of petitioner is that the Whitney act, in so providing for imprisonment, did not operate, and should not be construed to operate, to modify the provisions of the general statute providing for imprisonment in the county jail. But this position is not tenable. The cases to which we are referred are those cases enunciating the well-settled principle that a general act is to be construed as not repealing a particular one,—that is, one directed toward a special object, or a special class of objects, under the maxim,—"*Generalia specialibus non derogant.*" This, however, like every rule of construction, must give way to the plain intent of the legislature, plainly expressed in the statute; and of this intent, in the present instance, there can be no doubt. The legislature meant to declare, and did declare, that the imprisonment for convictions had in the courts created by the Whitney act should be in the city prisons.

There is left for consideration the single proposition whether such a provision is violative of the law, as providing different punishments for the same crime; in other words, whether there is any vice in the law which provides, in effect, that if the crime of petit larceny be committed in Alameda county, but without the corporate limits of the city of Oakland, the imprisonment therefor shall

be had in the county jail, while, if the same crime be committed within the corporate limits of the city of Oakland, the punishment therefor shall be by imprisonment in the city jail. We have instanced the case of petit larceny because jurisdiction over that offense is likewise conferred by the Whitney act upon the police court, while by the statute (Pen. Code, § 490) it is made punishable by imprisonment in the county jail. This point was decided against petitioner's contention in *Ex parte Halsted*, 89 Cal. 471, 28 Pac. 961. There the petitioner had been convicted of the crime of petit larceny in the police court of the city of Los Angeles, which also is controlled by the provisions of the Whitney act; and the judgment of the court imposed a fine, with the alternative of imprisonment in the city jail. This court said: "There is no conflict between the provisions of the Code and those referred to, and we think there can be no doubt of the power of the police court to direct imprisonment in the city jail." The same question as to the power of the legislature to provide different places of punishment for the same offense arose in construing the act in relation to the house of correction of the city and county of San Francisco. St. 1877-78, p. 953. By section 3 of this act it was provided that all persons appearing for sentence in the police judge's court, or the city criminal court, or the municipal criminal court of the city and county of San Francisco, who might be sentenced to imprisonment in the county jail or in the state prison, may, instead thereof, be sentenced to imprisonment in the house of correction in said city and county. By this law, too, it is apparent that one committing a given crime in the city and county of San Francisco would be imprisoned in the house of correction, while the perpetrator of the same crime in any other part of the state would be sent to a state prison. This law, however, was upheld in *Ex parte Flood*, 64 Cal. 251, 30 Pac. 437. Elsewhere, also, the reasonableness and validity of such acts have been upheld. In *People v. Borges*, 6 Abb. Prac. 134, the statute prescribed punishment in either the county jails (penitentiaries) or the state prison. It was argued that in those counties which did not possess jails the punishment must be, of necessity, imprisonment in the state prison, while in those counties possessing such penal institutions the imprisonment might be ordered therein. It was held that this was no objection to the law. In *City of Miltonvale v. Lanoue*, 35 Kan. 603, 12 Pac. 12, a defendant was convicted under a municipal ordinance which provided for imprisonment in the city jail, and was sentenced to imprisonment therein. Upon appeal he was retried in the district court, found guilty, and sentenced to the county jail. This sentence was upheld, and there was declared to be no clash between the ordinance and the statute, and no irregularity

in the last judgment. In *Kimbleawicz v. State* (Ohio Sup.) 38 N. E. 1072, a law provided that punishment should be had by imprisonment in county jails or city prisons. A later act declared that, where a county had a workhouse, imprisonment should be had in it. This law was held to create no conflict. And in *Brenan's Case*, 10 Q. B. 492, the statute having enacted that, when any convict adjudged to transportation by any British court out of the United Kingdom was brought to England to be transported, it should be lawful to imprison him in any place of confinement provided under the act, it was held that, if the place in which the prisoner was imprisoned was not one of the appointed places, the officers concerned might be liable to censure, but the detention was not unlawful, so as to entitle the prisoner to be discharged. It follows from the foregoing that the writ should be discharged, and the prisoner remanded, and it is so ordered.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN FLEET, J.; TEMPLE, J.; HARRISON, J.

THE VICTORIAN NUMBER TWO.

SUTTON et al. v. THE VICTORIAN.

(Supreme Court of Oregon. Oct. 8, 1894.)

JOINDER OF CAUSES OF ACTION—ASSIGNMENT OF LIEN—INTEREST.

1. One holding a lien for material furnished on running account, one for material furnished on special contract after the running account was closed, and one as assignee, all of which arise under the same statute, against the same boat, and are between the same parties, may enforce them all in the same action.

2. A perfected boat lien is assignable.

3. The assignee of a perfected boat lien may enforce the lien in his own name.

4. Interest is allowable on a boat lien from the time action is begun.

Appeal from circuit court, Multnomah county; Hartwell Hurley, Judge.

Action by Sutton & Beebe against the boat *Victorian* to enforce a lien for materials furnished and used by a contractor in her construction. From a judgment for plaintiff, the owner, the Oregon Short Line & Utah Northern Railway Company, appeals. Affirmed.

The complaint contains three causes of action. The first is on an open running account for material alleged to have been furnished; the second, for materials furnished on a certain date; and the third is brought by the plaintiffs, as assignees of one Moore, for materials furnished by him between April 1, 1891, and June 1, 1891.

William W. Cotton, for appellant. Chas. E. S. Wood (Geo. H. Williams, Stewart B. Linthicum, and J. Couch Flanders, on the brief), for respondent.

BEAN, C. J. This case is similar in many of its facts to the case of *Smith v. The Vic-*

torian (Or.) 32 Pac. 1040, commenced July 13, 1891, to enforce a lien for materials sold and furnished Steffen between December 12, 1889, and February 20, 1891, and which were used in the construction of the boat in question. In the *Smith* Case the constitutionality of the boat lien law, the maritime or nonmaritime character of liens for materials and supplies furnished Steffen and used by him in the construction of the boat after it was launched, and the statute of limitations, were all presented and decided (*The Victorian*, 24 Or. 121, 32 Pac. 1040), and, although counsel for defendants has reargued these questions with much learning and ability, we are still satisfied with the decision formerly made, and shall regard it as controlling authority. The only questions, then, raised by this appeal, not determined by the *Smith* Case are: (1) Can the several causes of action sued on be united in the same complaint? (2) Are the plaintiffs entitled to force Moore's lien for materials furnished by him in their name? And (3) did the court err in allowing as a part of the lien interest in accordance with the agreement between plaintiffs and Steffen on the first and second causes of action?

1. We think the first question must be answered in the affirmative. All the causes of action stated in the complaint arose under the same statute, are between the same parties, triable in the same manner, against the same vessel, and can be embodied in one judgment; and hence we are unable to discover any good reason why they should not be united in the same complaint. And, besides, it is very doubtful whether the overruling of a demurrer for the misjoinder of causes of action is ground for the reversal of a judgment or decree unless the defendant has been prejudiced in some substantial manner by such judgment or decree. *Hill's Code*, §§ 104, 230; *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176, and 12 Pac. 449; *Angell v. Hopkins*, 79 Cal. 181, 21 Pac. 729.

2. As to the assignability of mechanics' liens, there is much diversity of opinion in the authorities. Mr. Phillips states the conflicting rules prevailing in the several states as: (1) That the lien is personal, and cannot be assigned; (2) that the proceedings to be taken to enforce the lien must be in the name of the assignor, but subject to this restriction: that the lien is assignable; and (3) that a lien is as assignable as any other debt, and that the proceedings for its enforcement may, if the state law permits, be carried on in the name of the assignee. *Phil. Mech. Liens*, § 54. In *Brown v. Harper*, 4 Or. 89, it was held by this court that the right to perfect a mechanic's lien by filing the notice required by law is a privilege personal to the party performing the labor or furnishing the material, and not assignable; but, after the lien has been perfected by filing the required notice, it then becomes assignable, and can be enforced in the name of the assignee. Under the boat lien law no notice is required to

perfect the lien, but it is a proceeding in rem, analogous to a suit in admiralty to enforce a maritime lien. It attaches and is a completed lien by force of the statute from the time the materials are furnished or labor performed, and not, as in case of a mechanic's lien, a mere remedy given by law, which secures the preference provided for on condition that the claimant brings himself within the provisions of the statute by a compliance with its terms. If a mechanic's lien is assignable, so that the assignee may sue in his own name after it is perfected, we can conceive of no satisfactory reason why an assignment of a perfected lien under the boat lien law may not be made, so that the assignee can enforce it as if he were the original contractor, whether the proceedings to that end are, under the statute, technically an action at law or a suit in equity. That it is so assignable accords, in our opinion, with the decided weight of authority, the general policy of our law, and the spirit and purpose of the lien law, and can work no injury to the claimant, while the creditor will lose a part of the benefit of his security if he cannot assign it. As was said by Berry, J.: "The claim of the material man and the lien are certainly the property of the material man, and why should he not have the right to dispose of both? There is nothing in the lien right of the nature of a personal trust. The lien holder is not intrusted with the possession of the property bound by the lien. His lien is a security. What difference can it make to the lienor who holds the lien? His duty is to pay the debt. If he pays it, his property is discharged. If he fails to pay it, and so loses the property, of what moment is it to him whether the lien is enforced by the material man or his assignee?" *Tuttle v. Howe*, 14 Minn. 149 (Gil. 113). This view is sustained by the following, among other, authorities: *Phil. Mech. Liens*, § 55; *Jones, Liens*, § 1493; 15 *Am. & Eng. Enc. Law*, 102; *Laege v. Bossieux*, 15 *Grat. 83*; *Skyrme v. Mining Co.*, 8 *Nev.* 219; *Davis v. Billsland*, 18 *Wall.* 659; *Kerr v. Moore*, 64 *Miss.* 286; *The American Eagle*, 19 *Fed.* 879; *The M. Vandercook*, 24 *Fed.* 472.

3. From the findings of fact it appears that it was agreed between the plaintiffs and Steffen that the latter should pay interest at the rate of 10 per cent. per annum upon the purchase price of each installment of materials furnished him, if not paid within 60 days after the date thereof. The court, however, allowed interest only from the time of the commencement of the action. The allowance of this interest is assigned as error. In *Milling Co. v. Riley*, 1 *Or.* 183, objection was made to the amount of the judgment because the interest accruing on the demand of plaintiff was included in the judgment, and it was claimed that interest is a nonlienable item of

account, but the objection was overruled, and the court held "that interest may be computed on a lienable demand, and a lien awarded for the entire amount"; and the same rule was announced and applied in *Forbes v. Electric Co.*, 19 *Or.* 61, 23 *Pac.* 670. It follows that the judgment appealed from must be affirmed. Affirmed.

STATE v. PENNOYER.

(Supreme Court of Oregon. Jan. 14, 1895.)

On motion to recall mandate. Granted.

For original opinion, see 37 *Pac.* 906.

PER CURIAM. The application to recall the mandate in this case is based upon the assumption that a preliminary injunction was issued by the court below which has been in terms dissolved by the decree or judgment in this court, entered by the clerk, which entry was made under the impression that no such injunction was issued. The decision heretofore made proceeds upon the theory that the complaint does not state a cause of suit, and for that reason it was error in the court below to overrule the demurrer, and enter a decree as prayed for in the complaint. But, because it was thought the defect could perhaps be remedied by amendment, the cause was ordered remanded for further proceedings not inconsistent with the opinion, so that plaintiff might thereby be given an opportunity to apply in the court below for leave to amend, if so advised. This conclusion necessarily reversed and annulled the decree of the court below making the injunction perpetual, but it was not intended or designed to interfere with or disturb any preliminary injunction which may have been issued by the court. It was the intention to leave the case in statu quo until plaintiff could have an opportunity, by permission of the court below, to frame a complaint, if the facts justified, so as to present the important public question which it desired to have decided. It is not clear from the record whether a preliminary injunction was in fact issued or served, but, in order to avoid any question as to the effect of the order in this court reversing the decree, the mandate will be recalled, and the decree amended so as not to interfere with any preliminary injunction or restraining order which may have been issued by the court below. The case was decided on the 16th of November, 1893, and the mandate issued on the 13th of the following month, and then at the request of both parties, and it is to be regretted that counsel for plaintiff did not take the precaution to observe the form of the decree before the mandate was issued, and thereby obviate the delay incident to this proceeding.

SALEM IMP. CO. v. McCOURT et al.¹

(Supreme Court of Oregon. July 5, 1894.)

**VENDOR AND PURCHASER—RIGHTS OF GRANTEE TO
SUBSEQUENTLY ACQUIRED TITLE OF GRANTOR
—QUIETING TITLE—BOUNDARIES—EQUITABLE
JURISDICTION.**

1. Where an agent of the state, authorized to select land in a particular county in lieu of school lands lost therein, by sale or otherwise, selects and conveys land in another county, a valid title to such lands subsequently acquired by the state will not inure to the benefit of the grantee.

2. Where a court of equity has obtained jurisdiction of an action to quiet title to land, it also has jurisdiction to ascertain the boundary of such land on plaintiff's allegation of a change in the channel of a navigable stream, originally forming such boundary. Hence, striking such allegation from the complaint is erroneous.

Appeal from circuit court, Marion county; George H. Burnett, Judge.

Action by the Salem Improvement Company against one McCourt and others to quiet title. From a decree for defendants, plaintiff appeals. Reversed.

This is a suit to quiet title. The facts show that on September 8, 1857, in pursuance of an act of the legislative assembly of the territory of Oregon, passed January 26, 1856, the superintendent of common schools of Marion county, Or., sold as school land to one John A. Johns the S. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 28, in township 7 S., of range 3 W. of the Willamette meridian, in said county, together with other real property, and on October 20, 1860, the full consideration therefor having been paid, executed and delivered a deed to him, purporting to convey said land in pursuance of such sale. The west 40 of said tract was made fractional by the main channel of the Willamette river, and that portion lying east of the river was surveyed and platted as lot 6 of said section, containing 23.06 acres. When the government survey was made, an island existed in said river, opposite said lot 6, which was surveyed and platted as lot 9 of section 28, containing 17.20 acres, and lot 3 of section 29, containing 5.42 acres. The description of land contained in said deed embraced a part of said lot 9, triangular in form, its north and west lines extending about 6.43 chains from the northwest corner of said west 40, which, together with the accretions thereto, forms the subject of this suit. Julia A. Johns, having acquired the interest of John A. Johns in said school lands, applied to the board of commissioners for the sale of school and university lands for a confirmatory deed for the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and lot 6 of section 28, but made no application for any part of lot 9, and said board, on February 9, 1880, executed and delivered to her a deed to the property applied for. Said lot 9 was selected by a duly-authorized agent of the state in lieu of school lands lost to the state by sale or otherwise, and said selection was, on May 27, 1891, duly approved by the secre-

tary of the interior, subject to any valid interfering rights which may have existed at the date of the selection. The said board of commissioners for the sale of school and university lands, on June 21, 1892, executed and delivered to George D. Goodhue and others a deed purporting to convey said lot 9 to them. The plaintiff has, by mesne conveyances, acquired their title thereto, while the defendants, by mesne conveyances, have acquired what title Julia A. Johns had to the triangular tract forming a part of said lot 9. When the deed to Johns was executed, the main channel of the Willamette river lay between lot 6 and said island, the center of which formed the boundary line between the counties of Marion and Polk; but during a freshet in said river the current changed its course, and thereafter flowed west of said island, creating a new channel, and the old channel gradually filled up, so that a large part of the sand and gravel therein is now uncovered at low water. The defendants, at the commencement of this suit, claiming authority so to do under the Johns' deed and subsequent mesne conveyances through which they claim title, were digging and carrying away sand, loam, and gravel from the triangular tract embraced in said lot 9, and the accretions thereto, in the old channel. The plaintiff alleges ownership and possession of said lot 9 and the accretions thereto, and that the defendants claim to have some adverse interest or estate in some part thereof, and, said allegations of ownership and possession having been denied by the defendants, the case was referred to W. P. Williams to take testimony, and upon the report thereof by the referee the court found for the defendants, and decreed that they were the owners in fee, and entitled to the possession of the lands in controversy, and awarded them their costs and disbursements, from which decree the plaintiff appeals. Reversed.

Tilmon Ford and S. T. Richardson, for appellant. Bonham & Holmes, for respondents.

MOORE, J. (after stating the facts). The plaintiff contends that the superintendent's deed conveyed no title, while the defendants contend that Johns, their grantor, having obtained a deed which purported to convey the fee-simple title to the land in controversy, the state is estopped from claiming any after-acquired title, and that, plaintiff's grantors having obtained their deed from the state with notice of the prior recorded deed, the legal title inured to the defendants. Section 20 of the act of congress approved August 14, 1848 (9 Stat. 323), reserved sections numbered 16 and 36 in each township in the territory of Oregon for the support of schools therein, and on January 7, 1853, another act of congress was approved (10 Stat. 150), which authorized the legislative assembly of the territory to appoint the county commissioners of the several counties, or such other officer as it should direct, to select lands in lieu of sections 16 and

¹ Rehearing denied.

36, when they had been taken under the donation law, or were otherwise disposed of; whereupon the legislative assembly, in pursuance of this authority, passed an act, January 31, 1855 (Sess. Laws 1855, p. 465), appointing the school superintendent of each county to select lands in his county in lieu of lands in sections 16 and 36, lost to the territory by donation or otherwise, and on January 26, 1856, passed another act (Sess. Laws 1856, p. 69), which authorized the said superintendent to sell the school lands in their respective counties, for cash or upon time, and upon the payment of the purchase price to execute deeds thereto. Section 4 of the act of congress approved February 14, 1859 (11 Stat. 383), granted sections numbered 16 and 36 in every township to the state of Oregon, and it was provided therein that, where either of said sections, or any part thereof, had been sold or otherwise disposed of, other lands equivalent thereto should be granted, upon certain conditions therein named. These conditions were accepted by the legislative assembly of the state of Oregon June 3, 1859 (Hill's Code, § 125), and the state thereupon became vested with the legal title to sections 16 and 36 and such other land as had been selected by the school superintendents in lieu thereof. It will thus be seen that the school superintendent of Marion county had authority, under the acts of congress, and of the legislative assembly of the territory of Oregon, to select such lieu lands in his county, but that at the time his deed was executed the state had no title to any part of lot 9, which was situated in the county of Polk, and the question to be decided is, would the title to the triangular tract on the island, embraced in the superintendent's deed, inure to Johns when the state acquired the legal title?

Section 6 of the act of January 26, 1856, authorized the school superintendent to execute and deliver to the purchaser of school lands a bond conditioned that he and his successor in office would execute and deliver to such purchaser or his assigns a proper deed in fee simple, upon the payment of the purchase price and interest. Section 5 of article 8 of the state constitution created a board of commissioners for the sale of school and university lands, consisting of the governor, secretary of state, and state treasurer, and provided that its powers and duties should be such as might be prescribed by law; but no statute authorizing said board to make sale of school lands, or to execute deeds to purchasers thereof, was enacted by the legislative assembly of the state until October 22, 1864. Dedy's Code Or. 1845-64, p. 884. Section 7 of article 18 of said constitution provided that all laws in force in the territory of Oregon when the constitution took effect, and consistent therewith, should continue in force until altered or repealed. The state having acquired the legal title to sections 16 and 36, together with such other lands as had been properly selected in lieu thereof, the school superin-

tendent of Marion county, on October 20, 1860, under the territorial act of January 26, 1856, executed and delivered to Johns a deed, of which the following is a copy: "Know all men by these presents, that whereas, I, B. F. Bonham, superintendent of common schools in and for the county of Marion and state of Oregon, in pursuance of an act passed by the legislative assembly of the territory of Oregon on the twenty-sixth day of January, eighteen hundred and fifty-six, did, on the eighth day of September, eighteen hundred and fifty-seven, sell to John A. Johns three hundred and eighteen and sixty-four hundredths acres of the common-school land of said Marion county for the sum of six hundred and thirty-seven dollars and twenty-four cents; and whereas, the said John A. Johns has paid into the treasury of said Marion county the full purchase price of said land, wherefore I, the said B. F. Bonham, do by these presents bargain, sell, and convey unto said John A. Johns the following described tracts or parcels of school land as described on the plats of the United States, to wit, the south half of the southwest quarter of section twenty-eight, in township seven north, of range three west * * * containing three hundred and eighteen and sixty-four hundredths acres of land, more or less; to have and to hold the said premises, with all the appurtenances thereunto belonging, unto the said John A. Johns, his heirs and assigns, in fee simple forever. In witness whereof I have hereunto set my hand and seal this twentieth day of October, eighteen hundred and sixty. [Seal] B. F. Bonham, Superintendent of Common Schools in and for the County of Marion, State of Oregon." It will be seen from the foregoing that the superintendent had authority to sell the school lands of Marion county, Or., and to convey the same by a fee-simple title, and the deed therefor is to all intents and purposes a patent of the state of Oregon. *Dolph v. Barney*, 5 Or. 191. At common law, when the mode of assurance was a feoffment, fine, or common recovery, an estate actually passed by operation of the doctrine of estoppel, which not only divested the party of what interest he then had in the land, but of every estate which he might thereafter, by any possibility, acquire; and this doctrine is now applied to modern covenants. But a grant or a release did not have this effect, and hence deeds of bargain and sale, lease and release, have no greater effect by way of estoppel than the common-law grant or release. "When, however," says Mr. Rawle, in his work on Covenants for Title, 388, "it has distinctly appeared in such conveyance, either by a recital, an admission, a covenant, or otherwise, that the parties actually intended to convey and receive, reciprocally, a certain estate, they have been held to be estopped from denying the operation of the deed according to this intent." In *Van Rensselaer v. Kearney*, 11 How. 325, it was held that, if the grantor sets forth on the face of the instrument by

way of recital or averment that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. In *Taggart v. Risley*, 4 Or. 235, the doctrine announced in the preceding case was quoted with approval, and it was there held that from the language employed in the deed it was evident the grantor intended to convey, and the grantee expected to become invested with, the land itself in fee simple, and that a covenant for quiet enjoyment estopped the grantor from setting up an after-acquired title. The case of *Bayley v. McCoy*, 8 Or. 259, was an action to recover damages for an alleged breach of certain covenants in a deed which purported to convey only the right, title, and interest of the grantors in certain premises, with covenants of ownership, freedom from incumbrances, and general warranty. It was there held, affirming the doctrine of *Taggart v. Risley*, 4 Or. 235, that the action was maintainable. In *Wilson v. McEwan*, 7 Or. 87, it was held that a power appointing an attorney to bargain and sell or dispose of in any manner he might see fit any lot as fully and effectually as the principal could do if personally present, authorized the attorney to execute a warranty deed upon a sale of said property, thus affirming the doctrine announced in *Taggart v. Risley*, 4 Or. 235, and also held that the grantees of the principal were estopped from setting up any after-acquired title.

In the case at bar the superintendent, in pursuance of the statute then in force, executed and delivered a deed to defendant's grantor, which, upon its face, purported to convey an estate in fee simple forever, and expresses a manifest intention to deal with the land itself, and not with a mere interest therein, which deed having been accepted by the grantee, it must be presumed the parties actually intended to convey and receive reciprocally the estate therein specified; and it only remains to be seen whether the state is estopped from denying the operation of the deed according to this intent. While there is a conflict of authority upon this question in cases where the officers have acted within the scope of their powers, the courts have uniformly held that the doctrine of estoppel cannot be invoked against the state in support of the unauthorized acts of its officers and agents, however long acquiesced in. *Attorney General v. Marr*, 55 Mich. 445, 21 N. W. 883; *Pulaski Co. v. State*, 42 Ark. 118; *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S. W. 865. In *State v. Brewer*, 64 Ala. 287, it was held that all who deal with the officers or agents of the government must inquire at their peril into the extent of their power; and that the act of no agent, public or private, not within the scope of the agency, can bind the principal by way of

estoppel, no matter how much reliance may have been placed upon it. "A state," says Mr. Throop, in his work on Public Officers (section 551), "is never estopped on the ground that its agent is acting under an apparent authority which is not real." Assuming that the term "in fee simple forever," as used in the superintendent's deed, was sufficient to convey an after-acquired estate, it could only apply to state lands in Marion county. The superintendent had no authority to sell or convey the school lands situated in the county of Polk, and the attempt on his part to do so was unauthorized. And as the state is only estopped by the acts of its agents and officers when done within the scope of their authority, the doctrine of estoppel cannot be invoked in the case at bar.

The plaintiff, in substance, alleged that accretions having been gradually formed on the east side of said lot 9 had caused said river to recede till the old channel has become filled with sand, gravel, and loam, and the river now flows on the west side of said lot, and that the east boundary thereof has, in consequence of such accretions, been extended to the center of the old river bed, which was described by course and distance. This allegation was stricken out by the court, and, as the plaintiff contends, erroneously. We think the allegation was material, and presented an issue as to the boundary between the estates of the parties hereto. The court must take judicial knowledge that the Willamette river, as it flowed between lots 6 and 9, was a public navigable stream (*Shaw v. Iron Co.*, 10 Or. 371), and hence the title to the bed thereof was in the state (*Gould, Waters*, § 158). If by any sudden change in the course of the river the old bed became filled with sand, gravel, and loam, the state was not thereby divested of its legal title, and neither plaintiff nor defendant could claim any interest therein, except as to such parts as had been added to their respective estates by imperceptible accretions, and the line where such accretions met would become the boundary of their estates. *Buse v. Russell*, 86 Mo. 209. This was an issue tendered by the plaintiff, which it was entitled to have tried, if contested; and the motion to strike the said allegation from the complaint must be overruled.

Ejectment is the proper remedy for settling questions of disputed boundaries, but equity, having obtained jurisdiction for the purpose of quieting the title to the disputed tract, will retain it for the purpose of ascertaining the extent of the accretions thereto when controverted by others. The decree appealed from will therefore be reversed, and a decree entered here for plaintiff that it is the owner in fee of said lot 9, together with the accretions, if any, and quieting its title thereto, and that the cause be remanded to the court below to determine the question of boundary, if the allegations so erroneously stricken out shall be controverted. Reversed.

SHAPLEIGH et al. v. HULL.¹

(Supreme Court of Colorado. Sept. 30, 1895.)

QUIETING TITLE — SUFFICIENCY OF BILL — TRUST DEED — VALIDITY — MECHANICS' LIENS — PROPERTY COVERED.

1. In an action to remove a cloud caused by a trust deed, plaintiff alleged that he entered into a contract with one L. to sell him a lot, and to deliver a deed on payment of a certain price; that no payment was ever made, but that a warranty deed, purporting to have been made by plaintiff and acknowledged, was recorded, and a trust deed executed, by said L.; that such warranty deed "is fraudulent, forged, and made without plaintiff's consent, and in fraud of his rights"; and that he has not sold or conveyed any of his interest in said property, except by the contract before mentioned. *Held* to sufficiently allege the forgery and the fraudulent character of the warranty deed.

2. Where a deed to certain land is forged, a trust deed by the grantee in such forged deed gives the grantee in the trust deed no lien on the land.

3. H. agreed to sell, and L. agreed to buy, certain lots, for a specified sum, 60 days after the date of the contract. L. agreed to erect on such lots two houses, work to be commenced at once; and H. agreed, on payment of such specified sum, to deliver to L. a good and sufficient title for the lots. L. afterwards erected such buildings, but never paid such purchase money, or obtained any deed to the lots; and liens were filed by L.'s contractors for labor and material. *Held*, that such mechanics' liens were not limited to the buildings, but extended to the lots.

4. A notary's certificate of acknowledgment cannot be impeached by his evidence.

5. Where a notary public, as a witness to impeach a certificate of acknowledgment made by him, gives evidence which tends as much to sustain his certificate as to overthrow it, the error in admitting his evidence is harmless.

6. Under the Colorado Civil Code, the rule in equity that, where the answer is responsive to the bill, plaintiff, in order to prevail, must overcome it by the evidence of two witnesses, or of one witness and strong corroborating circumstances, does not apply.

Appeal from district court, Arapahoe county.

Action by George T. Hull against George A. Shapleigh and others to remove a cloud from title. From the decree, defendants appeal. Reversed.

Action to remove cloud from title, commenced by appellee, George T. Hull, who alleges that on November 10, 1890, he was owner and in possession of lots B and C in subdivision to lots 1, 2, and 3 in block 2, Highland Park; that at the date mentioned the plaintiff entered into the following agreement with one C. William Leimbach: "This agreement, made Nov. 10th, 1890, between George T. Hull and C. Wm. Leimbach, witnesseth: That said George T. Hull agrees to sell, and that said C. W. Leimbach agrees to buy, lots B and C in sublots 1, 2, and 3 in block 2, Highland Park, for the sum of twenty-five hundred (\$2,500) dollars, sixty days after the date of this agreement, together with interest at eight per cent. per annum. Said C. W. Leimbach agrees to erect upon said lots two houses, to cost not less than \$3,500 each; work on said houses is to be commenced at

once. Geo. T. Hull agrees, upon payment of \$2,500, together with interest as aforesaid, to deliver a good and sufficient title for said lots to C. W. Leimbach." Afterwards Leimbach began the construction of two houses on the property, in accordance with the written contract, and made certain contracts for the performance of labor and furnishing of material with others, including the defendants. Plaintiff alleges that he has no knowledge as to the amount of such contracts, or the amounts due thereon, and avers that he assumed no responsibility therefor. He also avers that on December 13, 1890, an alleged warranty deed, dated December 1, 1890, and purporting to have been acknowledged December 2, 1890, was recorded in the county clerk and recorder's office of Arapahoe county. Plaintiff alleges that he is named as the grantor in said deed, and that it purports to convey his title to Leimbach, and avers that this deed is fraudulent, forged, and made without plaintiff's consent, and in fraud of his rights. It is further alleged that subsequently Leimbach executed and delivered to George A. Shapleigh, one of the defendants, a trust deed on the premises, to secure the payment of a certain note, for \$5,000, to one Sawyer, with interest at 8 per cent. per annum, payable five years after date, and attached thereto certain coupon interest notes; that this deed was acknowledged on the 13th day of December, 1890, and duly recorded. Plaintiff avers that Leimbach had no title to the property, or authority to execute the deed; that the same was executed without the knowledge or consent of the plaintiff, and in fraud of plaintiff's rights; that no consideration was paid therefor, and that the deed did not refer to the trust deed before mentioned; that the defendants and others have placed mechanics' liens upon said property, and are seeking to hold the plaintiff responsible for various sums which they claim are due from Leimbach; that defendant Leimbach has failed to pay the sum of \$2,500 due plaintiff on January 10, 1891, for the property, as provided in the contract between the plaintiff and Leimbach,—and avers that plaintiff is the owner and entitled to the possession of the premises, free and unhindered by the defendants, or any of them. It is also averred that the warranty deed executed by Leimbach on December 2, 1890, is false and fictitious, and was never executed by the plaintiff; that plaintiff has not sold or conveyed any interest in said property, except as in the contract hereinbefore set out, which said contract has, by its terms, expired, and is of no effect; that plaintiff is now in the full possession of the premises in controversy, and is entitled to continue in such possession, without let or hindrance from the defendant. It is also averred that the pretended title hereinbefore set forth, and the so-called liens, constitute a cloud upon the title of plaintiff to said premises, and should be set aside and declared void. Plaintiff asks that the cloud created

¹ Rehearing denied October 21, 1895.

by said conveyance and mechanics' liens be set aside, and for general relief. To this complaint the defendants filed separate answers under oath. These answers set forth in full the facts upon which they rely to establish their respective liens. An answer was also filed by Martha J. Sawyer, denying all allegations of the complaint, and asking that she be decreed a lien on the premises for the amount advanced by her upon the trust deed executed by Leimbach. Upon these issues the case was tried to the court without a jury. The trial resulted in certain findings of fact in favor of the plaintiff, to the effect that the deed purporting to have been executed by the plaintiff to the defendant Leimbach was never executed by plaintiff, but that the same is false and forged. The court further found that certain defendants were entitled to liens upon the building erected upon the property in controversy, and also that the defendant Martha J. Sawyer, the beneficiary in the trust deed made by Leimbach, is entitled to recover thereon the sum of \$2,730, subject to the prior liens of the mechanics' and material men. Upon these facts the court entered a decree that all buildings erected upon the lots in controversy should be sold at sheriff's sale, as upon execution, after proper advertisement; the purchasers to have 30 days to remove the buildings, and the proceeds to be divided among the defendants in order of the priority of their liens. It was further decreed that the deed bearing date December 13, 1890, purporting to have been made by plaintiff to the defendant Leimbach, is null and void, and of no effect. It was further ordered that Leimbach pay within 30 days, to said Hull, \$2,500, with interest, and that, upon the failure to make such payment within 90 days, he should be forever barred from claiming any interest in the real estate, and, further, that any or all of the defendants whose liens had been established on said property might pay the above-mentioned amount to the plaintiff in the manner and within the time provided, and that upon such payment they should be subrogated to the plaintiff's rights to the property. It was also ordered that, in case the property should be insufficient to pay the amounts of the liens thereon, the respective parties may have judgment and execution against the defendant Leimbach for the amount of the deficiency. From this decree no appeal was taken by Leimbach, but each of the lien claimants filed and perfected an appeal to this court.

John P. Heisler, J. Warner Mills, and Charles H. Burton, for appellants. John Hipp, for appellee.

HAYT, C. J. (after stating the facts). It was claimed in the district court that the complaint fails to state facts sufficient to constitute a cause of action. The insufficiency of the complaint in this respect was raised first by demurrer, and afterwards by ob-

jection to the introduction of evidence, and the objection is now renewed in this court. It will be noticed that the complaint alleges that a deed from Hull to Leimbach was acknowledged, but the complaint does not allege that the appellee, Hull, did not acknowledge such deed. The argument of counsel upon this pleading is that Hull, having alleged the acknowledgment of the deed, should be required, in order to make out a case against the defendants, to attack the acknowledgment, as well as the deed, by proper and sufficient allegations of fraud. The complaint, however, does allege that the deed was "fraudulent, forged, and without plaintiff's consent, and in fraud of plaintiff's rights," and, again, "that said warranty deed, purporting to have been executed and delivered by plaintiff to said Leimbach on December 2, 1890, is false and fictitious, and was never executed by the plaintiff; that plaintiff has not sold or conveyed any of his interest in said property, except in the contract hereinbefore referred to." Those allegations must be taken as a sufficient statement, not only that the deed was a forgery, but that the entire instrument is false and fraudulent, and that plaintiff has never conveyed any interest in the property by this or any other deed. The proof of forgery in this case is strong and convincing. Plaintiff not only swears that he never executed or acknowledged any deed to the premises in controversy, but also that no part of the consideration has been paid to him by Leimbach, or any one for him. It is also shown that, soon after the alleged deed was placed upon record, Leimbach succeeded in securing quite a sum of money upon the Austin trust deed. This money was raised upon a chain of title in which the forged deed, purporting to have been executed by Hull, constitutes an essential link. The defendant left the state as soon as he secured this money, leaving his contractors, in the main, unpaid. He could not be induced to return, and neither party was able to secure his evidence to be used at the trial, or to obtain the deed in question. Leimbach, however, filed an answer, sworn to without the state, in which the allegations of the bill are denied; and counsel now contend for the application of the rule in equity that, where the answer is responsive to the bill, the plaintiff, to prevail, must overcome it by the evidence of two witnesses, or of one witness and strong corroborating circumstances. The correctness of this rule, in jurisdictions where the equity practice prevails as formerly, will be conceded. The rule, however, has no application under the Civil Code. Under the former practice the plaintiff could bring the defendant before the chancellor, and compel him to answer upon his conscience, thereby making his adversary his own witness; and it was not unreasonable, under such circumstances, to hold that he was bound by this answer under oath, un-

less he could disprove it in the manner indicated. But, under the Code, all parties are allowed to testify, and a bill of discovery is practically obsolete. The pleadings, under our system, are for the purpose of making the issues, leaving the same to be decided upon the weight of evidence introduced at the trial. *Conger v. Cotton*, 37 Ark. 286.

The certificate of acknowledgment upon the deed was made by one Percy Austin, a notary public. Austin was allowed to testify at the trial, against the objection of the defendants. He was offered as a witness for the plaintiff, to impeach the certificate, and his evidence should have been excluded, when so offered. This error we regard as entirely harmless, however, as the evidence of the witness tends as much to sustain his certificate as to overthrow the same.

The district court, by its decree, limited the operation of the liens of the mechanics and material men to the structure itself, and refused to extend the same to the lots. This would be proper, if Hull had merely sold the lots, leaving it with Leimbach to improve them, or not, as he might elect, as the rule is well settled that the lien, in such cases, attaches only to the interest of the one who causes the improvement to be made; but in this case, by the contract of sale, Leimbach was not only authorized to construct the houses which he afterwards did construct, but he was required so to do. In other words, the building of the houses was not only authorized, but enjoined by Hull, the owner of the land, by the very terms of the written contract. Under these circumstances, the interest of the vendor in the real estate, as well as that of the vendee, became subject to the liens of those furnishing the labor and materials for the construction of the houses under the contract of sale. This rule is not only supported by sound reason, but it is now well settled by authority. *Henderson v. Connelly*, 123 Ill. 98, 14 N. E. 1; *Davis v. Humphrey*, 112 Mass. 309; *Manufacturing Co. v. Kountze*, 30 Neb. 719, 46 N. W. 1123; *Hill v. Gill*, 40 Minn. 441, 42 N. W. 294; *Hickey v. Collom*, 47 Minn. 505, 50 N. W. 918; *Phil. Mech. Liens* (3d Ed.) § 69.

The district court correctly decided that no lien was created by the Austin trust deed, executed by Leimbach, the deed from Hull to Leimbach being a forgery. For the reasons given the judgment of the district court will be reversed, and the cause remanded with directions to enter a decree in accordance with this opinion. Reversed.

IN RE CONTRACTING OF STATE DEBT BY LOAN.

(Supreme Court of Colorado. Sept. 24, 1895.)
CONSTITUTIONAL LAW — STATE INDEBTEDNESS — LIMITATIONS.

1. Act April 8, 1895 (Sess. Laws 1895, pp. 178-182), providing for the funding of certain indebtedness of the state, is constitutional.

2. Const. art. 11, § 3, provides that "the state shall not contract any debt by loan in any form except to provide for casual deficiencies of revenue * * * suppress insurrection * * * and the amount of the debt contracted in any one year to provide for deficiencies of revenue shall not exceed one-fourth of a mill on each dollar of valuation of taxable property, * * * and the aggregate amount of such debt shall not at any time exceed three-fourths of a mill on each dollar of said valuation until the valuation shall equal one hundred millions of dollars, and thereafter such debt shall not exceed one hundred thousand dollars * * * and in all cases the valuation * * * shall be that of the assessment last preceding the creation of said debt." The valuation of taxable property in Colorado, both for 1894 and for 1895, slightly exceeded \$200,000,000. *Held*, that the state may during the fiscal year of 1895, on the basis either of the assessment of 1894 or 1895, lawfully issue its bonds, under Act April 8, 1895, to provide for a casual deficiency in its revenues, in the sum of \$50,000, and during any subsequent fiscal year in an additional sum of \$50,000; and, the amount of the debt to be contracted by loan to suppress insurrection being subject to no limitations as to amount, the state may also issue its bonds for such purpose at any time.

3. The term "year," as used in Const. art. 11, § 3, declaring that the debt contracted in any one year to provide for deficiencies of revenue shall not exceed, etc., means "fiscal year," which, in Colorado, commences December 1st, and ends November 30th.

The opinion of the court is in response to the following communication from the governor:

"Whereas, the tenth general assembly passed an act providing for the funding of certain indebtedness of the state, which act was approved April 8, 1895, and appears in the Session Laws of the State of Colorado for 1895, on pages 178-182 of said Session Laws; and whereas, the total valuation of the taxable property within the state of Colorado, as shown by the assessment for 1894, was \$209,970,000; and whereas, under the provisions of article 11, § 3, of the constitution of the state of Colorado, doubts have arisen as to the power of the state to issue the whole amount of the said casualty deficiency bonds mentioned in said act, at the present time, and the officers of the state are in doubt as to their duty in the premises; and whereas, it is by me considered that the questions raised by and involved in the foregoing premises are important, and the occasion solemn: Now, therefore, I, Albert W. McIntire, governor of the state of Colorado, do hereby require the opinion of the honorable supreme court upon the following interrogatories; that is to say:

"First. Is it lawful for the state of Colorado, under the law hereinbefore cited, to issue the bonds of the state, in the sum of \$100,000, for the payment of the casualty deficiencies of the revenue mentioned therein, and in the further sum of \$75,000 for the payment of the expenses of suppressing insurrection, as mentioned therein?

"Second. If it be unlawful for the state to issue \$100,000 for the payment of said casual deficiencies at the present time, what amount can be issued, and what amount, not exceed-

ing \$100,000 as a total, if any, can be issued after the end of the present fiscal year?

"Third. Is the form of the bond, and is the form of the coupon thereto attached, herewith submitted, in compliance with the statute and the constitution?

"Fourth. Is there anything in the said act, or the title thereof, in contravention of the constitution of this state, or any provision thereof?

"[Signed] ALBERT W. MCINTIRE,
"Governor of the State of Colorado."

That part of section 3 of article 11 of the constitution referred to in the foregoing preamble, and material to this inquiry, is as follows: "The state shall not contract any debt by loan in any form except to provide for casual deficiencies of revenue * * * suppress insurrection * * * and the amount of the debt contracted in any one year to provide for deficiencies of revenue shall not exceed one-fourth of a mill on each dollar of valuation of taxable property within the state, and the aggregate amount of such debt shall not at any time exceed three-fourths of a mill on each dollar of said valuation until the valuation shall equal one hundred millions of dollars, and thereafter such debt shall not exceed one hundred thousand dollars * * * and in all cases the valuation in this section mentioned shall be that of the assessment last preceding the creation of said debt."

B. L. Carr, Atty. Gen., and W. B. Felker, for affirmative. D. E. Parks, *amicus curiæ*.

PER CURIAM. This section gives to the state the power to contract a debt, by loan, to provide for the payment of expenses incurred to suppress insurrection, subject to no limitation as to the amount. By the same section, the state may contract a debt, by loan, to provide for casual deficiencies of its revenue. But in such case such debt, when evidenced or represented by bonds as provided in this act, is contracted when the bonds are duly executed and delivered; and the power to contract such a debt, under existing circumstances, is subject to two limitations: First, the amount of such debt contracted in any one year shall not exceed one-fourth of a mill on each dollar of valuation of taxable property within the state; second, after such valuation exceeds \$100,000,000, the aggregate amount of such debt (that is, the debt contracted by loan to provide for casual deficiencies of the revenue) shall not exceed \$100,000. The term "year," in section 3, means "fiscal year," and in this state the fiscal year shall be deemed to commence on the 1st day of December, and end on the 30th

day of November, in each year. Our general assembly meets biennially, and at each session legislates with respect to the raising and disbursing of revenue for the two fiscal years next ensuing. We are advised by the governor that by the assessment of 1894 the total valuation of taxable property in the state was \$209,970,000; and upon the oral argument it was conceded by counsel who appeared in favor of the validity of the act, as well as by counsel who took the contrary view, that the valuation of taxable property in the state for the year 1895 is slightly in excess of \$200,000,000. It is unnecessary to determine whether the valuation of taxable property upon which the amount of the debt is computed shall be of the assessment of 1894 or 1895; for in either case the provisions of this act may be made to harmonize with the limitations found in this section of the constitution, both as to the amount of the debt to be contracted in any one year, and the aggregate amount of such debt.

Our conclusion, therefore, is that the state—having, by section 3 of article 11 of the constitution, the power to contract a debt, by loan, to provide for casual deficiencies of the revenue, which debt, under the present circumstances, may aggregate, but not exceed, \$100,000, but being limited, in the amount of the debt to be contracted in any one year, to one-fourth of a mill on each dollar of valuation of taxable property—may, during the present fiscal year, upon the basis either of the assessment of 1894 or 1895, lawfully issue its bonds, under this act, to provide for a casual deficiency in its revenues, in the sum of \$50,000, and during any subsequent fiscal year in an additional sum of \$50,000. The amount of the debt to be contracted by loan to pay for the expenses to suppress insurrection being subject to no limitations as to the amount thereof, the state may also issue its bonds for such purpose, in the sum of \$75,000, at any time, and in accordance with the provisions of the act.

In the argument no other provisions of the constitution were called to our attention which this act, or its title, was supposed to contravene, nor, in our investigations, have we discovered any constitutional objection thereto.

As to the form of the bond and coupon submitted to us, we decline to express an opinion, as the question is not of a nature calling for our decision in the present proceeding. Such matters of detail as the form of the bonds to be issued under this act may be safely intrusted to the governor and attorney general, who, by section 7 of the act under consideration, are authorized to prescribe the form of the bonds, subject to the provisions of section 2 of the same act.

(7 Colo. App. 72)

DING v. KENNEDY.¹

(Court of Appeals of Colorado. Sept. 9, 1895.)

ACTION FOR RENT—REVIEW ON APPEAL.

1. A judgment for rent may be had against any one of several joint lessees.

2. When a person does business individually under a firm name, and as such firm becomes a joint lessee, a judgment against him individually for rent is proper.

3. A finding of fact by the jury on conflicting evidence will not, on appeal, be disturbed, unless clearly against the weight of evidence.

Appeal from Arapahoe county court.

Action by Michael Kennedy against Look Ding and others for rent. From a judgment against him personally, Look Ding appeals. Affirmed.

F. J. Hanks and Wm. H. Andrew, for appellant. Willis Stidger and Geo. Stidger, for appellee.

REED, P. J. The Sing Wah Company and three or four other Chinese companies and individuals rented premises of appellee. Appellant executed the lease on behalf of Sing Wah Company. A part of the rent being due and unpaid, suit was brought against appellant, as "Look Ding, doing business as Sing Wah & Company," and the other parties executing the lease. Look Ding was the only party served. He appeared and defended. The case was tried to a jury. Verdict and judgment against him, individually, for \$141, from which this appeal was prosecuted. The correctness and amount of the claim do not appear to have been contested. The only question was in regard to the individual liability of appellant. The only question of fact to be determined by the jury was whether he was individually doing business under the name of Sing Wah & Company, or a partnership existed, of which he was a member. If the firm was composed of himself and others, no legal judgment could have been had against him personally. *Craig v. Smith*, 10 Colo. 220, 15 Pac. 337; *Coates v. Preston*, 105 Ill. 470; *Shafer v. Hewitt* (Colo. App.; April term, 1895) 41 Pac. 509. If appellant alone did business, and assumed the firm name and style of Sing Wah & Company, an individual judgment was correct.

The different firms and persons who executed the lease executed it jointly. Consequently, as to them, it was joint and several; and judgment could have been taken against any firm or person who was a party to it, but not against an individual member of a firm.

The testimony on the question of fact was contradictory. It was found against appellant, on very meager and unsatisfactory evidence of former statements of appellant that might have been misunderstood; but juries are made judges of the veracity of witnesses, and discredited the evidence of appellant. The finding of the jury on questions of fact,

on contradictory evidence, when there is no marked preponderance against the finding, will not be disturbed. The judgment will be affirmed. Affirmed.

(7 Colo. App. 41)

BELL v. PREVILE.¹

(Court of Appeals of Colorado. Sept. 9, 1895.)

APPEAL—REVIEW—SUFFICIENCY OF RECORD.

In replevin by a chattel mortgagee against an officer, the supreme court cannot, on appeal, determine whether or not the mortgage is void, because of reservations therein for the benefit of the mortgagor, where the bill of exceptions merely shows that the chattel mortgage was introduced in evidence, but does not set forth any part of the instrument, nor contain any statement concerning its purport, as provided by Code, § 392.

Appeal from district court, Clear Creek county.

Action of replevin by Joseph L. Previle against Josiah Bell. From a judgment for plaintiff, defendant appeals. Affirmed.

Rogers, Cuthbert & Ellis, for appellant.

THOMSON, J. This is an appeal from a judgment in replevin. The appellee, as plaintiff, brought his action to recover a number of gold and silver watches, alleged to be wrongfully detained by the defendant. The defendant answered that he was in possession of the property by virtue of a writ of attachment levied upon it by him, as sheriff of Clear Creek county, in a suit of Daniels & Fisher against Angelina Rapin, the owner of the property, and that the claim of the plaintiff was based upon a chattel mortgage, which was given to him in the course of trade, and provided that, until default, the mortgagor should retain and enjoy the property, selling and disposing of the same. The allegations of the answer were denied by the replication. The argument of the appellant is that the mortgage, by reason of a proviso which it is said to contain, that, until default, the mortgagor might retain possession of the goods, and use and enjoy them, is without validity as to creditors. It is settled in this state, by a series of decisions of the supreme court and this court, that such a proviso in a chattel mortgage covering a stock in trade, renders the mortgage void as to creditors of the mortgagor; but, outside of the statement of counsel in their brief, and an allegation in the answer which was denied, we have no information whether the mortgage in question contained that proviso or not. It appears from the bill of exceptions that a chattel mortgage was introduced in evidence, but the instrument is not set forth, nor any part of it; nor is there any statement concerning its purport or effect, as provided by section 392 of the Code. There being nothing in the record to impart to us a knowledge of the contents of the paper, it is impossible for us to pass upon

¹ Rehearing denied October 14, 1895.¹ Rehearing denied October 14, 1895.

the question discussed by counsel as affecting this case, and we must assume the correctness of its disposition by the trial court. As there is no other question involved, the judgment will be affirmed. Affirmed.

(2 Kan.A. 13)

STATE v. SAXTON.¹

(Court of Appeals of Kansas, Southern Department, W. D. Oct. 9, 1896.)

ABATEMENT OF LIQUOR NUISANCE — JURISDICTION OF A JUSTICE—SUFFICIENCY OF COMPLAINT — TRIAL—INSTRUCTIONS.

1. A justice of the peace of the proper county has jurisdiction to hear and determine an action, brought under section 392 of the crimes act, to abate a common nuisance as therein defined, and to punish the owner or keeper thereof.

2. When, from the entire statement made in a complaint filed before a justice of the peace, the day and year upon which the offense is alleged to have been committed can be collected, the complaint is good, though such date be not expressly averred.

3. Where, upon the trial of a criminal action in which the defendant is charged, in separate counts, with the sale of intoxicating liquors in violation of law, the state is required to elect upon which sale it will rely for a conviction under each count, and elects to rely under one count upon a sale of two glasses of whisky made by the defendant to one W., for which W. paid defendant 20 cents, and under the other count upon a sale of one glass of whisky and one bottle of beer made by the defendant to C., for which C. paid the defendant 25 cents, and where the evidence shows that but one sale of the kinds indicated was made to said W. and C., and further fixes definitely the date of each of such sales, *held*, that the election was sufficiently definite and certain under each count.

4. The instructions complained of in this case examined, and *held* sufficient.

(Syllabus by the Court.)

Appeal from district court, Rice county; Ansel R. Clark, Judge.

George Saxton, having been convicted of maintaining a liquor nuisance, appeals. Affirmed.

J. W. Brinkerhoff and Davidson & Williams, for appellant. S. H. Jones, Co. Atty., and Saml. Jones and C. F. Foley, for the State.

COLE, J. The defendant, George Saxton, was arrested upon a complaint filed before a justice of the peace of Rice county, Kan., charging him, in five separate counts, with unlawful sales of intoxicating liquors, and, in the sixth count, with maintaining a nuisance, by being the keeper of a place where intoxicating liquors were kept for sale and barter in violation of law. Upon the trial the jury rendered a verdict of guilty upon each of the said counts, excepting the fifth, and thereupon said defendant filed his appeal in the district court of said county; and upon a trial in that court a verdict of guilty was rendered on the first, third, and sixth counts;

and the court having sentenced the defendant to the county jail of said county for a term of 30 days, and to pay a fine of \$100, upon each of said counts upon which he was convicted in said court, the defendant has brought the case here for review.

Several reasons are alleged why a reversal of this case should be had, the principal one being that a justice of the peace has no jurisdiction to hear and determine an action brought under section 392 of the crimes act (being the section of the prohibitory act defining a nuisance and prescribing punishment therefor), and that, as the justice of the peace had no jurisdiction to hear and determine such a case in the first instance, the district court gained no jurisdiction under appeal and trial de novo, and that, as the district court obtained no jurisdiction of that part of the action charging the defendant with maintaining a nuisance, the entire judgment must be reversed because of the admission of evidence which, while competent to sustain that charge, was incompetent as to the other counts of the complaint, which charged specific sales. It is contended by the counsel for the state that this question of jurisdiction was not raised upon the motion to quash the complaint filed before the justice of the peace, and that the question of jurisdiction was not raised in the district court until an objection was made to the introduction of evidence. The record does not present the motion to quash in the form claimed by the counsel for the defendant, and it is difficult to determine whether the question now raised was urged under the motion as it appears in the record; but we feel inclined to give the defendant the benefit of the doubt, and to proceed with the discussion of the question presented. Section 392 of the crimes act declares all places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of said act, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter, or delivery in violation of said act, to be a common nuisance, and provides that upon the judgment of a court having jurisdiction, finding such places to be a nuisance under said section, the sheriff, his deputy, or undersheriff, or any constable of the county, or marshal of any city, where the same is located, shall be directed to shut up and abate such places (prescribing the manner in which the same shall be done), and that the owner or keeper thereof, upon conviction, shall be adjudged guilty of maintaining a common nuisance, and punished by fine of not less than \$100, nor more than \$500, and imprisonment in the county jail not less than 30 days, or more than 90 days. This same section also provides that the attorney general, county attorney, or any citizen of the county may maintain an action to abate and enjoin such nuisance, in the name

¹ Rehearing pending.

of the state, and further provides a punishment for the violation of the terms of any injunction granted in such proceeding; and the same section further provides for the taxation of a reasonable amount as attorney's fees, as a part of the costs, in case the plaintiff shall recover judgment in such an action.

Counsel for the defendant argues in his brief that under this section the same court that can convict the owner or keeper of maintaining this nuisance can also make its order to the sheriff or other officer to abate the same, in the manner provided for by such section, and we agree that such is the fact. Our statute divides public offenses into two classes,—felonies and misdemeanors,—and defines a felony as an offense punishable by death or confinement and hard labor in the penitentiary, and declares that all other offenses are misdemeanors. Code Cr. Proc. §§ 3, 4. Section 5433, Gen. St. 1889, gives the justices of the peace concurrent original jurisdiction with the district court, coextensive with their respective counties, in all cases of misdemeanors in which the fine cannot exceed \$500, and the imprisonment cannot exceed one year, except as otherwise provided by law. It is certainly true that any act, for the commission of which the statute of this state provides a punishment, becomes thereby a public offense, whether it be specially named as such in the statute, or not. And, if the punishment prescribed by the statute for the commission of an act is less than confinement in the penitentiary, such act is a misdemeanor; and if the punishment for such misdemeanor cannot exceed a fine of \$500, or imprisonment for more than one year, a justice of the peace of the proper county has jurisdiction to hear and determine the guilt or innocence of a party charged with such misdemeanors, unless the statute expressly provides otherwise. But counsel for the defendant urges that it is an elementary principle that the power to abate carries with it the power to restrain and enjoin, and that, because section 392 of the crimes act provides a remedy by injunction, as well as by abatement, neither remedy may be invoked excepting in a court having jurisdiction of both of said remedies. We do not deem this reasoning correct. A police magistrate in a city of the third class, even, may, under a proper ordinance, punish a citizen for maintaining a nuisance within the limits of said city, and may, as a part of the judgment in said cause, order the marshal of said city to abate the nuisance complained of; and yet it would not be contended that a police magistrate of a city of the third class, under our statutes, has the power to issue an injunction to restrain the maintenance or creation of the same nuisance. It is clear that section 392 of the crimes act provides two distinct remedies for the offense therein named: The first is a criminal action, maintained in the name of the state, and carries with it a specific punishment, viz. fine

and imprisonment, and also, as a part of the judgment, and in addition to the fine and imprisonment which is assessed against the owner or keeper of the thing prescribed, the abatement of the nuisance is also ordered in the manner therein provided. The second is a civil remedy, which, while brought in the name of the state, may be upon the relation of any citizen of the county, and is for the purpose of enjoining the nuisance complained of. It is true, the statute which gives this second remedy also provides a punishment, but not for the maintaining of the nuisance, but only for contempt of the court issuing the injunction, in case the same is violated. It does not follow that the same court has jurisdiction in the application of both of these remedies. It is a general truth that where two remedies exist, the plaintiff in an action may elect which remedy he will pursue. He may choose for himself any mode of proceeding authorized by law. In neither civil nor criminal cases is the tribunal or form of action selected by the defendant. Nor in case one tribunal has jurisdiction, and one form of action is authorized, can the defendant object on the ground that another tribunal has jurisdiction, and that in a different form of action the litigation may be determined with less expense, and in a shorter time. This, which is a general truth applicable to all actions, ought to be especially enforced where the state is the plaintiff, and the action a criminal one. The state ought not to be hampered. It should have the privilege of going before any tribunal which has jurisdiction, and resorting to any mode of procedure which is authorized by law. Dissenting opinion of Brewer, J., in *Re Donnelly*, 30 Kan. 430, 1 Pac. 648, 778. We can see no good reason why either of the remedies prescribed by the statute under discussion may not be invoked, or why a justice of the peace may not hear and determine a case which is clearly within his jurisdiction under the statute, because another and separate remedy, the enforcement of which is beyond his jurisdiction, has also been provided.

But counsel for defendant urge, as another reason why a justice of the peace cannot acquire jurisdiction in a prosecution brought under section 392 of the crimes act, that said section provides for the punishment of the "owner or keeper" of the nuisance, and a plea of not guilty puts in issue the title to the particular real estate where it might be alleged the nuisance was maintained, and that, as a justice of the peace is barred by statute from determining a case where it appears to his satisfaction that the title to real estate is in dispute, therefore it was not intended to confer jurisdiction upon justices of the peace to hear and determine cases arising under said section 392. Again we think the reasoning is not good. The constitutional provision in our state with regard to justices of the peace is that they shall have

such jurisdiction as may be given them by law. It is left, then, to the same power, viz. the legislature, to extend or limit the jurisdiction of a justice of the peace; and, where that power has expressly conferred jurisdiction upon justices of the peace to hear and determine all misdemeanor cases where the punishment is within a certain fixed limit, there is implied in that jurisdiction the power to determine any and all questions necessary to properly adjudicate the rights of the parties to such an action. And, where the main question to be determined is the guilt or innocence of the defendant, a justice of the peace may, to the extent necessary to a just determination of that question, permit the investigation on the trial of the title to the real estate where it is alleged the nuisance is maintained. *Brown v. Burdick*, 25 Ohio St. 260; *Trustees v. Tuttle*, 30 Ohio St. 62; *Lyman v. Stanton*, 39 Kan. 443, 18 Pac. 513; *Id.*, 40 Kan. 727, 20 Pac. 510. However, in this case the objection urged by the counsel did not arise, as the defendant was not charged as the owner, but as the keeper, of the place alleged to be a common nuisance.

It is further argued that the complaint in this case was defective in not stating a time when the alleged offense was committed. The allegation referred to is as follows: "Was, and still continues to be, a place where spirituous, vinous, malt, fermented, and other intoxicating liquors were, and have been, and are still continuing to be, sold and bartered in violation of an act of the legislature." And the complaint contained a further allegation, "George Saxton did then and there, at the above-stated time, unlawfully did keep and maintain," etc. The rule is well settled that an indictment or information is good if the day and year can be collected from the entire statement, though they be not expressly averred. And where, in an information, indictment, or complaint, it is charged that a certain building therein described "was, and is, and still continues to be, a place where intoxicating liquors were, and have been, and now are still continuing to be, sold in violation of law," and that "the defendant then and there, at the time above stated, unlawfully did keep and maintain said place, and still continues to keep and maintain said place," it certainly charges the then present time, which would mean the date of filing the complaint, and is sufficiently specific, so that the rights of the defendant are not prejudiced, in any sense whatever.

The defendant further alleges that the court committed error in overruling his motion to require the state to make its election more definite and certain. So far as the election made upon the second count is concerned, it is immaterial at this time, for the reason that the defendant was acquitted upon that count; and no election is required, so far as the offense charged in the sixth count

is concerned. *State v. Lund*, 49 Kan. 218, 666, 30 Pac. 518, and 31 Pac. 309. The state relied for a conviction under the first count upon a sale of two glasses of whisky made by the defendant to the witness A. E. Wellman, and for which A. E. Wellman paid the defendant 20 cents. The testimony of Wellman discloses but one sale of the nature indicated in the election, and he fixes the time as the 1st day of November, 1894. Under the third count the state relied for a conviction upon a sale of one glass of whisky and one bottle of beer made by the defendant to W. C. Crawford, for which said Crawford paid the defendant 25 cents. And this was the only sale of the description stated in the election which was testified to, and he fixes the date of the same in his testimony as November 2, 1894. These sales testified to by Wellman and Crawford were, in each instance, but a single sale; for, while more than one article was purchased, all were purchased together, and but one payment made. The elections made by the state were sufficient, under the rule laid down in *State v. Crimmins*, 31 Kan. 380, 2 Pac. 574; *State v. O'Connell*, 31 Kan. 393, 2 Pac. 579,—and, when taken in connection with the evidence in this case, could in no way have confused the jury, or prejudiced the rights of the defendant. In each instance a definite sale, which is specifically described, both as to the person to whom the sale was made, the kind of liquor sold, and the amount of money paid for the purchase, is indicated. The only thing not indicated is the date of the sale, and, as we before stated, there was but one date upon which such a sale was made under the testimony. In the cases referred to in the brief of counsel for defendant, no such definite election was made as in this case. The views above expressed with regard to the last assignment of error also dispose of the objection raised to the seventh, eighth, and ninth instructions of the court.

Counsel for the defendant allege that the court erred in giving the tenth instruction, for the reason, as they claim—First, that said instruction assumed that the mere keeping of a place where intoxicating liquors were sold in violation of the law was a common nuisance, without any judicial determination of that fact; and, second, that the court, by said instruction, attempted to establish the time when the nuisance was supposed to have been kept. This second objection we have answered in connection with other alleged errors. With regard to the first objection, we do not give the interpretation to the statute contended for by counsel. The statute plainly declares a place such as is charged in the complaint in this case to be a common nuisance, and the manifest interpretation of that portion of the section which reads, "upon the judgment of a court having jurisdiction finding said place to be a nuisance under this section," is that when the court finds, from the evidence in a case.

that a place charged in the complaint is one where the acts prescribed are committed, it shall then apply the remedy. The determination of the court that it is such a place is all that is necessary. The statute fixes its name.

This, we think, disposes of all the alleged errors complained of. The judgment of the district court will be affirmed. All the justices concurring.

(1 Kan.A. 738)

AMAZON IRRIGATING CO. v. BRIESEN.

(Court of Appeals of Kansas, Southern Department, W. D. Oct. 9, 1895.)

ACTION FOR WAGES — CONTRACT — EVIDENCE — SUFFICIENCY — LIENS.

1. Where the evidence shows the making of a contract between a civil engineer and an irrigating company, a corporation, to perform work as an engineer in and about the construction of an irrigating canal, and that the engineer was to receive \$100 per month as his compensation, and the performance of work under such contract, and the length of time worked, and the nonpayment of the contract price, and the jury have returned a verdict thereon in favor of the plaintiff, for the amount proven, and the court has rendered a judgment thereon in accordance with the verdict, *held*, that the evidence was sufficient to support the verdict, and warranted the rendition of the judgment thereon.

2. Where the petition alleges the making of a contract between a plaintiff, on his own behalf, and the corporation, by P., its vice president and superintendent, who was at the time superintending the construction of an irrigating canal for the corporation, and the corporation does not deny the authority of P., the vice president and superintendent, to make such contract, under oath, the authority is admitted, and it does not require evidence to prove the authority of the vice president and superintendent to bind the corporation; and the conversation and statements between the plaintiff and P. during the time of making the contract, and in the performance of work under such contract, are competent evidence.

3. Where the evidence shows that J. was present, giving directions and instructions, in the construction of an irrigating canal, and so continued in the superintendency with P., the vice president and superintendent, for a period of about four months, and was permitted by said corporation to appear and give directions and instructions, and there was no objection at any time to his giving directions, and no objection was made at any time by the corporation when his directions were followed, but that they were, from time to time, approved by the officers of the corporation, and J. furnished all the funds to pay the parties engaged in and about the construction of such canal, *held*, that the statements of J., made while giving instructions upon the work as it progressed, were competent evidence against the corporation, without first proving that J. was the officer of the corporation.

4. A civil engineer who makes field notes, maps, charts, and drawings, while employed by a corporation in and about the construction of an irrigating canal, on books and papers furnished by the corporation, is entitled to a lien on such field notes, maps, charts, and drawings, and has a right to retain possession of the same until he is paid for making the same.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. Abbott, Judge.

Action by J. V. Briesen against the Amazon Irrigating Company. Plaintiff had judgment, and defendant brings error. Affirmed.

This suit was commenced by J. V. Briesen against the Amazon Irrigating Company, a corporation, in the district court of Finney county. The plaintiff alleged, as his first cause of action, that on the 3d day of February, 1888, he entered the employ of the Amazon Irrigating Company, as a civil engineer, in the construction of an irrigating canal or ditch running through Finney and several other counties, in the state of Kansas; that he continued to work for said company until the 22d day of May, 1888, and that said company agreed and contracted with him, at the time he entered into their employ, that his compensation should be \$100 per month and all of his expenses, and all necessary supplies to carry on said work; and that there was still due him for his services under his said contract the sum of \$321, with 7 per cent. per annum from the 22d day of May, 1888. And before answer plaintiff filed an amended petition, setting up the facts more fully than in his original petition, and attaching a statement of the account between himself and the company; showing the time he worked, the amount he had received, and the balance due him. To the petition and amended petition the company made answer, containing four separate counts. The first was a general denial of all matters except such as was thereafter admitted. The second answer alleges that plaintiff did undertake to do certain surveying and engineering work for the defendant, in and about the construction of its canal that it was then constructing, and that he promised and agreed that such work to be done by him included the making and furnishing to defendant certain field notes, drawings, and plats; that the entire value of the plaintiff's work to defendant depended upon the making and furnishing the defendant the said field notes, plats, and drawings, and that plaintiff refused to deliver such field notes, plats, and drawings to defendant, or to allow defendant to inspect the same; that by reason thereof all of the plaintiff's services in behalf of defendant became of no value to defendant. And, for a third answer, defendant alleges "that, while plaintiff was engaged in the service of defendant, he made certain field notes, drawings, and plats, in books and upon material belonging to and furnished by defendant, and were so made by instruments furnished by defendant, and that said field notes, plats, and drawings were the property of and belonged to the defendant, and the plaintiff, on quitting the service of the defendant, possessed himself and retained possession of said field notes, plats, and drawings, and refused to deliver the same to defendant, and that plaintiff quit the service of the defendant voluntarily, and without any just cause or reason, and in violation of his agreement to remain in the service of the de-

fendant until the surveying and engineering work in connection with the canal or ditch should be completed"; and alleges, by reason of the failure to turn over the field notes, plats, and drawings, and by quitting the work before completed, defendant was damaged \$200. In the fourth paragraph of the answer it alleges that, at the time plaintiff quit the service of the defendant, he had in his possession certain surveying instruments, the property of defendant; that he wrongfully took and carried away said instruments, which were of the value of \$300,—and demands judgment against the plaintiff for the sum of \$325. The reply of the plaintiff to the answer of defendant alleges: That it is not true, as alleged in said answer, that the entire value of plaintiff's work for defendant depended upon making and furnishing defendant field notes, plats, and drawings. That it is not true that plaintiff refused to deliver certain field notes, drawings, and plats made by him to the defendant, but that plaintiff offered to deliver the same to defendant upon payment to him by defendant of the amount that was then due and owing to him. That it is not true that the plaintiff's services, for any reason, became of no value to defendant, or that the defendant was in any way inconvenienced by any act of the plaintiff with regard to said field notes, plats, or drawings. That it was wholly the fault of the defendant, in not paying him for his services. It is not true that the field notes, plats, and drawings were the property of or belonged to the defendant, but, on the contrary, they were the property of the plaintiff, until such time as the defendant paid the plaintiff for his services. It is not true that plaintiff quit the service of the defendant without notice, or just cause or reason, or in violation of his agreement, but that on the 22d day of May, 1888, defendant suspended work upon said canal or ditch, and at that time notified plaintiff that it would have no further work for him until some uncertain time in the future; and for this reason alone the plaintiff quit the employ of the defendant, and was compelled to seek employment elsewhere. It is not true that plaintiff took and carried away instruments belonging to defendant. Upon these pleadings the case was tried before the court and a jury, and resulted in a verdict and judgment in favor of the plaintiff. The jury also made special findings of fact. The defendant filed a motion for new trial, setting up three grounds: "(1) Irregularity in the proceedings of the court and jury and plaintiff, by which defendant was prevented from having a fair trial. (2) Because the verdict is not sustained by sufficient evidence, and is contrary to law. (3) Error of law occurring at the trial, and excepted to by defendant, specifically and especially in the admission of incompetent, irrelevant, and immaterial testimony, and error in giving and refusing instructions to the jury."

Cook & Gossett and H. F. Mason, for plaintiff in error. John Guthrie, for defendant in error.

JOHNSON, P. J. (after stating the facts). The first assignment of error complained of by plaintiff in error is that the evidence and testimony were not sufficient to warrant the finding of a verdict and rendition of a judgment against the defendant below. The petition of the plaintiff below alleges that he entered the employment of the defendant below as a civil engineer, to perform the services of an engineer in the construction of a certain canal or ditch through Finney and other counties in the state of Kansas, at an agreed compensation per month; that he remained in the service of the irrigating company from February 3, 1888, until the 22d day of May, 1888, performing the services of an engineer; that there was due him for his services under his contract the sum of \$221, with interest. The answer of the defendant below denies all of the allegations of the petition and the amended petition of the plaintiff below, except such as was thereafter specifically admitted, and it admits that plaintiff did undertake to do certain surveying and engineering work for defendant, and promised and agreed that such work should include the making and furnishing certain field notes, drawings, and plats; that plaintiff made said field notes, drawings, and plats, but refused to deliver them to the defendant, and that plaintiff voluntarily quit the service of the defendant, without just cause or reason therefor, and in violation of his agreement to remain in the service of the defendant until the surveying and engineering work in the construction of the canal or ditch was complete,—and demands damages by reason of the failure to turn over the field notes, drawings, and plats, and by reason of his quitting the employment of the defendant before the canal or ditch was completed, and also alleges that the defendant furnished certain surveying instruments to the plaintiff, and he carried them away with him when he quit work on the canal, and demands judgment against plaintiff for the value of these instruments. Plaintiff below, for reply to the answer, denies specifically all the new matter set up in the answer of the defendant below which is in conflict with his petition and amended petition. These were the issues upon which the trial was had, and there was but one single witness examined on the trial, and that was the plaintiff himself. He testified at great length as to making the agreement to do the engineering work in the construction of the canal or ditch, which was partly constructed when he entered the service of the company, and as to the compensation he was to receive, and the work done in pursuance of his agreement, and the time he commenced, and the time he quit; and there was no objection shown anywhere as to the manner of doing the work, or that it was not

done in accordance with the contract. We think the evidence proves the issues on part of the plaintiff below fully, and was sufficient to sustain the verdict of the jury, and justify the judgment of the court thereon. The evidence covered several of the matters admitted by the pleadings, which were entirely unnecessary, under the pleadings, to be proven. There was no evidence anywhere tending to prove any of the affirmative matters set up in the answer of the defendant below.

The second assignment of error is in the admission in evidence of the conversations between the plaintiff below and U. D. Pickering. It is alleged in the amended petition of the plaintiff below that the contract was made by him in behalf of himself, and by U. D. Pickering on behalf of the defendant; that at the time of making the contract the said Pickering was vice president of the irrigating company, and superintendent of the building and construction of said canal or ditch, and was acting in that capacity at the time. Section 108, c. 80, Gen. St. 1889, reads: "In all actions allegations of the execution of written instruments and endorsements thereon of the existence of a corporation or partnership or of any appointment of authority or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." The allegations of the authority of Pickering were not denied under oath, and were admitted by the pleadings, and it was not necessary to introduce evidence to prove the authority of Pickering before his statements could be given in evidence; and it was also shown by the evidence that the only contract that Briesen had made when he entered the employment of the irrigating company was with Pickering, as vice president of said company; and the defendant's answer alleges a contract with Briesen, and asks damages for the breach of it.

It is also contended that the court erred in the admission in evidence of certain conversations between Briesen and Jones, for the reason that it was not shown that Jones was an agent or officer of the irrigating company, or had any authority to represent it, and his statements were incompetent, irrelevant, and immaterial. It is shown from the evidence: That Jones was acting in conjunction with Pickering in the superintendency of the construction of the canal for the company. That both Pickering and Jones were giving directions in and about the work. That one Cook was a contractor, doing the work of excavating and making fills in the construction of the canal, and Pickering and Jones were giving the engineers and others engaged in the work directions as to the location of the general route of the canal; and it also appears that Jones was the per-

son who provided the funds to pay the expenses and to pay the employes. There was no time during the progress of the work that there was any objection to the instructions given by Jones. That he was on the work every week, and he was the one whose instructions were generally followed, and he was permitted, for about four months, to appear as one of the officers and one of the superintendents of the work, without any objection whatever, being on the work almost continually, and the directions given by him were entirely satisfactory to the company. We think the evidence sufficiently shows that Jones had authority to represent the company, and to act in conjunction with Pickering in its supervision, and that his statements and directions in the premises while the work was in progress were such as to bind the corporation. There never has been any disapproval of the manner in which the work was done, but, on the contrary, the whole work of the plaintiff has been approved; and the corporation says, in its answer to the petition and amended petition, that the plaintiff below quit work voluntarily, to the damage of the company. But, if there were no evidence tending to show that Jones had authority to represent the company, then there would have been no prejudicial error in the admission of his statements. In the evidence given, containing his statements, he stated nothing about the making of the contract, or the compensation to be paid for the same, or the length of time the plaintiff below had worked, nor anything about any material fact in the case; and the company was in no manner prejudiced by any of the statements testified to as having been made by Jones.

It is contended by plaintiff that the court erred in giving instruction No. 5, as follows: "(5) You are instructed that if you find from the evidence that the blank books, papers, maps, charts, and profiles were furnished to the said plaintiff by the defendant company, and that he, the said plaintiff, by his labor, art, and skill, placed therein and thereon field notes, tracings, profiles, and maps which were and are valuable to said defendant, and that defendant had not paid him for such services, that he is then entitled to a lien on said property until he has received his pay." The defendant below, in substance, averred that the work to be done by plaintiff included the execution of maps, field notes, and drawings, and which plaintiff offered to turn over to the defendant below upon defendant's paying plaintiff what defendant was owing him; that the defendant below refused to do so, and for that reason alone the drawings, field notes, and maps were not delivered to the defendant below; that he was then, and now is, and always had been ready and willing to turn over the same to the defendant, upon payment for his services; that the drawings, field notes, and maps did not belong to de-

fendant until plaintiff was paid for his services. The defendant below, in its answer, among other matters, in substance, avers that plaintiff did undertake to do certain surveying and engineering work; that such work so required to be done by plaintiff included the making and furnishing to defendant certain field notes, drawings, and plats; that the entire value of plaintiff's work for defendant depended upon making and furnishing to defendant the field notes, plats, and drawings. The reply of the plaintiff below, among other things, in substance, avers that it was not true that plaintiff refused to deliver the field notes, drawings, and plats made by him to defendant, but that plaintiff offered to deliver the same to the defendant on the payment by it to plaintiff for his services. Section 1, c. 58, Gen. St. 1889, reads: "Whenever any person shall entrust to any mechanic, artisan or tradesman materials to construct, alter or repair any article of value, or any article of value to be altered or repaired, such mechanic, artisan or tradesman shall have a lien on such articles." It is contended by plaintiff in error, in his brief, that a civil engineer employed by the month is not entitled to any lien upon instruments produced by his labor, and that the very fact that the employment, if any, was upon a salary to be paid indefinitely or monthly, is inconsistent with the claim of lien under paragraph 3063 of the General Statutes of 1889, relating to mechanics, artisans, and tradesmen doing job or piece work, and not to salaried employes. We do not think that it makes any difference whether the engineer is employed by the month, the day, or whether he is only employed to make the field notes, drawings, and plats. He is entitled to his lien until he has been paid for the making of the same, and, where he has not delivered over the possession to the adverse party, is entitled to retain possession of the field notes, maps, and drawings until he has received his compensation for making the same.

It is insisted that the court erred in allowing the pleadings to be taken to the jury room. The court, in instructing the jury, gave them, very fully and completely, the issues stated in the pleadings, and what was claimed by each, stating to them that the plaintiff alleged that he entered into a con-

tract with the Amazon Irrigating Company, through its authorized agent, to work for it, as a civil engineer, at \$100 per month, and that the amount due him under his contract, for work and labor performed, over and above all set-offs or counterclaims, was the sum of \$321.65, with 7 per cent. from May 22, 1888; that he also claimed a lien on certain books and papers in his possession, containing maps, profiles, and field notes made by him while acting as such civil engineer, said books, maps, and profiles having been furnished to him, in blank, by said company, for the purpose for which they were used; and that it was claimed by the company that the work done by plaintiff was of little value to it, except by and through the maps, charts, profiles, and field notes, and that, unless the company can have them, it does not owe the plaintiff anything. The defendant below could not have been prejudiced by allowing the pleadings to go to the jury room for references for dates, after having the issues fully stated by the court. In the case of *Myer v. Moon*, 45 Kan. 580, 26 Pac. 40, Justice Johnston, delivering the opinion of the court, says: "In charging the jury, the court, instead of reciting at length the contract alleged to have been violated, and the misrepresentations alleged to have been made, referred the jury to the petition, and indicated those portions of the petition where the contract and misrepresentations might be found, by pencil marks, and permitted the jury to take the petition to the jury room with them. The practice of referring the jury to the pleadings in order to determine, in whole or in part, the issues of the case, is not to be commended. It is the province of the court to determine the issues, and state them to the jury, and not leave them to ascertain the effect of the pleadings, or the issues which they present. In this case, however, the issues were stated by the court, and the jury were only referred to the petition to ascertain the terms of the contract, which were not disputed, and the misrepresentations which it was alleged had been made by Myer. The construction of the pleadings, or the determination of what the pleadings were, was not left to the jury, and no prejudice could have resulted from the action of the court." There being no error in the record, the judgment of the district court is affirmed. All the judges concurring.

